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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,

v.

Randall J. Drew,

Respondent.

FINAL BRIEF OF RESPONDENT

September 4, 2013

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STATEMENT OF ISSUES ON APPEAL

1. Whether Judge Young erred in ruling the statute of limitations bars Appellants' legal malpractice claim against Respondent.

STATEMENT OF THE CASE

Appellants filed this legal malpractice action against Respondent on May 5, 2011.[1] Respondent timely filed an Answer on May 20, 2011, which raised the statute of limitations as an affirmative defense. The parties engaged in written and deposition discovery after which Respondent filed a Motion for Summary Judgment on April 25, 2012. On June 19, 2012, Respondent filed a Brief supporting the Motion for Summary Judgment. On July 23, 2012, Appellants filed a Brief in Opposition to the Motion for Summary Judgment. That same day, the Hon. W. Jeffrey Young heard the Motion in Charleston, at which time he took the Motion under advisement. On October 19, 2012, Judge Young issued an Order granting the Motion for Summary Judgment for failure to file the claim within the applicable three year statute of limitations. Appellants filed a Motion to Alter or Amend the Order granting Summary Judgment on November 5, 2012. Judge Young denied that Motion on December 18, 2012. This Appeal results.

ARGUMENT

Background Facts

Respondent Randall J. Drew is a lawyer in Mt. Pleasant, South Carolina where he operates a solo practice, Randall J. Drew, LLC. Drew primarily practices in real estate law, and this case arises out of a closing he oversaw on August 17, 2005. (R. p. 258, lines 4 - 6) Appellant Keith Roberts became interested in purchasing a lot in Berkeley

[1] The Complaint is dated May 3, 2008, and was file stamped on May 5, 2008.

County referred to as "Lot 12," located on Yellow House Road next to Yellow House Creek (the "Property"). (R. p. 15, ¶ 7) At the time, Thomas Stone owned the Property, a deep water lot with a dock permit. (Id.)

Roberts signed a contract to purchase the Property from Stone for $525,000 on July 9, 2005. (R. p. 254, line 17 - p. 256, line 9; R. pp. 727 - 731) Prior to the closing, the S.C. Dept. of Health and Environmental Control Office of Ocean and Coastal Resource Management ("DHEC-OCRM") revoked the permit because the U.S. Navy claimed it owned the marshland adjacent to the Property over which a dock would be built. (R. pp. 845 - 846) Stone hired Charleston lawyer Mary Shahid to bring an action in the Administrative Law Court ("ALC Case") in efforts to have the permit reinstated. (R. p. 573, line 17 - p. 575, line 2) Judge Ralph King Anderson, III issued an Order in the ALC case on June 3, 2005, providing for the reinstatement of the dock permit because the Navy had failed to prove its ownership claim to the marshland adjacent to the Property.[2] (R. pp. 847 - 854)

Prior to the August 17, 2005, closing, Roberts was aware of the Navy's claim and its impact on the dock permit, as well as the ALC Case:

> A: I was aware there was an issue with the--with the administrative law judge.
>
> Q: What was your understanding of that issue?
>
> A: That there were some issues with the dock permit and--with Mr. Stone and he had to go before the administrative law judge, present his case, and then the dock permit was reissued, reinstated, reissued.
>
> Q: Who told you that information?

[2] For some unexplained reason, the Navy refused to participate in the ALC Case despite having been notified of it.

A: I believe we got the information from Randy Drew.

Q: When?

A: At some time in between July 9th and closing. (Dep. K. Roberts, R. p. 257, line 16 - p. 258, line 3)

Despite the dock permit being valid at the time of the closing, concerns existed that the Navy could potentially make a claim of ownership of the adjacent marshland (which would impact the ability to maintain a dock there). This led Stone to reduce the purchase price by $50,000 in exchange for a release of liability related to future dock permitting issues.

Q: So can you tell me one way or another whether you agreed to the reduction in price in exchange for a release of liability of Mr. Stone related to any issues that might arise regarding the dock permit?

A: I believe I did. (Dep. K. Roberts, R. p. 262, lines 14 - 18)

In fact, in light of the potential permitting issues, the parties amended the contract to include the language "[c]ontract not contingent on dock permit."

Q: And looking at the contract and based on your testimony, the initial agreed-upon price was about $525,000?

A: Yes, sir.

Q: And is it accurate that the contract, as initially drafted, included a contingency of a dock permit?

A: Initially, yes, sir.

Q: Tell me about how that changed.

A: Since I had to--the dock permit was taken away and I went to an Administrative Judge in Columbia, the dock permit was reinstated. Since that's a state permit and I knew there could possibly be complications, I wanted to know if--by taking $50,000 off the contract price, if you ran into problems down the

road, they're on you. Don't come back at me. (Dep. T. Stone, R. p. 689, line 24 - p. 690, line 15)

Q: So basically, the parties to the transaction knew that the Navy could possibly come back and make claim on the marshland that would impact the ability to build the dock –

Q: --on the property?

A: They did.

Q: And based on that understanding, you reduced the contract price by $50,000?

A: That's correct.

Q: And you did that so that Mr. Roberts could not come back against you down the road in case those issues arose?

A: Correct.

Q: So if Mr. Roberts, for example, in this lawsuit had tried to sue you, that would probably have been a defense you would have raised?

A: I would show this paperwork that we have in front us, and he cannot come back at me because he agreed to the reduction in the price. And also the dock permit--there's a line in here, the dock permit contingency, was taking--taken off of the contract. So there's no issue with the dock--

Q: And that was--

A: --as of the closing.

Q: All those measures were taken specifically in light of the Navy's potential claims?

A: Yes.

Q: So even though the ALJ order had been rendered, there were still concerns at the closing date that the Navy could come back and make a claim?

A: Repeat the question.

Q: As of the closing date, despite the ALJ order that reinstated the dock permit, there were still concerns on behalf of the parties that the Navy's potential claim could resurface?

A: Yes, possibly. That was the reason for the reduction. If I did not feel there would be an issue, then obviously I would not have subtracted the $50,000. (Dep. T. Stone, R. p. 693, line 16 - p. 695, line 11)

Roberts' testimony indicates that, prior to closing, he knew that (1) the government claimed ownership of the marshland adjacent to the Property, (2) the permit had been revoked and reissued as a result of the ALC Case, and (3) the Navy could make a claim in the future despite the dock permit:

Q: What prompted the inclusion of this language about the dock permit in the contract then?

A: I don't--I don't know.

Q: Going down a little further, I think you referenced this note earlier, it says, "Contract not contingent on dock permit." Do you see that?

A: Yes.

Q: Is that part of the contract that you agreed to?

A: Yes.

Q: And again, if the dock permit was valid at the time you signed the contract, do you recall why the contingency language would be included in the contract?

A: I would imagine it was because they had an issue prior to.

Q: Right. Did you know at the time what that issue was?

A: Yes.

Q: What was it?

A: That the government was saying--let me rephrase that. I knew there was an issue with the dock permit, that there was an issue

concerning the government and the marshland, that's what I recall about that.

Q: Well, is it fair to say that at this time, at this point in time today, we know that the government, the Navy has said it owns the marshland and, therefore, you don't have permission to build a dock there?

A: Absolutely, at this day, I know that.

Q: Did you know when you signed this contract that the government was making or had made a claim of that nature?

A: I knew they had a claim of some nature, but until--until after all of this, when I started really--when we got into digging into it did I know the magnitude of it. (Dep. K. Roberts, R. p. 265, line 11 - p. 266, line 21)

Roberts discussed the Navy's claim with Drew prior to the closing, although the parties dispute exactly what Drew told Roberts. According to Roberts, the following discussion took place:

Q: What did Mr. Drew tell you about the magnitude of the claims of the government?

A: When?

Q: Before you bought the property.

A: That there was an issue, that the issue had been resolved by an administrative law judge, and that it was good to go, it was good to buy the property. (Dep. T. Stone, R. p. 267, lines 4 - 10)

Drew maintains he indicated the dock permit appeared to be valid, but there was no way to predict whether the Navy would pursue its claim of ownership of the marshland in the future:

Q: Did you ever discuss with Mr. Roberts any issues related to trespass about the Navy property or Navy's claimed property?

A: I specifically discussed with Keith when he called me to tell me he wanted the assignment of dock permit transferred the day of

closing and hand-delivered to the OCRM office, I told him that the Navy still could make a claim in the future and that they have big ships with guns on them and I did not want to be in a battle with the Navy. And he said, well, I'm going to start it right away and get it done.

Q: Did you advise him of any risk that would be associated if he proceeded with building a dock?

A: I told him they could still make a claim. I said they hadn't proved anything based on the administrative law order, what I discussed with Mary, but they could still make a claim. (Dep. R. Drew, R. p. 404, lines 6 - 24)

The closing took place on August 17, 2005, at which time Roberts received title to the Property, and Stone transferred the dock permit to Roberts for the negotiated purchase price of $475,000. (R. p. 262, line 24 - p. 263, line 1; p. 290, line 15 - p. 291, line 1; R. p. 855) Roberts later transferred title to the Property to his LLC, Lot 12 Yellow House, LLC. (R. p. 288, lines 9 - 11) He then built a dock at the Property in or around September 2005, and began construction of a house in March or April 2006. (R. p. 294, lines 2 - 12 and p. 300, lines 18 - 20) Appellants took out a $1.065 million loan on the Property to finance construction around that time as well. (R. p. 301, line 22 - p. 302, line 1) Roberts began marketing the Property for sale in 2006, and on October 27, 2006, he signed a contract to sell it to Robert Bowen for $2.2 million ($1.725 million more than the purchase price). (R. p. 304, line 2 - p. 305, line 15; R. pp. 962 - 974) This deal was set to close by January 8, 2007 (R. p. 309, line 23 - p. 310, line 7)

However, on November 13, 2006, Roberts received an email from his real estate agent, Chuck Mimms, indicating the Navy considered the dock a trespass over the marshland adjacent to the Property and demanded the dock be removed. (R. p. 856 and R. p. 310, line 14 - p. 312, line 18) The email was a forward Mimms received from

Susan Bryant, Bowen's real estate agent. In it, Bryant stated "[w]e have a serious issue regarding the lawsuits with the Navy... I received a phone call from E. R. Nelson, I believe, who told me the dock has to be removed and to call the Navy's attorney[.]" (Id.) Roberts read the email on or around November 13, 2006, and indicated it was the first notification he received following purchasing the Property that the Navy planned to continue to pursue its claim of ownership of the marshland. (R. p. 313, line 6 - p. 314, line 7)

On November 16, 2006, Bryant sent Mimms a letter formalizing Bowen's concern regarding the Navy's claim to the marshland adjacent to the Property and its impact on the ability to maintain a dock there. (R. pp. 857 - 858) The letter states the following in pertinent part:

> The ownership of the land/marsh that the dock crosses appears to be in dispute with the Unites States Government Department of the Navy, according to the records of SCDHEC, Berkeley County, phone conversations, and the correspondence from the Navy and others. This is a matter of paramount importance and must be addressed to the satisfaction of the buyer before he will agree to proceed with the purchase of the property [.] (Id.)

Roberts received this letter in November 2006 and plainly admitted in his deposition that he was aware of the Navy's claim by that time:

> Q: So is it fair to say that as of November 28th, 2006, that you were at least aware of the Navy's claim of ownership of the marsh adjacent to the property?
>
> A: Yes. (Dep. K. Roberts, R. p. 318, lines 21 - 25)

In December 2006, Roberts retained Shahid (who had previously represented Stone) to investigate these issues. (R. pp. 859 - 860) According to Roberts, he paid Shahid around $500 for her services. (R. p. 320, line 14 - p. 321, line 15)

On January 18, 2007, Bowen canceled the contract to purchase the Property from Roberts via a letter from his real estate agent Susan Bryant.[3] (R. pp. 861 - 862) Bowen canceled the contract primarily because of the Navy's claim of the marshland adjacent to the Property. (Id.) Roberts was specifically aware of this, as according to him, the Navy's claim of ownership of the marshland caused Bowen to cancel the contract. (R. p. 330, lines 15 - 20)

When Bowen canceled the contract, Roberts initially refused to refund Bowen's earnest money ($10,000). (R. p. 332, lines 20 - 23) Bowen's lawyer then wrote Roberts' real estate agent on February 7, 2007, reiterating the cancelation of the contract and citing the Navy's claim as a reason for the same. (R. pp. 863 - 864) Roberts received this letter and faxed it to Drew on February 18, 2007. (R. p. 333, lines 3 - 13)

In March 2007, Roberts attended a meeting with Drew and lawyers from the Navy to discuss the dock permit having been issued for construction over marshland the Navy claimed it owned. (R. p. 315, lines 17 - 23 and p. 335, line 18 - p. 336, line 12) Roberts maintains the Navy demanded he remove the dock at this meeting. (R. p. 336, lines 13 - 20) On July 26, 2007, Shahid forwarded Roberts a letter she received from the Department of Justice ("DOJ"), along with a response to the DOJ she sent on Roberts' behalf. July 26, 2007. (R. p. 865) Roberts received Shahid's letter and the attached correspondence around this time. (R. p. 338, line 23 - p. 339, line 9) Of note, the letter from the DOJ accused Roberts of trespassing over its marshland, demanded the dock be removed, and threatened to sue for damages in the event Roberts failed to remove the dock:

[3] The letter is dated Jan. 18, 2006, but Roberts testified this was a typographic error.

> The owners' trespass on to [sic] the lands of the United States may subject them to damages, both actual and punitive, and costs to remove any structures intruding onto [sic] the land of the United States, and other remedies both equitable and legal. (R. pp. 866 - 867)

Shahid corroborated Robert's knowledge of a claim as of July 26, 2007:

> Q: So, as of July 26, 2007, Mr. Roberts was aware of the Navy's continued claim of ownership of the adjacent marshland?
>
> A: Yes. (Dep. M. Shahid, R. p. 637, line 25 - p. 638, line 3)

The U.S. Attorney's office then wrote Roberts on August 8, 2007. (R. pp. 868 - 869) In that letter, the DOJ again accused Roberts of trespassing and threatened to seek damages and other relief if Roberts failed to remove the dock. (Id.) Roberts testified as follows regarding the DOJ's letter:

> Q: But when you received this letter in August of 2007, you knew that the Navy was asking you to take the dock down and was threatening to try to seek damages against you in the event that you refused to do so, correct?
>
> A: Yes. (Dep. K. Roberts, R. p. 342, line 21 - p. 343, line 1)

On January 20, 2008, Roberts emailed Drew asking to discuss the situation: "[h]ow about giving me a call after you receive this please. These people just don't want to go away." (R. p. 870) Roberts also forwarded Drew threatening letters he received from the Navy with that email. (R. p. 345, lines 17 - 23) During this time, Roberts also sought counsel regarding the Navy's claim from yet another lawyer, Clay Walker. (R. p. 346, lines 5 - 17) Next, via an email dated January 30, 2008, the Navy threatened to file suit against Roberts if he did not remove the dock. (R. p. 871) Walker forwarded Roberts the email by carbon copy, which Roberts received on or about January 30, 2008. (R. p. 347, lines 7 - 10)

On February 6, 2008, the DOJ wrote Drew regarding the Navy's claim to the marshland adjacent to the Property. (R. pp. 872 - 873) In pertinent part, the letter states:

> The dock constructed from Lot 12 to Yellow House Creek crosses land owned by the United Stated Government. Please refer to the enclosed survey showing the encroachment of the private dock. By constructing this dock across the United States' property, your client has trespassed upon the property of the United States. Additionally, the dock remaining on the property of the United States Government is a continuing trespass. By this letter, the United States is demanding that your client not enter onto the property of the United States Government. This letter further demands that your client not traverse on that portion of the dock that is situated on United States' property. (Id.)

Roberts received and reviewed this letter around February 6, 2008. (R. p. 347, lines 17 - 24)

On February 29, 2008, Roberts wrote United States Senator Lindsey Graham regarding the situation. (R. p. 874) In the letter, Roberts stated he was being "threatened by the U.S. Attorney," and told Senator Graham the government was threatening to seek damages and other recovery against Roberts if he failed to remove the dock. Id. Roberts also stated: "This controversy was going on for years before I bought the property, and even though I was under the impression that it was a 'done deal,' *it has once again reared its ugly head.*" (emphasis added) (Id.) Roberts stated the following regarding the ordeal in light of his letter to Senator Graham:

> Q: So is it fair to say that at this time, February 29, 2008, that the situation was a serious issue in your mind?
>
> A: It was an issue and any time you get a letter from the government threatening you the way they threatened me, I would say it's a serious issue... (Dep. K. Roberts, R. p. 351, lines 10 - 18)

Sometime prior to April 29, 2008, Roberts wrote consultant Wayne Beam, Ph.D., asking for help regarding the issues with the Navy's claim and dock permit. (R. p. 356, line 19 - p. 358, line 8) Beam wrote Roberts on April 29, 2008, stating in part, "You desire me to convince the US [sic] Department of Defense and US [sic] Department of Justice to cease and desist from their efforts to have your existing private recreational dock disassembled and removed." (R. pp. 875 - 876) Roberts was prepared to pay Beam $80,000 for his services. (R. p. 358, lines 18 - 23)

In February 2009, the Navy filed a lawsuit in federal court seeking damages and an injunction ordering the dock be removed. The lawsuit included the filing of a *Lis Pendens*, and the bank now owns the Property following a foreclosure. (R. p. 252, lines 1 - 5) Stan Barnett represents Roberts in that lawsuit, which remains pending as the parties are waiting for Judge Houck to rule on Cross Motions for Summary Judgment, the hearing for which took place over two years ago. Roberts' position in the federal case is that the Navy's claim of ownership of the marshland adjacent to the Property is invalid and that the Navy has no grounds to seek the removal of the dock. [4] (R. pp. 975 - 997)

The Appellants filed this legal malpractice action against Randy Drew on May 5, 2011. According to Appellants, Drew improperly failed to advise Roberts not to proceed with the closing and that Appellants suffered damages as a result. Specifically, Appellants allege that Drew assured Roberts that the dock permit Stone transferred to Roberts at closing was valid and the Navy's claim of ownership of the marshland adjacent to the Property was illegitimate. Appellants maintain Drew was negligent in his

[4] Since the parties to this Appeal filed their initial briefs, the federal court dismissed the underlying case after the bank (current owner of the Property) voluntarily removed the dock. So, the federal case is no longer pending, and no substantive ruling regarding the ownership of the marshland should be forthcoming from the federal court.

failure to properly advise Roberts and that he would not have purchased the Property but for Drew's negligence. Appellants allege they have incurred over $1 million in damages as a result of Drew's negligence related to lost profits on the contract to sell the Property to Bowen, among other things. (R. p. 13, 763 - 764) The Plaintiffs also seek other damages related to the foreclosure action and federal lawsuit. (Id.)

Standard of Review

Upon review of the circuit court's grant of summary judgment, the appellate court applies the same standard the circuit court applies pursuant to George v. Fabri, 345 S.C. 440, 451, 548 S.E.2d 868, 873 (2001). Summary judgment is proper if the pleadings, depositions, discovery responses, and affidavits, if any, show that no genuine issue as to any material fact exists and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, "the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

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JUDGE YOUNG CORRECTLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE APPELLANTS FAILED TO FILE THE COMPLAINT WITHIN THE THREE YEAR STATUTE OF LIMITATIONS

1. STATUTE OF LIMITATIONS

A. The statute of limitations begins to run when a reasonable person knows or should know that a claim may exist.

The statute of limitations is not a mere technicality. Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). On the contrary, statutes of limitations are fundamental to a well-ordered judicial system. Id. Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Id. One primary purpose of a statute of limitations is "to relieve the courts 'of the burden of trying stale claims when a plaintiff has slept on his rights.'" McKinney v. CSX Transp., Inc., 298 S.C. 47, 49 - 50, 378 S.E.2d 69, 70 (Ct. App. 1989) (*quoting* Burnett v. New York Cent. R.R., 380 U.S. 424, 428, 85 S.Ct. 1050, 1054 (1965)). Another purpose is to protect potential defendants from protracted fear of litigation. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008). "[S]tatutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims. Moreover, limitations periods discourage plaintiffs from sitting on their rights. Statutes of limitations are, indeed, fundamental to our judicial system." Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 176, 609 S.E.2d 548, 552 (Ct. App. 2005) (internal citation omitted).

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5); see also Berry v. McLeod, 328 S.C. 435, 444 - 45, 492 S.E.2d 794,

799 (Ct. App. 1997) (finding § 15-3-530(5) provides a three-year statute of limitations for legal malpractice actions). Pursuant to the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. Burgess v. Am. Cancer Soc., S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see also S.C. Code Ann. § 15-3-535 ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.").

The standard as to when the limitations period begins to run is objective. Burgess, 300 S.C. at 186, 386 S.E.2d at 800. Under § 15-3-535, the statute of limitations is triggered by knowledge of diligently acquired facts sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). It begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996); see also Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). "The fact that the injured party may not comprehend the full extent of the damage is immaterial." Dean v. Ruscon Corp., 321 S.C. at 364, 468 S.E.2d at 647. In other words, the statute is *not* delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery. Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). "[I]nstead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (internal citations omitted).

B. Since Appellants claim they have been damaged because Drew negligently failed to advise them NOT to purchase the Property, the statute of limitations began to run when Appellants knew or should have known that Drew's advice regarding purchase of the Property was wrong.

Appellants' argument may be construed in two ways. On one hand, if Appellants argue that Drew was incorrect in asserting that the Navy does not have valid ownership of the marshland and that the dock permit is valid, then no cause of action has arisen because the federal court has not determined whether Drew was correct in his assertions. However, the Appellants are actually arguing that Drew failed to properly advise Roberts *not* to purchase the Property because of the possibility that the Navy would re-assert its claim of ownership of the adjacent marshland. Roberts maintains Drew negligently advised him regarding buying the Property:

> A: My conversations with Mr. Drew were all based on one thing and one thing only, that if I bought this property, I would be able to put a dock on and across the marsh. He assured me not once, he assured me numerous times, after whatever research he did, that I would not have a problem, I had a legal dock permit. (Dep. K. Roberts, R. p. 275, line 25 - p. 276, line 5)
>
> Q: Do you have any understanding as to what you think Mr. Drew improperly did or failed to do regarding giving you the advice about purchasing the property?
>
> A: I guess I can best answer that by if Mr. Drew had done what I know now he should have done, I wouldn't be here.
>
> Q: And what is that?
>
> A: Advise me not to buy the property because there's an--there would have been an issue with it with the United States. (Dep. K. Roberts, R. p. 277, line 22 - p. 278, line 6)

According to the Appellants, Roberts never would have purchased the Property had he known the Navy would assert that it owned the marshland and take issue with

having a dock there. Appellants maintain they have been damaged because of Drew's failure to advise Roberts not to purchase the Property.[5]

Rather than claiming that Drew was incorrect in his assertions that the Navy did not have a valid claim of ownership of the marshlands and that the dock permit was valid (which has yet to be decided), Appellants have essentially claimed that Drew was negligent in allowing Roberts to proceed with the closing given the possibility of problems that could arise with the Navy. Therefore, the Appellants are seeking damages proximately resulting from Drew's failure to advise Roberts *not* to purchase the property. Since the damages sought are those proximately resulting from Roberts' purchase of the property (relying on Drew's advice/opinion), whether the Navy actually owns the marshland adjacent to the property is irrelevant because Roberts had already incurred damages resulting from his purchase of the Property as early as January 2007.

The statute of limitations began to run when a reasonable person of common knowledge and experience would have been on notice that a claim against Drew might exist. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Assuming for the sake of argument that Drew negligently advised Roberts regarding the purchase of the Property by telling him it was "good to go," the key point in time for statute of limitations purposes is *when Roberts knew or should have known that Drew's advice was incorrect.* In other words, when would a reasonable person in Roberts' position have known that the

[5] In reality, Roberts purchased the Property knowing full well that the Navy had made a previous claim and could make that claim again. Drew advised Roberts that in his opinion, the dock permit was valid at the time of the purchase (which is not in dispute), but he made no guaranty as to whether the Navy might choose to re-assert its ownership claim in the future. In fact, this was the very reason for the $50,000 price reduction at closing. Drew advised Roberts that the Navy had "big ships with guns" and that he wouldn't want to get into a battle with the Navy. (R. p. 404, lines 6 - 24) Roberts went into the transaction with "eyes wide open."

Navy *intended to pursue its claim of ownership* of the marshland adjacent to the Property, and when did Appellants incur damages related to the Navy's claim?

So, whether Drew's assertions that the Navy had ownership of the marshland in question were correct is irrelevant in determining when the statute of limitations began to run. Even if the federal court determines that the Navy does not own the marshland and the dock permit is valid, Appellants would still have a cause of action against Drew based on Roberts incurring significant damages as a result of the Navy claiming it owns the marshland. Because of Drew's (allegedly) negligent advice, Appellants have suffered damages in the forms of costs to purchase the Property, lost profits from the cancelation of the Contract with Bowen, and additional litigation costs defending against the Navy's claim in federal court. So, the Appellants' cause of action against Drew arose when Appellants were put on notice that Drew was incorrect in *failing to advise them NOT to proceed with the closing.* In other words, Appellants' cause of action against Drew arose when Roberts had notice of damages incurred as a result of purchasing the Property in reliance on Drew's advice.

C. Constructive notice determines when the statute of limitations begins to run.

Appellants argue Roberts had no actual knowledge of a claim against Drew until April 2010, when Roberts overheard a comment by Judge Houck in the federal case. This is difficult to accept in light of the overwhelming evidence to the contrary, including the knowledge of the Navy's claim and the hundreds of thousands of dollars in damages Appellants allege they had incurred by this time. However, even assuming this to be true, Roberts' actual knowledge is not germane to when the statute began to run. The law applies a *constructive knowledge* standard. The statute of limitations begins to run when

the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. Burgess v. Am. Cancer Soc., S.C. Div., Inc., 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989); see also S.C. Code Ann. § 15-3-535.

D. The statute of limitations can begin to run before a plaintiff knows the full extent of his damages and before a plaintiff has established a full-blown theory of recovery.

Additionally, the law is well settled that a plaintiff does not need to realize the full extent of his damages in order for the statute of limitations to commence. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Arguing to the contrary would be disingenuous here since the Appellants incurred the majority of their alleged damages when Roberts purchased the Property in 2005 (purchase price) and when Bowen canceled the contract (lost profits) in early 2007. By the time Bowen canceled the contract, Roberts knew or should have known he had incurred actual damages as a result of following Drew's advice regarding purchasing the Property.

The law also states that "the statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) (citing Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997)). So, even if Appellants do not know the full extent of their damages or have a full-blown theory of recovery developed, the statute of limitations started running when Appellants either knew or should have known that a claim may exist against Drew from damages proximately resulting from him negligently failing to advise Appellants NOT to purchase the Property. Therefore, since the Appellants believe Drew negligently failed to advise Roberts not to purchase the

Property, Appellants should have been on notice of a possible claim against Drew when Roberts incurred damages as a result of the Navy interfering with Roberts' ability to maintain a dock on the Property.

2. EVIDENCE OF APPELLANTS' NOTICE OF A CLAIM AGAINST DREW

A. August 17, 2005 – Roberts is initially put on notice that the Navy may pursue its claim of ownership when he receives a $50,000 reduction in the purchase price.

August 17, 2005 is the date of the closing where Roberts purchased the Property and received the dock permit from Thomas Stone. Prior to or at closing, Stone reduced the purchase price of the Property by $50,000 and included language in the contract specifying the transaction was *not* contingent on the ability to build a dock at the Property. Because of the uncertainty of the dock permitting issues, Roberts accepted a $50,000 price reduction in exchange for releasing Stone of liability in the event issues arose with the dock/dock permit. Both Stone's and Roberts' deposition testimony confirms this. In fact, Roberts specifically stated at the closing that he was aware of issues related to the dock permit based on the Navy's claim of ownership of the marshland. (R. p. 262, lines 14 - 18 and p. 265, line 11 - p. 266, lines 21) At closing, Roberts was aware the Navy had previously claimed an ownership interest in the marshland adjacent to the Property and was cognizant of the impact the Navy's claim could have on the ability to build a dock, as he accepted a $50,000 purchase price reduction.

B. November 13, 2006 – Roberts is put on notice that the Navy intended to pursue its claim of ownership of the marshland.

On October 27, 2006, Roberts signed the contract to sell the Property to Bowen for $2.2 million. Then, on November 13, 2006, Roberts received Mimm's email

indicating that the Navy considered the dock to be a trespass over the adjacent marshland, which the Navy maintained it owned. (R. p. 856) According to Roberts' deposition, this was the first indication following the closing that the Navy was pursuing its claim of ownership of the marshland and thus the first indication that he may have difficulty maintaining the dock. Mimm's November 13, 2006, email referred to the Navy's claim as a "serious issue" and referenced the Navy's demand that Roberts remove the dock. (Id. and R. p. 311, line 21 - p. 312, line 18)

Roberts maintains Drew assured him the dock permit was valid and the Navy's ownership claim was not legitimate prior to the closing, and that Roberts relied on this information in consummating the deal. Even assuming this to be true, the ultimate validity of the Navy's claim became irrelevant at this point. Regardless of whether the Navy actually owned the marshland, it threatened legal action and demanded Roberts remove the dock. Of course, this had the potential to significantly impact the value of the Property and Appellants' ability to sell it, as well as involve the Appellants in costly litigation. Despite Drew's alleged advice that the dock permit was valid and the Navy's claims to the marshland were illegitimate, as of November 13, 2006, Roberts was aware that the Navy planned to pursue its claim of the marshland and that claim was a "serious issue" that could have significant financial implications. Under these circumstances, a reasonable person in Roberts' position would have been aware of a claim against Drew related to his failure to advise Roberts not to purchase the Property.

C. November 16, 2006 – Bowen plans to cancel the purchase contract because of the Navy's claim of ownership of the marshland.

On November 16, 2006, Bowen's agent sent Roberts a letter indicating Bowen's plan to cancel the contract to buy the Property for $2.2 million, because of the Navy's

claim of ownership of the adjacent marsh and its impact on the ability to maintain a dock. Roberts believes the sale would have happened had it not been for the issues with the Navy and the dock permit. Appellants stood to lose $425,000 in profits if the multi-million dollar deal to sell the Property to Bowen fell through.

So, as of November 16, 2006, Roberts knew Bowen planned to cancel the contract because of the issues with the Navy and the dock permit (the very issue about which Roberts says Drew advised him), which meant potentially losing hundreds of thousands of dollars in profits. Appellants argue they had no reason to believe a claim existed against Drew at this point because Drew maintained the Navy's claim of ownership of the marshland was invalid. However, whether the Navy was correct does not determine when a claim against Drew arose. Roberts knew the Navy was pursuing its claim, and nothing Drew said about the validity of the Navy's claim had any impact on the Navy's choice to pursue its claim. Roberts had actual knowledge that Drew's advice was (allegedly) wrong and that Roberts stood to incur significant damages as a result. According to Roberts, he would not have been in this position had Drew advised him against purchasing the Property. Any reasonable person in Roberts' position would have known of a claim against Drew as of this time, November 16, 2006.

D. November 28, 2006 – Roberts is aware of the Navy's claim of ownership of the marshland.

Appellants argue that despite Bowen indicating his intent to cancel the contract to purchase the Property, the statute of limitations did not start to run because Roberts believed Drew when he told Roberts that the Navy's claims of ownership of the marshland were unfounded and the dock permit was valid. Roberts testified as follows:

A: My conversations with Mr. Drew were all based on one thing and one thing only, that if I bought this property, I would be able to put a dock on and across the marsh. He assured me not once, he assured me numerous times, after whatever research he did, that I would not have a problem, I had a legal dock permit. (Dep. K. Roberts, R. p. 275, line 25 - p. 276, line 5)

However, again, regardless of whether the Navy actually owns the marshland, Roberts knew or should have known a claim existed against Drew when this "problem" arose with his ability to maintain a dock at the Property. Roberts plainly admitted in his deposition that he was aware of the Navy's claim of ownership of the marshland by November 28, 2006. The validity of the Navy's claim is immaterial to determining whether Roberts had notice of a claim against Drew because the Navy's mere *assertion* of its ownership claim of the marshland prevented Roberts from legally maintaining a dock at the Property. If the ultimate validity of the Navy's claim is the key issue, the statute has not yet started to run, as the federal court has still not determined whether the Navy owns the marshland. Under these circumstances, Roberts' knowledge that the Navy was making a claim and the problems associated with that are the relevant factors for purposes of determining when the statute of limitations began to run.

It is undisputed that as of November 28, 2006, Roberts was aware of the: (a) Navy's claim of ownership of the marshland; (b) potential impact of the claim on the dock permit; (c) potential and actual impact of the claim on the ability to sell the Property; and (d) resulting cancelation of the contract to sell the Property for $2.2 million. Appellants' argument that Roberts lacked knowledge of a claim against Drew because he repeatedly assured Roberts the Navy's claim was illegitimate is a red herring because it does not matter whether the Navy's claim was legitimate. Even if the Navy's claim of ownership is incorrect, Roberts would still have the same potential cause of

action against Drew for the damages already incurred. Therefore, any reasonable person in Roberts' position would have known of a claim against Drew by this date.

E. December 6, 2006 – Roberts obtains outside counsel to advise him on this significant problem.

Roberts retained Shahid to help with these issues in December 2006, which included paying her at least $500. So, by December 6, 2006, Roberts recognized a problem significant enough to hire another lawyer. According to the Appellants' own logic, had Drew advised Roberts against purchasing the Property because of the Navy's potential claim, Roberts would not have purchased the Property, incurred construction costs, lost the contract with Bowen, or had to hire separate counsel. Despite any assurances by Drew that the Navy's claim would ultimately be invalidated, any reasonable person in Roberts' position would have been on notice by this time of a claim against Drew related to his failure to advise Roberts not to purchase the Property.

F. January 18, 2007 and February 7, 2007 – Bowen officially cancels purchase contract, costing Appellants hundreds of thousands of dollars.

On January 18, 2007, Bowen formally canceled the contract to purchase the Property because of issues related to the Navy's claim and the dock permit, meaning a loss of hundreds of thousands of dollars in profits to Appellants. Bowen also requested the earnest money back he had put down, which Roberts initially refused to return. However, after hearing from Bowen's lawyer–who cited the Navy's claim and dock permitting issues as a reason for canceling the contract–Roberts returned the earnest money, and recognized the contract as canceled.

Since Appellants' primary alleged damages include the purchase price ($475,000) and lost profits on the Bowen contract ($425,000), it is unclear how Appellants did not

have actual, much less constructive, knowledge of a claim against Drew by this point. Additionally, no assurances that the Navy's position was wrong–whether in the form of assertions by Drew or a ruling by the federal court–could help Roberts recoup these losses. Although the federal court's decision may clarify the extent of the damages Appellants have incurred as a result of purchasing the Property, whether Roberts comprehended the full extent of the damages incurred at this time is **immaterial** in determining whether a potential claim existed against Drew. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996).

The Court acknowledged this at the hearing for the Motion for Summary Judgment:

Court: So there's no question, though, it was in January of 2007, a $2.2 million deal fell through?

Def. couns.: Yes, your honor.

Court: Any question?

Pls. couns.: No. Other than tempered by the assurances he got from his lawyer that that Navy claim is not valid.

Court: But, I mean, wouldn't–you've got to agree with me, I would think, that every time you're getting ready to sell something and the buyer backs out because they see there's a problem, and it's $2.2 million, then that should raise a red flag that there is a problem.

Pls. couns.: There isn't any question, your honor, that my client was aware of the Navy's issue. That was the reason–

Court: I'm saying, that is a real issue when a $2.2 million claim–or deal falls through.

Pls. couns.: It is. (R. p. 71, line 9 - p. 72, line 4)

At the hearing, Roberts' counsel argued he had a right to rely on Drew's assurances that the Navy's claim of ownership was invalid because Roberts was not a

lawyer. The Court recognized that despite any right to rely and not being a lawyer, Roberts knew or should have known of a claim against Drew by this time:

> Court: I just–I just–I don't care whether you're a layman or a lawyer, when you lose $900,000, you know, maybe it's time to say I need to seek other counsel. Maybe I can't rely on my attorney. He's not duty bound to stay with Mr. Drew from this point forward.
>
> Pls. couns.: No question –
>
> Court: He has an obligation to look into it. He can't go in with blinders and say, I'm just going to trust whatever Mr. Drew tells me from this point forward. I just lost $900,000; I think I'm going to talk to somebody else. (R. p. 73, lines 1 - 12)

Again, the argument that the statute did not begin to run because of assurances Drew gave Roberts is a diversion. Even if Roberts believed Drew was correct and the court would one day invalidate the Navy's claim, Roberts had still incurred hundreds of thousands of dollars in damages that he would never recoup as a result of purchasing the Property pursuant to Drew's advice. There can simply be no question that the statute of limitations began to run by early 2007, and any argument to the contrary is an attempt to distort the facts and applicable law.

G. March 2007 – the Navy continues to demand for Roberts to remove the dock.

In March 2007, Roberts met with Drew and lawyers from the Navy to discuss these issues. Roberts testified that the Navy demanded he remove the dock and claimed it owned the marshland adjacent to the Property. It was clear at this point that the Navy was not going to change its position regarding the dock permit. Despite any "assurances" Drew may have provided that the Navy's claim was wrong, by this time, Roberts knew the Navy had raised the claim and planned to vigorously pursue it. Under these circumstances, Roberts would certainly never be able to recover the purchase price of the

Property or the lost profits on the contract to sell it to Bowen. It is unclear how Roberts could not have known about a potential claim against Drew at this point.

H. June 26, 2007 and August 8, 2007 – Department of Justice demands that Roberts remove the dock.

On June 26, 2007, Shahid forwarded Roberts two letters, one from the DOJ and her response to the DOJ. The letters discussed the Navy's claim to the marshland, and the DOJ emphatically demanded that Roberts remove the dock, and accused Roberts of trespassing. The letter from the DOJ, signed by a U.S. Attorney, threatened to pursue damages against Roberts if he refused to remove the dock. Roberts testified that he received the letter and knew at that time that the Navy was demanding the removal of the dock. On August 8, 2007, the DOJ sent Roberts another letter, this time directly, again accusing him of trespassing via the dock, demanding the removal of the dock, and threatening to seek damages.

Regardless of anything Drew said about whether the Navy actually owned the marshland, the Navy was on record as accusing Roberts of trespassing and threatening to seek damages against him. So, in addition to losing money on the purchase of the Property and contract to sell it to Bowen, Roberts was now facing legal action by the Navy, including a claim for monetary damages. Had Drew advised Roberts against purchasing the Property as Roberts says Drew should have, Roberts would never have been in this position, which is the basis for his malpractice claim against Drew. Any reasonable person in Appellants' position would have been aware of a claim under these circumstances.

I. January 2008 – Roberts seeks advice from additional counsel.

In early 2008, Roberts sought advice from yet another lawyer, Clay Walker, regarding the Navy's claim and its impact on the dock permit. Roberts also discussed this with Drew after emailing him stating "these people just don't want to go away." On January 30, 2008, the Navy again threatened to file suit against Roberts if he refused to remove the dock. The Navy was indisputably intent on seeing its claim through and forcing the removal of the dock from the Property. By January 2008, Roberts had lost hundreds of thousands of dollars and legal fees from multiple lawyers as a result of the Navy's claim–and now stood to lose even more–all because he followed Drew's allegedly negligent advice regarding purchasing the Property. Again, a reasonable person in Roberts' position would have been aware of a potential claim for malpractice against Drew by this time.

J. February 29, 2008 – Roberts writes Senator Graham asking for help.

The government continued to threaten and harass Roberts regarding removing the dock, reiterating the claim that the dock constituted a trespass over the Navy's land. In light of these threats and after having exhausted other options, Roberts wrote Senator Lindsey Graham asking for help on February 29, 2008. Appellants claim Roberts continued to rely on assurances Drew provided, but in his letter to Senator Graham, Roberts stated "it [the Navy's claim] has reared its ugly head again." (R. p. 874) Roberts even described the situation as "serious" by this time.

By Roberts' own admission, as of February 2008, he was facing "serious" threats by the government, a failed contract, and mounting costs (in addition to hundreds of thousands of dollars in unrecoverable losses) as a result of purchasing the Property on

Drew's advice. Further, Roberts turned to his state senator to help deal with this "serious" situation, as the Navy was intent on pursuing its claim and having the dock removed. Again, according to Roberts, he never would have been in this situation had Drew properly advised him against purchasing the Property. How Roberts could not have known of the existence of a claim against Drew by this time is difficult to fathom.

K. April 2008 – Roberts seeks help from Wayne Beam.

Finally, as further evidence of Roberts' damages and desperation, in April 2008, Roberts attempted to hire Wayne Beam, a government liaison of sorts, to assist with these issues. Roberts testified he was prepared to pay Beam $80,000 if he was able to help him. Appellants' maintain Roberts would not have purchased the Property (and incurred these tremendous damages) but for Drew's negligent advice. No reasonable person could take the position that he was unaware of a claim against the lawyer related at this point. Even under the most generous analysis, no legitimate argument exists that Roberts was unaware of a claim against Drew by April 2008.

By April 2008, describing Roberts' situation as a problem is an understatement, and this situation, according to Roberts, resulted entirely from following Drew's negligent advice. In fact, by that time, the Navy's claim had cost him hundreds of thousands of dollars and led to him seeking the advice of multiple lawyers, a U.S. Senator and a third-party consultant. No plausible argument exists that the Appellants lacked actual or constructive knowledge of claims against Drew by April 2008, at the absolute latest. However, the Appellants filed their Complaint on or about May 5, 2011, which is more than three years after the latest date the statute of limitations could have possibly began to run. Therefore, the statute of limitations bars Appellants' claim.

3. EQUITABLE ESTOPPEL

Appellants also argue Drew should be estopped from raising the statute of limitations as a defense because he acted in such a manner as to induce Roberts to delay in timely filing a cause of action. Appellants rely on Kelly v. Logan, Jolley & Smith, L.L.P., 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009), in asserting this position. According to the Court in Kelly, a defendant may be estopped from benefiting from the statute of limitations as a defense when he has acted in such a manner as to induce the plaintiff to delay in timely filing a cause of action. Id. at 638, 682 S.E.2d at 7. The Court also held that "conduct may be either an express representation that the claim will be settled without litigation, or actions suggesting that a lawsuit is unnecessary." Id. Further, "the party claiming estoppel must prove that he or she (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." Id. Finally, "[t]he 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.

Drew's position was (and continues to be) that the Navy's claim of ownership of the marshland is invalid. As noted above, it is unknown whether this is true, as the federal court has yet to determine that issue.[6] However, as described in detail above, the ultimate validity of the Navy's claim is not relevant in determining when the statute of limitations began to run on a claim against Drew. Even if the federal court determines

[6] Again, the federal court previously dismissed the federal claim following the voluntary removal of the dock.

the Navy's claim is invalid, Appellants will have incurred over $1 million in damages as a result of having purchased the Property pursuant to Drew's advice. No assurances Drew gave regarding the ultimate validity of the Navy's claim could change that reality.

A. Drew did not conceal any material facts or, in the event that the Navy DOES own the marshland in question, possess any knowledge of the" true facts."

The Court in Kelly established that in order for Appellants to claim estoppel, Drew must have given a false representation or concealed a material fact AND possessed knowledge of the true facts. Appellants maintain that Drew consistently and continuously over the course of years attempted to conceal his errors and shield Roberts from any knowledge of his failure to properly advise him regarding the Navy's ownership of the marshland adjacent to the Property. This argument fails for two reasons. First, in the event that Appellants are claiming the "concealed error" was Drew's determination that the Navy did not own the marshland adjacent to the Property, the federal court has yet to decide whether Drew's determination was in fact erroneous. Since there has been no finding that Drew's conclusion is wrong, there is no error to conceal. Also, Roberts recognizes in his Affidavit that Drew does not believe he committed malpractice and continues to maintain the Navy's claim of ownership of the marshland adjacent to the Property is invalid.

Additionally, Roberts' Affidavit correctly asserts that Drew ordered a title search by a third-party abstractor. However, the results of this search did not change Drew's opinion that the Navy's claim of ownership of the marshland is invalid. Drew cannot make an effort to conceal a non-existent mistake. The party asserting equitable estoppel bears the burden of establishing all the elements. Id. Appellants have failed to do so here. The record contains no evidence that Drew took any efforts to conceal an error or

induce Roberts to refrain from filing an action against Drew. Even if Appellants can somehow prove that Drew concealed the truth, they must also prove Drew had knowledge of the truth. This is impossible because the "truth" remains unknown until the federal court makes a decision.

However, as discussed earlier, Appellants' claim does NOT hinge on the outcome of Drew's determination regarding the validity of the Navy's claim of ownership of the marshland. Appellants' claim arises from Drew's allegedly negligent conduct in failing to advise Roberts not to purchase the Property. So, if there is any error to begin with, the error was Drew's failure to advise Roberts not to purchase the property. It is illogical to conclude that Drew could have concealed this error given all the resulting damages incurred by Roberts. In other words, Drew's "error" (his failure to properly advise Roberts not to purchase the property) was blatant and in no way was it possible for Drew to even attempt to conceal this error given the losses Roberts already suffered.

B. Appellants had no reason to rely on Drew's assurances.

If Appellants could prove that Drew had knowledge of the truth and concealed the truth, they must still show that Roberts relied on Drew's conduct, and that this reliance prevented them from filing timely suit against Drew. Since Appellants' potential claim exists due to damages resulting from Drew's failure to advise Roberts *not* to purchase the property, Drew's subsequent assurances that the Navy's claim is invalid are completely irrelevant to the present cause of action because Appellants have already incurred the damages caused by Drew's alleged negligence. Regardless of whether the Navy is correct, Appellants' claim already exists against Drew and has existed since at least April 2008, at the very latest. In reality, there is nothing for Appellants to rely on from Drew

that could prevent them from filing suit because the damages incurred as a result of Drew's failure to advise Roberts against purchasing the Property. Even if the federal court later determines that Drew is correct and the Navy does NOT own the marshland, Appellants could, in theory, have a cause of action against Drew related to the damages incurred as a result of purchasing the Property. So, whether Appellants believed or relied on Drew's assurances is completely irrelevant in the present cause of action.

Even if Appellants could somehow prove (1) that Drew concealed material facts, (2) that Drew possessed knowledge of the true facts, AND (3) that Appellant's reliance on Drew's assurances ARE relevant, Appellants had no reason to rely on Drew's assurances (even though the assurances are irrelevant) after having lost nearly $1 million. As Judge Young surmised, in light of the damages incurred as a result of purchasing the Property and the contract falling through, Roberts had no right to rely on any given assurances Drew may have provided under the circumstances:

> Court: Well I don't know that he has a right to rely. I'd be daggum if I'm going to rely on somebody after I lost $900,000. (R. p. 73, lines 22–24)

However, again, since the cause of action exists due to Drew's failure to advise against purchasing the property and the damages have occurred regardless of the outcome in the federal court, whether Appellants' subsequently relied on Drew's later assurances is irrelevant. Therefore, Appellants cannot prove the reliance element necessary for an estoppel claim.

C. Appellants did not lack knowledge and means of obtaining knowledge of the truth.

Finally, even if Roberts relied on Drew's assurances, Appellants must prove Roberts lacked the knowledge and means of obtaining knowledge of the truth of the facts

in question. However, Drew could not have concealed the truth about whether the Navy actually owned the marshland because the "truth" has not yet been determined by the federal court. Moreover, Appellants had access to the same information as Drew in trying to determine the truth. Appellants' brief correctly indicates that Drew took such efforts as reviewing the title documents, speaking with individuals who worked for the Navy, and ordering an independent title search. These efforts supported Drew's opinion that the Navy's claim of ownership of the marshland adjacent to the Property was invalid, and Drew advised Roberts as such. In other words, Drew shared all the information he obtained concerning whether the Navy owned the marshland with Roberts. Even though the "truth" of Drew's assurances has yet to be determined by the federal court, Appellants had access to the same information Drew used to form his opinion, as well as advice and information from other counsel and third-parties.

However, regardless of whether the Navy's claim of ownership is valid – the fact that the Navy chose to pursue the claim caused Appellants' problems. Therefore, when determining whether Appellants can prove Roberts lacked knowledge and means of obtaining knowledge of the truth of the facts in question (assuming Appellants can somehow prove Drew concealed the truth, knew of the truth, and Roberts relied on Drew), Appellants must prove they also lacked knowledge and means of obtaining knowledge of the fact that the Navy chose to pursue its claim against Roberts. Clearly, Appellants had knowledge of the Navy's claim against Roberts and the resulting damages long before April 2008.

Appellants consistently try to confuse the issue by applying the elements of estoppel to a factual scenario where the outcome depends on whether Drew's opinion as

to the Navy's claims that it owns the marshland is correct. However, again, whether Drew's opinion is correct on that issue is irrelevant. And, even when applying the elements of estoppel to Appellants' "imaginary argument," the elements are still unsatisfied because Drew did not know the true facts. Therefore, he could not have concealed the true facts. Again, if the estoppel claim depends on whether Drew was correct in his opinion about who owns the marshland, this claim is not ripe because the elements of estoppel require Drew to have had knowledge of the true facts, and the federal court has yet to determine the true facts.

Even when Appellants try to confuse the issue by making the outcome of whether the Navy owns the marshland seem relevant, they still cannot meet the elements of estoppel. Further, when CORRECTLY applying the elements of estoppel to the current situation, the Appellants clearly fell short. Even if Appellants could somehow show that Drew concealed material information, they cannot prove that they relied on Drew's assurances or that they were unable to discover the truth on their own.

The pertinent question is whether Drew was wrong in allegedly advising Roberts the Property was "good to go," not whether the Navy's ownership claim is valid. If the key fact is whether the Navy owns the marshland, that answer remains unknown until the federal court issues its ruling on the matter. As detailed above, Roberts was well aware that the Navy claimed it owned the marshland and sought to have the dock removed, as well as the problems this caused (by way of hundreds of thousands of dollars) significantly more than three years prior to the filing of the Complaint. The record contains no evidence of information Drew withheld that could support Appellants' claim of equitable estoppel. Again, if the issue is whether Drew's opinion regarding title to the

marshland was correct, that issue will not be determined until the federal court issues its ruling. Under these circumstances, Appellants cannot prove equitable estoppel.

4. THE LOWER COURT'S FINDINGS OF FACT

Appellants maintain the trial court made erroneous findings of fact in its Order granting the Motion for Summary Judgment. Respondents dispute this and will address these allegations in turn.

A. Drew oversaw the 2005 closing.

Appellants take issue with the characterization of Drew's role as the closing attorney. Appellants' seek to improperly expand Drew's role and the duties he owed to Roberts associated with overseeing the closing. This was an arms' length transaction where Roberts was well aware of the risk that the Navy could raise an issue regarding the validity of the dock permit. This was the reason for the $50,000 price reduction at the closing. Knowing full well of this risk (and receiving a substantial discount specifically because of it), Roberts proceeded with the transaction.

Stating that Drew oversaw the closing as the closing attorney does not mean Drew lacked duties to Roberts in that capacity. However, by the time Roberts asked Drew to perform the closing, Roberts had already negotiated and signed the contract to buy the Property. (R. p. 437, line 19 - p. 438, line 16) The Supreme Court defined the duties owed by closing attorneys in State v. Buyers Services Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). Closing lawyers have duties to oversee the (1) title search; (2) preparation of loan documents; (3) closing; and (4) recording title and mortgage. Id.

Drew does not dispute he owed these duties to Roberts as the closing lawyer, and the record is devoid of evidence that Drew failed to meet these duties. However, Drew

takes issue with Roberts' attempt to expand the scope of Drew's representation to being responsible for Roberts' decision to proceed with the transaction, especially in light of the $50,000 reduction in the purchase price specifically related to dock permitting issues. Roberts was fully informed about the Navy's claim and the risk that it could impact the ability to maintain a dock on the Property despite Drew's warnings. Roberts was intent on purchasing the Property in hopes that the Navy would not pursue the claim once he erected a dock. As the closing lawyer, Drew performed an accurate title search, informed Roberts of the risk, and otherwise properly oversaw the closing. This Court should deny Appellants' attempt to expand Drew's role to account for Roberts' decision to purchase the Property.

B. The Order omits reference 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.

As detailed above, whether Drew provided "assurances" regarding the validity of the Navy's claim is not germane to determining whether the statute of limitations ran on Roberts' claims against Drew. Again, the issue is not whether the Navy's claims are valid-the federal court has still not made that determination. The issue is determining when Roberts knew the Navy was raising the claim and the impact that had on his ability to maintain a dock at the Property. As a result, it is not necessary for the Order to refer to any "assurances" Drew provided to Roberts.

Further, Appellants mischaracterize what Drew actually told Roberts. While Drew (and Roberts) continue(s) to maintain the Navy's claim is invalid, Drew never told Roberts he would be able to maintain a dock there for any particular time period–only that the dock permit was valid as of the closing date, August 17, 2005. (R. p. 275, line 25 - p. 276, line 5) To the contrary, Drew repeatedly told Roberts that while the dock permit

appeared to be valid, he was unable to guaranty the Navy would not raise its claim in the future. Drew told Roberts that the Navy has "big ships with guns" and he would "not want to be in a battle with the Navy." (R. p. 404, lines 9 - 17) In response, Roberts indicated "well, I'm going to start it right away and get it done." So, to the extent Drew provided assurances, he never assured Roberts he would be able to maintain a dock at the property for any period of time and indicated only that the dock permit, which has not been revoked, appeared to be valid. Therefore, the Order is proper as written.

C. The Order states that Roberts later transferred title to the Property to Lot 12 Yellow House, LLC, a company that Roberts had recently formed.

Appellants argue that the Order incorrectly fails to note that Drew was the lawyer who helped Roberts form Lot 12 Yellow House, LLC, which "reflects Drew's inducement of Roberts' forbearance and adds additional context to Roberts' reliance on Drew's advice[.]" This is another attempt to expand Drew's scope of representation and shift blame for Roberts' poor business decisions to Drew. Drew did form Lot 12 Yellow House, LLC at Roberts' request. (R. p. 430, lines 8 - 10) Drew and Roberts were friends, and Drew assisted Roberts with legal matters involving property transactions from time to time, including retitling Roberts' personal residence and transferring the Property to Lot 12 Yellow House, LLC via quit claim deed. (R. p. 430, line 11 - p. 431, line 2) None of this expands the scope of Drew's duties as Roberts' closing lawyer (which Drew met). Therefore, the Order is properly written.

D. The Order summarizes many events relevant to Roberts' knowledge and involvement with the claims by the Navy, but specifically omits reference to the facts showing Roberts was in contact with Drew at all relevant times, that Drew hired a title abstractor to perform 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.

The Order appropriately addresses the pertinent facts relevant to determining when the statute of limitations commenced on Plaintiffs' claims against Drew. Appellants attempt to confuse the issue by discussing a "right to rely" and certain "assurances" Drew allegedly provided Roberts regarding the ultimate validity of the Navy's claim. If the federal court determines the Navy does not own the subject marshland, the Plaintiffs' situation in this regard is unchanged. A ruling in Roberts' favor would not undo the alleged damage Appellants have incurred as a result of following Drew's advice. Since the Property went through foreclosure, Lot 12 Yellow House, LLC no longer owns it. Notwithstanding any assurances Drew provided, any reasonable person in Roberts' position would have known of a possible claim against Drew in 2007 when the contract to sell the Property fell through because of the Navy's claim.

Regardless of when Roberts subjectively knew he had a potential claim against Drew, and viewing the facts in a light most favorable to Appellants, Roberts clearly should have known by January 2007 – and certainly no later than April 2008. By that time, 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. Moreover, the Plaintiffs allegedly incurred significant damages in January 2007 as a result of purchasing the Property pursuant to Drew's advice when the prospective purchaser canceled the

contract to sell it and Appellants were subsequently unable to sell the Property. Appellants filed the Complaint on or about May 5, 2011, more than three years after they knew or should have known of a potential claim against Drew. Therefore, the statute of limitations bars Appellants' claim against Drew.

The statute began to run when a reasonable person in Roberts' situation would have been aware of a claim. This would have taken place when Appellants incurred damages as a result of following Drew's allegedly negligent advice regarding purchasing the Property. Appellants' damages include the purchase price and lost profits on the contract to sell the Property, which total almost $1 million. Appellants incurred these damages by early 2007 and continued to incur damages in various forms through 2008. A determination that the Navy's claim is invalid and the dock permit is valid will have no impact on whether Appellants incurred damages as a result of purchasing the Property, allegedly on Drew's advice. The Order is therefore appropriately written in this regard and should not be amended.

E. The Order fails to make reference to Drew's actual and active involvement in assisting Roberts in contesting the Navy's demands when it referenced the federal lawsuit (page 8 of the Order).

Appellants maintain Drew was actively involved in contesting the Navy's claims and demands to remove the dock and continually assured Roberts he would be able to maintain a dock on the Property. Drew did assist Roberts in dealing with the Navy, but Drew never told Roberts he would be able to maintain a dock at the Property. This is a mischaracterization of what Drew told Roberts. Drew indicated he believed the Navy was wrong and did not actually own the marshland, and that the dock permit appeared to be valid as of the closing date. Notwithstanding what Drew told Roberts regarding who owned the marshland, as this Brief discusses *ad nauseum*, the Navy's pursuit of its claim,

not the validity of the claim (which remains in dispute), is the root of Roberts' damages. If the federal court determines the Navy does not own the marshland, Roberts will still be in the same damaged position as a result of having purchased the Property, allegedly because of Drew's negligent advice. The Order is therefore proper as written.

F. The Order concludes (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." 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.

Appellants confuse the relevant issue here. The issue is not whether Drew breached the standard of care (which Drew denies). To the contrary, the issue is when Appellants knew or should have known about a claim against Drew, assuming he breached the standard of care. As Appellants' expert confirms, their liability theory is that Drew failed to properly advise Roberts prior to purchasing the Property. So, the relevant question is when should Roberts have known about a claim against Drew related to that failure.

Again, the validity of the Navy's claim is still undetermined, as the federal court has yet to rule on that issue. If Roberts had a right to rely on Drew's "assurances," then no claim has yet accrued against Drew, and none will unless and until the federal court determines the Navy owns the marshland. On the other hand, if Appellants have a current claim against Drew based on the advice he gave or failed to give prior to the closing, the Plaintiffs failed to pursue the claims within the applicable three year statute of limitations. The Order as written is exactly on point regarding this issue.

G. The Order erred in the conclusion concerning Roberts' arguments that he "has a right to rely on Drew's assurances, which eliminated any 'knowledge of an injury' sufficient to trigger the statute of limitations (page 8)."

Appellants argue Drew assured Roberts the Navy's claims were invalid, and that the effect of these assurances was to eliminate knowledge of a claim against Drew for malpractice, as Roberts maintains he did not have actual knowledge of a claim against Drew until at a hearing in the federal case in April 2010. Appellants also argue that Drew hired a title abstractor to conduct a title search in November 2007, and the results of the title search confirmed Drew's opinion that the Navy did not own the marshland. According to Appellants, this "new advice" made it reasonable for Roberts to believe that Drew's advice in 2005 was correct.

It is difficult to imagine how Roberts did not know of a claim against Drew regardless of any assurances or "new advice" Drew provided in light of the nearly $1 million in actual damages Roberts maintains he incurred by early 2008. Further, if whether Drew committed malpractice is determined by if he is correct regarding the validity of the Navy's claim, then no cause of action has yet accrued because that issue is unresolved. However, Appellants claim Drew should have advised Roberts not to purchase the Property and that Roberts incurred significant damages as a result of proceeding with the purchase. Regardless of whether the federal court rules in favor of the Navy, Appellants have (allegedly) been damaged as a result of following Drew's advice to purchase the Property. Roberts knew or should have known of a claim against Drew when he incurred these damages as a result of purchasing the Property no later than April 2008 (as described above). The Order correctly concludes that despite any advice Drew gave Roberts, he was well aware of the damages incurred as a result of following

Drew's alleged advice to purchase the Property. As a result, the statute of limitations began to run absolutely no later than April 2008.

CONCLUSION

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. Further, by January 2007, following Drew's advice had caused Roberts to lose profits on the $2.2 million contract to sell the Property to Bowen. A reasonable person in Appellants' situation would have been aware of a potential claim against Drew in January 2007.

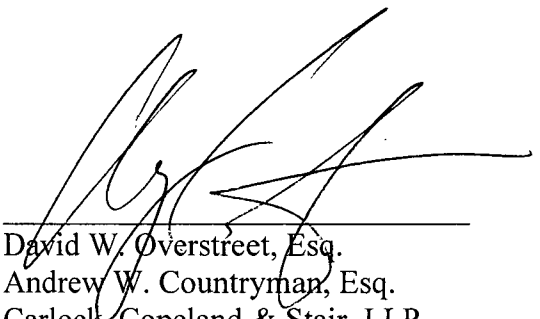
From December 2006 through February 2008, the Navy vigorously pursued its claim and repeatedly demanded Roberts remove the dock and threatened to sue Roberts for damages if he failed to do so. Roberts was fully aware of this and actively contested the Navy's demands. He even sought advice and assistance from outside counsel and a U.S. senator in efforts to resist the Navy's position. According to Roberts, had Drew advised him prior to closing it was likely the Navy's claim could cause such issues with the dock and/or advised him against purchasing the Property, Appellants would not have suffered damages by spending money to buy the Property or from the loss of the Contract, nor would he have been subjected to contesting the Navy's claim throughout 2007 and the early parts of 2008. A reasonable person in this situation would have known of a possible claim against Drew by April 2008 at the very latest.

Further, Appellants' "right to rely" or estoppel argument fails because the Navy's *pursuit of its claim*, regardless of its validity, caused Appellants' damages. If the federal

court determines the Navy does not own the subject marshland, the Plaintiffs' situation in this regard is unchanged. A ruling against the Navy would not undo the alleged damage the Appellants have incurred as a result of following Drew's advice. Notwithstanding any assurances Drew provided, any reasonable person in Appellants' position would have known of a possible claim against Drew in 2007 when the contract fell through, causing alleged damages in the form of lost profits, in addition to the money spent to buy the Property in the first place.

Regardless of when Roberts subjectively knew he had a potential claim against Drew, and viewing the facts in a light most favorable to Appellants, Roberts clearly should have known by January 2007, and certainly no later than April 2008, that a potential claim against Drew for malpractice existed. By that time, Roberts was indisputably aware that Drew's alleged 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. Moreover, Appellants incurred significant damages in January 2007 as a result of purchasing the Property pursuant to Drew's advice when the prospective purchaser canceled the Contract and the Plaintiffs were unable to sell the Property. No assurances or advice Drew provided or could have provided could have changed this fact. Finally, the record contains no evidence showing Drew took any efforts to conceal an error or induce Roberts to refrain from filing action against him. Equitable estoppel does not apply under these circumstances.

Appellants filed the Complaint on or about May 5, 2011, more than three years after they knew or should have known of a potential claim against Drew. Therefore, the statute of limitations bars Appellants' claims, and the trial court properly granted the Defendants' Motion for Summary Judgment.



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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,

v.

Randall J. Drew,

Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Appellants by depositing a copy in the United States Mail, postage prepaid, on September 4, 2013, addressed to counsel for the Appellants, Thomas A. Pendarvis and Catherine B. Kerney, 500 Carteret Street, Suite A, Beaufort, South Carolina 29909-5066.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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