

**RECEIVED**  
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SC COURT OF APPEALS

The State Of South Carolina  
In The Court Of Appeals

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Appeal from Beaufort County  
Court Of Common Pleas  
The Honorable Marvin H. Dukes, III,  
Master-In-Equity

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Civil Action No. 2008-CP-07-00517

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Gregory M. Gottschlich and Donald L. McNeil,

Appellants,

versus

Strimpfel Custom Homes, Inc., Joseph A. Reeve,  
Jerry L. Richardson, Coastal Surveying Co., Inc.,  
Thomas N. Dye, Jan H. Dye, Ken Oliver,  
The Byrne Corporation d/b/a Dunes Marketing Group,  
Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman,

Defendants,

Of whom

Ken Oliver, The Byrne Corporation d/b/a Dunes Marketing Group,  
Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman  
are the

Respondents.

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**Final Appellants' Brief of Appellants Gottschlich and McNeil**

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## **STATEMENT OF ISSUES ON APPEAL**

**There was evidence that at the time of the closing the Ohio doctors who bought a vacation home in Hilton Head did not know, and under the objective standard, should not have known, that a right had been invaded or a claim might exist. It was error for the Master in Equity to grant summary judgment to the defendants on the Statute of Limitations when the issue should be submitted to a jury.**

## STATEMENT OF THE CASE

The Plaintiffs filed their Complaint on February 18, 2008, and subsequently filed an Amended Complaint on March 20, 2009. [R.pp. 10-43; 44-106; Complaint; Amended Complaint.] The Amended Complaint alleged causes of action against Ken Oliver of the Byrne Corp d/b/a Dunes Marketing Group, the Byrne Corp. d/b/a the Dunes Marketing Group, and the Dyes for negligent misrepresentation, violation of Sec. 27-50-10 of the S.C. Code, negligence, breach of contract, breach of contract accompanied by a fraudulent act, civil conspiracy, fraud, and constructive fraud; and, against the Byrne Corp. d/b/a the Dunes Marketing Group for violation of the Unfair Trade Practices Act and breach of fiduciary duty; and against Robert Deeb, Charles Wiseman, and Laurich & Deeb P.A. for professional negligence/legal malpractice, breach of contract, breach of fiduciary duty, and equitable indemnification. [R.pp. 44-106; Amended Complaint.] Claims against the other defendants were settled.

The defendants Byrne Company d/b/a Dunes Marketing and its agent, Ken Oliver Answered on March 23, 2009; the defendants Tom and Jan Dye Answered on April 17, 2009; and Bob Deeb, Charles and the firm of Laurich & Deeb Answered on April 28, 2009. The Answers set forth a number of defenses including the defense of the statute of limitations. [R.pp. 107-155; Answers.] These three defendants subsequently moved for summary judgment on the statute of limitations and other grounds.

The defendants Byrne Company d/b/a Dunes Marketing and its agent, Ken Oliver (dated December 4, 2009); the defendants Tom and Jan Dye (dated October 15, 2009); and Robert Deeb, Charles Wiseman and the firm of Laurich and Deeb (dated December 1, 2009) moved for summary judgment on the statute of limitations and other grounds.

[R.pp. 156-163; Motions.] The motions were heard by the Master in Equity for Beaufort County on December 16, 2009 who granted summary judgment to each of these defendants on the ground of the statute of limitations and declined to rule on the other grounds by Order dated January 11, 2010. [R.pp. 882-965; 1-7; December 16, 2009 Hearing Tr.; Order.] A timely motion to reconsider was made by the plaintiffs which was heard on March 16, 2010 and denied by Order dated May 3, 2010. [R.pp. 862-874; 966-1046; 809; Motion; March 16, 2010 Hearing Tr.; Order.] A Notice of Appeal was timely filed and served on May 28, 2010.

#### **Nature of the Case**

Greg Gottschlich and Don McNeil are physicians from Ohio who together bought a vacation home on Hilton Head Island for \$1,395,000.00. [R.pp. 887; 80-84; 328-334; December 16, 2009 Hearing Tr. p. 6, lines 13–15; Contract of Sale; Settlement Statement.] What they did not know, and would not learn until several years later, was that the house violated the City Ordinance for Hilton Head’s Building Code and the Federal Emergency Management Act Guidelines, both of which mandate of a minimum of 14 feet base flood elevation. [R.pp. 734-735; 650; Gottschlich Dep. p. 14 line 6 – p. 15 line 1; Deeb Dep. p. 51 lines 1-22.] This violation of the City Code is a mandatory condition for having an occupancy permit. [R.p. 655; Deeb Dep. p. 75 lines 3-23.] This violation is also in noncompliance with the FEMA guidelines used to underwrite and price flood insurance. [R.p. 650; Id. at 51.]

Dr. Gottschlich and Dr. McNeil had hired and paid their local professional real estate agent to represent them and guide them in buying the home. [R.pp. 75-76; Exclusive Buyer’s Agent Contract.] They had hired and paid their Hilton Head lawyer to

represent them and handle the closing. [R.pp. 887-888; December 16, 2009 Hearing Tr. p. 6 line 24, p. 7 line 3.] They borrowed funds from Wells Fargo Bank, paid for \$250,000.00 of flood insurance, closed on the house in December 2003, and began using it. [R.p. 888; Id. at 7 lines 8-9.] Their loan payments included monthly payments and escrowed installments for principal, interest, taxes and insurance. They did not know the house was in violation of these important legal principles.

Hurricane Katrina hit New Orleans on August 29, 2005 and was the most destructive in U.S. History destroying a reported estimated 275,000 houses and costing \$110 billion. Dr. Gottschlich and Dr. McNeil reacted to this catastrophe by recognizing they might need to have the house be more fully covered for flood insurance. [R.pp. 734-735; Gottschlich Dep. p. 14 line 6, p. 15 line 25.] They followed up by seeing about increasing the amount of insurance up to the replacement cost of the house. Id. When Dr. Gottschlich went to the Seacoast Insurance Co. on Hilton Head and Teena Ferrell at the agency pulled up the computer file on the property, she realized for the first time that the house was only 13.3 feet elevation. [R.pp. 888; 734-735; December 16, 2009 Hearing Tr. p. 7 lines 16-18; Gottschlich Dep. p. 14 lines 6 – p. 15 line 1.]

Dr. Gottschlich was stunned and thinking there had to be a mistake, began an immediate and detailed investigation into what had happened. [R.p. 736; Gottschlich Dep. p. 16.] Ultimately, he determined that the house was in fact at an elevation of only 13.3 ft. as shown on a survey [R.p. 695; Survey sent to Tom and Jane Dye and sent by Cary Griffin to Laurich & Deeb] and that this created at least two major negative impacts on the value of his house: (1) the construction of the house was and always had been in violation of the code and it would have to be fixed at great cost or disclosed if they sold it

before fixing it, and (2) because the house violated FEMA guidelines for flood insurance it would only be eligible for replacement cost insurance at extremely high premiums [R.p. 396; Lyons Dep. p. 63 lines 12 – 24].

Their buyer's agent, Greg Merrill, of Byrne Corp. d/b/a Dunes Marketing Group and their real estate lawyer both had copies of the survey showing the elevation of 13.3 feet elevation. [R.p. 694-695; Letter from Cary Griffin to Deeb with Survey.] Dr. Gottschlich and Dr. McNeil brought this action to recover the damages they have sustained that resulted from the acts and omissions of their buyer's agent and their real estate lawyers in handling the transaction.

**STANDARD OF REVIEW FOR SUMMARY JUDGMENT  
ON STATUTE OF LIMITATIONS**

**Burden of Proof under Standard of Review**

The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962).

**Standard of Proof When on Summary Judgment**

When the evidence is conflicting on the determination of when the plaintiff knew or should have known of any potential claims it presents a question for the jury. *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 274, 284 S.E.2d 693, 696 (1989).

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

**Issue of Fact Which Must Be Supported by a Scintilla of Evidence**

Under the discovery rule, the statute does not begin to run until the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *Dillon County Sch. Dist. No. 2 v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App.1985), cert. granted, 287 S.C. 234, 337 S.E.2d 697 (1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986). The exercise of reasonable diligence means “an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge

and experience on notice that some right ... has been invaded or that some claim against another party might exist.” *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Graniteville Company, Inc. v. IH Services, Inc.*, 316 S.C. 146, 447 S.E.2d 226 (S.C. App. 1995).

### **STATEMENT OF FACTS**

Dr. Greg Gottschlich and Dr. Don McNeil have travelled to Hilton Head Island for their vacations many times. They are from Ohio and friends. They decided together to look for a house to buy on Hilton Head. They contacted Greg Merrill of The Byrne Corporation d/b/a Dunes Marketing Group and contracted with him as their agent as buyers to find a suitable property. They signed an exclusive buyer’s agent contact with Greg Merrill of the Byrne Corporation d/b/a Dunes Marketing Group. [R.pp. 75-76; Exclusive Buyer’s Agent Contract].

Merrill, as their agent, showed them approximately eight to fifteen houses including the house they chose 48 Sea Lane on Hilton Head Island. With Merrill’s assistance they made an offer which was accepted and agreed to a contract for sale from the owners Tom and Jan Dye. [R.pp. 80-84; Contract of Sale] At Merrill’s suggestion they retained the law firm of Laurich & Deeb to represent them in closing their purchase of the house at 48 Sea Lane.

Simultaneously, on the same date, November 6, 2003, Greg Merrill, of the Byrne Corp. d/b/a Dunes Marketing Group presented Dr. Gottschlich and Dr. McNeil with, and they signed, the Exclusive Buyers Agency Agreement with Greg Merrill [R.pp. 75-76; Exclusive Buyer’s Agency Agreement], the dual agency consent [R.p. 481; Dual Agency Consent], and the Contract of Sale [R.pp. 80-84; Contract of Sale].

Prior to closing Dr. Gottschlich and Dr. McNeil hired a building inspector, and at the suggestion of Merrill bought property and flood insurance from the same company, Seacoast, as the previous owner, Tom and Jan Dye had used. [R.p. 799; Gottschlich Dep. p. 56.]

Robert M. Deeb Jr. and Charles H. Wiseman of Laurich & Deeb, an experienced law firm concentrating in real estate, were responsible for satisfying the lender requirements of Wells Fargo and for representing Dr. Gottschlich and Dr. McNeil in the transaction. Tom and Jan Dye, the sellers, were represented by Cary Griffin, another experience real estate attorney on Hilton Head.

Dr. Gottschlich was scheduled to do surgery on the date the lawyers set the closing so the law firm prepared and he and Dr. McNeil executed a Power of Attorney appointing the lawyers as attorney in fact to save the doctors a trip from Ohio to execute the settlement documents. [R.pp. 85-88; Gottschlich Power of Attorney and McNeil Power of Attorney.]

### **Parties and Witnesses Identified**

**There are a number of witnesses and parties. For convenient reference, the names of most of the people mentioned in the record are listed here and identified.**

#### **Buyers**

*Dr. Greg Gottschlich* – one of the plaintiff doctors who hired professionals to guide and protect him when he purchased the house. [R.p. 887; December 16, 2009 Hearing Tr. p. 6, lines 12-18.]

*Dr. Don McNeil* –one of the plaintiff doctors who purchased the house and hired professionals to guide and protect him. [R.p. 887; December 16, 2009 Hearing Tr. p. 6 lines 12-18]

## **Sellers**

*Thomas N. Dye* – one of the sellers of the house who put it on the market eight days after learning the house was in violation of the Code and FEMA guidelines but did not reveal that fact in the seller’s disclosure documents. [R.p. 887; December 16, 2009 Hearing Tr. p. 6 lines 15-18]

*Jan H. Dye* – one of the sellers of the house who put it on the market eight days after learning the house was in violation of the Code and FEMA guidelines but did not reveal that fact in the seller’s disclosure documents. [R.p. 887; December 16, 2009 Hearing Tr. p. 6 lines 17-18]

## **Previous Owners**

*Joseph A. Reeve* – the owner-contractor who built the house when he was working for Strimpfel Custom Homes, Inc. [R.pp. 265, 573.]

*Strimpfel Custom Homes, Inc.* – the builder of the house. [R.pp. 265, 573.]

*Ben and Myra Muldong* – bought the house from Reeve and sold it to Tom and Jan Dye. [R.pp. 573; 523-524; Settlement Statement of Sale from Muldongs to Dyes.]

*Tom and Jan Dye* - who bought the house from the Muldongs and sold it to Dr. Gottschlich and Dr. McNeil for a substantial profit without disclosing to the buyers that the house violated the elevation requirements of the Code of the Town of Hilton Head as well as the FEMA guidelines. [R.pp. 505-522; 523-524; 80-84; Deposition Excerpts of Tom Dye; Settlement Statement of Sale from Muldongs to Dyes; Contract of Sale to Plaintiffs.]

## **Lawyers and Law Firms**

*Robert M. Deeb, Jr.* – the lawyer Dr. Gottschlich and Dr. McNeil hired on the recommendation of their buyer’s agent Greg Merrill to represent them and handle the closing. He is a member of the law firm of Laurich & Deeb, P.A. who were the closing attorneys. [R.p. 642; Deeb Dep. p. 13 lines 18-24.]

*Charles H. Wiseman* – was at the time of the closing a member of the law firm of Laurich & Deeb, P.A.. In addition, he acted as attorney in fact and executed the buyer’s documents for Dr. Gottschlich at the closing. [R.p. 643; Deeb Dep. p. 15 lines 2-15.]

*Leslee Thomas\** - She was a paralegal of Laurich & Deeb and is the person who communicated with Dr. Gottschlich and assisted in the closing. [R.pp. 661-662; Deeb Dep. p. 149 lines 6-15 and p. 162 lines 10-18.]

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\* Deceased

*Cary Griffin* – an experience real estate lawyer from Hilton Head who represented Tom and Jan Dye, the sellers, in the closing, and who is also counsel for the Byrne Corp. d/b/a Dunes Marketing Group, and also Secretary of the Corporation of the Byrne Corp. d/b/a Dunes Marketing Group. [R.p. 835; Baldwin Dep. p. 110 lines 9-12.]

### **Real Estate Sales Persons and Brokers**

*Greg Merrill\** - of Byrnes Corporation d/b/a Dunes Marketing whom the buyers, Dr. Gottschlich and Dr. McNeil contacted and selected to represent them in the process of choosing and purchasing a vacation house on Hilton Head. [R.pp. 798; 837; Gottschlich Dep. p. 38 lines 3-6; Baldwin Dep. p. 116 lines 6-20.]

*William Baldwin* – the 30(b)(6) corporate witness for the Byrne Corporation d/b/a Dunes Marketing Group. [R.pp. 914-915; December 16, 2009 Hearing Tr. p. 33 lines 25 – p. 34 line 10.]

*Ken Oliver* - of the Byrne Corporation d/b/a Dunes Marketing Group employed by Tom and Jan Dye to represent them as sellers in their efforts to sell their house. [R.pp. 565-566; 511; Exclusive Right to Sell Contract with Tom and Jan Dye dated March 3, 2003 attached to Ken Oliver deposition; Tom Dye Dep. p. 53 lines 16-19.]

### **Surveyors**

*Jerry L. Richardson* – of Coastal Surveying Co. Inc. that prepared the original erroneous elevation certificate back in 1987 by relying on the builders assurance the mandatory elevation would be met. He provided the Certificate of Elevation to the Town of Hilton Head stating the elevation of the house was 14.1 ft. He and his company for \$5000.00. [R.pp. 574-575, 589; 70; Elevation Certificate dated November 24, 1987.]

*Coastal Surveying Co. Inc.* – the original surveyor that recorded the 14.1 elevation and that Dr. Gottschlich called upon to verify the accuracy of their original survey which turned out to be wrong. [R.p. 70; Elevation Certificate dated November 24, 1987.]

*Sea Island Land Survey* – Surveyor who did an updated survey for the Dyes when they found out about the correct elevation. After Dr. Gottschlich discovered the problem in 2006 he asked this survey company to go back and verify the correct elevation. [R.p. 73; Elevation Certificate dated March 28, 2001]

*Jack Jones* - of Sea Island Surveyors that Dr. Gottschlich asked to verify the correct elevation. [R.p. 73; Survey signed by Jack Jones.]

### **Builder**

*Joseph Reeve* - was working for Strimpfel Custom Homes and built this house to own personally [R.pp. 265, 573.]

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\* Deceased

*Strimpfel Custom Homes* – Contractor who built the house and for whom Joseph Reeve worked [R.pp. 265, 573.]

### **Lender**

*Wells Fargo Bank* – the lender who provided closing instructions to the law firm of Laurich & Deeb who were the lawyers representing Dr. Gottschlich and Dr. McNeil reviewing everything and handling the closing. [R.p. 798; Gottschlich Dep. p. 38 lines 3-11.]

*Matt Topping* – officer of Wells Fargo, the lender. Id.

### **Insurance**

*Teena Ferrell* – of Seacoast Insurance Co. that Dr. Gottschlich met with after Hurricane Katrina about increasing coverage and she saw in her file that the house was not in compliance with the City Code or the FEMA guidelines. [R.pp. 562; 735; Patricia Ferrell Dep. p. 34; Gottschlich Dep. p. 15 lines 1-25.]

*Shelley Wright* – of Seacoast Insurance Co. notified Tom and Jan Dye of the new information about the elevation and the effect of the correct information on the price of their premiums. [R.p. 503; February 25, 2003 Letter from Wright to Dyes.]

*Seacoast Insurance Company* – which sold property and flood insurance to Tom and Jan Dye, and continued providing insurance to Dr. Gottschlich and Dr. McNeil after the Dyes sold the house. [R.p. 799; Gottschlich Dep. 56 lines 3-25.]

### **Programs, Organizations**

*National Flood Insurance Program* ("NFIP") administered by FEMA.

*Federal Emergency Management Agency* ("FEMA") administers and establishes guidelines for the National Flood Insurance Program.

*Trudy Johnson* – Town Flood Plain Administrator; the Code Enforcement and FEMA compliance person for the Town of Hilton Head whom Dr. Gottschlich met with and who said the office was going one by one to resolve noncompliant houses. [R.p. 737; Gottschlich Dep. p. 33.] The only elevation certificate in her file was the 14.1 ft. certificate from the original construction of the house. [R.p. 770; Johnson Dep. p. 29 lines 2-23.]

### **Expert Witnesses**

*Thomas Hartnett* – plaintiff's expert on duties of realtors and diminution in value. [R.pp. 766-767; Hartnett Dep. p. 50 lines 1-25, p. 51 lines 1-25.]

*Joe Roof* – Lawyer – Dr. Gottschlich and Dr. McNeil’s expert witness [R.pp. 91-106; Affidavit of Joe Roof.]

*Herb Novit* – Lawyer – Deeb’s expert witness. [R.pp. 664; 740; Deeb Dep. p. 169 lines 19-24; cover sheet of Novit Dep.]

*Alan O. Campbell* – of Anchor Construction of Beaufort Inc. - plaintiff’s witness on cost to bring house into compliance. [R.pp. 630-638; Affidavit of Alan O. Campbell.]

*Lynes Construction Inc.* – Plaintiff’s witness of cost to bring house into compliance. [R.pp. 633-635; Proposal letter dated May 1, 2007 from Lynes Construction to Plaintiffs attached to Campbell deposition.]

*Anchor Construction of Beaufort Inc.* – plaintiff’s witness on cost to bring house into compliance. [R.pp. 637-638; Letter dated December 18, 2008 from Eddie Powell of Anchor Construction attached to Campbell deposition.]

**The Plaintiffs’ Discovery of the Elevation Problems and Their Post-Discovery Diligence**

The efforts the plaintiffs made after they discovered the damage to the value of the house shows the same diligence they displayed earlier when they tried to protect themselves from problems like this by employing professionals who were in Hilton Head and deeply experienced in real estate transactions. [R.p. 538; Gottschlich Dep. p. 87 lines 4-8.]

The house was built by Joseph Reeve of Strimpfel Custom Homes in 1987 [R.p. 69; Building permit] and was built in violation of Town of Hilton Head’s City Code and in violation of the FEMA guidelines. When the city inspector for issuance of the Occupancy Permit came for the inspection, the house was not in compliance, but the builder told the inspector that another course of material would be put in place thereby raising the base flood level elevation to 14.1 ft. [R.pp. 71; 48-49; Note dated November 23, 1987 of Inspector that additional 24’ to be added to ninth course; Amended Complaint, pp. 4-5.]

The inspector took the builder at his word and issued a certificate of elevation of 14.1 base flood elevation which was recorded in the city files and is the only one recorded in the city files. [R.pp. 70; 538; Certificate; Gottschlich Dep. p. 87 lines 6-8.] The builder did not add the additional height and the elevation in truth was only 13.3 feet base flood elevation. Nothing else was said or known by anyone else for years.

The next owners were Ben and Myra Muldong who bought the house from Joseph Reeve . Tom and Jan Dye bought the house from Ben and Myra Muldong in 2001. [R.pp. 508; 523-524; Tom Dye Dep. p. 45, Ins 2-9; Settlement Statement (Ex. 2).]

Tom and Jan Dye bought the house on or about April 3, 2001 and paid \$1,162,500.00 to Ben and Myra Muldong. [R.pp. 508; 523-524; Tom Dye Dep. p. 45 lines 7-8; Settlement Statement.] The Dyes were paying approximately \$500.00 for flood insurance based on a stated elevation of 14.1 feet.

On February 25, 2003, Shelley Wright wrote a letter to Tom and Jan Dye notifying them of nonrenewal of their Excess Windstorm and Flood Insurance policy. [R.p. 503; February 25, 2003 Letter from Wright.]

The letter also demanded timely payment of \$4,578.00 for coverage. At the bottom of the letter, set off by three asterisks, was a notice advising the Dye's that the flood insurance premium was more expensive due to the house's negative elevation of 13.3 Id.

On March 28, 2001, Sea Island Land Survey issued an elevation certificate to Defendants Dye for the house which showed the lowest finished floor elevation to be 13.3 feet (13.3') - or 0.9 feet less than the applicable fourteen (14) foot base flood elevation. [R.pp. 590-592; 73-74; Pls.' Answers to Interrogs. To Each Pl. from Def.

Oliver and Dunes Mktg. Group, Answer No. 12; 2001 Elevation Certificate.] Defendant Thomas Dye first learned of the house's negative elevation when he received the Sea Island elevation certificate in early 2001. [R.pp. 517-522; T. Dye Dep. p 74, ln 25 - p. 75 ln 7; p. 77, lns 14-25; p. 93, ln 24 - p. 95 ln 2.]

Eight (8) days after the date of the Seacoast letter, on March 3, 2003, Tom and Jan Dye hired Ken Oliver of Byrnes Corp. d/b/a Dunes Marketing to sell the house. [R.pp. 820-821; Oliver Dep. Ex. 8.] At the direction of Ken Oliver, Tom and Jan Dye completed a 24 point South Carolina Residential Property Condition Disclosure Statement [R.pp. 510-511; 77-79; T. Dye Dep. p. 52, ln. 13 - p. 53 ln. 19; Disclosure Statement.] Later, Ken Oliver gave this disclosure statement, which stated there were no code violations, to Dr. Gottschlich and Dr. McNeil through their buyer's agent Greg Merrill. [R.pp. 811-814; Oliver Dep. pp. 44-47.]

Tom and Jan Dye knew, actually knew, the house's elevation was not the previously recorded 14.1 feet; but, was instead the 13.3 feet they had just found out about. However, with Ken Oliver assisting, they filled in the disclosure statement but did not disclose this new found knowledge that the house was in violation of the City Code and the FEMA guidelines. Item 17 ("Violations or variances of building codes or zoning ordinances") was checked as "No." [R.pp. 517-522; 812-813; 50-51; 77-79; Tom Dye Dep. pp. 74-75, 77, 93-95; Oliver Dep. pp. 45-46; Am. Compl. ¶ 22, Ex. G).]

Having no reason to expect or think that a house that had been lived in by several different owners for about 16 years could be in violation of a major provision of the City Code for houses, Dr. Gottschlich and Dr. McNeil signed a contract of sale for

\$1,395,000.00. [R.pp. 565-566; 80-84; Exclusive Right to Sell from Dyes to Ken Oliver; Contract of Sale.]

Dr. Gottschlich and Dr. McNeil had hired Greg Merrill of Byrnes Corp. d/b/a Dunes Marketing to be their buyer's agent who presented the house to them. [R.p. 535; Gottschlich Dep. p. 24 lines 10-19.] After the contract of sale was signed, at Greg Merrill's recommendation, they engaged the law firm of Laurich & Deeb, to represent them and handle the closing for them. At Greg Merrill's suggestion they used the same vendors and also used the same insurance source of Seacoast Insurance Co. which had arranged for the recent policy for the Dyes based on the erroneous 14.1 foot elevation information.

After Hurricane Katrina caused catastrophic damage to New Orleans and the Gulf Coast in August, 2005, Dr. Gottschlich and Dr. McNeil became aware that they might need an increase in their flood insurance from the \$250,000.00 to replacement value, realizing after the massive destruction in New Orleans the possibility of sustaining a total loss. [R.p. 533; Gottschlich Dep. p. 14 lines 14-24] They sought quotes for flood insurance for the house in the event a similar disaster.

Dr. Gottschlich went to Seacoast Insurance Co., which had provided coverage to Tom and Jan Dye and to Dr. Gottschlich and Dr. McNeil. He met with Teena Ferrell to see about getting more coverage. [R.p. 533; Gottschlich Dep. p. 14 lines 22-24] She retrieved the file for the house from her computer data base and saw the 13.3 elevation which she knew was a violation of the City Code and a violation of the FEMA guidelines for flood insurance. [R.pp. 534; 73-74; Gottschlich Dep. p. 15 lines 9-25; Elevation Certificate.]

This was the first time she had recognized the 13.3 ft. elevation, perhaps because the coverage had been placed for Tom and Jan Dye when it was erroneously thought that the elevation was 14.1 feet. While it was later determined that some insurance companies will write insurance for such a house, at extremely high costs, none of the insurance companies she and Coastal had access to would write any policy on the house. She tried to explain that to Dr. Gottschlich. This was around April 10 -20, 2006. [R.p. 533 Gottschlich Dep. p. 14 lines 22-24.]

Shocked at this hard-to-believe discovery, Greg Gottschlich immediately started an extraordinary investigation into the circumstances that could have led to this situation. Because the house was about 16 years old and he and Don McNeil were the fourth owner-occupants, he initially thought there must be a mistake that could be identified and straightened out. [R.p. 736; Gottschlich Dep. p. 16.]

Here are some of the efforts Dr. Gottschlich undertook. He had a number of conversations with Trudy Johnson, [R.p. 737; Gottschlich Dep. p. 33 lines 3-17] who was the city official responsible for enforcement of the Code Enactments and the FEMA guidelines. When she examined her files they only contained the original elevation certificate which showed an elevation of 14.1 feet. Among other things, she explained to him that if the owners failed to remedy the elevation defect, they would ultimately be compelled by the Town of Hilton Head to do so. [R.p. 737; Gottschlich Dep. p. 33 lines 3-17.]

He contacted Coastal Surveying who had done the 14.1 ft. survey and asked Coastal to resurvey. Coastal did that and found their first survey showing 14.1 was incorrect and the more recent survey they had done on the house showed only 13.3. [R.p.

205; Follow up Survey.] Dr. Gottschlich also contacted Sea Island Land Survey, who had done the more recent survey [R.p. 591] for the Dye's showing 13.3 ft. and asked them to recheck their numbers. They did and confirmed the house was non-compliant at 13.3 feet elevation.

Dr. Gottschlich investigated the potential cost of what would have to be done and how much it would cost to raise this 5000 sq. ft. house to the minimum 14 ft. elevation.

Dr. Gottschlich determined who had built the house and who the previous owners were. He learned how the original failure to meet Code which somehow resulted in an erroneous 14.1 ft. elevation certificate for the City. He learned that the 14.1 ft. elevation certificate on file with the City and with Seacoast Insurance had in turn obscured and camouflaged the consequences of being in violation. The 14.1 ft. elevation certificate was the reason the Town of Hilton Head had not approached the previous owners to bring the house in compliance. The 14.1 elevation certificate was also the reason no question of insurability had been raised before.

After Dr. Gottschlich and Dr. McNeil exhausted their attempts to find a solution to the problem, they filed this action on February 18, 2008, which is less than two years from when they first discovered the elevation problems with their house.

### **Chronological Dates**

- |                   |   |
|-------------------|---|
| 1987 -            | Builder -Strimpfel Custom Homes, Inc. Joseph A. Reeve – builder owner-contractor [R.pp. 538; 48, 69; Gottschlich Dep. p. 87; Amended Complaint, ¶ 12, Ex. A.] |
| Nov. 24, 1987 @ - | Strimpfel got the elevation certificate by Jerry Richardson of Coastal -4.16 ft [R.p. 70; Elevation Certificate.]   |
| May 23, 1988 –    | Certificate of occupancy was issued [R.p. 72; Certificate.]   |

- After Joseph Reeve 2<sup>nd</sup> Owner Ben Muldong, Myra Muldong purchased the house. [R.p. 574; Pls. Answers to Oliver Interrogatories, p. 4]
- March 28, 2001 – Coastal Survey to Dyes - showed Lowest Floor 13.3 ft. base flood elevation. [R.p. 73; Elevation Certificate.]
- April 3, 2001 3<sup>rd</sup> Owner – Thomas N. Dye, Jan H. Dye purchased 2001[R.p. 523-524; Settlement Statement between Muldongs and Dyes.]
- February 25, 2003 - Seacoast Insurance’s Shelley Wright wrote the Dyes and told them their insurance had ended because of the elevation information and also they needed to send premium [R.p. 503; Letter.]
- Shortly Before Closing In the seller’s residential sale disclosure statement Item 17 asks if there are any violations of codes or ordinances . The Dyes who were being assisted by Ken Oliver of Byrne Corp. d/b/a Dunes Marketing Group, and they “no” for Item 17. [R.p. 77-79; Disclosure.]
- November 4, 2003- The beginning effective date for the Dunes Marketing Exclusive Buyer Agency Agreement as stated in No. 3 of the agreement. This exclusive buyer’s agency agreement was for six months until June 4, 2004 [R.pp. 75-76; Agreement.]
- November 6, 2003 - Dr. Gottschlich and Dr. McNeil signed a Dunes Marketing Exclusive Buyer Agency Agreement [R.pp. 75-76; Agreement.]
- November 6, 2003 - Dr. Gottschlich signed Agency Relationships in Real Estate which is a single page document that has on the bottom a Consent to Dual Agency which our clients signed. [R.p. 481; Agency Relationship Document.]
- November 6, 2003 - date Contract of Sale – Offer and Acceptance (purchase price \$1,395,000.00) [R.pp. 80-84; Contract.] (at this point they are still under the exclusive agency agreement with Dunes Marketing and Greg Merrill) ( item 7 refers to a possible dual agency later)
- November 2003 Prior to closing – Dr. Gottschlich and Dr. McNeil have an inspection and inspection report done between contract of sale and closing
- November 12, 2003 - date of appraisal ( \$1,4426,801.00)

- November 13, 2003 - date of the engagement letter from the lawyers to the Doctors. Subsequently, the doctors executed limited powers of attorney to Robert M. Deeb, Jr. and/or Charles Wiseman. [R.pp. 669-674; 85-88; Letter; Powers of Attorney.]
- November 16, 2003 - Date of letter from seller's attorney Cary Griffin to buyer's attorney Bob Deeb [R.p. 694; Letter.]
- November 26, 2003 - Dr. Gottschlich was in surgery in Ohio and could not attend the closing in Hilton Head.
- November 26, 2003 – fax from Laurich and Deeb to McNeil with an attached 3 page copy of an appraisal; and, it tells McNeil to send a copy of the elevation certificate to the insurance company since he doesn't have one, and if sellers' attorney doesn't have one, then we'll need to order one. [R.pp. 455-457; Fax.]
- November 26, 2003 - There is a fax from the dual real estate agents and/or Cary Griffin along with the survey and elevation certificate. [R.pp. 455-457; Fax.]
- December 2, 2003 - 4th Owner - purchased paid \$1.395MM. Commission was \$78,700.00 to be split by Greg Merrill, Ken Oliver and DMG [R.p. 839; Baldwin deposition p. 164 lines 4-11.]
- December 2, 2003 - The flood insurance application is prepared by Seacoast Insurance from Travelers Flood Insurance Program. [R.pp. 195-199; Application.]
- December 2, 2003 – The settlement statement for the closing. [R.pp. 329-334; Statement.]
- December 2, 2003 - The Doctors are given a flood insurance policy at the time of the closing and annual renewal documents showed a -1 elevation. It would have been given to the lawyer under Power Of Attorney.
- June 4, 2004 - The end of the six month term of the Dunes Marketing Exclusive Buyer Agency Agreement by its original terms.
- December 14, 2004 - The Sea Coast activity log states that they called a surveyor and learned that the home was built below the base flood elevation. [R.p. 221; Log.]
- August 29, 2005 - Hurricane Katrina hit @ 275,000 homes; \$110 billion - costliest in U.S. History.

- March or April, 2006 Dr. Gottschlich was in Teena Farrell's office at Seacoast Insurance when she turned to her computer and pulled up the file. It is his impression she was surprised. She said we can't issue insurance on the house because it doesn't meet code. [R.p. 591; Pls. Answers to Oliver Interrogatories, p. 21.]
- April to Oct. , 2006 Dr. Gottschlich went on extended research effort to determine if there was some kind of mistake, or if it was grandfathered, or if there was a way to fix the problem. [R.p. 591; Pls. Answers to Oliver Interrogatories, p. 21.]
- April 10-20, 2006 Seacoast Insurance Company told the doctors the house was not eligible for excess flood insurance because of the elevation of the lowest finished floor being less than 14 feet. R.pp. 591; 734-735; Pls. Answers to Oliver Interrogatories, p. 21; Gottschlich Dep. pp. 14-15.]
- May 9, 2006 Shelley Wright called Seacoast and declined coverage because of elevation. [R.p. 577; Pls Answers to Oliver Interrogatories, p. 7.]
- June 5, 2006- Seacoast Insurance prepared another application for excess insurance.
- Mid-2006 Dr. Gottschlich got Sea Island Land Survey and Coastal Surveying to verify the March 28, 2001 survey [R.p. 574; Pls Answers to Oliver Interrogatories, p. 4.]
- December 1, 2006 - Friday, the day before the three year anniversary of closing contact closing attorneys about elevation concerns. [R.pp. 738; 89-90; Gottschlich Dep. p. 63; December 8, 2006 Letter from Deeb.]
- December 4, 2006 - The lawyer pulled the file from storage on Monday [R.p. 89; December 8, 2006 Letter.]
- February 18, 2008 – Complaint [R.pp. 10-43.]
- March 20, 2009 - Amended Complaint adding Laurich & Deeb as a defendant [R.pp. 44-106.]
- January 11, 2010 – Order granting summary judgment. [R.pp. 1-7.]

## **Argument Why Summary Judgment Should Be Reversed**

The applicable statute of limitations is S.C. CODE ANN. § 15-3-530, which provides a three year period coupled with the discovery rule.

### **The Diligence of Dr. Gottschlich and Dr. McNeil Before and During their Purchase of the House**

The defendants asserted, and the Trial Court erroneously accepted, the view that Dr. Gottschlich and Dr. McNeil knew or should have known of the elevation problem by virtue of the survey which the Dye's lawyer, Cary Griffin, faxed to their lawyers, Bob Deeb and Charles Wiseman for the closing, and the fact that the insurance premiums were higher than the amount Dr. Gottschlich put in a pro forma he had done for himself to gauge whether the house was in the range they could afford.

The duty of diligence under the discovery rule only comes into play after there is information that should give rise to discovery by a person of reasonable knowledge and experience. Until that happens, there is nothing to investigate. The discovery rule provides that the statute does not begin to run until a person using reasonable diligence knew or should have known the existence of the claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Snell*. The standard for when a person should know of a potential claim is if the facts and circumstances of an injury would put a person of common knowledge and experience on notice of that claim. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App.2004); *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005).

Sometimes an event gives sufficient notice of a particular kind of injury when the same event may not give sufficient notice of another different kind of injury. An illustration how this can happen is what took place at Roger Peace Hospital when a

young man with Down's Syndrome fell and hit his face. There was blood and other obvious visible injuries to his face, for which his parents got immediate attention and took care of. Later, after the elapse of the fixed time in the statute, it turned out that he may also have sustained neurological damage which could have been caused by the fall. The nature of the injuries was not readily discoverable. The Court found that the first injury to his face was barred by the statute of limitations but the second injury which was neurological was not time barred because a person of reasonable knowledge and experience would not have known to undertake a neurological examination until symptoms developed. *Benton v. Roger C. Peace Hospital*, 313 S.C. 520, 443 S.E.2d 537 (1994).

That decision and analysis is what should guide a decision in this case. The mere fact that the Dye's lawyer sent a survey copy to Laurich & Deeb, does not give rise to any duty on the part of Dr. Gottschlich and Dr. McNeil to investigate issues about compliance with the City Code and the FEMA guidelines. The number 13.3 in a survey is not something a person of common knowledge and experience could recognize and understand to mean there was a huge major negative factor of violating the City Code and the FEMA guidelines for base flood elevation mandates.

In the case of the young man with Down's Syndrome who fell at Roger Peace Hospital, the parents at least saw the fall and the blood and the injury to his face. Dr. Gottschlich and Dr. McNeil did not even have that benefit of information.

The Master in Equity committed error when he held that the copy of the survey was notice that should start the clock running because a person of common knowledge and experience should know something was wrong and a diligent investigation should

begin. This is not a matter of common knowledge. That is why surveys are done by professional surveyors. That is why a real estate purchase is done professionally assisted with the advice and experience of an exclusive buyer's agent who is knowledgeable and experienced not only with real estate in general but also with the location of the real estate. That is why professional lenders determine the financial requirements. That is why the legally binding transaction of contracting for and transferring ownership is done by professional lawyers.

The doctors did not presume to know these various professional fields of expertise. This was the biggest purchase either had ever made. They used professionals for every aspect of their purchase of the house. They were wise to do so. That is the only way the doctors could protect themselves. Don't do it yourself. Get help from the professionals.

The professionals can also protect themselves by having professional liability insurance to protect them from a large risk should they not act in accordance standards of their profession.

Laws and codes and zoning are well known as important in South Carolina coastal areas and particularly Hilton Head. South Carolina beach property produced the landmark case which established that not even the government can deny responsibility for taking important property rights that destroy value of a beach lot. It was a South Carolina owner of beachfront property who brought the action alleging that application of South Carolina Beachfront Management Act to his property constituted a taking without just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S.1003 (1992).

Hilton Head is special even among coastal property. It is nationally famous as a resort and meeting location because of Charles Fraser's award winning conversion of timber property into a pristine natural environment. Local realtors and real estate lawyers are well aware of the importance of compliance with property requirements.

The Courts have held time and again that an injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right had been invaded or that some claim against another party might exist. *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993).

Dr. Gottschlich and Dr. McNeil are not persons of knowledge or experience in the fields of law, real estate, insurance, construction, building codes, FEMA guidelines, surveying and other related and associated fields. A copy of the survey and a higher insurance premium do not suggest to a person of common knowledge and experience that they have contracted to buy a house that violates the City Code and FEMA guidelines for elevation.

First, the doctors have no knowledge or experience interpreting surveys. They would not recognize the meaning of the 13.3 number. Second, even if the number were pointed out to them, they have no knowledge or experience with the City Code of the Town of Hilton Head, the guidelines of FEMA, or the consequences it brings to someone who owns a house that violates the 14 ft. minimum base flood elevation. Third, they were buying a house as the fourth owners, a house which had been owned and lived in by three previous owners. It is totally improbable that any house that had passed muster through those transactions was shackled with a problem that constituted a violation of this

magnitude. Fourth, they had not just looked at listed houses on their own. They were from Ohio and engaged an experienced local realtor, Greg Merrill, to find a suitable house to buy. Fifth, they engaged local experienced real estate lawyers to represent them and to handle the transaction on their behalf.

The defendants argued, and the Master in Equity ruled, with irony and inconsistency. On the one hand, for purposes of the statute of limitations, these professional defendants asserted, and the Master in Equity concurred, that the two doctors had actual, inquiry and imputed notice from a faxed copy of a survey and their insurance payments which were part of their PITI monthly payments to Wells Fargo escrowed and spread over twelve months.

On the other hand, for purposes of their other grounds for summary judgment, these professional defendants asserted that the realtors and the lawyers had no duty, and breached no duty, to recognize and protect their clients from the very same information they claim their clients should have known were ominous.

The real estate company, Byrne Corp. d/b/a Dunes Marketing Group, washes its hands by pointing out that its client signed consent to dual agency. Here are the circumstances of the relationship between the Byrne Corp d/b/a Dunes Marketing and Dr. Gottschlich and Dr. McNeil. The doctors were not local, so they, as clients, contacted and engaged Greg Merrill of the Byrne Corp d/b/a Dunes Marketing as their Exclusive Buyer's Agent. They relied on him to find a suitable house and help them evaluate, prepare an offer, and conclude a purchase of a home on Hilton Head. After they had worked with Greg Merrill and the doctors chose this house, they signed a written Exclusive Buyer's Agent agreement with Greg Merrill.

The State of South Carolina recognizes the special qualifications and special responsibilities of real estate agents and lawyers.

The Exclusive Buyer's Agent agreement must comply with all of the expected duties established and required by S.C. CODE ANN. § 40-57-137.

**Real estate brokerage company duties to client; agency relationship; applicability of common law.**

(H) On reaching a written agreement to provide brokerage services to a potential buyer of real estate, a buyer's agent shall:

- (1) perform the terms of the written brokerage agreement made with the buyer;
- (2) in accordance with subsection (A), promote the interest of the buyer by performing the buyer's agent's duties which include:
  - (a) seeking property at the price and terms stated in the brokerage agreement or at a price and terms acceptable to the buyer, except that the licensee is not obligated to seek additional properties unless the brokerage agreement provides otherwise for a buyer once the buyer becomes a party to a contract of sale;
  - (b) presenting in a timely manner all offers and counteroffers to and from the buyer;
  - (c) disclosing to the buyer all relevant facts concerning the transaction which are actually known to the licensee or, if acting in a reasonable manner, should have been known to the licensee, except as directed otherwise in this section. Nothing in this chapter shall limit a buyer's obligation to inspect the physical condition of the property which the buyer may purchase;
  - (d) advising the buyer to obtain expert advice on material matters that are beyond the expertise of the licensee;
  - (e) accounting in a timely manner, as required by this chapter, for all money and property received in which the buyer has or may have an interest;
- (3) exercising reasonable skill and care in discharging the buyer's agent's agency duties;
- (4) complying with all provisions of this chapter and with any regulations promulgated by the department;
- (5) complying with all applicable federal, state, or local laws, rules, regulations, and ordinances related to real estate brokerage, including laws which relate to fair housing and civil rights;
- (6) preserving confidential information provided by the buyer during the course of or following the agency relationship that might have a negative impact on the buyer's real estate activity unless:

(a) the buyer to whom the confidential information pertains, grants consent to disclose the information; or

(b) disclosure is required by law; or

(c) disclosure is necessary to defend the licensee against an accusation of wrongful conduct in a proceeding before the commission or before a professional association or professional standards committee.

No cause of action may arise against a licensee for disclosing confidential information in compliance with subsections (H)(6)(a), (b), or (c).

(I) A licensee acting as a buyer's agent may offer properties which interest his buyer client to other potential buyers.

(J) A licensee acting as a buyer's agent may not offer a sub agency relationship to other brokers or offer to compensate another broker who represents a seller without the knowledge and consent of the buyer client.

(K) A licensee who represents a buyer shall treat all prospective sellers honestly and may not knowingly give them false or misleading information about the buyer's ability to perform the terms of a transaction. A buyer's agent is not obligated to discover latent defects in property or to advise his clients on matters outside the scope of his real estate expertise. Notwithstanding another provision of law, no cause of action may be brought against a buyer's agent that has truthfully disclosed to a buyer known material defects including, but not limited to, moisture or mold problems and conditions. No cause of action may be brought against a real estate licensee by a buyer for information contained in reports or opinions prepared by an engineer, land surveyor, geologist, wood destroying inspection control expert, termite inspector, mortgage broker, home inspector or other home inspection expert, or other similar reports. A buyer's agent, his company, and the broker-in-charge are not liable to a seller for providing the seller with false or misleading information if that information was provided to the licensee by his client and the licensee did not know or have reasonable cause to suspect the information was false or incomplete.

(L) A licensee who represents one party to a real estate transaction may provide assistance to other parties to the transaction by performing ministerial acts such as writing and conveying offers, and providing information and aid concerning other professional services not related to the real estate brokerage services being performed for a client. Performing ministerial acts does not create an agency relationship.

The Byrne Corp. d/b/a Dunes Marketing Group says it no longer had the responsibility of a Buyer's Agent because the doctors signed consent to dual agency. Dr. Gottschlich testified that nothing was explained that gave him any reason to understand there would be any degrading or reducing of Greg Merrill's duties and responsibilities to

the buyers. It was presented quickly as something that needed to be signed because the listing agent was also with the Byrne Group d/b/a Dunes Marketing Group. Whatever the duties are for a dual agent, Greg Merrill was their Exclusive Buyer's Agent with the duty to act in their interest in advising them to consent to a dual agency and to fully inform them of the ramifications of doing so. If it had been explained then as it is being argued now, there would likely be no consent.

One thing that corroborates Dr. Merrill's description of his understanding Greg Merrill and Byrne Corp. d/b/a were still working for his best interest with the same obligations of loyalty and allegiance is that (1) the Exclusive Buyer's Agency Agreement, (2) the Consent to Dual Agency Agreement, and (3) the Contract of Sale were all signed on exactly the same day, November 6, 2003.

The situation would also indicate that these duties were still applicable. The terms of the sale had already been negotiated and agreed to by the buyer and seller. [R.pp. 565-566; 80-84; Listing agreement at 1,495,000.00; Contract of Sale at \$1,395,000.00] The seller now only needed to wait until the closing and be sure they got the amount of money stated in the agreement.

On the other hand, the buyers still need professional real estate to guidance to take them through all of the steps of the closing. The commission that went to the Byrne Corp. d/b/a Dunes Marketing was the handsome sum of \$78,770.00. [R.p. 839; Baldwin Dep. p. 164 lines 4-11.]

It is one thing to accept this kind of commission, when it is earned, as it was here. It is another thing to simultaneously accept this much money and stick a dual agency document in with the buyer's exclusive agency agreement and claim any duties of a

buyer's exclusive agent just disappeared. It is then yet a third thing to simultaneously accept this much money, stick a dual agency agreement in with the buyer's agency agreement, and then assert that the client buyers should have seen and understand the significance of what the professionals did not.

The statute which establishes the duties of a buyer's agent also sets forth how and when someone can become a dual agent. § 40-57-137.

- (M)(1) A licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties. The informed consent must be evidenced by a dual agency agreement, promulgated by the commission, and must be signed by the buyer before writing an offer and by the seller before signing the sales contract. The agreement must specify the transaction in which a licensee is serving as dual agent and must state that:
- (a) in acting as a dual agent, a licensee represents clients whose interests may be adverse and that agency duties are limited;
  - (b) the dual agent may disclose information gained from one party to another party if the information is relevant to the transaction, except if the information concerns:
    - (i) the willingness or ability of a seller to accept less than the asking price;
    - (ii) the willingness or ability of a buyer to pay more than an offered price;
    - (iii) confidential negotiating strategy not disclosed in an offer as terms of a sale; or
    - (iv) the motivation of a seller for selling property or the motivation of a buyer for buying property.
  - (c) the clients may choose to consent to disclosed dual agency or may reject it; and
  - (d) the clients have read and understood the agency agreement and the agency disclosure form and acknowledge that their consent to dual agency is voluntary.

It is not certain in what order the dual agency agreement, the buyer's exclusive agency agreement, and the contract of sale were signed, so as to know if they were void from the beginning under the statute, but, in any event, it is hard to imagine how the consent to dual agency could be informed. The exclusive buyer's agreement and the dual agency consent were in direct conflict with each other, and, the offer and acceptance between the buyers and the sellers was being executed at the same time.

A \$78,000.00 Commission fee on a \$ 1 ½ million dollar transaction should not be followed by a realtor's escape responsibility clause. Just the steps that are critical to the buyers begin; the realtor now argues that the buyers who have been clients are transformed to mere customers. It wasn't done in this case in compliance with the statute. It also is amazing that the realtors not only disown any responsibility but they argue the doctors should see and understand what the realtors say they don't do.

### **The Duties of the Real Estate Lawyer**

The real estate lawyer also has significant responsibility. The Courts of South Carolina have be vigilant in continuing the protection that home buyers, usually making the biggest purchase of a lifetime, are provided by having an attorney at law involved in, and responsible for, real estate transactions and closings. The important steps in the process constitute the practice of law in South Carolina.

The South Carolina Supreme Court has held that many things some lenders and mortgage originators would like to have their own staff perform acts that constitute the unauthorized practice of law. "We agree this approach, in theory, would protect the public from receiving improper legal advice. Our Court is convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice. The Court's reason is that "protection of the public is of paramount concern." *State v. Buyers Service Company, Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987).

In *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003), the court refined the definition of the unauthorized practice of law in the context of residential real estate closings first set forth in *State v. Buyers Serv. Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15

(1987). In *Buyers Service* the Court identified four steps in a residential real estate closing that involve the practice of law:

“1) *Title Search*

The title search and preparation of title documents for the lender and subsequent preparation of related documents is the practice of law which must be performed or supervised by an attorney.

2) *Loan Documents*

A lender may prepare legal documents for use in financing or refinancing a real property loan so long as an independent attorney reviews them and makes any corrections necessary “to ensure their compliance with law.”

3) *Closing*

Real Estate closings and mortgage loan closings should be conducted only under an attorney’s supervision. The supervising attorney may represent both the lender and the borrower after full disclosure and with each party’s consent.

4) *Recordation of Documents*

The recording of documents is the “final phase” of the real estate loan process and must be done under the supervision of an attorney.

In *McMaster* the Court added a fifth: “the disbursement of funds in the context of a residential real estate loan closing cannot and should not be separated from the process as a whole. Accordingly, we hold that the disbursement of the funds must be supervised by an attorney.”

This cautious protection of the public by insisting that lawyers remain heavily involved in and responsible for also benefits lawyers who practice real estate law. At the same time our Court has repeatedly enforced the professional accountability of those engaged in the practice of real estate law. Over delegation to staff has brought disciplinary proceedings as well as civil liability.

Dr. Gottschlich and Dr. McNeil retained Laurich & Deeb to represent them and protect their interest in a \$1,495,000.00 listing and \$1,395,000.00 purchase transaction. [R.pp. 565-566; 80-84; Listing Agreement from Dyes to Oliver, Contract of Sale with Dyes.] It deserved significant professional attention by lawyers who know the significance of land regulatory and code matters in a coastal resort like Hilton Head.

There is nothing obscure about coastal property having legally required elevation requirements. They are just as common as set back lines and density zoning.

If the survey, which has been sent by another lawyer for purpose of the closing, reflects a violation of the law for elevation that applies to the entire municipality of Hilton Head and the FEMA requirements, if anyone is to protect the buyers it could only be the lawyers the clients engaged for that purpose.

The South Carolina Supreme Court describes competence standard for lawyers in representing clients. 1.1, SCRPC, Rule 407, SCACR.

#### **RULE 1.1: COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

#### **Comment**

#### **Thoroughness and Preparation**

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

#### **The Master in Equity Erred in Imposing a Higher Standard for Notice than the Professionals for the Running of the Statute of Limitations**

The doctors who are the Appellants believe that the Master in Equity should have found as a matter of law that the survey and insurance premiums would not put a person of common knowledge and experience on notice that something was wrong that should be investigated to see if a cause of action existed.

At a bare minimum the Master in Equity should have found that there was some evidence that a person of common knowledge and experience would not have reason to begin investigating the circumstances until the date when Dr. Gottschlich met with Teena Ferrell at Seacoast Insurance to ask about increasing his flood insurance to replacement value.

The test is an objective test of what a person of common knowledge and experience would be able to see that some legal right had been invaded. *Epstein v. Brown*, 363 S.C. 372, 376, 610, S.E.2d 816, 818 (2005). The Master in Equity did not apply this test in reviewing this record to see if there is at least a scintilla of evidence to support the doctor homeowners' position. Instead, the Master in Equity confused the concept that an undisputed piece of evidence, the survey, is the same thing as satisfying the objective standard of review. In contrast to the survey is a huge amount of other evidence to demonstrate what a person of common knowledge of experience should know under these facts.

The Master in Equity mistakenly equated the existence of one item of disputed evidence with the summary judgment standard that when there is other conflicting evidence in the record summary judgment must be denied. And, if there is conflicting evidence, the issue of whether or not the facts meet the objective standard of what a reasonable person of common knowledge and experience would do under the same circumstances is for the jury to decide.

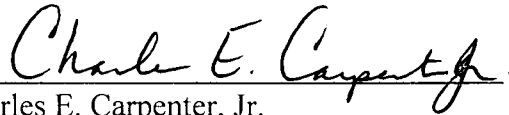
At an absolute minimum this is an issue for a jury to resolve. If there is conflicting evidence as to whether a claimant knew or should have known he or she had a

cause of action, the question is one for the jury. *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989).

**CONCLUSION**

There is definitive evidence or at a minimum, there is sufficient evidence to create a jury question as to when the claim was or should have been discovered. *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993). The Order of the Master in Equity granting summary judgment on the statute of limitation should be reversed as a matter of law or in the alternative reversed and remanded to submit the issue to a jury.

Respectfully submitted

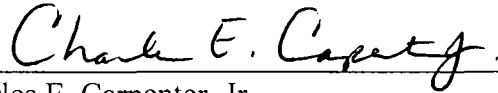


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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Final Appellants' Brief of Appellants complies with Rule 211(b), SCACR.



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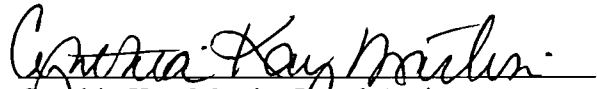
June 21, 2012.

**CERTIFICATE OF SERVICE**

I, the undersigned, an employee of CARPENTER APPEALS AND TRIAL SUPPORT, LLC for Appellants, Gregory M. Gottschlich and Donald L. McNeil, do hereby certify that I have this date served the foregoing Final Appellants' Brief of Appellants, dated June 21, 2012, by causing same to be deposited in an United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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