THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Hon. Benjamin H. Culbertson, Circuit Court Judge

Case No. 2023-CP-26-02475
Court of Appeals Case No. 2024-000440

Nicholas F. Wilson,

Appellant,

v.

Janet P. Gochenour; Janet P. Gochenour Trustee; James B. Parker; James B. Parker, Sr.; Mary Ann Parker; Kenneth Gregory Moore; R&G Corp. d/b/a Century 21 The Harrelson Group; Patton Development SC, LLC; Flagstar Bank, N.A.; Sonia M. Raymond; Raymond Law Firm, P.A.,

Respondents.

INITIAL BRIEF OF RESPONDENTS SONIA M. RAYMOND AND RAYMOND LAW FIRM, P.A.

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STATEMENT OF ISSUES ON APPEAL

Respondents Sonia M. Raymond and the Raymond Law Firm identify the following Issues on Appeal:

I. Whether the Circuit Court properly dismissed Appellant's Complaint on grounds that the statute of limitations expired.

II. Whether the Circuit Court properly denied Appellant's motion to amend the Complaint because any amendment would be clearly futile.

III. Whether additional sustaining grounds exist in the record to affirm the Court's dismissal of the Complaint with prejudice.

IV. Whether Appellant filed his Notice of Appeal timely.

STATEMENT OF THE CASE

Appellant filed his complaint on April 19, 2023. Paragraph 90 of the Complaint recognizes Appellant's statute of limitations problem, particularly in light of S.C. Code Ann. § 15-36-100(B):

> …this Complaint is being filed when there is a good faith basis to believe the expiration of the statute of limitations is imminent or that the Defendants may argue that the statute of limitations may expire…

Complaint, ¶90. Respondents Sonia M. Raymond and the Raymond Law Firm, P.A. filed a motion to dismiss on May 24, 2023, arguing the statute of limitations had expired on Appellant's claims of professional negligence against Respondents. The Circuit Court dismissed the Complaint because "Plaintiff's action is barred by the Statute of Limitations." Order dated September 8, 2023 at 1. The Court denied Appellant's Motion to Alter or Amend pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. Order dated February 7, 2024 at 1. Appellant served and filed his Notice of Appeal March 15, 2024.[1]

The gravamen of Appellant's complaint arises from his alleged failure to obtain unencumbered fee simple title over a driveway appurtenant to his residential lot. Brief of Appellant at 2 and 3. Specifically, Appellant alleges, with respect to the driveway, that "[Appellant]] made it abundantly clear that he would not purchase the property unless he was going to be deeded the driveway." Complaint, ¶46 at 8. Specifically regarding these Respondents, Appellant alleged

> On information and belief, the Plaintiffs Closing Attorney and others, including but not limited to Kenny Moore, Janet and

[1] As stated in Respondents' Motion to Dismiss Appeal, Appellant failed to timely serve his Notice of Appeal, such that this appeal should be dismissed in its entirety.

> Jim Parker, then knew or should have known that Janet may not have had the legal rights at that time to convey to Plaintiff the entirety of Tracts A, B, C, and/or D, as shown on the Jan. 30, 2020 Original Survey prepared by Jordan.

Complaint, ¶ 45, at 8. Appellant's expert witness testified the transaction "include[s] a fee-simple conveyance of the driveway used to access the Property from S.C. Highway 90 …" Affidavit of Erin Culbertson at 2, ¶6.c.[2] Appellant alleges in the Complaint that he "did not receive title to the driveway, specifically Tract D, as shown on the Original Survey…" Complaint, ¶118 at 15.

Appellant entered into a written contract with Janet Gochenour for the purchase of certain real estate. Complaint, ¶¶21-23 at 4-5. The Contract stated in relevant part that Gochenour would convey "Tax Map 36201010001 plus additional acreage". Complaint, Ex. ¶3, at 1. Appellant and Gochenour executed an addendum on January 23, 2020, which described the property to be conveyed as "4708 Highway 90" and "TMS 36201010001", and the parties agreed as follows:

> Seller shall have the property surveyed, including the additional acreage listed as being included in this sale to reach no less than 8 acres and recorded as part of this parcel confirming total acreage. Seller to include the deed of the driveway as part of the sale.

Complaint Ex. 3, Form 390 at 1. Appellant and Gochenour executed an addendum on January 29, 2020 which did not change the property description. Complaint Ex. 3, Second Form 390 at 1. Appellant received the Original Survey, attached as Exhibit 1 to the Complaint. Complaint, ¶42, at 7; Exhibit 1. That Original Survey shows the land to be purchased as well as the existing driveway. The Original Survey is the only plat Appellant

[2] Expert affidavits must be filed "as part of the complaint" pursuant to S.C. Code Ann. § 15-36-100(B).

claims he ever saw, and it is the Original Survey on which Appellant relied. Complaint, ¶42, at 7.

The Original Survey (Exhibit 1 to the Complaint) depicts the house, lot, and the driveway. The Original Survey describes the driveway as "Tract 'D' Existing 30' Access Road":

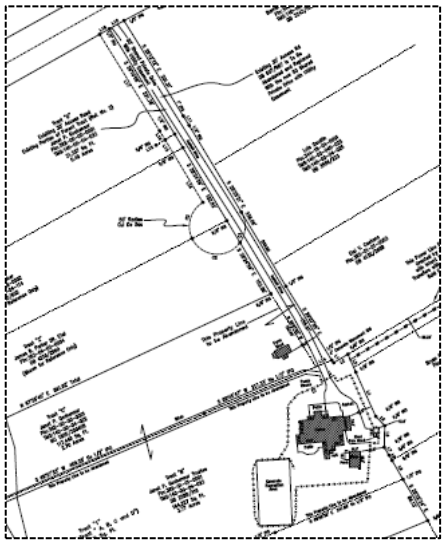
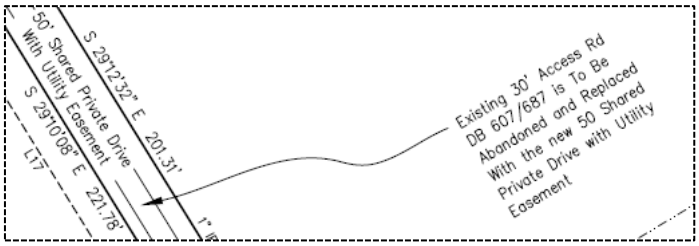


Exhibit 1, Complaint. Closer review of the Original Survey, Exhibit 1 to the Complaint, reveals the following facts in regards to the Driveway in Tract D:



The Original Survey describes the driveway as a "shared private drive" and notes the existing 30-foot access road would be abandoned and replaced with a 50-foot shared private drive. *Id.* The Original Survey, on which Appellant relies for all of his claims, thus

shows two separate notations stating the driveway would be a "50' shared private drive with utility easement." *Id*. As the Complaint alleges, the Appellant relied on the Original Survey prior to closing, and he was on notice then that he would not receive unencumbered fee simple title to the driveway. *Id*.

Appellant complains that Respondents Sonia Raymond and the Raymond Law Firm failed to "ensure that [Appellant] received the property as identified in the Jan. 23, 2020 Addendum and as shown on the Original Survey." Complaint, ¶87, at 12. Specifically, Appellant alleges Respondents "additionally failed to advise him that he was not receiving a deed to the property … as shown on the Original Survey." Complaint, ¶88, at 12. Appellant complains "he did not receive title to the driveway … as shown on the Original Survey…" Complaint, ¶118, at 15. Appellant further complains that other defendants "remain as owners or maintained ownership rights in the driveway…." Complaint, ¶119, at 15.

The Complaint alleges Appellant received the Original Survey on February 2, 2020. Appellant's Brief at 2. Respondents Sonia Raymond and the Raymond Law Firm recorded the allegedly defective deed on March 6, 2020. Affidavit of Erin Culbertson at 3, ¶6.i; Appellant's Brief at 3. Appellant filed his Complaint on April 19, 2023, more than three years after the receipt of the Original Survey showing the shared private driveway on Tract D, and more than three years after recording the allegedly defective deed.

Respondents filed a Motion to Dismiss on May 24, 2023. Thereafter, Respondents filed a memorandum in support of their Motion to Dismiss on August 28, 2023. Appellant filed a memorandum in opposition to the Motion to Dismiss on September 7, 2023. The Circuit Court, The Honorable Benjamin Culbertson presiding, granted the motion to

dismiss by Order dated September 8, 2023. Appellant filed a Motion to Alter or Amend pursuant to Rule 59, South Carolina Rules of Civil Procedure on September 18, 2023. Respondents filed a memorandum in opposition to Appellant's Motion to Alter or Amend on October 5, 2023. Appellant filed a reply memorandum on December 6, 2023. Thereafter, Appellant's counsel sent a letter to Judge Culbertson on January 29, 2024. Judge Culbertson denied the Motion to Alter or Amend by Order dated February 7, 2024.

Appellant filed his Notice of Appeal on March 15, 2024, more than thirty (30) days after notice of entry of the Order on his Rule 59(e) Motion.

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Hager v. McCabe, Trotter & Beverly, P.C.*, 435 S.C. 740, 746, 869 S.E.2d 886, 889 (Ct. App. 2022) "If the facts and inferences would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.*

Trial courts should not dismiss pleadings with prejudice at the 12(b) stage without allowing amendment unless any amendment would be futile. *Alterna Tax Asset Grp., LLC v. York Cnty.*, 434 S.C. 328, 334, 863 S.E.2d 465, 468 (Ct. App. 2021). Therefore, "a trial court may deny a motion to amend if the amendment would be clearly futile." *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019). Amendments adding Claims barred by the statute of limitations are futile. *Coral Gables v. Palmetto Brick Co.*, 183 S.C. 478, 191 S.E. 337, 341 (1937).

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding that an appellate court may affirm the circuit court's ruling using any additional reasons that are both raised by the respondent's brief and found within the record); *Shadwell v. Craigie*, 361 S.C. 492, 497, 605 S.E.2d 567, 569 (Ct. App. 2004).

FACTS

The facts are taken from Appellant's Complaint filed April 19, 2023. Appellant entered into a written real estate sales contract with Defendant Janet Gochenour. Complaint, ¶¶ 21 and 22. The Contract was amended several times. Complaint, ¶¶ 23, 24, and 27. The Contract identified the property Appellant was purchasing, including a parcel known as Tract "D". Complaint, ¶25. The property Appellant was purchasing, including Tract "D", was depicted on an unrecorded Plat, attached as Exhibit 1 to the Complaint. Complaint, ¶25, Ex. 1. Tract "D" in turn contained a driveway Appellant states everyone knew he was purchasing. Complaint, ¶22. "Appellant made it abundantly clear that he would not purchase the property unless he was going to be deeded the driveway." Complaint, ¶46. Appellant purchased the property and closed the transaction on March 6, 2020. Complaint, ¶¶ 4, 15, 27. Appellant did not receive unencumbered fee simple title to the driveway or Tract "D". Complaint, ¶118.

Appellant retained Respondents as his closing lawyers based on the recommendation of his realtors. Complaint, ¶82. Appellant alleges Respondents Sonia M. Raymond and the Raymond Law Firm, P.A. (hereafter, the "Lawyers") breached the duties owed to Appellant. Complaint, ¶86. Specifically, Appellant alleges these Respondents failed to ensure he received the real property identified in the Contract and the Original Survey. Complaint, ¶87. Appellant also alleges Respondents failed to advise Appellant he would not receive a deed to the property identified in the Contract and the Original Survey. Complaint, ¶88.

Appellant filed an affidavit pursuant to S.C. Code Ann. § 15-36-100 on May 5, 2023. In that affidavit, Appellant's expert states that Appellant closed on the property on March

6, 2020. Affidavit at 3, ¶6.i. Appellant's expert states that Respondents failed to explain to Appellant that he was not receiving a deed to the driveway in fee simple, but only an easement. *Id*., ¶7.c.

ARGUMENT

I. The Circuit Court properly dismissed the Complaint as to Respondents Sonia M. Raymond and Raymond Law Firm, P.A. because the statute of limitations had expired.

Appellant's complaint asserts a single cause of action against Respondents for Breach of Fiduciary Duty / Legal Malpractice. The statute of limitations for both breach of fiduciary and legal malpractice claims is three years. S.C. Code Ann. § 15-35-350(5); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (statute of limitations for legal malpractice is three years*); Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009), aff'd, 392 S.C. 403, 709 S.E.2d 661 (2011)(claim for breach of fiduciary duty is subject to a three-year statute of limitations.). Appellant knew or should have known that he had a cause of action against Respondents before April 19, 2020.

Respondents closed the transactions on March 6, 2020 and recorded the deed to Appellant the same day. As a result, the statute of limitations on any claim that would have been revealed by reviewing the deed began to run, at the latest, March 6, 2020. Appellant's claims arise out of the fact that the deed is allegedly different from the Contract and the Original Survey[3]. Complaint, ¶87. Similarly, Appellant's claims against Respondents arise out of their alleged failure to explain he was not getting fee simple title to the driveway in the deed. Complaint, ¶88. Appellant would have known the contents

[3] Interestingly, Appellant knew or should have known, upon receipt of the Original Survey, that the existing easement over Tract "D" would be abandoned and a private shared driveway would be imposed in its place, leaving others with "ownership interests in the driveway".

of the deed had he examined them. In fact, as Appellant's expert states, the deed plainly does not convey the property described in the Contract.

The applicability of statutes of limitations in South Carolina is based in part on the "discovery" rule – i.e., the statute begins to run when a reasonable plaintiff knew or should have known about the alleged negligence. *Christensen v. Mikell*, 324 S.C. 70, 73, 476 S.E.2d 692, 693 (1996). This is an objective test, and the discovery rule focuses on whether the complaining party acquired knowledge of any facts sufficient to put said party on inquiry, which, if developed will disclose the alleged malpractice. *Peterson v. Richland County*, 335 S.C. 135, 139, 515 S.E.2d 553, 555 (1999). An individual on "inquiry" or "constructive" notice is held to be on notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed. *Fuller–Ahrens Partnership v. S.C. Dept. of H'ways and Pub. Trans.*, 311 S.C. 177, 180, 427 S.E.2d 920, 922 (Ct.App. 1993).

In *Fuller-Ahrens v. S.C. Dept. of H'ways and Pub. Trans.*, 311 S.C. 177, 180, 427 S.E.2d 920, 922 (Ct.App. 1993), the plaintiff sued the Department of Transportation for inverse condemnation arising out of the existence of a drainage pipe on that plaintiff's land. Plaintiff in that action claimed it did not have actual or constructive notice of the pipe until plaintiff discovered the pipe on the property. The Court of Appeals succinctly dispensed with this argument: "Fuller–Ahrens had constructive notice of the pipe's existence because of a 1956 deed in Fuller–Ahrens' chain of title." *Id.* at 179, 427 S.E.2d at 921. In explaining its holding, the Court stated that the Department's constructions plans, incorporated into the 1956 deed, were "read with the deed", including notations

about the drain pipe contained in those construction plans. *Id.* at 180, 427 S.E.2d at 922.[4] In this regard, the Court of Appeals went further in *Fuller-Ahrens* than the Circuit Court in this case – finding the plaintiff had notice of unrecorded documents incorporated into a deed of record. Furthermore, the Court of Appeals stated:

> The Pattersons' deed and the other documents, as required by statute, were filed, as an affidavit of a department assistant maintenance engineer suggests, in the Department's offices in Columbia. … The filing of these instruments provided a record sufficient to impart notice, albeit constructive notice, to Fuller–Ahrens of the deed and its contents, including the deed's reference to the Department's plans, just as though such transaction was recorded in the county where the land is situate.

Id. at 181, 427 S.E.2d at 922. Like the plaintiff in *Fuller-Ahrens*, Appellant was on constructive notice of the contents of the deed when it was recorded March 6, 2020.

The case of *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct.App. 1997) proves instructive here. In *Berry*, the plaintiffs sued based on the lawyers' alleged malpractice arising out of the filing of a public bond to fund a sewer system for the Town of New Ellenton. The trial court and Court of Appeals dismissed the action because the statute of limitations had expired. *Id*. at 445-46, 495 S.E.2d at 800. The *Berry* lawyer defendant had filed, in the public record, the issuance of a bond, which was documented in the public record. *Id.* at 443, 492 S.E.2d at 798. In affirming the dismissal, the Court of Appeals held "[t]he statute of limitations begins to run at the time the individual has inquiry or constructive notice." *Id*. at 445, 492 S.E.2d at 800.

The Court of Appeals, further citing *Fuller-Ahrens, supra,* , held:

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[4] Like the plaintiff in *Fuller-Ahrens*, Appellant was on further notice of the shared driveway by virtue of the Original Survey, which contained notations that the driveway easement would be abandoned and a private ***shared driveway*** would exist going forward. Complaint, Exhibit 1.

> An individual on inquiry or constructive notice is held to be on notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed.

Berry v. McLeod, 328 S.C. at 445, 492 S.E.2d at 799. The Court of Appeals affirmed the trial court's determination that "the statute of limitations began to run**,** at the latest, when the bond documents were publicly filed with the clerk of court…" *Id.,* 492 S.E.2d at 800. Like the *Berry* plaintiffs, Appellant knew or should have known he did not own the driveway when Respondents recorded the Deed on March 6, 2020. Appellant's filing this malpractice action after March 6, 2023 is barred by the statute of limitations.

Stated simply, because the deed was recorded, Appellant would have learned of any deficiencies had he looked at the recorded deed.

Therefore, the statute of limitations runs from the date of filing of the deed, March 6, 2020. Because Appellant did not file this action until April 19, 2023, his claims against Sonia Raymond and The Raymond Law Firm are barred as a matter of law. The Court should affirm the dismissal of the Complaint with prejudice.

II. The Circuit Court properly denied Appellant's Motion to Alter or Amend because amending the Complaint would be futile.

After the Circuit Court dismissed Appellant's Complaint, Appellant filed a Motion to Alter or Amend pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. Motion to Alter or Amend dated September 18, 2023 (the "Motion to Alter"). In his Motion to Alter, Appellant argued the Court wrongfully dismissed the Complaint. Motion to Alter at 2. Appellant also argued the Circuit Court should have allowed Appellant to file an Amended Complaint pursuant to *Skydive Myrtle Beach v. Horry Cty.,* 426 S.C. 175, 826 S.E.2d 585 (2019). *Id.* The Circuit Court denied Appellant's Motion to Alter by Order dated February 7, 2024. In doing so, the Circuit Court decided the Motion to Alter "on the

contents of plaintiff's motion, prior arguments and memorandums of the parties, and letter dated January 29, 2024, from plaintiff's lawyer…" Order dated February 7, 2024 at 1.

Appellant filed a Motion to Amend his Complaint on December 12, 2023. *See* Motion to Amend Complaint. Regarding the claims asserted against the Lawyers, Appellant would allege in his Amended Complaint Respondents did not provide a copy of the recorded Deed to Appellant until May 7, 2020. See proposed Amended Complaint, ¶43, Exhibits 4 and 5. In short, Appellant would allege, if allowed to amend his Complaint, that he did not receive actual notice of the contents of the deed until May 7, 2020. *Id.* However, Respondents argued dismissal, and the Circuit Court dismissed the Complaint, based on *constructive notice of the recording of the deed on March 6, 2020.* Specifically citing *Fuller–Ahrens Partnership v. S.C. Dept. of H'ways and Pub. Trans.*, 311 S.C. 177, 180, 427 S.E.2d 920, 922 (Ct.App. 1993), Respondents argued Appellant was on constructive notice of the contents of the Deed when it was filed March 6, 2020. Memorandum in Support at 4.

All of the discussion regarding actual or constructive notice, of course, concerns the discovery rule applicable in statute of limitations arguments. *Christensen v. Mikell, supra.* And "[c]onstructive notice must be sustained by an available record to which a member of the public could have access and could find in the Clerk's office, such as deeds, mortgages, etc., which are indexed and entered of record." *Thornton v. Atl. Coast Line R. Co.*, 196 S.C. 316, 13 S.E.2d 442, 446 (1941). All parties agree the Deed was recorded March 6, 2020. Affidavit of Erin Culbertson at 3, ¶6.i.; Appellant's Initial Brief at 2. Constructive notice flows from that date because "[p]roperty owners are charged with constructive notice of instruments recorded in their chain of title." *Binkley v. Rabon Creek*

Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). As a result, Appellant's ***actual notice*** of the defects in the Deed, received in May 2020, are immaterial to the constructive notice of the alleged defects under *Fuller-Ahrens* and *Berry.*

In his Reply Memorandum filed December 6, 2023, Appellant argues that the Court's original Order of Dismissal does not mention "constructive notice". Reply Memorandum at 3. In Opposition to Appellant's Motion to Alter, Respondents argued that Appellant's constructive notice of the defects in the Deed began on March 6, 2020, the date Respondents recorded the Deed. Memorandum in Opposition to Motion to Alter or Amend, at 4-5. Clearly, the Circuit Court's Order considered and ruled in favor of Respondents' argument that Appellant's claims are barred by the constructive notice contained in the recorded Deed.

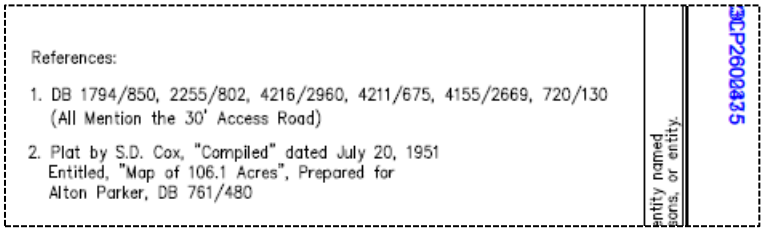
III. Sufficient grounds exist in the record to affirm the Circuit Court's dismissal of Appellant's Complaint.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. "Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Those additional sustaining grounds must appear in the record on appeal. *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 508, 812 S.E.2d 438, 442 (Ct. App. 2018). Respondents Sonia M. Raymond and the Raymond Law Firm, P.A. assert additional grounds exist to dismiss Appellant's complaint; namely, the Original Survey attached to Appellant's complaint put

Appellant on notice that he would not receive unencumbered fee simple title to the driveway.

As discussed *supra*, Appellant received the Original Survey in February 2, 2020. Complaint, ¶26 at 5; Appellant's Initial Brief at 2. Appellant relied on the Original Survey. Complaint, ¶42, at 7. Appellant made it clear that he would not close on the purchase of the real property if he was not going to be deeded the driveway. *Id.*, ¶46, at 8. Defendant Patton Development now claims an interest in the driveway. *Id.*, ¶¶47-48, at 8. Appellant alleges that he did not receive clear title to the driveway, Tract D, as shown on the Original Survey. *Id.*, ¶118, at 15. Appellant's claims and damages alleged against Sonia Raymond and the Raymond Law Firm result from Appellant not receiving deeded title to the property shown on the Original Survey. *Id.*, ¶¶88-89, at 12. In fact, Appellant "had no idea he would ever receive anything less than what was shown on the Original Survey…" Complaint, ¶98, at 13.

As discussed in Respondents' Statement of the Case, pp. 2-5 *supra*, Appellant knew or should have known, as of February 2, 2020, he would not receive fee simple title to the driveway. He should have known that the driveway was, at the time of the Original Survey, subject to a 30' access easement. Complaint, Ex. 1. The Original Survey explicitly notes that in two places. First, the references on the Original Survey show six (6) recorded instruments mentioning the 30' Access Road over the driveway Tract D:


References:

1. DB 1794/850, 2255/802, 4216/2960, 4211/675, 4155/2669, 720/130 (All Mention the 30' Access Road)
2. Plat by S.D. Cox, "Compiled" dated July 20, 1951 Entitled, "Map of 106.1 Acres", Prepared for Alton Parker, DB 761/480

entity named ears, or entity.

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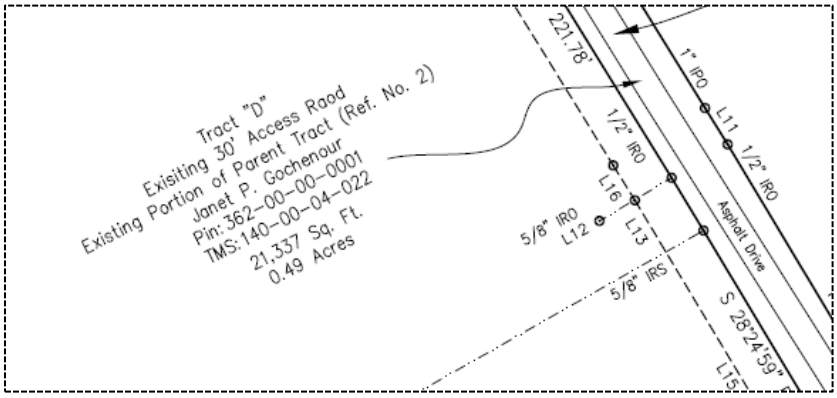
Complaint, Exhibit 1. Second, Tract D itself states it is subject to the 30' Access Road:



Complaint, Exhibit 1. Based on the notes and descriptions set forth on the face of the Original Survey, attached as Exhibit 1 to the Complaint, Tract D was subject to an access easement ***at the time Appellant contracted to purchase it***. Exhibit 1. Without more, then, Appellant knew or should have known in February 2020 that he would not receive title to Tract D free and clear of other ownership interests. Additionally, the Original Survey showed that Tract D would, in the future, be subjected to a private shared driveway:

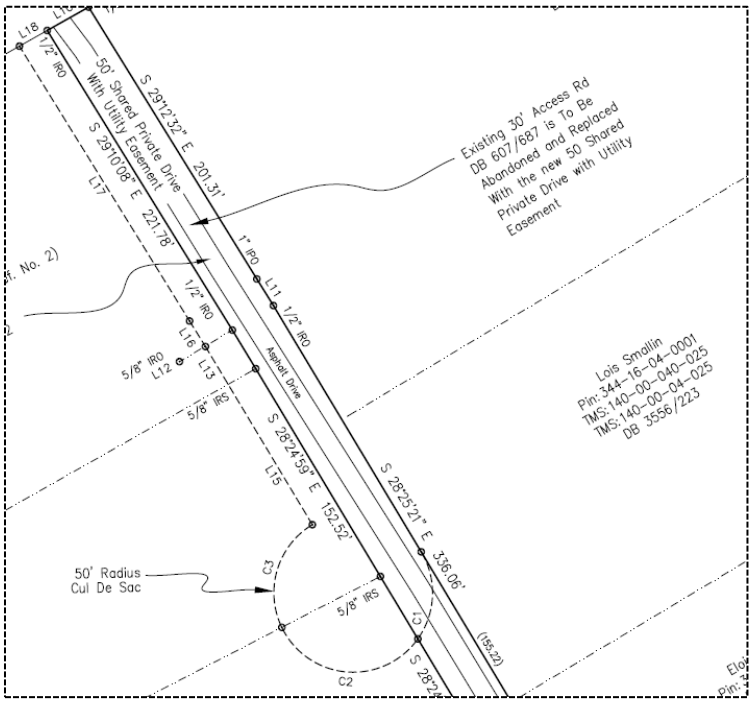


Exhibit 1. The Original Survey clearly depicts the location, extent, and scope of the fifty-foot shared driveway to replace the 30-foot access road. This future fifty-foot shared driveway sits atop a significant portion of Tract D, the driveway Appellant was allegedly going to receive in fee simple. So Appellant knew or should have known in February 2020 that the property he was purchasing would be subjected to a "50' Shared Private Drive". *Id.*

A shared private drive is utterly opposed to unencumbered fee simple title. As the Appraisal attached to the Complaint states, Appellant anticipated receiving the Property "as improved, ***in unencumbered fee simple title*** of ownership." Exhibit 2, Complaint, at 1 (emphasis added). The proposed shared private drive would constitute an encumbrance of Appellant's fee simple title. *See Marathon Fin. Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 596, 483 S.E.2d 757, 761 (Ct. App. 1997)(defining an encumbrance as "any right to or interest in the land which may subsist in a third party, to the diminution of the value of the land, but at the same time consistent with the passage of the fee thereto"); *see also* Black's Law Dictionary (10th ed. 2014) (defining encumbrance as a "claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage"). Moreover, Appellant's Complaint alleges Defendants Mary Ann, Jim, and James Parker would not have rights in the driveway. Complaint, ¶119, at 15. However, a shared private driveway would necessarily put Appellant on notice of their rights in the property, contradicting an unencumbered fee simple title. *See Grice v. Scarborough*, 29 S.C.L. (2 Speers) 649, 652 (S.C. App. L. 1844)(holding "a right to an easement of any kind is an incumbrance [sic]…"). Therefore, Appellant knew or should have known as early as February 2, 2020 that he would not receive unencumbered fee

simple title to the driveway. As a result, Appellant's filing the Complaint on April 19, 2023 was after the expiration of the statute of limitations.

IV. Appellant failed to timely serve his Notice of Appeal.

The Circuit Court, the Honorable Benjamin Culbertson presiding, denied the Motion to Alter or Amend by Order dated February 7, 2024. See Order at Exhibit B. The Court provided electronic notice of entry of the Order denying the Motion to Alter or Amend on February 7, 2024. *See* Electronic Notice at Exhibit C. Appellant filed his Notice of Appeal on March 15, 2024, more than thirty (30) days after receipt of electronic notice of the Order. See Notice of Appeal at Exhibit D.[5] In his Notice of Appeal, Appellant erroneously states the Order denying the Motion to Alter or Amend was filed February 17, 2024. See Exhibit D at 1. The Order was in fact filed February 7, 2024 and notice of the entry of the Order provided to Appellant's counsel that same day.

"In all cases within the jurisdiction of the court as provided in this chapter, the notice of appeal must be filed with the court of appeals in the manner provided by the South Carolina Appellate Court Rules." S.C. Code Ann. § 14-8-260. Under the South Carolina Appellate Court Rules, Appellants must serve the Notice of Appeal "within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR Under Guideline 6 of the *Electronic Filing Policies and Guidelines* promulgated by the South Carolina Supreme Court, "[a]n Authorized E-Filer has receipt of the written notice of the entry of a judgment or the filing of an order upon receipt of the emailed NEF [Notice of Electronic Filing]." Accordingly, the time to file the notice of appeal began to run on

[5] The Notice of Appeal references an Order denying a Motion to Amend Complaint. Denials of Motions to Amend are not usually immediately appealable, but can be appealed when the case is ended. *See Tillman v. Tillman*, 420 S.C. 246, 251, 801 S.E.2d 757, 760 (Ct. App. 2017)(stating orders denying motion to amend are generally interlocutory).

February 7, 2024, the date of the NEF for entry of the order denying Appellant's Rule 59(e) motion. *See Upchurch v. Upchurch*, 367 S.C. 16, 24, 624 S.E.2d 643, 647 (2006) ("[T]he time to file a notice of appeal pursuant to Rule 203(b), SCACR, begins to run when written notice that the order has been entered into the record by the clerk of court has been received."). ; *cf. Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 422 S.C. 211, 214–15, 810 S.E.2d 856, 858 (2018)(holding that "an email" received by counsel of record "providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR triggers the time to appeal").

Service of the notice of appeal is a "jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Camp v. Camp*, 386 S.C. 571, 574–75, 689 S.E.2d 634, 636 (2010)(quoting *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985)). Here, the Circuit Court entered the final Order on February 7, 2024, and Appellant received electronic notice that same day. Appellant did not serve his Notice of Appeal until March 15, 2024, more than thirty (30) days after receipt of notice of entry of the Order. Under these circumstances, the Court of Appeals should dismiss Appellant's appeal as untimely. *Robinson v. Robinson*, 365 S.C. 583, 587, 619 S.E.2d 425, 427 (2005); Rule 203(d)(3), SCACR ("[i]f the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 260.").

CONCLUSION

Respondents Sonia M. Raymond and Raymond Law Firm, P.A. request the Court affirm the Circuit Court's dismissal of the Complaint. Respondents further request the Court affirm the dismissal with prejudice because any amendment to the Complaint as to Respondents Sonia M. Raymond and Raymond Law Firm, P.A. would be futile.

Respectfully submitted,

s/Bruce Wallace
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