The State of South Carolina
In the Supreme Court

Appellate Case No. 2013-000375

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

Civil Action No. 2008-CP-07-00517

Opinion No. 4995 (S.C. Ct. App. filed June 27, 2012)

Gregory M. Gottschlich and Donald L. McNeil,

Petitioners,

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

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
are the

Respondents.

Brief of Petitioners

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Procedural Issue

I. **The Court of Appeals misapplied the two issue rule because there is only one issue in this appeal and it was properly preserved.**

Substantive Issue

II. **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**

Discretionary Issues

III. **Request for the Court to Consider the additional grounds of the Respondent/Defendants' Motion for Summary Judgment.**

a. There is some evidence in the record of breach of duty.
b. There is some evidence in the record of damages.

Statement of the Case

The Plaintiffs filed their Complaint on February 18, 2008, followed by an Amended Complaint on March 20, 2009. 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.

Claims against other defendants were settled and are not involved in the appeal.

The Defendants Byrne Company d/b/a Dunes Marketing and its agent, Ken Oliver Answered on March 23, 2009; 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.

The Defendants Byrne Company d/b/a Dunes Marketing and its agent, Ken Oliver (December 4, 2009); Tom and Jan Dye (October 15, 2009); and Robert Deeb, Charles Wiseman and the firm of Laurich and Deeb (December 1, 2009) moved for summary judgment on the statute of limitations and two other grounds: whether there was any evidence of breach of duty or damages. The motions were heard December 16, 2009 by the Master in Equity for Beaufort County who, by Order dated January 11, 2010, granted summary judgment on the ground of the statute of limitations and declined to rule on the

other two grounds. 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. A Notice of Appeal was timely filed and served on May 28, 2010.

The Court of Appeals issued its decision on December 19, 2012, dismissing this case under the two issue rule although there was only one issue decided below. A Petition for Rehearing was filed January 3, 2013. The Court of Appeals denied the Petition for Rehearing by Order dated January 25, 2013. A Petition for a Writ of Certiorari was filed on February 25, 2013. This Court issued the Writ on May 8, 2014.

Statement of the Facts

(There are a number of names and dates in the Briefs. At the end of the Statement of Facts, for convenient reference, is a list identifying witnesses and a timeline of dates.)

Dr. Greg Gottschlich and Dr. Don McNeil have travelled to Hilton Head Island for their vacations many times. They are from Ohio and they are friends. They decided to look together 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 exclusive buyer's agent. [R.pp. 75-76; Exclusive Buyer's Agent Contract].

Merrill showed them a number of houses and they chose 48 Sea Lane on Hilton Head Island. They bought it from Tom and Jan Dye for $1,395,000.00. [R.pp 80-84; R.pp. 887; 80-84; 328-334] What they did not know, and would not learn until several years later, was that the elevation of the house violated the City Ordinance for Hilton Head's 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].

Compliance with this requirement is a mandatory condition for obtaining an occupancy permit. [R. p. 655]. This violation is also in noncompliance with the FEMA guidelines used to underwrite and price flood insurance. [R. p. 650; Id. at 51].

The house had only 13.3 ft. of elevation. However, the records as they existed ever since the house was built showed an elevation of 14.16 ft.

The reason for the discrepancy between the true elevation and the city's inaccurate record of 14.16 ft. is because the first owner, Joseph Reeve, who was also the builder, persuaded the city inspector to go ahead and record the elevation as 14.16 ft. on his promise that he would add another layer of building blocks to raise the elevation from 13.3 ft. to exceed the mandatory requirement at 14.16 ft. elevation. However, Reeve left the elevation at 13.3 ft. and did not tell anyone.

Ownership changed hands several times during which nobody knew that Reeve had left the building in violation of the Code of the City of Hilton Head and the FEMA guidelines.

Dr. Gottschlich and Dr. McNeil hired their own local exclusive buyer's real estate agent to represent them. [R.pp. 75-76]. They had the house inspected. They had the house appraised. They had hired and paid their Hilton Head lawyer to represent them and handle the closing. [R.pp. 887-888]. They bought property insurance and also bought the $250,000.00 of flood insurance required by the lender. At the suggestion of Merrill, they bought the insurance from the same company, Seacoast, as the previous owner, Tom and Jan Dye had used. [R.p. 799].

They borrowed funds from Wells Fargo Bank on Hilton Head. Their loan payments included monthly payments and escrowed installments for principal, interest,

taxes and insurance. As their agent Merrill suggested, they retained Robert M. Deeb Jr. and Charles H. Wiseman of Laurich & Deeb, with an experienced law firm concentrating in real estate, to be responsible for satisfying the lender requirements of Wells Fargo and for representing Dr. Gottschlich and Dr. McNeil in the transaction.

The sellers, Tom and Jan Dye, also had their lawyer, Cary Griffin, another experienced real estate attorney on Hilton Head.

Cary Griffin, in addition to being counsel for the Dyes, was 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].

Cary Griffin was also the person who had the Dye's survey that he sent to Laurich & Deeb just prior to the closing.

Dr. Gottschlich was scheduled to do surgery on the date the lawyers set the closing. The doctors needed to stay in Ohio. Laurich & Deeb prepared a Powers of Attorney appointing the lawyers as attorney in fact to execute the settlement documents. Dr. Gottschlich and Dr. McNeil executed the powers of attorney. [R.pp. 85-88].

They closed on the house in December 2003 [R.p. 888] and began using it. They did not know the house was in violation of the City Code of Hilton Head or the FEMA Guidelines and they would not learn of this for some time and then only by a fortuitous circumstance.

The Doctors discover their house violates the Code and FEMA

Hurricane Katrina hit New Orleans on August 29, 2005 and completely destroyed many houses. Dr. Gottschlich and Dr. McNeil reacted to this catastrophe by recognizing

they might need to have their house more fully covered with flood insurance than what they had. [R.pp. 734-735]. They followed up by seeing about increasing the amount of insurance up to the replacement cost of the house. Id.

Dr. Gottschlich went to the Seacoast Insurance Co. on Hilton Head where he met with Teena Ferrell at the agency. She pulled up the computer file on the property. This was the first time she recognized the 13.3 ft. elevation, [R.pp. 888; 734-735]. Perhaps it was the first time she recognized it was because the coverage initially had been placed for Tom and Jan Dye when it was erroneously thought that the elevation was 14.16 feet. Also, the more recent correspondence from Seacoast Insurance to Tom and Jan Dye was not from Teena Ferrell, but from Shelley Wright. Shelley Wright of Seacoast Insurance wrote a letter on February 25, 2003, telling Tom and Jan Dye about the 13.3 ft. elevation problem and notifying them of nonrenewal of their Excess Windstorm and Flood Insurance policy, a large premium due, and the increase in insurance premiums because of the 13.3 ft. elevation. [R.p. 503].

While it was later determined that some companies will write insurance for such a house, at extremely high costs, none of the insurance companies Teena Ferrell 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]. 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]. Ultimately, he determined that the house was in fact at an elevation of only 13.3 ft. as shown on a survey which had been received by Tom and Jan Dye. Their lawyer, Cary Griffin, sent a copy to Laurich & Deeb by a letter dated Nov. 16, 2003.

This surprise bad news created at least two major negative impacts on the value of the 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 therefore reducing the value, 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].

Because the house was about 16 years old and Greg Gottschlich and Don McNeil were the fourth owner-occupants, Greg initially thought there must be a mistake that could be identified and straightened out. [R.p. 736; Gottschlich Dep. p. 16.].

The Doctor's Post-Discovery Diligence

Here are some of the efforts Dr. Gottschlich undertook. He had a number of conversations with Trudy Johnson, [R.p. 737]. 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 14.16 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].

He contacted Coastal Surveying who had done the 14.16 ft. survey and asked Coastal to re-survey. Coastal did that and found their first survey showing 14.16 was incorrect and the more recent survey they had done on the house showed only 13.3. [R.p. 205]. 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 determined who had built the house and who the previous owners were. He learned how the original failure to meet Code resulted in an erroneous 14.16 ft. elevation certificate for the City. He learned that the 14.16 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 14.16 ft. elevation certificate was the reason the Town of Hilton Head had not approached the previous owners to bring the house in compliance. The 14.16 elevation certificate was also the reason no question of insurability had been raised before.

The First Owner-Builder Misrepresented the Elevation

Dr. Gottschlich learned that the house was built by Joseph Reeve of Strimpfel Custom Homes in 1987 [R.p. 69]. 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 13.3 ft. and not in compliance, but Reeve told the inspector that another course of material would be put in place thereby raising the base flood level elevation to 14.16 ft. [R.pp. 71; 48-49].

The inspector took Reeve at his word and issued a certificate of 14.16 base flood elevation which was recorded in the city files and is the only one recorded in the city files. [R.pp. 70; 538]. Reeve 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 Second Owners, the Muldongs, Never Knew of the Violation

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]

The 3rd Owners Learned of the Violation but Did Not Disclose it

Tom and Jan Dye bought the house on April 3, 2001 and paid $1,162,500.00 to Ben and Myra Muldong.[R.pp. 508; 523-524]. The Dyes were paying approximately $500.00 for flood insurance based on a stated elevation of 14.16 feet.

On March 28, 2001, Sea Island Land Survey had 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 legally required fourteen (14) foot base flood elevation. [R.pp. 590-592; 73-74]. The Dyes received a copy of the house's negative elevation when he received the Sea Island elevation certificate in early 2001. [R.pp. 517-522]. However, they did not receive notice of the meaning and consequence of that negative elevation until the letter from Shelley Wright of Seacoast Insurance dated February 25, 2003 informing them:

1. Agency has been notified that Seacoast Brokers will not be renewing the policy.
2. The non-renewal is effective April 3, 2003.
3. Due to market changes, coverage is no longer available under the policy.
4. The Agency can replace the coverage with Travelers or NXS.
5. The annual premium for excess windstorm will be $1,855.00.
6. The annual premium for Flood Insurance will be $2,723.00.
7. The total premium is $4,578.00.

8. It will have to be paid in full by April 2, 2003.
9. The flood premium is high due to the elevation.
10. The base flood elevation is 14 ft.
11. Your house is 13.3 ft. base elevation.
12. Your house is .07 ft. below base flood elevation.

The Dyes received this letter telling them the meaning of the house elevation. The letter date is February 25, 2003, a Tuesday. The Dyes had already signed an Exclusive Seller's Agent Contract with Ken Oliver by Monday, March 3, 2003 and the Disclosure statement by Tuesday, March 4, 2003. In other words, in less than a week, they hired Ken Oliver of Byrnes Corp. d/b/a Dunes Marketing to sell the house. [R.pp. 820-821]. 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] 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, who was also with Byrne Company d/b/a Dunes Marketing. [R.pp. 811-814]

Tom and Jan Dye knew, actually knew, the house's elevation was not the previously recorded 14.16 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].

Filing the Lawsuit

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.

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.

Their buyer's agent, Greg Merrill, of Byrne Corp. d/b/a Dunes Marketing Group and Laurich & Deeb both had copies of the survey showing the elevation of 13.3 feet elevation prior to the closing. [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.

Byrne Corp. d/b/a Dunes Marketing Group had at least three people who had the 13.3 ft. survey before Greg Gottschlich and Don McNeil closed on the house. Cary Griffin had it. Greg Merrill had it. Ken Oliver had it. And, their recommended law firm, Laurich & Deeb had it.

Parties and Witnesses 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 immediately put it on the market 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 immediately 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. and who misrepresented the elevation to the city inspector for the occupancy permit. [R.pp. 265, 573.]

Strimpfel Custom Homes, Inc. – the builder of the house through Joseph Reeve. [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]

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]

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.]

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].

Leslee Thomas - She is now deceased. 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.]

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].

Real Estate Sales Persons and Brokers

Greg Merrill - He is now deceased. He was the Exclusive Buyers Agent from Byrnes Corporation d/b/a Dunes Marketing whom the buyers, Dr. Gottschlich and Dr. McNeil engaged to represent them in the process of choosing and purchasing a vacation house on Hilton Head. [R.pp. 798; 837].

William Baldwin – the 30(b)(6) corporate witness for the Byrne Corporation d/b/a Dunes Marketing Group. [R.pp. 914-915]

Ken Oliver - of the Byrne Corporation d/b/a Dunes Marketing Group employed by Tom and Jan Dye to represent them as Exclusive Sellers Agent. [R.pp. 565-566; 511].

Surveyors

Jerry L. Richardson – of Coastal Surveying Co. Inc. that prepared the original erroneous elevation certificate back in 1987 by relying on the builder's assurance the mandatory elevation would be met. He provided the November 24, 1987 Certificate of Elevation to the Town of Hilton Head stating the elevation of the house was 14.16 ft. [R.pp. 574-575, 589; 70; 24].

Coastal Surveying Co. Inc. – the original surveyor company that recorded the 14.16 elevation and that Dr. Gottschlich called upon to verify the accuracy of their original survey which turned out to be wrong. [R.p. 70].

Sea Island Land Survey – Surveyor company who did an updated survey for the Dyes which contained the correct elevation of 13.3 ft. After Dr. Gottschlich discovered the problem in 2006 he asked this survey company to go back and verify the correct elevation. [R.p. 73]
Jack Jones - of Sea Island Surveyors that Dr. Gottschlich asked to verify the correct elevation. [R.p. 73].

Builder

Joseph Reeve - He misrepresented the true elevation of the house and caused the ciey to issue and occupancy permit and to record the elevation as 14.16 when it was only 13.3. Reeve was working for Strimpfel Custom Homes and built this house to own personally [R.pp. 265, 573.]

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.].

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].

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 non-renewal of their policy, the price of their premiums, and that the 13.3 ft. elevation was the reason. [R.p. 503].

Seacoast Insurance Company – 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].

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] The only elevation certificate in her file was the 14.16 ft. certificate from the original construction of the house. [R.p. 770].

Expert Witnesses

Thomas Hartnett – Plaintiffs' real estate expert witness on duties of realtors and diminution in value. [R.pp. 766-767].

Joe Roof – Plaintiffs' attorney expert witness [R.pp. 91-106].

Herb Novit – Lawyer – Deeb's expert witness. [R.pp. 664; 740].

Alan O. Campbell – of Anchor Construction of Beaufort Inc. - plaintiffs' expert witness on cost to bring house into compliance. [R.pp. 630-638] .

Lynes Construction Inc. – Plaintiffs' expert witness on cost to bring house into compliance. [R.pp. 633-635] from Lynes Construction to Plaintiffs attached to Campbell deposition.]

Anchor Construction of Beaufort Inc. – plaintiff's expert witness on cost to bring house into compliance. [R.pp. 637-638]

Chronology

1987 - Joseph Reeve of Builder -Strimpfel Custom Homes, Inc. constructs his personal house. [R.pp. 538; 48, 69].

Nov. 24, 1987 - Joseph Reeve misrepresented the elevation height he would achieve and got the elevation certificate of 4.16 ft [R.p. 70].

May 23, 1988 – Certificate of occupancy was issued [R.p. 72].

After Joseph Reeve 2nd Owners - Ben and Myra Muldong purchased the house from Joseph Reeve. [R.p. 523-524].

March 28, 2001 – Coastal Survey to Dyes - showed Lowest Floor 13.3 ft. base flood elevation. [R.p. 73].

April 3, 2001 3rd Owner – Thomas N. Dye, Jan H. Dye purchased 2001[R.p. 523-524].

Tuesday, February 25, 2003 - Shelley Wright of Seacoast Insurance wrote the Dyes and told them their insurance had ended because of the elevation information and also they needed to send premium [R.p. 502].

Monday, March 3, 2003 - Tom and Jan Dye execute the Exclusive Sellers agent agreement with Ken Oliver of the Byrne Corp. d/b/a Dunes Marketing Group [565-566].

Tuesday, March 4, 2003 - Tom and Jan Dye execute the Disclosure Form with Ken Oliver. In the 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, answered "no" for Item 17. [R.p. 77-79]

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].

November 6, 2003 - Dr. Gottschlich and Dr. McNeil signed a Dunes Marketing Exclusive Buyer Agency Agreement [R.pp. 75-76].

November 6, 2003 - Dr. Gottschlich and Dr. McNeil signed the Contract of Sale – [R.p. 25] (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 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 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.]
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

I. The Court of Appeals misapplied the two issue rule because there is only one issue in this appeal and it was properly preserved.

The Court of Appeals refused to consider the merits of the only issue in this appeal. That single issue was set forth in the appealed Order of the Master in Equity on the first page in ftn 1:

> "Laurich & Deeb moved for summary judgment on three separate grounds. The court has only considered the statute of limitations basis for summary judgment and reserves argument and ruling on the additional grounds should that be necessary."

The statute of limitations is Section 15-3-535 of the SC Code which states in full:

> "Except as to actions initiated under Section 15-3-545, all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.

This case has not gone to trial, it is only on Summary Judgment, so the issue narrows itself further to simply ask: Is there **any 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. This is the only issue to be decided. The Court of Appeals erroneously refused to consider it.

In the lower court under Rule 59 (e) and before the Court of Appeals, the plaintiffs asserted, as they do here,

> "'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."

There were not any other issues that could be raised because the Master in Equity specifically did not rule on the other alleged grounds for summary judgment. With on one issue, the two issue rule cannot apply and the single issue of whether there was any evidence that the doctors did not and should not have known the house had an elevation problem until within three years of bringing this action.

This question was raised and preserved and should have been decided. The single issue comes from the single sentence of Section 15-3-535 which states in full:

"Except as to actions initiated under Section 15-3-545, all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."

The Plaintiffs presented the issue in the statute. They only need to show some evidence they did not know and nor should they have known.

The Defendants contend that they can divide the statute into three issues by using the words actual, constructive and inquiry. Describing an issue by more than one adjective is a common technique to give the appearance of multiple obstacles to argue, which can distract and give a feel of complexity when there is a single issue for decision.

The Plaintiffs do not have to adopt the Defendant's rewritten version of the statute. The statutory language sets the issue and it is one issue not three. To say actual, constructive and inquiry notice is to describe facts. It would also be possible in a given case to say letter notice, voicemail notice, email notice, in person verbal notice, posted notice and others.

It is a mischaracterization to make these facts become issues. There is only one legal issue. If a defendant describes the same thing with three different words it is still one thing. It is commonly done to suggest to a plaintiff that it is necessary to prevail over multiple obstacles to succeed. If a plaintiff buys into the tactic, it can complicate and obscure the plaintiffs' explanation.

A plaintiff does not have to use the language of the defendants spin to preserve the issue the plaintiff is raising. Not only are the Plaintiffs' free to use their own way of stating the issue, the Plaintiffs have used the exact meaning of the statute that creates the issue. The Defendants have not. The analysis in this case is simply to look at the evidence and apply it to the objective legal standard of the statutory "discovery" rule

– is there any evidence that Dr. McNeil and Dr. Gottschlich should not have known they had a cause of action more than three years before they brought this lawsuit? It is one issue and it was raised and it was preserved.

II. 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.

Burden Of Proof on the Statute of Limitations

The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting on 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 on Summary Judgment

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).

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).

Diligence of Gottschlich and McNeil Before and During their Purchase

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).

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.

An event can give sufficient notice of one kind of injury but not another. An example happened at Roger Peace Hospital in Greenville 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 time fixed in the statute of limitations, it was discovered that he also 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 that kind 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 defendant's attempt to make much of their observation that the insurance premium charged to them should have put them on notice. The defendants contrast the difference between an insurance amount used informally by Dr. Gottschlich when looking at the total cost to see if he and Dr. McNeil could afford to buy the house. He wasn't focused on insurance, he was aggregating a group of approximations.

The way the two doctors paid for their flood insurance would not be a source of notice because of how it was done. Each of the two made monthly payments so any component of the house payments would be borne by each doctor in $1/24^{th}$ of the annual

premium. Furthermore, even that 1/24th was not segregated into its components. The payment was an aggregate of principle, interest, taxes, and insurance. The taxes and insurance were actually paid by the bank from monthly escrowed payments by the home owners.

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 by professionals as important in South Carolina coastal areas. South Carolina beach property produced the landmark case which established that not even the government can avoid responsibility for taking property rights that destroy value of a beach lot. *Lucas v. South Carolina Coastal Council,* 505 U.S.1003 (1992).

The Courts have 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).

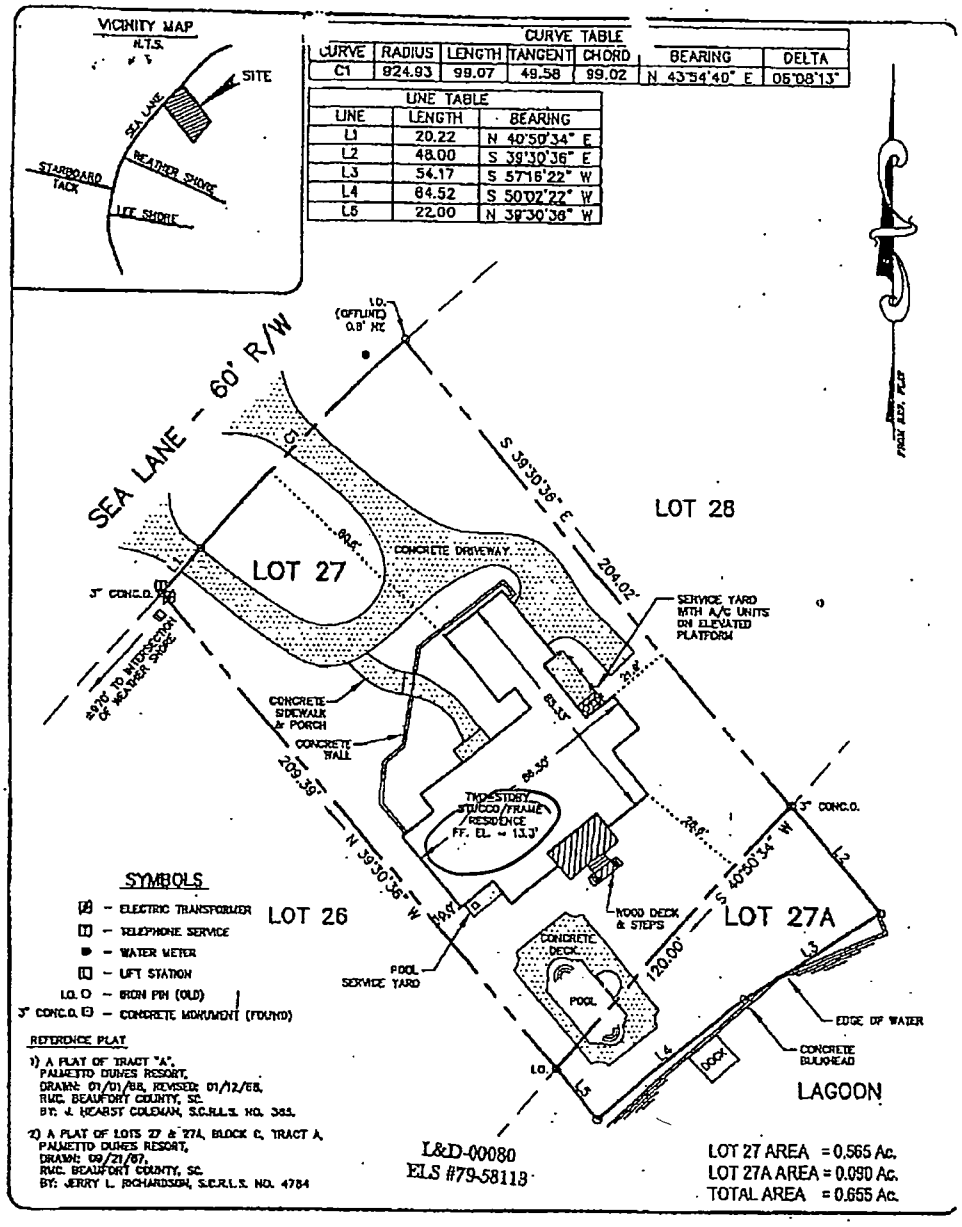
Dr. Gottschlich and Dr. McNeil are not persons of knowledge or experience in the fields of law, real estate, insurance, construction, building codes, FEMA guidelines,

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. The doctors have no knowledge or experience interpreting surveys. They would not recognize the meaning of the 13.3 number. 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.

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.

This is the survey that attorney Cary Griffin sent just before the closing:

How this survey document is supposed to put the doctors on notice of a need to investigate a possible cause of action is only in the imagination of the defendants.



SUBJECT PROPERTY DOES NOT APPEAR TO BE AFFECTED BY THE BEACHFRONT SETBACK REQUIREMENTS OF THE S.C. BEACH PROTECTION ACT OF JULY 1, 1988.

ADDRESS: 848 SEA LANE

DIST.: 520 , MAP: 12A , PARCEL: 168

THIS PROPERTY LIES IN F.E.M.A. ZONE AE
BASE ELEVATION = 14.0'

I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN.

SOUTH CAROLINA SEA ISLAND LAND SURVEY No. C02180 CERTIFICATE OF AUTHORIZATION

SOUTH CAROLINA REGISTERED LAND SURVEYOR 13852 JACK JONES

NOT VALID UNLESS EMBOSSED.

ASBUILT SURVEY OF:

LOT 27 & LOT 27A, TRACT A, PARCEL 3, BLOCK C, PALMETTO DUNES RESORT, HILTON HEAD ISLAND, BEAUFORT COUNTY, SOUTH CAROLINA

PREPARED FOR:

THOMAS N. & JAN H. DYE

DATE: 03/28/01 SCALE: 1" = 40'

GRAPHIC SCALE 0 40 80 120

Sea Island Land Survey
P.O. Box 21588, Hilton Head Island, SC 29925 Tel (843) 681-3248
4-D Mathews Court, Hilton Head Island, SC 29926 Fax (843) 689-3671

JOB No: 01096 FILE: 8-744

The lawyer defendants and the real estate defendants did not react to the survey yet they persuaded the trial court to conclude that the Doctors should have reacted. 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 it 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.

Duty of Exclusive Buyer's Agent and the Dual Agency Form

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 duties to client; agency relationship.

> (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:
....
(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,
...
(d) advising the buyer to obtain expert advice on material matters that are beyond the expertise of the licensee;
....
(3) exercising reasonable skill and care in discharging the buyer's agent's agency duties;
....

(6) ...

(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.
....
(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 a 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 himself and Dr. McNeil. 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 have been no consent.

One thing that corroborates Dr. Gottschlich's description of his understanding that 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]. The sellers now only needed to be sure they got the amount of money stated in the contract of sale.

On the other hand, the buyers still needed their professional real estate agent's 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].

It is one thing to accept this kind of commission, when it is earned. It is another thing to simultaneously accept this much money, stick a dual agency form in with the buyer's exclusive agency agreement, and, claim any duties of a buyer's exclusive agent just disappeared. It is then a third and absurd thing to then assert that the client buyers should have seen and understood 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.

With the simultaneous execution of an exclusive buyer's agency contract and a dual agency written document, it is unimaginable how consent to dual agency could be informed. In addition, the offer and acceptance between the buyers and the sellers was executed at the same time. The exclusive buyer's agreement and the dual agency consent were in direct conflict with each other.

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 as 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.

The Duties of the Real Estate Lawyer

The real estate lawyer also has significant responsibilities. 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 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, are 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).

The recent disastrous work by mortgage banking personnel in the collapse of the Great Recession support our Court's insistence on protecting the public by having loan closing supervised by attorneys. It provides the dual protection of having the skills of a licensed attorney to prevent errors, and, backs that up with the expectation that the attorney will not only have professional skills, but, will also have professional liability insurance in the event the standards of professional skills are not met.

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 responsible 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]. 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. Along the coast 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.

Imposing a Higher Standard for the Clients than for the Lawyers

The doctors 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.

At a bare minimum the Master in Equity should have found that there was some evidence to that effect. The test is an objective test of whether 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). At the summary judgment stage the test is whether there is at least a scintilla of evidence to support the doctors' position.

Instead, the Master in Equity confused or conflated two legal concepts. The test for granting summary judgment is when all of the evidence supports only one conclusion. That is a very different thing than the concept that a specific fact is not in dispute.

The Master in Equity misapplied the concept of an undisputed piece of evidence, the survey, and used that concept to satisfying the objective standard of review. To a lay client, the survey itself does not prove legal notice. Furthermore, in contrast to the survey is a huge amount of other evidence to demonstrate what a person of common knowledge or experience should know under these facts.

The Master in Equity mistakenly equated the existence of one item of evidence with the summary judgment standard. When there is other conflicting evidence in the record summary judgment must be denied.

Evidence the doctors did not know and had no reason to know.

1. They were represented by a licensed local realtor working for a long established real estate company so there is no reason to start out with any suspicion about looking for a house.
2. The house was approximately 16 years old and had been owned and lived in by several different owners so that would suggest it is not in violation of the Code or FEMA.
3. They looked at a number of houses and could easily avoided this one if the seller had disclosed the problem or the real estate agent or the lawyers had protected them from buying a house with this defect.
4. They hired someone to inspect the house for them.
5. They complied with all of the requirements of Wells Fargo.
6. They bought property insurance.
7. They bought flood insurance.
8. They had an exclusive real estate agent just to look out for them.

9. They hired a local real estate law firm to look out for them.
10. No prior owner noticed the defect.
11. The seller, the Dyes did not recognize the defect from looking at the house and living in it. They did not recognize a problem when they were sent the same survey the defendants say the Doctors should have been on notice from. The Dyes did not recognize they had a problem until two years later when they received the letter from Shelley Wright on Feb. 25, 2003.

    The letter from Shelley Wright did not just forward a survey. It did not just say the house had an elevation of 13.3 ft.

    The letter from Shelley Wright was very explicit about exactly what the defect was, and why, and what the consequences were. It let them know:

    The insurance agency had been notified that Seacoast Brokers will not be renewing the policy.
    The non-renewal is effective April 3, 2003.
    Due to market changes, coverage is no longer available under the policy.
    The Agency can replace the coverage with Travelers or NXS.
    The annual premium for excess windstorm will be $1,855.00.
    The annual premium for Flood Insurance will be $2,723.00.
    The total premium is $4,578.00.
    It will have to be paid in full by April 2, 2003.
    The flood premium is high due to the elevation.
    The base flood elevation is 14 ft.
    Your house is 13.3 ft. base elevation.
    Your house is .07 ft. below base flood elevation.

That letter of Feb. 25, 2003 was meaningful notice that would put a person on notice. It put the Dyes on notice but they did not disclose it and immediately got rid of the house.

The insurance professional picked up on the significance of the 13.3 ft elevation from the survey. If the professional real estate attorneys or the professional real estate agents had picked up on it, the Doctors would have been protected.

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 and the case remanded for trial.

III. In addition, the plaintiffs respectfully request that the Supreme Court exercise its discretion and fully resolve the Motions for Summary Judgment.

This case was begun on Feb. 18, 2008 with a Summons and Complaint yet has only reached a result on one of three grounds upon which summary judgment was sought.

The lawyer defendants moved for Summary Judgment on Dec. 1, 2009 followed by the real estate defendants on Dec.4, 2009. The lawyer defendants asserted three grounds: "The specific grounds for this Motion include, without limitation, that the Amended Complaint should be dismissed under Rule 56, SCRCP, because Plaintiffs' claims are barred by the applicable statute of limitations, Plaintiffs have no competent evidence of any breach in the standard of care by these Defendants, and Plaintiff's damages are speculative."

The Plaintiffs have submitted an extended sixteen page thorough affidavit of an attorney expert witness C. Joseph Roof which in which he recited the details of all the

facts he reviewed and concluded with his opinion that Deeb, Wiseman, and the law firm had breached the duty and standard of care of reasonably competent attorneys in eight particulars. [R.Ap. 715 – 730].

The Plaintiff's retained a real estate expert, Thomas Hartnett who was deposed and who gave his opinion that the brokers and agents did not comply with the requirements of state law for the acknowledgement of a dual agency agreement and who also expressed his opinion that they did not do their responsibilities with diligence. [R p 852 – 856].

Plaintiff's submitted one proposal from Anchor Construction in the amount of $275,336.00 from Anchor Construction dated December 18, 2008 [R p 754-756] and another from Lynes Construction dated May 1, 2007 in the amount of $374,478.00. [R p 757 – 759].

Whether these items of evidence will ultimately convince a jury, they at least constitute a scintilla of evidence that both the lawyer defendants and the real estate defendants breached duties to the plaintiff and the plaintiffs have sustained damages.

The Plaintiffs are aware that the trial court did not rule on these issues. However, there had been full discovery when the Defendant's moved for Summary Judgment and the Record is sufficient for these to be ruled upon.

The Plaintiffs have been met with many obstacles in reaching this point and although the case was begun in early 2008, it has only progressed to the first of the three grounds for Summary Judgment.

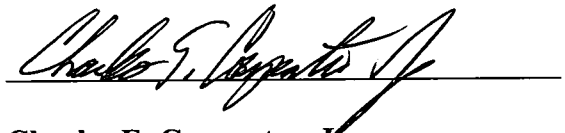
The Plaintiffs are not saying they are entitled to have these other two grounds ruled upon. The Plaintiffs are simple pointing out the possibility of a remand still facing

two additional summary judgment issues and requesting that this Court exercise its discretion and rule on the other two grounds. This is not a situation in which there is any advantage to a trial judge or any deference due. It is purely a question of whether there is any evidence of a breach of duty and damages.

The Record on Appeal is sufficient to see if it contains at least a scintilla of evidence of breach of duties and damages.

With respect, your Plaintiff's ask that this Court make that determination.

Respectfully submitted



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Certificate Of Compliance

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

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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, Brief on Certiorari of Petitioner-Appellants Gottschlich and McNeil, dated July 8th, 2014, 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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