

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

App. Case No. 2013-000020
Case No. 2011-CP-10-3241

Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C. Appellants,

vs.

Randall J. Drew Respondent.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

- I. Whether the lower court erred in granting summary judgment finding that the statute of limitations ran on Appellants' claims prior to the commencement of this lawsuit when there were disputed questions of material fact as to when Appellants knew or should have knowN of Respondent's negligence in advising Appellant Roberts to proceed with the purchase of a lot for development purposes.
- II. Whether the lower court erred in granting summary judgment finding that the statute of limitations ran when there were disputed questions of material fact as to whether Respondent should be estopped to assert the statute of limitations defense based on repeated assurances long after the closing but less than three years before suit was filed.
- III. Whether the lower court erred by concluding Appellants should have known that Respondent's advice – that the Navy's easement claims over marsh adjacent to a lot would not impact the ability to maintain a dock – was negligent when no court has ever found that the dock cannot be maintained.
- IV. Whether the lower court erred by failing to find that disputed issues of material fact exist as to whether Appellants should have known of Respondent's errors before May 2008.
- V. Whether the lower court erred by failing to find that there were disputed questions of fact as to whether Respondent should be equitably estopped from raising a statute of limitations defense because his conduct caused the delay.

VI. Whether the lower court erred by making erroneous findings of fact in its Order.

STATEMENT OF THE CASE

On May 3, 2011 , Appellants, Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C. filed a Summons and Complaint in the Charleston County Court of Common Pleas. (Complaint, ROA 13). Respondent, Randall J. Drew, filed his Answer on May 19, 2011. In May 2011, a protracted period of discovery began with both parties serving and responding to written discovery and deposing fact and expert witnesses. On April 24, 2012, Respondent filed a Motion for Summary Judgment. (Motion for Summary Judgment, ROA 798). On June 18, 2012, Respondent filed a Memorandum in Support of the Motion for Summary Judgment. On July 17, 2012, Appellants filed an Affidavit of Keith Roberts. (Roberts Affidavit, ROA 877). On July 23, 2012, Appellants submitted a Memorandum in Opposition to Respondent's Motion for Summary Judgment, which included as exhibits the following:

1. Deposition of Drew dated September 30, 2009;
2. Deposition of Roberts dated August 25, 2009;
3. Deposition of Drew dated February 14, 2012;
4. Deposition of Roberts dated November 14, 2011;
5. Deposition of Mary Shahid dated April 25, 2012;
6. Affidavit of Keith W. Roberts dated July 17, 2012;
7. Deposition of Thomas H. Stone dated September 16, 2009;
8. Deposition of Thomas H. Stone dated April 25, 2012;
9. Agreement to Buy and Sell Real Estate;
10. Appellant Roberts' Memorandum in Opposition to Motion for Summary Judgment filed in the federal case, dated December 20, 2009, (without exhibits); and
11. Affidavit of Brian J. Boger, Plaintiff's expert.

Shortly after the hearing on the motion for summary judgment, a letter was sent to the trial court elaborating Roberts' position. (Pendarvis letter July 25, 2012, ROA 909).

On October 24, 2012, the trial court issued an Order Granting Defendant's Motion for Summary Judgment. (Order, ROA 1). Appellants submitted a Motion to Alter or Amend the Order Granting Summary Judgment on November 2, 2012, which the court denied on December 27, 2012. (Motion to Alter or Amend, ROA 944); (Order denying Motion to Alter or Amend, ROA 11). Appellants timely filed a Notice of Appeal.

ARGUMENTS

I. The lower Court Incorrectly Concluded That Roberts Should Have Known Drew's Advice – That the Navy's Claims Would Not Impact the Ability to Maintain a Dock – Was Negligent When No Court Has Found That the Dock Cannot Be Maintained.

A. Facts Relevant to the Arguments.

On July 9, 2005, Appellant, Keith W. Roberts ("Roberts"), as purchaser, and Thomas H. Stone ("Stone"), as seller, entered into an "Agreement to Buy and Sell Real Estate (For General Use and Lots/Acreage)" for the purchase of a parcel of real property on deep water with a dock permit. (Contract at 1, ROA 727). The subject property is located at Lot 12 on Yellow House Road, now known as 108 Blue Crab Lane, in Berkeley County, South Carolina ("the Property"). (Boger Affidavit June 6, 2012 at 1, ROA 799).

Approximately four years before Roberts agreed to purchase the Property, in July 2001, the Department of Health and Environmental Control, Office of Coastal Resource Management (OCRM) had granted to Stone a permit to construct a dock appurtenant to the Property. (Stone deposition Sept. 16, 2009, 13:16-18, ROA 119). Between November 2004 and June 2005, OCRM had attempted to revoke that permit based on claims by the United States Department of the Navy that it owned

a portion of the marsh over which the permit allowed a dock to be constructed. (Drew deposition Feb. 14, 2012, 43:19-24, ROA 434). Mary Shahid represented Stone in those proceedings. In June 2005, the South Carolina Administrative Law Court issued an Order denying OCRM's revocation and reinstated the dock permit. (Stone Deposition Sept. 16, 2009, 50:15-20, ROA 156); (ALC Order, ROA 847).

Shortly thereafter, Roberts entered into a contract with Stone to purchase the Property and have the dock permit assigned to him. (Contract at 4, ¶30, ROA 730). Roberts intended to construct a residential home on the lot and a dock appurtenant to it for resale purposes. (Boger Affidavit June 6, 2012 at 2, ROA 800); (Roberts affidavit July 17, 2012, ROA 877).

Around July 11, 2005, Respondent, Randall J. Drew ("Drew") accepted the representation to provide Roberts with legal advice and counsel as to whether to proceed with purchasing the Property depending on its compatibility with Roberts' development plans to build a house with a dock on deep water. (Roberts deposition Nov. 14, 2011, 18:16-19:21, ROA 257-258; 21:2-17, ROA 260; 28:4-10, ROA 267; 30:22-25, ROA 269; 43:10-19, ROA 282); (Drew deposition Feb. 14, 2012, 12:22-13:5, ROA 403-404); (Boger Affidavit June 6, 2012 at 19, ROA 817 ("Drew's representation was below the standard of care because he did not advise Roberts not to purchase [the Property] when it was clear that [the Property] was not suitable for Robert's development purposes.")). The ability to build and maintain a dock was critical to Roberts' decision to proceed with the purchase especially in light of OCRM's then-recent attempts to revoke the dock permit. (Roberts deposition Nov. 14, 2011, 28:4-10, ROA 267; 30:22-25, ROA 269). The contract to purchase

included a contingency provision allowing Roberts "to have a maximum of 60 days due diligence for suitability of use" providing sufficient time to investigate the legal status of the dock permit. (Contract at 2, ¶ 13, ROA 728). In addition, the contract also contained a provision that the "[c]ontract [was] not contingent on dock permit." (Contract at 4, ¶ 30, ROA 730). In fact, Stone had reduced the \$525,000 purchase price by \$50,000 to remove a contingency proposed by Roberts concerning the dock, making the final purchase price \$475,000. (Stone deposition Sept. 16, 2009, 34:9-16, ROA 140); (Stone deposition Apr. 25, 2012, 13:3-15, ROA 690). Stone's willingness to make such a price reduction highlighted Roberts' need for, and reliance on, Drew's legal advice.

Roberts testified that during the due diligence phase he informed Drew that he was interested in purchasing the Property because it was on deep water, had a dock permit, and appeared to have the characteristics suitable for construction of a residential home and dock with strong potential for sale with a substantial profit. (Roberts deposition Nov. 14, 2011, 36:25-37:5, ROA 275-276). Roberts also testified that during the due diligence phase he discussed with Drew the claim by the Navy that it owned the marsh or a portion of the marsh between the high ground on the Property and the deepwater on Yellow Creek over which the dock permit allowed a dock to be constructed. (Roberts deposition Nov. 14, 2011, 18:16-19:6, ROA 257-258; 20:8-12, ROA 259; 28:4-10, ROA 267; 43:10-19, ROA 282; 46:5-9, ROA 285; 46:13-18, ROA 285; 50:10-15, ROA 289; 75:17-24, ROA 314; 78:25-79:9, ROA 317; 132:23-133:5, ROA 371-372; 138:4-10, ROA 377).

Roberts testified that the primary reasons he retained Drew were to obtain advice regarding 1) the Navy's marsh ownership claim, 2) whether a dock could be constructed notwithstanding the Navy's claim, and 3) if Drew's legal advice and opinions were either that the Navy's claim was not valid or if it was valid, that a dock could be constructed without a material risk the Navy could or would take actions adverse to Roberts, then Drew was to handle the closing on Roberts' purchase of the Property. (Roberts deposition Nov. 14, 2011, 18:16-19:6, ROA 257-258; 20:8-12, ROA 259; 28:4-10, ROA 267; 43:10-19, ROA 282; 46:5-9, ROA 285; 46:13-18, ROA 285; 50:10-15, ROA 289; 75:17-24, ROA 314; 78:25-79:9, ROA 317; 132:23-133:5, ROA 371-372; 138:4-10, ROA 377).

Drew testified that he advised Roberts that the OCRM permit to build a dock was valid and allowed Roberts to proceed with the purchase of the Property. (Drew deposition Feb. 14, 2012, 12:22-13:5, ROA 403-404). Drew failed to advise Roberts prior to the purchase that there were documents recorded showing the United States' takings lawsuit through which it acquired ownership of a portion of the marsh adjacent to the Property over which the dock permit allowed for placement of a dock. (Boger Affidavit June 6, 2012 at 19, ROA 817); (Roberts affidavit July 17, 2012, ROA 877).

Roberts purchased the Property, constructed a dock and a house, then marketed the Property.¹ In 2006, Roberts entered into an agreement to sell the

¹ After Roberts' purchase of the Property, Drew formed LOT 12 YELLOW HOUSE, LLC and handled Roberts' transfer of title to the Property to LOT 12 YELLOW HOUSE, LLC. Roberts and Appellant, LOT 12 YELLOW HOUSE, LLC, will be referred to collectively in the remainder of this Brief as "Roberts."

Property for \$2,200,000 with a closing set for January 8, 2007, which would have resulted in an approximate profit of a little over \$1,000,000. (Roberts deposition Nov. 14, 2011, 65:2-71:7, ROA 304-310). Prior to the closing, the purchaser discovered that the dock allegedly encroached upon properties owned by the United States Navy, and therefore refused to close on the property. (E-mail from Mims to Roberts Nov. 13, 2006, ROA 856); (Bryant letter to Mims Nov. 16, 2006, ROA 857); (Bryant letter to Mims Jan. 18, 2007, ROA 861); (Roberts deposition Nov. 14, 2011, 71:14-79:25, ROA 310-318).

While Roberts acknowledged that the Navy's claim of ownership was one of the reasons the contract did not close, he did not believe Drew's advice was improper or inaccurate because of a) subsequent assurances by Drew that the Navy's claims were invalid, b) Drew's subsequent title searches and title searches by an abstractor hired by Drew, the results of which were all consistent with Drew's advice and assurances that the Navy's claims were invalid, and c) the fact that no court ever ruled that a dock had to be removed. (Roberts affidavit July 17, 2012, ROA 877 ("All along through Randy's extra title searches, communications with the Navy, litigation with the Navy and even in his Navy deposition as well as his deposition in this case, Randy has never said he made a mistake. And, as far as I can tell, to this day, Randy still claims that he did not commit malpractice.")).

The United States Department of Justice subsequently demanded that Roberts remove the dock. (Shahid letter to Roberts July 26, 2007, ROA 865). In July 2007, after the Navy began writing letters, Drew advised Roberts that the Navy

did not have a valid claim and that the dock permit was legally valid. Roberts testified as follows:

101:7 **Q.** And you received this letter in July of 2007,
101:8 correct?

101:9 **A.** Yes.

101:10 **Q.** And at this point, was Miss Shahid
101:11 representing you, or was she just forwarding you a
101:12 letter that she received from the Department of
101:13 Justice?

101:14 **A.** I'm sure she was just forwarding the letter.

101:15 **Q.** What did you do when you received this
101:16 letter, if you can recall?

101:17 **A.** Probably called Randy and sent it to him.

101:18 **Q.** Do you remember doing that?

101:19 **A.** Yes.

101:20 **Q.** What did Mr. Drew say?

101:21 **A.** He said the same thing that he said the
101:22 entire time that we've had this dealing, it's not --
101:23 they're wrong, they're not right.

101:24 **Q.** And you --

101:25 **A.** They have not proven that they own this
102:1 property.

(Roberts deposition Nov. 14, 2011, 101:7-102:1, ROA 340-341).

In October and November 2007, after the contract did not close and after the communications on behalf of the Navy, Drew again reassured Roberts that the Navy had no valid claims and that Roberts possessed a legal dock permit. In October 2007, Drew engaged an independent title abstractor to perform an additional title search. Drew ordered the additional title search, obtained results, and again advised Roberts that the Navy was wrong because it did not have any ownership interests in the marsh. (Roberts deposition Nov. 14, 2011, 104:4-105:22, 343-344);

(Pendarvis letter to Judge Young July 25, 2012, including Drew fax to Edisto Title Services Oct. 16, 2007, ROA 909; (Edisto Title Services memo Nov. 14, 2007 (with exhibits), ROA 732); (Boger affidavit June 6, 2012 at 16, ROA 814).

Roberts testified as follows:

75:17 **A.** He would have told me that, "There is no
75:18 issue with the Navy. It was litigated or -- with the
75:19 administrative law judge and you've got a legal dock
75:20 permit."

75:21 **Q.** You said he would have told you that. Do you
75:22 remember whether he actually told you that?

75:23 **A.** He has told me that many, many, many times,
75:24 yes, sir.

78:25 **Q.** Do you know what the result of that
79:1 conversation was, or do you know what Mr. Drew told
79:2 you?

79:3 **A.** Randy told me that, you know, we have in our
79:4 hands a legitimate dock permit, legal dock permit, and
79:5 based on the ALJ's decision, that we had a legal dock
79:6 permit.

79:7 **Q.** Did he tell you whether he thought the Navy
79:8 owned the marshland?

79:9 **A.** No.

(Roberts deposition Nov. 14, 2011, 75:17-24, ROA 314; 79:1-79:9, ROA 318).

Also in November 2007, Roberts sent a letter to Ms. Shahid, who had represented Stone in the ALC proceedings, asking for information about the Navy's claim. Roberts testified that he reviewed Shahid's response letter assuring him that it appeared "*unlikely that the Navy would initiate such action.*" Roberts relied on Ms. Shahid's advice, which was consistent with Drew's advice. (Roberts deposition Nov. 14, 2011, 80:10-81-1, ROA 319-320).

Drew acknowledged, even as late as February 2012, that the Navy still has not proven it owns the marsh adjacent to the Property.

145:18 **Q.** But you testified earlier that you
145:19 never told Mr. Roberts that the Navy owns the marsh
145:20 in front of Blue Crab Lane and you need to be
145:21 careful if you build a dock because the Navy
145:22 definitely owns it.
145:23 MR. COUNTRYMAN: Object to the form.
145:24 THE WITNESS: **That's because the Navy**
145:25 **still hasn't proven that the Navy owns it as far as**
146:1 **I know.**

(Drew Deposition Feb. 14, 2012, 145:18-146:1, ROA 536-537) (emphasis added).

Around February 6, 2008, Drew was continuing to advise Roberts that he possessed a valid dock permit and based this new reassurance on a second title search conducted by an independent title agency.

Later in February 2008, Roberts received another letter from the Navy.

When asked about this letter, Roberts testified as follows:

112:10 **Q.** So is it fair to say that at this time,
112:11 February 29, 2008, that the situation was a serious
112:12 issue in your mind?
112:13 **A.** It was an issue and any time you get a letter
112:14 from the government threatening you the way they
112:15 threatened me, I would say it's a serious issue, but
112:16 when I'm reassured by my attorney over and over again
112:17 that we have -- we really have no issue, we are right
112:18 in this...

112:19 **Q.** Is it fair to say that at this point, you
112:20 don't know whether you were right in this?
112:21 **A.** Oh, no. Trust me, I believed that I was --
112:22 that we were right, based on Randy telling me that we
112:23 were right, I had -- you got to remember, you know,
112:24 this is my attorney, this is a guy that's done a lot of
112:25 closings for me, and I trusted him. And to this
113:1 letter, prior letters from the government, he still
113:2 believed that he was right in what he had Edisto Title
113:3 Search do a title search for.

(Roberts deposition Nov. 14, 2011, 112:10-113:3, ROA 351-352).

Roberts testified that he had no reason not to believe what Drew told him.

31:1 **Q.** You don't have any reason to believe that
31:2 Mr. Drew wasn't telling the truth when he testified
31:3 that he talked to people from the Navy and they told
31:4 him that the Navy didn't plan on pursuing the claims,
31:5 do you?
31:6 **A.** I've known Randy a long time and I have no
31:7 reason to not believe him.

(Roberts deposition Nov. 14, 2011, 31:1-7, ROA 270).

Similarly, former OCRM lawyer, Mary D. Shahid, testified that she thought there was a very low risk that the Navy would do anything based on the history with OCRM, the ALC trial and her communications with the Navy. Ms. Shahid testified as follows:

46:22 2005, 2006, when I would assess the risk, I
46:23 thought it was a low risk at that point that the
46:24 Navy was going to do anything. And that was based
46:25 on the whole history with OCRM, the trial, what I
47:1 knew about the Navy's communications with OCRM,
47:2 and my own communications with the Navy.

(Shahid deposition Apr. 25, 2012, 46:22-47:2, ROA 608-609).

On April 28, 2010, based on a comment by the presiding judge in the federal lawsuit, Roberts was put on notice for the first time regarding possible claims against Drew. The trial court's Order granting summary judgment, however,

tak[es] the events completely out of context and us[es] the benefit of hindsight. The truth is that, taken in context, during each of these events, I was being reassured that the Navy had no claim, could not prove it had a claim and that my lawyers were working in my best interest to prove the Navy had no claim.

(Roberts affidavit July 17, 2012, ROA 877).

B. The lower court erred when it found that Roberts should have known about Drew's malpractice prior to May 2008.

In South Carolina, "the statute of limitations begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist." *Epstein v. Brown*, 363 S.C. 372, 382, 610 S.E.2d 816, 821 (2005). The record demonstrates that Roberts knew of the Navy's claims of ownership that had been asserted during the OCRM dock permanent litigation before the Property was purchased. Acting as a reasonable person with knowledge of the Navy's claims prior to purchasing the Property, Roberts hired Drew to give legal advice regarding the dock permit and the Navy's claim of ownership. Roberts believed Drew's advice that a dock could be maintained because the Navy's claim to ownership was settled by the ruling in the ALC proceeding directing that the dock permit be reinstated.

When the Navy later reasserted its claims of ownership, Roberts went back to Drew and again relied on Drew's legal advice during 2007 - 2009 that the Navy's claims were invalid based on the ALC Order and subsequent title searches that Roberts was told confirmed the earlier advice. In addition, Roberts' hired other lawyers who also advised that it was unlikely the Navy's claims were valid. Over the years of litigating against the Navy's claims, Roberts knew that a judge had previously ruled against the Navy on this issue and by now three lawyers had looked at this issue and advised that the Navy's claims were invalid. All of these facts and testimony were before the trial court, which taken in the light most favorable to Roberts, establishes that neither Roberts or a reasonable person of common knowledge and experience would have been on notice that a claim existed

against Drew more than three years before this lawsuit was filed. And, in fact, Roberts did not know or have any reason to know that the advice from Drew was incorrect until Roberts heard the judge in the federal case commenting on Drew's error. That was on April 28, 2010 and this lawsuit was filed on May 3, 2011, well within the three-year statute of limitations period.

Because Roberts did not have actual knowledge about any claims against Drew until April 28, 2010 and because there were disputed facts and testimony in the record as to whether a reasonable person would have known of those claims at any point before May 2008, the statute of limitations had not run and the trial court's ruling granting Drew's motion for summary judgment was improper and should be reversed.

C. The Navy's *claim* that the Roberts did not have the right to maintain a dock did not put Roberts on notice of claims against Drew.

Throughout the Order, the lower court found as a matter of undisputed fact and concluded as a matter of law that Drew gave legal advice to Roberts "that the Navy's claim of ownership of the adjacent marshland was invalid and should not impact the ability to maintain a dock at the Property." (Order at 2, ROA 2; p. 7, ROA 7; at 8, ROA 8; at 9, ROA 9) (emphasis added). The record, however, shows that as a matter of undisputed fact the dock is still being maintained at the Property, notwithstanding the Navy's now-four year old lawsuit seeking to have a federal court require Roberts to remove the dock, which remains pending before the United States District Court with the federal government's motion for summary judgment still under advisement.

The lower court Order concludes that “no later than April 2008 ” “Roberts was aware that Drew’s advice regarding the Navy’s claim and *its impact on the ability to maintain a dock at the Property was incorrect*, as the Navy vigorously pursued its claim and demanded removal of the dock beginning in 2006.” (Order at 9, ROA 9) (underlining in original, other emphasis added). This conclusion is incorrect for several reasons.

First, because the federal lawsuit remains pending without any finding that the dock cannot be “maintained,” there is no evidence before the Court that Roberts knew or should have known that Drew’s advice concerning the “ability to maintain a dock” was incorrect; Roberts may prevail in the federal lawsuit.² Next, because the Navy’s lawsuit was not filed until February 2009, a little more than two years before this malpractice lawsuit was filed, the conclusion in the Order that “the Navy vigorously pursued its claim” is not consistent with the facts in the record and certainly was not construed in the light most favorable to Roberts. Also, Roberts knew about the “Navy’s claim” before he engaged Drew to provide legal advice on whether the Navy’s claim was valid before he purchased the Property. So the question of whether the Navy’s claims are valid remains unresolved.

² In the event Roberts prevails in the federal lawsuit, Appellants will still be able to maintain a claim against Drew based on the opinions from their expert that Drew should have told Roberts not to purchase the Property and that to advise him to proceed with the purchase was below the standard of care. (Boger Affidavit June 6, 2012, p. 19, ROA 817; “Drew’s representation was below the standard of care because he did not advise [Roberts] not to purchase [the Property] when it was clear that [the Property] was not suitable for [Roberts’] development purposes.”)

Second, South Carolina law on when a statute of limitations begins to run can be summarized as beginning when a party a) sustains damages and b) has knowledge or should have knowledge that a claim exists based on wrongful conduct. This lawsuit was filed a little more than a year after Roberts heard a federal judge make comments from the bench suggesting – for the first time to Roberts – that there may be malpractice claims against Roberts' closing lawyer, Drew. Given that by April 2010, Roberts had incurred expenses by way of legal fees in defending the Navy's lawsuit, such that cognizable damages existed, and when he heard a federal judge make reference to malpractice claims against Drew, triggering actual knowledge of his lawyer's negligence, the statute of limitations began running at that time per our Supreme Court's holdings in *Epstein v. Brown*, 363 S.C. at 380-81, 610 S.E.2d at 820-21.

The lower court incorrectly concluded that Roberts should have known of Drew's malpractice regarding advice that the Navy's claims would not impact the ability to maintain a dock when no court has found that the dock cannot be maintained. Roberts is not a lawyer with training and experience searching titles or analyzing the accuracy of the Navy's claims of marsh ownership. When the facts and circumstances are viewed in the light most favorable to Roberts, and especially when they are viewed by a lay person without the vast legal experience and knowledge possessed by the lower court judge, it is clear that disputed questions of material fact exist making summary judgment improper. Roberts respectfully requests that the lower court's Order granting summary judgment be reversed and the matter be remanded for trial on the merits.

D. Summary judgment was improper because genuine issues of material fact exist as to whether Roberts should have discovered Drew's malpractice at an earlier time.

"In South Carolina, all real estate closings must be supervised by an attorney." *Inglese v. Beal*, Op. No. 5123, 403 S.C. 290, 296, 742 S.E.2d 687, 690 (May 1, 2013) citing *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011). "This requirement is based on the policy determination that the use of an attorney to close a real estate sale is necessary to protect the participants in the transaction and the public from the numerous things that can go wrong when transferring real estate." *Id.* (citing *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987) (*per curiam*) (requiring real estate closings to be conducted by attorneys "for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law"))). "The attorney's role pursuant to this policy, therefore, is to protect the participants in real estate transactions from the numerous potential problems that may arise. When an attorney is aware of such a potential problem, it is the responsibility of the attorney to ensure that the potential never materializes." *Id.*

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). "In ruling on motions for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." *Id.*

Viewing the evidence and testimony in the light most favorable to Roberts, the fact that Roberts later learned the Navy was renewing its claims of ownership did not necessarily provide notice that Appellants may have a cause of action for legal malpractice against Drew. In fact, Roberts knew about the Navy's claims before he ever engaged Drew to represent him with regard to the closing on the Property. Drew's advice to Roberts, both before and after the closing, was that the Navy's claims were invalid and that Roberts had a permit and would be able to maintain a dock.

Contrary to Drew's contention, knowledge of Roberts' injury, the loss of the contract to purchase the property, does not, "*a fortiori*, give rise to a suspicion of any impropriety by [Roberts'] attorney." *Id.* at 120. The facts in the record before the trial court demonstrate that Roberts knew of the Navy's claims of ownership, however that knowledge did not translate into notice of Roberts' claims against Drew.

"A client should not be expected to investigate an attorney's loyalty every time the attorney provides the client with counsel the client dislikes. Instead, absent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest." *Id.* The record shows that Drew represented Roberts in several transactions, establishing an on-going, trusted lawyer-client relationship, which led to Robert's further trusting Drew's advice.

112:13 **A.** It was an issue and any time you get a letter
112:14 from the government threatening you the way they
112:15 threatened me, I would say it's a serious issue, but
112:16 when I'm reassured by my attorney over and over again
112:17 that we have -- we really have no issue, we are right.
112:18 in this...

112:19 Q. Is it fair to say that at this point, you
112:20 don't know whether you were right in this?
112:21 A. Oh, no. Trust me, I believed that I was --
112:22 that we were right, based on Randy telling me that we
112:23 were right, I had -- you got to remember, you know,
112:24 this is my attorney, this is a guy that's done a lot of
112:25 closings for me, and I trusted him. And to this
113:1 letter, prior letters from the government, he still
113:2 believed that he was right in what he had Edisto Title
113:3 Search do a title search for.

(Roberts Deposition Nov. 14, 2011, 112:10-113:3, ROA 351-352).

Moreover, Roberts did not blindly trust Drew's advice and, with help of Drew, Roberts hired a lawyer specializing in OCRM permitting for an opinion and again with Drew's help later hired another lawyer to defend the Navy's claims. At no time did Drew or the other two lawyers indicate that Drew may have given improper advice or that Roberts may have a claim for legal malpractice.

Taking the facts in the light most favorable to Roberts, summary judgment was improper because genuine issues of material fact exists as to whether Appellants were on notice. There is at least a scintilla of evidence on the record to show that Roberts did not know or should not be charged with knowing of claims against Drew. Summary judgment was improper and Roberts respectfully requests that the lower court's Order granting summary judgment be reversed and this matter be remanded for trial on the merits.

II. Drew Is Equitably Estopped From Claiming the Statute of Limitations Defense.

Drew should be estopped from claiming the statute of limitations defense because he acted in such a manner as to induce Roberts to delay in timely filing a cause of action. See *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682

S.E.2d 1, 8 (Ct. App. 2009). The type of conduct creating equitable estoppel claims “may be either an express representation that the claim will be settled without litigation or actions suggesting that a lawsuit is unnecessary.” *Id.* citing *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996)). In this matter, Drew consistently and continuously worked over the course of years to conceal his errors and shield Roberts from any knowledge of his failure to properly advise them regarding the Navy’s ownership of the marshland adjacent to the Property. (Roberts Affidavit p. 2, ¶ 3 - p. 3, ¶ 2, ROA 878-879).

For years, Drew advised Roberts that the Navy had no ownership rights over the marshland. Drew not only continued to advise Roberts that the Navy’s claims were invalid, Drew hired an independent title search agency to repeat the title search and advised Roberts that this second title search revealed that the Navy’s claims were invalid, an affirmative act which further delayed Roberts’ knowledge of Drew’s errors. In addition, Drew assisted Roberts in hiring a lawyer to help determine the validity of the Navy’s claims and a lawyer to defend the federal Navy lawsuit. (Roberts affidavit p. 4, ¶ 1, ROA 880). Also, Drew provided sworn testimony in the federal Navy lawsuit reasserting his position that his advice was proper and further concealing his errors from Roberts. (Drew deposition Sept. 30, 2009, 64:24-65-12, ROA 232-233). Even as late as 2012 in his deposition, Drew never mentioned to Roberts that he might have made an error and consistently denied that he failed to properly advise Roberts prior to or after the purchase of the Property. (Drew deposition Feb. 14, 2012 , 79:2-6, ROA 470; 79:21-25, ROA 470; 80:1-3, ROA 471).

The lower court's Order made no reference to Roberts' assertions that Drew should be equitably estopped from claiming the statute of limitations defense. To claim equitable estoppel, a plaintiff must prove that he (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. *See id.*; *see also Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n. 2, 531 S.E.2d 287, 292 n. 2 (2000). "The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts." *Id.*

Here, Roberts lacked the knowledge and the legal skills necessary to obtain knowledge of whether the Navy had an ownership interest sufficient to defeat his attempt to maintain a dock. Roberts, therefore, relied on Drew to conduct the title searches and provide the legal advice. As to Drew, his conduct resulted in the true facts of the Navy ownership being concealed from Roberts. It is clear from Drew's testimony that he intended for Roberts to continue relying on his advice that the Navy's claims were invalid and that the dock permit was valid. As a lawyer charged with the obligation to search the title, and who in fact searched it twice, Drew is deemed to have constructive knowledge of the validity of the Navy's claim.

The record shows that Drew had constructive knowledge of the plat known as "Exhibit B," which was referenced in documents in Drew's file. (Drew deposition Sept. 30, 2009, 46:15-47:8, ROA 214-215). Over the years, Drew's conduct continued to shield Roberts from the knowledge of his errors, in part because if

Roberts had been successful in the litigation with the Navy, then Roberts would possibly never have discovered Drew's negligence.

The lower court's Order refers to various dates and events to establish, as a matter of law and undisputed fact, that Roberts knew or should have known of Drew's errors. While the record is replete with facts and testimony supporting equitable estoppel, a simple review of just Drew's testimony in the federal lawsuit continuing to assert that the Navy's claims were not valid is sufficient to trigger estoppel. Considering the totality of the circumstances, Drew's conduct as both a lawyer and a friend to Roberts, should estop Drew from now asserting the statute of limitations affirmative defense.

For instance, the lower court's Order noted that "Roberts knew the advice Drew provided prior to closing (that the Navy's claim would not cause issues with the ability to maintain a dock at the Property) was incorrect in late 2006 when Roberts was informed the Navy was pursuing its claim of ownership of the subject marshland." (Order at 7, ROA 7). This only shows, however, that Roberts was aware that the Navy had previously claimed an ownership interest in the marshland. Drew, however, had specifically advised Roberts that the Navy had no proof of ownership in the marsh. As Roberts testified, he believed and trusted Drew regarding his legal work concerning the purchase of the Property:

98:23 **Q.** Did you talk about that with Mr. Drew
98:24 following the meeting, about whether he looked in the
98:25 right place?

99:1 **A.** We probably discussed it outside and his
99:2 stance -- everything that Randy had ever done in this
99:3 transaction or any transaction has always been what I
99:4 considered -- you know, I mean, I believed him, trusted
99:5 him and that's why I continued to use him, that the

99:6 research that he did with the titles, the title for the
99:7 property did not show any of -- the government not
99:8 owning any of the land.

(Roberts deposition Nov. 14, 2011, 98:23-99:8, ROA 337-338). Roberts trusted Drew as his lawyer and fiduciary to provide competent legal advice. This trust in his lawyer in combination with Drew's advice reassuring Roberts that the dock could be maintained, prevented Roberts from discovering or having knowledge of the existence of a claim against Drew.

As another example, the lower court's Order found that Roberts should have been aware of a claim against Drew when Roberts received an email indicating that the Navy was maintaining its ownership interest in the marshland. (Order at 3, ROA 3; at 7, ROA 7). However, Roberts testified that after he got the November 13, 2006 email, he called Drew who told him there was no issue with the Navy because it had been litigated, the ALJ had issued an Order, and Roberts had a legal dock permit:

75:17 **A.** He would have told me that, "There is no
75:18 issue with the Navy. It was litigated or -- with the
75:19 administrative law judge and you've got a legal dock
75:20 permit."

75:21 **Q.** You said he would have told you that. Do you
75:22 remember whether he actually told you that?

75:23 **A.** He has told me that many, many, many times,
75:24 yes, sir.

(Roberts deposition Nov. 14, 2011, 75:17-24, ROA 314). This phone call and the reassurances of Drew demonstrates why Drew should be estopped from asserting the statute of limitations defense.

As a further example, the lower court's Order found that the cancellation on the purchase contract for the Property based on concerns over the Navy's

ownership claims should have provided Roberts with notice of his claims against Drew. (Order at 8, ROA 8). However, again, Roberts testified that Drew told him the dock permit was legitimate based on the ALJ's Order.

78:25 **Q.** Do you know what the result of that
79:1 conversation was, or do you know what Mr. Drew told
79:2 you?

79:3 **A.** Randy told me that, you know, we have in our
79:4 hands a legitimate dock permit, legal dock permit, and
79:5 based on the ALJ's decision, that we had a legal dock
79:6 permit.

79:7 **Q.** Did he tell you whether he thought the Navy
79:8 owned the marshland?

79:9 **A.** No.

(Roberts deposition Nov. 14, 2011, 78:25-79:9, ROA 317-319). Again, these reassurances and the fact that Drew's conduct resulted in Roberts never having knowledge, or constructive knowledge of Drew's errors, demonstrate why Drew should be estopped from claiming statute of limitations as a defense.

The lower court's Order emphasized Roberts' knowledge of the Navy's claim of ownership as a trigger to start the clock on the statute of limitations. However, this demonstrates the fundamental problem with Drew claiming the statute of limitations as a defense. Roberts knew of the Navy's claim of ownership since he first became involved with the Property, however, this did not lead to knowledge of Drew's errors because Drew had been improperly advising Roberts over the years that the Navy's claims were invalid. This pattern of advice shielded Roberts from the knowledge of Drew's errors and prevented Appellants from gaining access to the truth that would have put them, or any other similarly situated reasonable person, on notice of their claims against Drew.

Further, the Order focused on the Navy's threats against Roberts as proof that Roberts should have known of their claims against Drew. However, Drew continuously reassured Roberts that the Navy was wrong and in fact had no ownership claim, thus, because Roberts trusted Drew as his lawyer on this and other transactions, Roberts was unable to recognize the Navy's threats as evidence of Drew's errors. Drew assured Roberts that the Navy's threats were baseless and Roberts had no reason not to believe or trust his lawyer. Roberts testified that he remembered sending Mary Shahid's July 2007 letter to Drew and Drew continued to tell Roberts that the Navy was wrong about owning the marsh property. As Roberts testified:

101:7 **Q.** And you received this letter in July of 2007,
101:8 correct?

101:9 **A.** Yes.

101:10 **Q.** And at this point, was Miss Shahid
101:11 representing you, or was she just forwarding you a
101:12 letter that she received from the Department of
101:13 Justice?

101:14 **A.** I'm sure she was just forwarding the letter.

101:15 **Q.** What did you do when you received this
101:16 letter, if you can recall?

101:17 **A.** Probably called Randy and sent it to him.

101:18 **Q.** Do you remember doing that?

101:19 **A.** Yes.

101:20 **Q.** What did Mr. Drew say?

101:21 **A.** He said the same thing that he said the
101:22 entire time that we've had this dealing, it's not --
101:23 they're wrong, they're not right.

101:24 **Q.** And you --

101:25 **A.** They have not proven that they own this
102:1 property.

(Roberts deposition Nov. 14, 2011, 101:7-102:1, ROA 340-341). Due to his conduct, equitable estoppel should prevent Drew from being able to assert the statute of limitations as a defense to these claims.

Another example of an error in the lower court's Order concerning Drew's conduct is the reference to Roberts' letter to Senator Graham. (Order at 4-5, ROA 4-5). This letter demonstrates that Roberts did not believe that the Navy's claims were valid because of Drew's consistent reassurances that the Navy had no proof of its ownership claims. As Roberts testified, as of February 2008, he had no need to find out how much it would cost to remove the dock because based on the information known to Drew and to Roberts there was no convincing evidence establishing the Navy owned the marsh:

109:18 **Q.** Did you start looking into how much it would
109:19 cost to tear the dock down?

109:20 **A.** I did eventually, and at what time, I don't
109:21 know. I've got an estimate, which I'm sure you've got,
109:22 for \$187,000. At that -- I don't know what the time
109:23 frame was when I received that.

109:24 **Q.** I don't recall either. It might be in our
109:25 documents. You don't remember, as we sit here right
110:1 now, whether that was before or after this --

110:2 **A.** Oh, it was not before -- I'm pretty sure it
110:3 was not before this at all. No. I know it wasn't,
110:4 because I had -- still had no real reason to find out
110:5 how much it would cost because I believed that -- as
110:6 well as Randy did, that we were right based on all the
110:7 information that he had gotten.

(Roberts deposition Nov. 14, 2011, 109:18-110:7, ROA 348).

Further, Roberts testified that he was "reassured by my attorney over and over again that we have -- we really have no issue, we are right in this . . ."

112:4 **Q.** And then the next sentence says, "This
112:5 controversy was going on for years before I bought the
112:6 property. Even though I was under the impression that
112:7 it was a done deal, it has once again reared its ugly
112:8 head." Is that what that says?

112:9 **A.** Yes, sir.

112:10 **Q.** So is it fair to say that at this time,
112:11 February 29, 2008, that the situation was a serious
112:12 issue in your mind?

112:13 **A.** It was an issue and any time you get a letter
112:14 from the government threatening you the way they
112:15 threatened me, I would say it's a serious issue, but
112:16 when I'm reassured by my attorney over and over again
112:17 that we have -- we really have no issue, we are right
112:18 in this...

(Roberts deposition Nov. 14, 2011, 112:4-18, ROA 351).

In addition, Roberts testified that, as of February 6, 2008, he believed his position about the Navy was correct because of what Drew was telling him and what Drew claimed was confirmed by the recent title work done by the independent title agency:

112:19 **Q.** Is it fair to say that at this point, you
112:20 don't know whether you were right in this?

112:21 **A.** Oh, no. Trust me, I believed that I was --
112:22 that we were right, based on Randy telling me that we
112:23 were right, I had -- you got to remember, you know,
112:24 this is my attorney, this is a guy that's done a lot of
112:25 closings for me, and I trusted him. And to this
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113:2 believed that he was right in what he had Edisto Title
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(Roberts deposition Nov. 14, 2011, 112:19-113:3, ROA 351-352).

Even as late as February 14, 2012, Drew claimed that he had no prior knowledge of the existence of the plat showing Navy ownership (Exhibit B, ROA 961) and assured Roberts that the Navy's ownership claims were invalid because

it was unable to present sufficient proof: "any time I've gotten the document [the judgment], it doesn't have the attachment," that is, the plat that was "Exhibit B" to the judgment from the federal takings lawsuit. (Drew deposition Feb. 14, 2012, 139:13-139:15, ROA 530).

"Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000). "Such inducement may consist of . . . conduct that suggests a lawsuit is not necessary." *Id.* at 136-37. Drew's conduct over the course of years in continuing to represent Roberts' interests, performing an additional title search, assisting with hiring counsel to fight the Navy's claims, providing deposition testimony and generally denying the Navy's claim of ownership all amount to conduct which would suggest a lawsuit was not necessary.

In sum, the lower court erred in failing to find that Drew is equitably estopped from claiming a statute of limitations defense as the basis for his motion for summary judgment and therefore summary judgment was improper.³

3

At the very least, a jury could find that Drew breached his fiduciary duty to Roberts when he prevented Roberts from discovering his malpractice. If the Court finds that equitable estoppel does not bar the use of the statute of limitations by Drew, the very same facts can be used to support Roberts' breach of fiduciary duty claims in that Drew had a duty to act with the highest level of care and loyalty towards his client and reveal any instances of malpractice on his part.

III. The Trial Court Made Erroneous Findings of Fact, Which Distort the Record and Collectively Serve to Cause Erroneous Conclusions of Law.

1. The Order found as an undisputed fact that “Drew oversaw the 2005 closing.” (Order at 1, ROA 1). While Roberts doubts this is a serious point of contention, the Order should conclude that Drew was the lawyer representing Roberts with regard to the closing on the property and that a client-lawyer relationship existed between Drew and Roberts such that Drew owed duties to Roberts with regard to the closing. Simply stating that “Drew oversaw the 2005 closing” does not acknowledge any duties Drew owed to Roberts.

2. The Order omitted any references in the Findings of Fact to Drew’s frequent and continual assurances to Roberts between November 2007 and May 2008 that the Navy’s claims were invalid and should not impact the ability to maintain a dock at the Property. (Order, ROA 1). Given the number of references in the record to Drew’s legal advice to Roberts assuring him of the accuracy and correctness of his legal advice, the lack of reference to these communications in the Findings of Fact distorts the Conclusions of Law.

3. The Order stated on page 2 that “Roberts later transferred title to the property to Lot 12 Yellow House, LLC, a company Roberts had recently formed.” The Order omitted the fact that Drew was the lawyer who actually formed LOT 12 YELLOW HOUSE, LLC on behalf of Roberts. (Order at 2, ROA 2). This fact reflects Drew’s inducement of Roberts’ forbearance and adds additional context to Roberts’ reliance on Drew’s advice throughout the relevant time periods and impacts the conclusions of law.

4. The Order on pages 3-5 summarized many of the events relevant to Roberts' knowledge and involvement with the claims by the Navy, but specifically omits reference to the facts showing that Roberts was in contact with Drew at all relevant times, that Drew hired a title abstractor to preform a second title search, or that Drew continued to assure Roberts that the dock permit was valid and that the Navy could not prevent the maintenance of the dock. (Order at 3-5, ROA 3-5). These factual findings regarding the numerous and on-going communications impacted the conclusions of law.

5. The Order failed to make any reference to Drew's actual and active involvement in assisting Roberts in contesting the Navy's demands when it referenced the federal lawsuit on page 8 of the Order. (Order at 8, ROA 8). Again, Drew was actively involved in contesting the Navy's claims and demands and continually assured Roberts that he would be able to maintain a dock on the Property. This finding of fact is especially important to Roberts' equitable estoppel claim, which the lower court failed to address, notwithstanding the fact that the equitable estoppel argument was raised before the trial court granted summary judgment and again in Roberts' Rule 59, SCRCp, motion.

6. The Order concluded on page 9 that "[a]dopting a 'right to rely' argument would mean a cause of action against Drew has not yet accrued, as it remains unclear whether his advice regarding the validity of the Navy's claim was correct." (Order at 9, ROA 9). This conclusion cannot be reconciled with the opinion of Roberts' expert that, even if the Navy's claims are found to be invalid, Drew fell below the standard of care in failing to advise Roberts not to purchase the property.

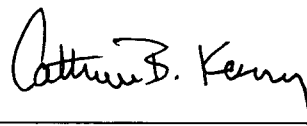
7. The Order erred in the conclusion concerning Roberts' arguments that "Roberts had a right to rely on Drew's assurances, which eliminated any 'knowledge of an injury' sufficient to trigger the statute of limitations." (Order at 8, ROA 8). This conclusion was incorrect. The true effect of Drew's assurances to Roberts that the "dock permit was valid and the Navy's claim of ownership of the adjacent marsh was invalid" was to eliminate Robert's "knowledge of a claim" against Drew for malpractice, which again was not revealed until Roberts heard it from the federal judge. Considering that in November 2007, Drew hired a title abstractor to conduct a title search more than two years after the closing Drew gave Roberts new advice again advising that the recent title work showed that the dock permit was valid and that Roberts could maintain a dock. The new advice in 2007 made it imminently reasonable for Roberts to believe that Drew's advice in 2005 was correct. A jury could conclude that it was reasonable for Roberts to believe Drew had not committed malpractice when he relied on Drew's advice between November 2007 and the time when the federal judge made his statements in April 2010 concerning Drew's professional negligence. Such a belief was consistent with the absence of any statements from any of the other lawyers representing Roberts, including Ms. Shahid and Mr. Barnett. Drew was unable to point to any evidence showing that Drew himself, Ms. Shahid, or Mr. Barnett ever suggested to Roberts that he might have a claim against Drew because none of them ever did.

CONCLUSION

Based on the foregoing arguments, the affidavits, deposition testimony, exhibits, and other evidence all viewed in the light most favorable to Roberts, the lower court's Order granting Drew's motion for summary judgment should be reversed and this matter remanded for a trial on the merits. Genuine issues of material fact are in dispute on each element of Roberts' claims for breach of fiduciary duty and professional negligence, such that granting Drew's motion for summary judgment on all claims in the Complaint was inappropriate. Sufficient facts remain in dispute as to whether, under the facts and circumstances, Roberts should have known at some point on or before May 5, 2008, of the legal malpractice claims against Drew, therefore this issue is suitable for determination by the jury at the trial of this case. In addition, Drew should be estopped from raising a statute of limitations defense based on his conduct in failing to disclose his errors or at least disclose that there was a potential claim, as the federal judge later recognized. As a matter of public policy, lawyers should not be allowed to continually reassure their clients for years that the legal matter was properly handled – even though problems are surfacing – and then assert a statute of limitations defense when the clients finally learn they had a claim.

Respectfully submitted,

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August 29, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

App. Case No. 2013-000020
Case No. 2011-CP-10-3241

Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C.. Appellants,

vs.

Randall J. Drew Respondent.

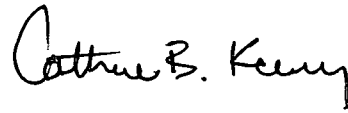
CERTIFICATE OF COUNSEL

The undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Brief of Appellant and the Reply Brief of Appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules.

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AUG 29 2013
SC Court of Appeals

Respectfully submitted,

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A handwritten signature in black ink, reading "Catherine B. Kerney". The signature is written in a cursive style with a large, stylized "C" at the beginning.

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PROOF OF SERVICE

I, Catherine B. Kerney, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the BRIEF OF APPELLANT, one (1) copy of the and the REPLY BRIEF OF APPELLANT, and one (1) copy of the CERTIFICATE OF COUNSEL upon counsel for Respondent, Randall J. Drew by depositing a copy of the same in the United States Mail, postage prepaid, on the 29th day of August, 2013 addressed to David W. Overstreet, J.D. and Andrew W. Countryman, J.D., CARLOCK, COPELAND & STAIR, L.L.P., 40 Calhoun Street, Suite 400, Charleston, South Carolina, 29401.

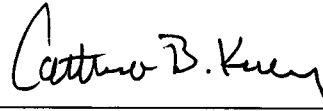
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AUG 29 2013

SC Court of Appeals

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