

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.

REPLY BRIEF OF APPELLANTS

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ARGUMENTS IN REPLY

I. Neither the Lower Court's Order Granting Summary Judgment Nor the Order Denying the Motion to Alter or Amend Made Any Findings of Fact or Conclusions of Law on Equitable Estoppel.

Respondent's Brief devotes almost fifteen pages of argument on whether "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." (Brief of Respondent at 30-45). At least thirty-one times Respondents used the word "assurances" referring to Drew's persuasive advice – as Roberts' counsel – affirming his legal advice to proceed with the purchase based on the quality of his title search and the inability of the Navy to establish its claim to the adjacent marsh.¹ Nowhere in those arguments, however, are there any citations to specific findings of fact or conclusions of law made by the lower court on equitable estoppel, because there are none. These arguments in combination with the record before the lower court and Appellants' arguments to the lower court highlight a fatal and reversible defect: the lower court made no findings of fact or conclusions of law with regard to the application of equitable estoppel to Respondent's efforts to assert a statute of limitations defense.

¹

For example, the Brief of Respondent summarily concludes, "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." (Brief of Respondent at 24).

A. Application of equitable estoppel was raised by Appellants but not ruled upon by the lower court.

Compounding the lower court's failure to address the equitable estoppel issue in its Order granting summary judgment is the fact that Appellants filed a Motion to Alter or Amend Order Granting Summary Judgment to Defendant specifically raising equitable estoppel arguing that Appellants were "entitled to rely on Drew's assurances that the Navy would not prevail on its claim that Roberts could not maintain a dock." (Plaintiffs' Motion to Alter or Amend Order Granting Summary Judgment to Defendant at 2, ROA 944). The Motion to Alter or Amend included seven pages of argument under a heading entitled "**The Order fails to address Plaintiffs' equitable estoppel arguments.**" *Id.* (emphasis in original). Appellants' Motion to Alter or Amend preserved their arguments on the application of equitable estoppel to Respondent's statute of limitations defense. *See Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). Nevertheless, on December 27, 2012, when the lower court issued its Order denying Appellants' Motion to Alter or Amend, it made no findings of fact or conclusion of law with regard to the equitable estoppel arguments. Its findings and conclusions simply reiterate its findings on the statute of limitations, with no findings or conclusions on whether Respondent should be estopped from asserting the statute of limitations defense. At a minimum, this matter should be remanded for a trial where testimony will be available from which findings of fact can be made and conclusions of law applied with regard to whether Respondent should be estopped from raising the statute of limitations defense.

B. Respondents should be estopped from raising the statute of limitations defense.

The record before the lower court included sufficient facts to create an issue as to whether the doctrine of estoppel should be invoked and whether estoppel is necessary to prevent an injustice to Roberts. As stated earlier, even the Brief of Respondent makes over thirty-one separate references to Drew's "assurances" to Roberts. How can it be equitable or fair to allow Drew – long after the August 2005 closing – to regularly and continually "assure" Roberts for almost four years, while serving as counsel, that the Navy is wrong about its claim to owning the marsh, "assure" him that he will be able to maintain the dock, "assure" Roberts that his first title search and the second title search in November 2007 were correct, and "assure" him that spending legal fees defending the Navy's lawsuit is proper and prudent, but then allow him to use a statute of limitations defense to effectively to say "gotcha – you waited too late to sue me." How is that not an injustice? How can it be equitable for Drew – as Appellants' lawyer – to sit silent for years about the existence of a legal malpractice claim all the while "assuring" Roberts that the dock permit issued by state agency, OCRM, somehow trumped the federal taking of the marsh property. In other words, that the Navy's claim was not "valid." The inequities are most prominent when viewed against Drew's admissions that:

1. He did not search the title to the marsh before advising Roberts to purchase the property;
2. He advised Roberts to proceed with building a dock based solely on the dock permit;
3. While representing Roberts, he never ever determined whether the

United States government owned any of the marsh adjacent to the Property;

4. The United States does, in fact, own marsh property in the area adjacent to the Property as shown by the public records; and
5. If Drew had all of the available public records, he would have advised Roberts that the Navy / United States “had a *valid* claim.”

(Drew deposition Feb. 14, 2012, 12:22-13:5, ROA 403-404; 54:4-16, ROA 445; 60:3-6, ROA 451; 66:8-13, ROA 457; 71:15-19, ROA 462; 81:13-22, ROA 472; 86:25-87:19, ROA 477-478) (emphasis added).

Drew continued to represent Appellants concerning the Property for at least four more years after the Navy began communicating with Appellants in 2007.² During those four years representing while Roberts with regard to the Navy’s concerns about the dock, Drew had duties to “reasonably consult with [Roberts] about the means by which [Roberts]’ objectives are to be accomplished” and to “explain a matter to the extent recently necessary to permit [Roberts] to make informed decisions regarding the representation.” Rule 1.4, RPC, Rule 407, SCACR.³ In other words, Drew should have informed Roberts at least that he may

²

Drew represented Appellants on another real estate closing on the Property when Appellants refinanced the loan taken out to construct the residence continuing his representation of Appellants concerning the Property. (Drew deposition Feb. 14, 2012, 140:7-22, ROA 531; 141:3-6, ROA 532).

³

Appellants are not trying to make an “end around” move to circumvent the rejection of the “continuous representation” doctrine announced in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005). Unlike the circumstances in *Epstein* where the lawyer represented the legal malpractice plaintiff in one litigation matter, the circumstances in this case involve erroneous advice leading to Roberts’ purchase

have given bad advice when he allowed Roberts to proceed with the purchase. See, e.g., *Nichols v. Keller*, 19 Cal. Rptr. 2d 601, 608 (Cal. Ct. App. 1993); *In re Farris*, 291 Ga. 98, 727 S.E.2d 503 (2012) (lawyer has duty to explain and clarify scope of representation as well as effect and ramifications of contemplated representation). This is true because Drew had fiduciary duties to Roberts.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another, See *Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004), and a client-lawyer relationship is by its nature a fiduciary relationship. See *RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 336, 732 S.E.2d 166, 173 (2012); *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011); *Holtz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991). Fiduciary duties are duties of the highest standard required by law of any agent relative to the agent's principal, which include the duties of loyalty, disclosure, confidentiality, obedience, reasonable care and diligence, and full accounting. The fiduciary obligation arises from the superiority of the lawyer in relationship to his client because:

A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. **Assurances of the lawyer's competence, diligence, and loyalty are therefore vital.** Lawyers often deal with matters most confidential and vital to the client. A lawyer's work is sometimes complex and technical, often is performed in the client's absence,

of the Property in August 2005 and then Drew's subsequent representation of Appellants beginning at least by the fall of 2007 concerning the Navy's challenge to Appellants' right and ability to maintain the dock.

and often cannot properly be evaluated simply by observing the results. **Special safeguards are therefore necessary.**

Correlatively, adequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help. The law encourages clients to consult lawyers and limits the liability to third persons of lawyers who act vigorously for their clients. **Requiring lawyers to protect their clients' interests with competence, diligence, and loyalty furthers those goals.**

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000)
(emphasis added) (internal section references omitted).

A lawyer's fiduciary duties includes duties to advise and inform his clients. The Preamble to the South Carolina Rules of Professional Conduct states: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. . . . As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others." South Carolina Rules of Professional Conduct, Preamble (2013). "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004); see also *Goldston v. Bank of America Corp.*, 259 Ga. App. 690, 696, 577 S.E.2d 864, 870 (2003) ("a fiduciary relationship encompasses a duty to disclose"). Many courts have held that professional liability attaches when the fiduciary does not disclose all material facts that affect the clients' interests. See, e.g., *Rice v. Perl*, 320 N.W.2d 407, 411 (Mn. 1982) (holding lawyer breached fiduciary duty to client where lawyer failed to disclose business

relationship with claims adjuster placing client in position that might taint settlement transaction); *Waggoner v. Williamson*, 8 So.3d 147, 154 (Miss. 2009) (“Without doubt, a lawyer has a duty to inform his client of all matters of reasonable importance related to the representation or arising therefrom.”); Ronald E. Mallen & Jeffery M. Smith, *Legal Malpractice* § 15:2 (2011 ed.) (noting fiduciary obligations are twofold: (1) confidentiality; and (2) undivided loyalty).

How could Drew truly be loyal to Roberts without at least suggesting the possibility of a malpractice claim concerning his advice before the closing on the purchase of the Property? Even after a meeting with a host of lawyers with the United States Department of Justice on March 7, 2008 and seeing the very same evidence he later admitted established ownership, Drew still maintained to Roberts that there was “no proof they [the Navy] owned the marsh” and also maintained that Roberts “was not trespassing.” (Drew deposition Feb. 14, 2012, 134:10-14, ROA 525; 135:10-25, ROA 526). Drew admitted that even after seeing the public records establishing the Navy’s ownership in March 2008,⁴ he was still telling Roberts that it was “within my professional judgment to rely upon the administrative law judge and the opinion of Mary Shahid.” (Drew deposition Feb. 14, 2012, 134:10-14, ROA 525; 135:10-25, ROA 526). Drew should be estopped from being allowed to raise a statute of limitations defense after lulling Roberts into inaction on even investigating a potential malpractice claim and by providing a false sense of security, equity and fairness.

4

Because this lawsuit was commenced on May 5, 2011, Drew’s advice, or lack of advice, prior to May 5, 2008, is important for the equitable estoppel analysis.

During this “second” representation, Roberts justly should not be held to be “sleeping on his rights” to pursue a malpractice claim when he was relying on his fiduciary relationship with Drew concerning these intricate title, dock permit regulations, and regulatory takings issues. During this “second” representation, Roberts should be allowed to rely on the *absence of advice* from Drew about the erroneous advice in 2005 to protect the integrity of the client-lawyer relationship and to allow Drew the opportunity to remedy his own error, or to establish that there has been no error, while simultaneously preventing Drew from defeating Robert’s malpractice causes of action based on a statute of limitations defense. *See Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1, 8 (Ct. App. 2009) (lawyer’s conduct inducing a client to delay in filing malpractice suit may include “actions suggesting that a lawsuit is unnecessary.”); (Appellants’ Motion to Alter or Amend Order Granting Summary Judgment to Defendant at 5-17, ROA 948-960); and (Roberts Affidavit July 12, 2012, ROA 877).

The doctrine of equitable estoppel applies when there is an argument that the statute of limitations has run and the defendant asserts the running of the statute of limitations as a defense. *See Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 209 (Ct. App. 1998). However, the defendant is estopped from benefitting from using the statute of limitations as a defense when the defendant’s act or omissions operated to suggest that a lawsuit was unnecessary. *See id.*; *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996). Whether based on the facts eventually presented at trial or based on the record that was

before the lower court,⁵ Drew's conduct, acts, or omissions should operate to estop Drew from claiming the statute of limitations defense.

Here, the record before the lower court contained no evidence that Drew satisfied his obligations to advise, counsel or at least mention to Roberts the possibility that he may have a claim for legal malpractice stemming from the closing. "Certainly, silence which amounts to misrepresentation or concealment of facts can satisfy the 'conduct' element of the test for equitable estoppel." *Maher*, 331 S.C. at 382, 500 S.E.2d at 210 (citing *Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992)). References to the record before the lower court showing that all of the other elements for the application of equitable estoppel were set forth in the Brief of Appellants and in Appellants' Motion to Alter or Amend Order Granting Summary Judgment to Defendant that was before the lower court. (Motion to Alter or Amend Order Granting Summary Judgment at 5-17, ROA 948-960).

It is important to remember that the record before the lower court showed that Drew was actively representing Roberts for about four years after the closing from at least February 2006, when Drew formed Lot 12 Yellow House, LLC and handled the closing when Roberts transferred title to the subject property to the LLC, until April 2010 when Roberts first heard of the availability of a potential legal

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Because equitable estoppel is equitable in nature, this Court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. See *Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997); *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); and *Rushing v. McKinney*, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006).

malpractice claim against Drew from the District Court judge in the federal proceedings. Drew's active efforts as legal counsel and as a fiduciary to Roberts to defeat the Navy's efforts to have the dock removed clearly operated as inducements for Roberts to "forbear from bringing suit before the expiration of statute limitations."

CONCLUSION

Based on the foregoing arguments and the record before the lower court, all viewed in the light most favorable to Roberts, the lower court's Order Granting Drew's Motion for Summary Judgment and the Order Denying Appellants' Motion to Alter or Amend Judgment should be reversed. This matter should be remanded for a trial on the merits, or at least for the lower court to make findings of fact and conclusions of law with regard to whether Drew should be estopped from asserting the statute of limitations. Alternatively, the record is sufficient for this Court to find that a preponderance of the evidence supports a finding that 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 to his clients, the Appellants, that there was a potential malpractice claim available to them, as Judge Houck later recognized.

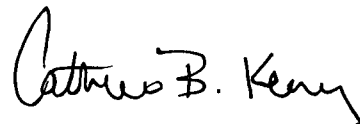
It is important to remember that Mr. Roberts has no legal training. Therefore, in analyzing when the statute of limitations on the legal malpractice claim should begin running or in analyzing, for equitable estoppel purposes, his rights to rely on Mr. Drews' advice (or lack of advice about the existence of a legal malpractice claim), this Court should view the testimony and other evidence as a lay person of common knowledge and experience would view it and in the light most favorable to

Mr. Roberts. There was no evidence before the lower court that suggested Mr. Roberts had any reason to doubt Mr. Drew or his legal advice that the original transaction was "good to go" (Order at 2, ROA 2) or that the Navy still has not proven it owns the marsh adjacent to the Property. (Drew deposition Feb. 14, 2012, 85:2-6, ROA 476).

As a matter of public policy, lawyers should not be allowed to provide "assurances" to their clients for years claiming that a complex legal matter was handled properly and then get away with effectively saying, "gotcha, you waited too long to sue me." The better public policy result is to invoke equitable estoppel to raise the statute of limitations or, at a minimum, let a jury decide if it was reasonable for Mr. Roberts to rely on Mr. Drew's "assurances" that the Navy's claims that a dock could not be maintained were invalid.

Respectfully submitted,

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