

The State Of South Carolina
In The Court Of Appeals

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

Civil Action No. 2008-CP-07-00517

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.

RECORD ON APPEAL
VOLUME III OF III (pp. 862-1047)

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**GOTTSCHLICH and McNEIL v. KEN OLIVER, THE BYRNE
CORPORATION d/b/a DUNES MARKETING GROUP, LAURICH & DEEB,
P.A., ROBERT M. DEEB, JR. and CHARLES H. WISEMAN**

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOR THE
FOURTEENTH JUDICIAL CIRCUIT

Gregory M. Gottschlich and
Donald L. McNeil,

Plaintiffs,

v.

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.

CIVIL ACTION NO. 2008-CP-07-00517

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION TO RECONSIDER
AND/OR ALTER OR AMEND ORDER
GRANTING SUMMARY JUDGMENT
TO DEFENDANTS 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**

**TO: SUSAN WALL, ESQUIRE, COUNSEL FOR LAURICH & DEEB, P.A.,
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GRAHAM, ESQUIRE, COUNSEL FOR THOMAS N. DYE AND JAN H. DYE;
AND MAX G. MAHAFFEE, ESQUIRE, COUNSEL FOR KEN OLIVER & THE
BYRNE CORPORATION.**

Please take notice that Plaintiffs, by and through counsel, will move, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, before The Honorable Marvin H. Dukes III, Master in Equity and Special Circuit Judge for Beaufort County, on the tenth day after service hereof or as soon thereafter as counsel may be heard, for an Order altering or amending the Order entered on January 11, 2010 granting the respective summary judgment motions of Defendants 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. Plaintiffs' respectfully submit that this motion should be granted on the following grounds: (1) the point in time when a reasonable

person would or should have been on notice of a potential claim under the circumstances in this case is a question of fact for the jury; (2) the existence and scope of an agency relationship between Plaintiffs and Seacoast are questions of fact for the jury; (3) the Court did not consider the relevant facts in the light most favorable to Plaintiffs, the nonmoving party, in reviewing Defendants' summary judgment motions as required under the summary judgment standard; (4) Defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr., and Charles H. Wiseman are equitably estopped from invoking a statute of limitations defense; and (5) Plaintiffs' equitable indemnification claim against Defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr., and Charles H. Wiseman is not subject to the statute of limitations.

Plaintiffs' motion is based upon the previous arguments of counsel (a copy of the hearing transcript is attached as **Exhibit A**), Plaintiffs' memoranda of law and corresponding exhibits submitted to the court in opposition to the summary judgment motions of Defendants Dye, Laurich & Deeb, P.A. and Dunes Marketing (copies of which are attached as **Exhibits B, C, and D** respectively), Plaintiffs counsel's December 30, 2009 letter to the court (a copy of which is attached as **Exhibit E**), applicable law, and such other and further material as may be properly submitted hereafter.

I. The Point in Time When a Reasonable Person Would or Should Have Been on Notice of a Potential Claim is a Question of Fact for the Jury.

"When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury." Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct.App. 2009) (citing Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006)). The discovery rule requires notice of a *claim* -- not notice of an injury, not suspicion that something may be amiss, and not simply notice of a negative elevation. True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997); Hunt v. Smith, 202

S.C. 129, 24 S.E.2d 164, 167 (1943). Where testimony is conflicting, the statute of limitations “becomes an issue for the jury to decide.” Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). The jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action. Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Cl.App. 1998) (citing Garner v. Houck, 312 S.C. 481, 485, 435 S.E.2d 847, 849 (1993))

Plaintiffs are entitled to have a jury determine the point in time when Plaintiffs knew or should have known of their potential claims against Defendants because there is conflicting evidence on the issue. Even if the Court is inclined to agree with Defendants and find that Plaintiffs were on notice of the negative elevation in 2003 or 2004, Plaintiffs are still entitled to have a jury determine whether notice of a particular, isolated fact such as this, as manifested under the circumstances, is sufficient to place *a reasonable person of common knowledge and experience* on notice that he had one or more claims against the remaining Defendants at that time. (emphasis added). The evidence is contradictory as to what particular information was actually in Plaintiffs’ possession at any given point in time. For instance, Defendants allege that Plaintiffs annually received declarations pages for their Travelers flood insurance policy beginning in 2003 and that the declarations pages should have put Plaintiffs on notice of the elevation problem. However, the very declarations pages Defendants reference begin with the policy period 12/03/05 to 12/03/06 (see Laurich & Deeb Memo in Support, Ex. 16), which is two years after Plaintiffs closed on the house. Defendants contend that Plaintiffs received information such as this annually beginning in 2003, however, Defendants’ claim is not supported by the evidence they ask this Court to rely upon.

Moreover, the Order misconstrues Plaintiffs' arguments regarding actual knowledge. According to the Order, "[Plaintiffs] contend that only upon actually knowing and appreciating the ramifications does the statute of limitations begin to run." (Order p. 3). This is not so, and both the memoranda in opposition to summary judgment and the summary judgment hearing transcript are devoid of this alleged argument. (See Plaintiffs' Memoranda in Opposition to Summary Judgment attached as Exhibits B, C, and D). Plaintiffs indeed do understand and appreciate the meaning of "knew or should have known;" they simply fundamentally disagree that the facts and circumstances of this case, particularly those events relied upon by the Court in its Order, would have put a reasonable person of common knowledge on notice of a potential claim. This is especially so in light of the fact that all of the remaining Defendants – among them professionals – now seeking the benefit of the Court's Order failed to discover and appreciate the significance of the negative elevation information contained in the majority of the evidence they point to in support of their statute of limitations defense. At the summary judgment hearing, Laurich & Deeb argued that a party, such as Plaintiffs in this case, "cannot close their eyes to information that is before them." (Tr. p. 11). Ironically, however, that is precisely what all of the Defendants did in this case.

The record contains ample evidence that Plaintiffs did not know, nor should they have known, of one or more claims against Defendants until April 2006 at the earliest. Accordingly, the question should be put to a jury for a proper determination of fact.

II. The Existence and Scope of an Agency Relationship are Questions of Fact for the Jury.

"Agency is a question of fact.... If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct.App. 1984). The scope of

agency is a question of fact for the jury. Holmes v. McKay, 334 S.C. 433, 439, 513 S.E.2d 851, 854 (Cl.App. 1999).

In imputing knowledge or notice of the negative elevation, as well as its import, to Plaintiffs, the Court implies that the insurance agent or broker had a duty to advise Plaintiffs in this regard. Insurance agents in South Carolina do not owe a duty to disclose information to a purchaser: "an insurance agent has no duty to advise an insured..." Houck v. State Farm Fire and Cas. Ins. Co., 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005); see also Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 337, 574 S.E.2d 502, 512 (Cl.App. 2002); Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30 (1993). Contravening the Court's reliance upon the Restatement (Third) of Agency, the above referenced authorities draw no distinction between agent and broker, using the terms interchangeably while noting that a duty to advise would "impose an undue burden upon insurance agents and brokers." Houck at 12, 620 S.E.2d at 329 (2005) (citing Sullivan Co. at 36, 437 S.E.2d at 31 (1993)).

The Order is silent as to any evidence that obtaining and disclosing the negative elevation, much less its consequences, was within the scope of the agent's relationship with Plaintiffs. In fact, Teena Farrell, the Seacoast customer service representative who assisted Plaintiffs, testified it was not. (Farrell Dep. Tr. p. 36, ln. 22 – p. 37, ln. 19). Furthermore, a jury could reasonably infer that Seacoast, having also handled Defendants Dyes' flood insurance, would have reasonably relied upon the Dyes to inform Plaintiffs of the negative elevation and adverse implications associated with it given that Seacoast provided this information to the Dyes in writing approximately 10 months before the Dyes sold the house to Plaintiffs.

Finally, the Order lacks reference to any case law imposing such an obligation on an insurance agent as a matter of law. As such, the Order granting Summary Judgment should be reconsidered, leaving determinations of existence and scope of agency for the jury.

III. The Relevant Facts Were Not Considered in the Light Most Favorable to the Nonmoving Party.

The Court should reconsider and alter or amend its Order because the Order does not consider the facts in favor of Plaintiffs, the nonmoving party, as required by the standard for summary judgment. The summary judgment standard was discussed in Plaintiffs' memoranda in opposition to Defendants' summary judgment motions. The case law clearly dictates that the Court must view all evidence and inferences which can reasonably be drawn therefrom in the light most favorable to the nonmoving party. See BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). All ambiguities, conclusion, and inferences rising from the evidence must be construed most strongly against the moving party. Id. An opposing party need only present a *mere scintilla* of evidence to survive summary judgment in cases where the burden of proof is the preponderance of the evidence standard. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) (emphasis added).

Plaintiffs presented ample evidence suggesting Defendants did not know, nor should they have known, of any potential claims until April 2006 at the earliest. Plaintiffs are entitled under the summary judgment standard for the Court to view and consider this evidence in their favor, not Defendants. The Order reveals a disconnect between the standard and the Court's conclusion in this matter, and accordingly, the Order should be reconsidered under the applicable standard.

IV. Defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr., and Charles H. Wiseman Are Equitably Estopped from Invoking a Statute of Limitations Defense.

In South Carolina, “a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct.” Black v. Lexington School Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997) (quoting Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)) (internal quotations omitted). Whether a defendant's conduct gives rise to equitable estoppel is a question of fact for the jury. Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Cl. App. 2001).

Plaintiffs had no knowledge, nor any reason to suspect, that any problems were associated with a negative elevation until 2006 at the earliest. Upon developing an understanding of the fact that the negative elevation with this particular house might pose a problem, Plaintiffs reached out to various individuals, including their closing attorney Robert M. Deeb, Jr (Deeb), to investigate. When contacted by Plaintiffs in writing in December 2006, Defendant Deeb represented to Plaintiffs that he would assist in resolving the elevation issue. Deeb, however, failed to honor the promises made in the December 8, 2006 letter and never informed Plaintiffs of his intention not to do so. Accordingly, Defendants Laurich & Deeb, P.A. and Deeb should be equitably estopped from seeking the protection of the statute.

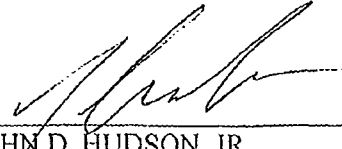
In dispatching Plaintiffs' equitable estoppel argument, the Order relies upon irrelevant and mischaracterized evidence related to the discovery rule. Plaintiffs never contended that the actions of Defendant Deeb in December 2006 kept them from discovering the claim, rather Plaintiffs' reliance on Defendant Deeb forestalled their pursuit of the claim. The Order's reference to “means of obtaining the knowledge”

coupled with the examples provided, suggests a misapplication of equitable estoppel. Awareness of a claim is a precursor to equitable estoppel, and it is that awareness gained in 2006 that brought Plaintiffs to Defendant Deeb. In order for Plaintiffs to have knowledge fatal to equitable estoppel in this case, Plaintiffs must have known, or had means of knowing, that Defendant Deeb would not honor his promise to aid them in resolving the issue. Defendants failed to present any evidence suggesting that Plaintiffs knew or should have known that Deeb would not honor his promise. Accordingly, the Order erroneously rejects equitable estoppel as a bar to the statute of limitations defense.

V. **Equitable Indemnification is not Subject to the Statute of Limitations.**

Plaintiffs assert a claim for equitable indemnification against Defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr., and Charles H. Wiseman. Equitable Indemnification is an action in equity, and it is not subject to the defense of statute of limitations. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005). As was the case with Plaintiffs' rescission claim against the Dyes, Defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr., and Charles H. Wiseman therefore cannot receive summary judgment on this claim based on the statute of limitations defense.

ELLIS, LAWHORNE & SIMS, P.A.

BY: 

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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
January 21, 2010

ELLIS:LAWHORNE

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December 30, 2009

Via Electronic Transmission

The Honorable Marvin H. Dukes, III
Master-In-Equity and Special Circuit Court Judge, Beaufort County
Post Office Drawer 1228
Beaufort, South Carolina 29901

Re: Gregory M. Gottschlich and Donald L. McNeil v. Strimpfel Custom Homes, Inc.,
Joseph A. Reeve, Jerry L. Richardson; Coastal Surveying Co., Inc., Thomas N.
Dye; Jan H. Dye; Ken Oliver; and The Byrne Corporation d/b/a Dunes Marketing
Group; Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman
Case No. 2008-CP-07-00517
ELS File Number: 79-58113

Dear Judge Dukes:

Please accept this letter in response to your request for Plaintiffs' comments on the proposed Order offered by all remaining Defendants in the above-referenced action. As discussed more fully below, Plaintiffs respectfully submit that the proposed Order should be rejected by the Court in its entirety because the remaining Defendants have failed to meet their burden of proof and questions of fact entitle Plaintiffs to a trial on all claims.

As you are aware, the proposed Order purports to grant summary judgment on all of Plaintiffs' claims against Defendants Thomas N. Dye and Jan H. Dye ("Dyes"); Defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman (collectively "Laurich & Deeb") and Defendants Ken Oliver and The Byrne Corporation d/b/a Dunes Marketing Group (collectively "Dunes Marketing"). The sole basis for granting all of these Defendants summary judgment on all of Plaintiffs' claims is Defendants' affirmative defense of the statute of limitations.

As an initial concern, Defendants' proposed Order implicitly finds, without any detailed analysis, that all of Plaintiffs' claims are barred by the statute of limitations. This is simply incorrect, and it demonstrates the impropriety of painting judgment with as broad of a stroke as Defendants encourage the Court to do with this proposed Order. By way of example, Plaintiffs have plead a claim for rescission against the Dyes. Rescission is an action in equity and it is not subject to the defense of the statute of limitations. *Dixon v. Dixon*, 362 S.C. 388, 400, 608



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S.E.2d 849, 855 (2005). The Dyes, therefore, cannot receive summary judgment on all claims based on the statute of limitations defenses, and the proposed Order is erroneous.

Next, the proposed Order does not reflect the applicable summary judgment standard imposed by South Carolina law, but rather it construes relevant fact as well as inferences to be drawn from those facts in a light most favorable to Defendants, the moving parties. "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." *Turner v. Milliman*, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct.App.2009). Each remaining Defendant bears the burden of establishing that the statute of limitations is a defense that applies and ran on every claim against him/her/it prior to Plaintiffs' filings, and at this stage, Plaintiffs are entitled to have all evidence, and all reasonable inferences to be drawn from that evidence, construed in their favor. *Id.* at 111, 671 S.E.2d at 641. At this stage, only a mere scintilla of evidence is required to deny Defendants' Motion as to any and all claims governed by a preponderance of evidence burden of proof. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000) (citing *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Id.*

All arguments in the proposed Order require the Court to make an inferential leap that it cannot make unless it construes the evidence in a light most favorable to Defendants rather than Plaintiffs, which the Court cannot do at this juncture. Defendants' argument can be surmised as follows: If Plaintiffs received in 2003 or 2004 some form of notice that the house had a negative elevation, then the discovery rule is satisfied and the statute of limitations ran on all causes of action before Plaintiffs' filings. However, an essential step is missing in this analysis which undercuts the validity of the proposed Order. The discovery rule requires notice of a claim -- not notice of an injury, not suspicion that something may be amiss, and not simply notice of a negative elevation. *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997); *Hunt v. Smith*, 202 S.C. 129, 24 S.E.2d 164, 167 (1943). Even if the Court agrees with Defendants and finds that Plaintiffs were on notice of the negative elevation, Plaintiffs are still entitled to have a jury determine whether notice of this particular, insulated fact, as it was manifested, is sufficient to place a reasonable person of common knowledge and experience on notice that he had one or more claims against the remaining Defendants at that time. The jury may infer and decide that a reasonable person would in fact not be on notice that one or more claims existed by simply

obtaining some notice of the negative elevation.¹ *True* at 119, 489 S.E.2d at 616. Because reasonable minds could differ on whether some form of notice of the negative elevation to Plaintiffs, prior to the additional, critical information discovered in 2006, was sufficient to satisfy the discovery rule on all of Plaintiffs' claims, Defendants' proposed Order is erroneous.

A simple example existing in this case demonstrates the error of the proposed Order's conflating of the analysis of all causes of action into one analysis predicated on one factual finding. Consider Plaintiff's causes of action against the Dyes for breach of contract and fraud. The jury may ultimately infer that Plaintiffs were on notice that they possessed a breach of contract claim at some point when they received notice of the elevation difference in 2003 or 2004. However, the jury may just as well determine that this particular, isolated fact was insufficient to place Plaintiffs on notice that they also possessed a cause of action for fraud or constructive fraud, which includes elements that differ from the breach of contract claim, such as the Dyes' knowledge of the falsity of the information conveyed and the Dyes' intent to deceive Plaintiffs. A jury may determine that Plaintiffs did not possess sufficient facts to discover the existence of a claim for fraud or constructive fraud until Plaintiffs' learned of the Dyes' actual knowledge of an actual problem with the property and their corresponding attempt to hide this information from Plaintiffs.

Finally, the proposed Order is erroneous as Defendants improperly attempt to distinguish *Pitt* by pointing to a difference that has no distinction under South Carolina law. Moreover, Defendants' contention is not supported by any South Carolina authority at all. To the contrary, numerous South Carolina authorities state that insurance agents do not owe a duty to disclose information to a purchaser: "an insurance agent has no duty to advise an insured...." *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005); *see also Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 337, 574 S.E.2d 502, 512 (Ct.App. 2002); *Sullivan Co. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993). These authorities draw no distinction between agent and broker, and refer to both in these decisions. Defendants fail to provide any evidence that obtaining and disclosing the negative elevation, much less its consequences, was within the scope of the agent's relationship with Plaintiffs, and they fail to cite any case law imposing such an obligation on an insurance agent as a matter of law. Moreover, whether an

¹ The causes of action that the proposed Order purports to resolve by simply concluding that the Plaintiffs had some form of notice of a negative elevation prior to 2003 include negligent misrepresentation against the Dyes and Dunes Marketing; violation of S.C. Code § 27-50-10 against the Dyes and Dunes Marketing; negligence against the Dyes, Dunes Marketing, and Laurich & Deeb; Breach of Contract against the Dyes, Dunes Marketing, and Laurich & Deeb; Violation of the South Carolina UTPA against Dunes Marketing; Civil Conspiracy against the Dyes and Dunes Marketing; Breach of Fiduciary Duty against Dunes Marketing and Laurich & Deeb; and Fraud and Constructive Fraud against the Dyes and Dunes Marketing.

The Honorable Marvin H. Dukes, III
December 30, 2009
Page 4

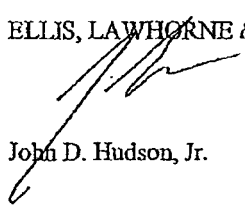
agency relationship exists and the scope of that agency is a question of fact for the jury. *Johnson v. Arbabi*, 355 S.C. 64, 70584 S.E.2d 113, 116 (2003). Plaintiffs have the right to have this issue determined by a jury as well.

Thank you for allowing Plaintiffs the opportunity to submit this correspondence for your consideration.

With kind regards, I am

Very truly yours,

ELLIS, LAWHORNE & SIMS, P.A.



John D. Hudson, Jr.

JDH, JR

Cc: Max G. Mahaffee, Esquire (via e-mail)
Katherine E. Graham, Esquire (via e-mail)
Susan Taylor Wall, Esquire (via e-mail)

STATE OF SOUTH CAROLINA
2010 JAN 29 PM 1:43 IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT

JERRI ANN ROSEMEAU
BEAUFORT COUNTY, S.C.
GREGORY M. GOTTSCHLICH AND ORN OF COURT
DONALD L. MCNEIL,

C/A No.: 2008-CP-07-00517

PLAINTIFFS,

VS.

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.

DEFENDANTS LAURICH & DEEB,
P.A., ROBERT M. DEEB, JR., AND
CHARLES H. WISEMAN'S RESPONSE
IN OPPOSITION TO PLAINTIFFS'
MOTION TO RECONSIDER AND/OR
ALTER OR AMEND ORDER
GRANTING SUMMARY JUDGMENT
TO DEFENDANTS

Defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman (together referred to herein as "Laurich & Deeb"), by and through their undersigned counsel, respectfully submit this Response in Opposition to Plaintiffs' Motion to Reconsider and/or Alter or Amend Order Granting Summary Judgment to Defendants 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 (collectively, "Defendants"). The Court properly granted Defendants' Motion for Summary Judgment, and thus Plaintiffs' Motion should be denied for the following reasons and for all those set forth in the Court's Order and that appear in the record: (1) the evidence in the record clearly supports the Court's ruling as to when Plaintiffs knew or should have known of a potential claim; (2) Laurich & Deeb is not equitably estopped from invoking a statute of limitations defense; and (3) Plaintiffs improperly seek to introduce a new ground to challenge the dismissal of the equitable indemnification claim against Laurich & Deeb.



1. The Evidence in the Record Clearly Supports the Court's Ruling as to When Plaintiffs Knew or Should Have Known of a Potential Claim.

In their Motion, Plaintiffs contend that there is no evidence to support the fact that Plaintiffs received insurance policy declaration pages annually, beginning in 2003, which put them on notice of their home's negative elevation. Contrary to Plaintiffs' assertion, however, the evidence in the record is clear that Plaintiffs did in fact receive declaration pages for the years 2003 and 2004, and this evidence was introduced to the Court in Laurich & Deeb's Memorandum of Law in Support of its Motion for Summary Judgment. (*See* Mem. in Supp. of Laurich & Deeb's Mot. for Summ. J. at 13.) As testified by two different Seacoast representatives, these declaration pages were mailed to the insureds annually. Thus, Plaintiffs had actual knowledge of the negative elevation beginning in 2003 and thus, the granting of summary judgment to Defendants was proper.

2. Laurich & Deeb is Not Equitably Estopped from Invoking a Statute of Limitations Defense.

Plaintiffs also contend that Laurich & Deeb is equitably estopped from invoking a statute of limitations defense because of Laurich & Deeb's alleged actions or inactions in December 2006. As argued before the Court on December 16, 2009 (Hearing Tr. at 54-58) and as set forth in the Order Granting Defendants Summary Judgment, Laurich & Deeb is not equitably estopped from asserting the statute of limitations as a defense. Laurich & Deeb did not keep Plaintiffs from pursuing their claims because the evidence is undisputed that Plaintiffs hired their own litigation attorney to assist them with the negative elevation issue after speaking with Laurich & Deeb on December 1, 2006 (Deeb Dep. pp. 213-22, Pl. Dep. pp. 185-86); Plaintiffs had the means of obtaining knowledge of the negative elevation as early as 2003; and Plaintiffs waited until Friday, December 1, 2006, the day before the statute of limitations ran, to contact Laurich

& Deeb, non-litigators, regarding the elevation issue. Thus, summary judgment was properly granted to Laurich & Deeb.

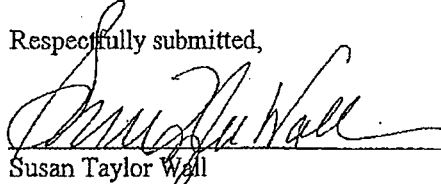
3. **Plaintiffs Improperly Seek to Introduce a New Ground to Challenge Dismissal of The Equitable Indemnification Claim Against Laurich & Deeb.**

Plaintiffs' attempt to argue that their equitable indemnification claim against Laurich & Deeb is not subject to the defense of statute of limitations is improper. Plaintiffs are barred from asserting such an argument because they failed to raise it prior to their Rule 59(e) Motion. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised, but was not, prior to judgment. *Dixon v. Dixon*, 362 S.C. 388, 400, 608 S.E.2d 849, 854 (2005); *Kiawah Prop. Owners Group v. Public Serv. Comm'n of South Carolina*, 359 S.C. 105, 114, 597 S.E.2d 145, 149 (2004). Furthermore, the equitable indemnification claim necessarily fails because the statute of limitations has run. (See Letter dated 1/8/10, Exh. 1.) Accordingly, Plaintiffs' equitable indemnification claim against Laurich & Deeb was properly dismissed.

CONCLUSION

For all the foregoing reasons and any others in the record, Laurich & Deeb respectfully requests that the Court issue an Order DENYING Plaintiffs' Motion to Reconsider and/or Alter or Amend Order Granting Summary Judgment to Defendants 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.

Respectfully submitted,



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January 28, 2010

Charleston, South Carolina



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January 8, 2010

VIA EMAIL: mdukes@bcgov.net

The Honorable Marvin H. Dukes, III
Beaufort County Master-In-Equity
P.O. Drawer 1228
Beaufort, SC 29901

Re: *Gottschlich, et al. vs. Strimpfel Custom Homes, Inc., et al.*
Case No.: 2008-CP-07-00517

Dear Judge Dukes:

I am writing in response to Mr. Hudson's letter dated December 30, 2009. Mr. Hudson's letter simply repeats arguments made during the hearing before Your Honor and the arguments do not change the propriety of granting summary judgment on the running of the statute of limitations as to Laurich & Deeb. Mr. Hudson's contention that Defendants' proposed order improperly grants summary judgment on statute of limitations grounds on all causes of action is legally and factually incorrect and summary judgment is proper on all causes of action asserted against Laurich & Deeb.¹

First, Mr. Hudson improperly asserts that the proposed Order does not reflect the applicable summary judgment standard which requires that the facts be viewed in a light most favorable to the plaintiffs. In truth, the proposed Order clearly recognizes this standard as set forth in the last sentence of the Legal Standard portion of the proposed Order. Further, the proposed Order is based upon undisputed facts and thus, no further inquiry is needed to clarify the application of the law.

Second, Mr. Hudson argues that the discovery rule requires notice of a claim. This is a mischaracterization of the law. The discovery rule does not require notice of a claim for the three year statute to begin running; rather, the rule requires only that Plaintiffs knew, or through the exercise of reasonable diligence, should have known that some right might be affected. See *eg. Burgess v. Am. Cancer Soc'y, South Carolina Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (emphasis added) (holding "the statutory period of limitations begins to run

¹ Plaintiffs have asserted only negligence based causes of action and a breach of contract cause of action against Laurich & Deeb. The additional cause of action for equitable indemnification necessarily fails, not only because such a claim cannot be asserted in the context of this lawsuit, but also because the statute of limitations as to Plaintiffs' claims has run, thus, Plaintiffs cannot show that Laurich & Deeb are liable for Plaintiffs' alleged loss, which is required on an equitable indemnification claim. *Vernier Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).



The Honorable Marvin H. Dukes, III
January 8, 2010
Page 2

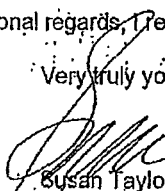
when a person *could* or *should have known*, through the exercise of reasonable diligence, that a cause of action *might* exist in his or her favor, *rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto*. Again, the cases do not state that knowledge of the claim triggers the statute of limitations; rather, actual or imputed knowledge of facts that might lead to a cause of action triggers the running of the statute of limitations. As set forth in the proposed Order and Laurich & Deeb's Memorandum in Support of its Motion for Summary Judgment, it is undisputed that Plaintiffs knew or should have known of facts sufficient to put them on notice that a cause of action might exist in December 2003 when they received documents evidencing the negative elevation on the home. Plaintiffs had three years from that point to explore the ramifications of the negative elevation and to bring suit within three years from that date. In this case, when the Plaintiffs knew or should have known that they might have a claim is not a question for the jury, but a matter for the court. See *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005) (granting summary judgment to attorney on statute of limitations grounds); *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (same); *Binkley v. Burry*, 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002) (same); *Burgess*, 300 S.C. 182, 386 S.E.2d 798 (same).

Third, Mr. Hudson misapprehends the law when he states that an insurance agent has no duty to disclose information to a customer. He cites several cases but fails to provide the Court with the complete quote or a complete analysis of the context in which the quote is utilized. The cases cited by Mr. Hudson have no application to the instant case for two reasons. First, these cases speak in terms of advice on *coverage*, which is not at issue in this case. Second, these cases hold that an insurance agent has no duty to advise an insured on coverage unless the agent undertakes to do so. An insurance agent has "no duty advise an insured at the point of application absent an express or implied undertaking to do so." *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005); *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988). In this case, Plaintiffs' insurance agent admits it undertook the duty to advise: the 30(b)(6) representative for the insurance agency testified that the agency typically undertakes to inform a customer of a negative elevation. In the final analysis, however, the issue of the insurance agent's duty does not defeat the running of the statute of limitations because Plaintiffs were on inquiry notice themselves in December 2003 when they received (1) a copy of the elevation certificate and (2) a copy of the first of their yearly insurance policy statements evidencing the negative elevation.

We respectfully request that the Court grant Laurich & Deeb's Motion for Summary Judgment and adopt the proposed Order submitted to the Court on December 28, 2009. Should the Court prefer separate orders for each of the three Defendants, please let us know and we will be happy to provide an Order as to Laurich & Deeb only.

Thank you and with highest professional regards, I remain

Very truly yours,


Susan Taylor Wall

STW:jsh

The Honorable Marvin H. Dukes, III

January 8, 2010

Page 3

cc: John D. Hudson, Jr., Esq. (via email)
Katherine E. Graham, Esq. (via email)
Max G. Mahaffee, Esq. (via email)
Amanda C. Williams, Esq.

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

GREGORY M. GOTTSCHLICH and DONALD L. MCNEIL,

Plaintiffs,

vs.

CIVIL ACTION NUMBER
2008-CP-07-00517

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.

-----/

The Hearing, in the above-entitled
cause, taken before the Honorable Judge Marvin
H. Dukes, III, Master-in-Equity, taken by Ceil
Weser, Certified Court Reporter and Notary
Public, at the Beaufort County Courthouse, 102
Ribaut Road, Beaufort, South Carolina, on the
16th day of December, 2009, commencing at or
about the hour of 4:05 p.m.



1

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 12 THE BYRNE CORPORATION d/b/a Dunes
 MARKETING GROUP:

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 18 AMANDA WILLIAMS, ESQUIRE
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 19 Suite 301
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I N D E X

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PAGE

24 OPENING REMARKS AND STIPULATIONS ----- 4

25 CERTIFICATE ----- 84

1 MOTION HEARING

2 MS. WALL: We are going to have
3 the record reflect that one of the
4 former Defendants Strimpfel Custom
5 Homes, Inc. filed a motion for summary
6 judgment several months ago. The
7 motion was granted by the court. There
8 is pending a Motion to Reconsider by
9 Plaintiffs' counsel.

10 However, approximately two days
11 ago Strimpfel Custom Homes, Inc. filed
12 for bankruptcy. Therefore, as we
13 understand the bankruptcy law to be the
14 Motion to Reconsider on Strimpfel
15 Custom Homes, Inc.'s motion for summary
16 judgement that was granted is not ripe
17 for hearing, because of their status in
18 bankruptcy court.

19 However, their status does not
20 affect the remaining defendants, and
21 therefore the court does have
22 jurisdiction to hear the respective
23 motions for summary judgment filed by
24 the three remaining Defendants Laurich
25 & Deeb, Robert Deeb and Charles

1 MOTION HEARING

2 Wiseman; Thomas and Jan Dye; and The
3 Byrne Corporation, doing business as
4 Dunes Marketing Group.

5 MR. MAHAFFEE: And Ken Oliver.

6 MS. WALL: And Ken Oliver.

7 There is on the caption an
8 additional several defendants, Joseph
9 A. Reeve; he has now settled. Jerry L.
10 Richardson and Coastal Surveying
11 Company, incorporated has also settled.

12 So as of this time the only
13 remaining defendants in this action in
14 this court are the three who are moving
15 today for summary judgment.

16 THE COURT: Okay. All right.

17 And I understand you have chosen
18 an order based on proximity to this end
19 of the table, so I am happy to hear
20 from you.

21 MS. WALL: Thank you, your Honor.
22 My name is Susan Wall. I represent the
23 Defendants Laurich & Deeb, Bob Deeb,
24 and Chuck Wiseman in this matter.

25 For purposes of background,

1 MOTION HEARING

2 discovery in this case has now ended;
3 therefore summary judgments are ripe.
4 Our ending time for discovery was
5 yesterday.

6 Your Honor, we are before the
7 court on a motion for summary judgment
8 on three grounds: The first is statute
9 of limitations; the second is that
10 there is no breach in the standard of
11 care as a matter of law; and the third
12 is that Plaintiffs' claimed damages are
13 either nonexistent, that is there is no
14 evidence of them; or that they are
15 speculative as a matter of law.

16 Although our brief filed with the
17 court argues no breach in the standard
18 of care first, in fact, your Honor,
19 with your leave what I am going to do
20 is argue the statute of limitations
21 first.

22 THE COURT: Okay.

23 MS. WALL: And the reason for that
24 is that the statute of limitations
25 argument applies equally to all

1 MOTION HEARING

2 defendants and the bases, the
3 uncontroverted facts in this case that
4 form the basis for the statute of
5 limitations defense is essentially the
6 same as to all defendants in this case.
7 So if I may, let me begin with the
8 statute of limitations argument.

9 Before I do, your Honor, as is set
10 forth in the various memoranda of law,
11 I want to put on the record critical,
12 undisputed facts. The first is that in
13 this case the Plaintiffs Gottschlich
14 and McNeil are doctors who live in
15 Ohio. They entered into a contract to
16 purchase a vacation home in Hilton
17 Head. The contract was with Thomas and
18 Jan Dye who were selling their home.

19 The Plaintiff's real estate agents
20 were Dunes Marketing. After entering
21 into the contract of sale with the
22 Dye's, the Plaintiffs had the home
23 inspected. They obtained financing.

24 They then retained Laurich & Deeb
25 to close the transaction. They chose

1 MOTION HEARING

2 not to attend the closing and signed
3 limited powers of attorney. All of the
4 documents that I am referencing, your
5 Honor, are in fact made an exhibit to
6 our memorandum. And I will point to
7 you to certain ones as we go along.

8 Before the closing, which occurred
9 on December 2, 2003 all of the events
10 that I have just mentioned had
11 occurred. In addition, the Plaintiffs
12 received a copy of an elevation
13 certificate, which is marked as Exhibit
14 Number 9, given to the Drs. McNeil and
15 Gottschlich in order for them to
16 contact their insurance agent, in this
17 case being Seacoast to obtain flood
18 insurance. Flood insurance was a
19 requirement of their lender.

20 Also before closing, when we turn
21 to Exhibit 24, the Plaintiffs'
22 insurance agency Seacoast filled out a
23 flood insurance application; so that at
24 closing they would have evidence of
25 flood insurance as required by the

1 MOTION HEARING

2 lender.

3 On the second page of that
4 document that we have marked as Exhibit
5 24, it specifically indicates under
6 elevation information, lowest floor is
7 13.3 and the base flood is 14. There
8 is no question, it is an undisputed
9 question of fact -- there is no
10 question of fact, excuse me. It is
11 undisputed in this case that Seacoast
12 was the insurance agent for the
13 Plaintiffs and acted for them in
14 obtaining flood insurance, which is a
15 requirement of the lender.

16 It is also undisputed that before
17 closing documents were sent to the
18 Plaintiffs in Ohio, closing documents
19 to review, that they asked no questions
20 of the closing attorneys.

21 It is also undisputed that Laurich
22 & Deeb had received a copy of a 2001
23 survey, which is marked as Exhibit
24 Number 14, from Cary Griffin; and as he
25 says to assist in your title

1 MOTION HEARING

2 examination.

3 And it is undisputed that -- I am
4 calling them Laurich & Deeb, it was
5 actually Bob Deeb; but Laurich & Deeb
6 looked at the survey for purposes of
7 title.

8 Now, it is further undisputed that
9 after the closing on December 2, 2003
10 every single year the Plaintiffs
11 received copies of their flood
12 insurance policy declaration page, we
13 have marked them as Exhibit 16; and
14 every single year on the front sheet of
15 the dec page it is noted right in the
16 middle, elevation difference minus 1.

17 Now, I note that Plaintiff's
18 counsel will note that the documents we
19 have attached as 16 are actually the
20 agent's copy. Well, that is because
21 the Plaintiffs, despite repeated
22 requests, never produced their own
23 copies. But it is uncontroverted that
24 they would receive every year, because
25 they had to pay the premiums, their

1 MOTION HEARING

2 flood dwelling policy declaration
3 sheet.

4 It is further undisputed, that if
5 you will look at Exhibit Number 26, one
6 year after the closing on December 14,
7 2004 the Plaintiffs -- and it is right
8 under the big, thick line -- the
9 Plaintiffs' insurance agency Seacoast
10 called the surveyor today regarding the
11 fact that the home was built below the
12 base flood elevation. At the time the
13 home was built in 1988 the BFE was 14
14 feet. There is nothing we can do to
15 re-underwrite the policy and improve
16 the premium amount for the insured.

17 So we have Seacoast -- obviously
18 it had back in 2003 actual knowledge
19 that the base flood elevation was below
20 14 feet, because they filled out the
21 application on behalf of the
22 Plaintiffs. But also one year later in
23 December 2004 they are trying to
24 find -- they are trying to improve the
25 premium for the insured, the insured

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2 being the Plaintiffs, and they find
3 they can't do it because of the
4 negative elevation.

5 The law requires that every person
6 to any activity, including the purchase
7 of property and the purchase of
8 insurance take reasonable steps to
9 protect himself. They cannot close
10 their eyes to information that is
11 before them or information that their
12 insurance agent has, and then seven
13 years later file suit and try to blame
14 other people for it.

15 The statute of limitations on
16 causes of action against my clients,
17 which are all negligence based causes
18 of action and breach of contract, which
19 is again with an attorney essentially
20 another way of saying a legal
21 malpractice claim, they are all three
22 years. And to my knowledge the causes
23 of action as to the other defendants,
24 which include breach of contract as to
25 the Dye's, negligent misrepresentation;

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2 and they can speak for whatever their
3 causes of action are, but as I
4 understand them they are all three-year
5 based.

6 The important issue is this, we
7 know the statute of limitations in
8 South Carolina is very well developed.
9 That is one thing we do have that is
10 very well developed. And we know that
11 a Plaintiff will be held, the statute
12 begins to run on him at the time that
13 he knew or through the exercise of
14 reasonable diligence should have known.
15 that he might have a claim. The law is
16 expressly clear that it is not once he
17 finds out he has a full blown theory or
18 that he knows what his damages are.

19 Furthermore, it is not an actual
20 knowledge test. It is what he
21 reasonably should have known.

22 And furthermore it is an objective
23 test, not a subjective test. We don't
24 care what any individual plaintiff
25 might or might not have thought, might

1 MOTION HEARING

2 or might not have done; this is an
3 objective test. And it would have to
4 be, because otherwise statute of
5 limitations would be meaningless and
6 every plaintiff would say well, maybe
7 that works for somebody else, but it
8 doesn't work for me because I am not
9 quite that bright or whatever the issue
10 happens to be. That is why it is an
11 objective test.

12 Now, why has the statute run on
13 all of these claims? First of all, the
14 Plaintiffs were on inquiry notice as of
15 December -- or November, excuse me, of
16 2003; that is even before the closing.
17 They were on inquiry notice. And why
18 was that? First of all, as we have
19 just seen because they had a copy of
20 the elevation certificate. Secondly,
21 they were given a copy of their flood
22 insurance policy each and every year,
23 and each and every year starting -- if
24 the closing was December 3, they would
25 have actually gotten their policy

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2 shortly thereafter. And their
3 anniversary date ran December to
4 December. So every December they would
5 get a new declaration policy sheet and
6 of course would be asked to pay for it,
7 for the renewal of the insurance. And
8 thus, they had the information.

9 For them to now say as they do in
10 their brief, well, you would have to be
11 a special person to understand how to
12 read a declaration page. Everyone gets
13 declaration pages. If you do not know
14 how to read it, you see the minus 1 and
15 you say to yourself, I have no idea,
16 what on earth does that mean. That is
17 what inquiry notice is all about. You
18 need to go to somebody and ask. And
19 who is that someone? To your insurance
20 agent. You say, what is this minus 1?
21 You found me this insurance. What does
22 this mean? They never did any of that
23 until the spring of 2006.

24 The second part to the statute of
25 limitations and whether they knew or

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2 should have known is the imputed
3 knowledge test, which is absolutely
4 satisfied here. These Plaintiffs are
5 charged with the knowledge that their
6 insurance agent had. We know their
7 insurance agent had the knowledge that
8 it was minus 1 elevation. That in
9 other words the elevation requirement
10 was 14 feet and this house was at 13.3.
11 We know they had that before the
12 closing, because they are the ones who
13 filled out the application which we
14 saw.

15 We also know that one year later
16 in December 2004 their insurance agent
17 had the knowledge that this had a
18 negative elevation, because they tried
19 to get them a better premium and were
20 unable to do so, and that is what their
21 notes reflect.

22 Very important also, the testimony
23 from the insurance agency, which for
24 whatever reason Plaintiffs determined,
25 decided not to sue, the insurance

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2 agency, we took three -- or four,
3 excuse me, four different depositions
4 and both from the president or CEO of
5 the company and also their 30(b)(6)
6 representative, both of them said that
7 policies and procedures would be
8 normally that they would tell the
9 customer if they were placing
10 insurance, flood insurance, that they
11 had it on property that had a negative
12 elevation. Plaintiffs claimed they
13 were never told this. Whether or not,
14 that is a question of fact, but it
15 doesn't matter. For purposes of
16 statute of limitations what the
17 Plaintiffs actually knew is not the
18 test. It is what they are imputed to
19 know through their agent, the insurance
20 agency or the insurance agent.

21 The Plaintiffs had cited in their
22 brief to a case which they claim says
23 no, no, there is no agency relationship
24 between an insurance agent and a
25 customer. Your Honor, that is

1 MOTION HEARING

2 absolutely incorrect. The case that
3 they cite has to do with purchasing an
4 insurance policy and what the
5 relationship is between the purchaser
6 of the policy and the carrier, and that
7 case simply says that there is no
8 fiduciary relationship at the time of
9 the purchase of the policy between the
10 customer and the carrier. That has
11 nothing do with the issue before your
12 Honor.

13 What is before you is the
14 relationship between the Plaintiffs as
15 the customer and their own insurance
16 agency Seacoast. That is an agency
17 relationship, whether or not it is a
18 fiduciary relationship is immaterial to
19 the examination. The examination for
20 purposes of imputed notice is the
21 agency relationship and no one could
22 argue that an insurance agent is not
23 the agent for the customer. I mean
24 obviously they are the agent for the
25 customer.

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2 So the knowledge of the insurance
3 agent, which we know they had before
4 the closing, which we know they had in
5 December of 2004 based on that entry is
6 imputed to the customer or here the
7 Plaintiff.

8 So we have the Plaintiffs on
9 inquiry notice in 2003 and each year
10 thereafter when they got their policy.

11 We have them on imputed notice
12 through their insurance agency.

13 And one could argue that they had
14 actual notice because they did receive
15 the elevation certificate before
16 closing.

17 Now, they contend they didn't read
18 it. They didn't look at it. They are
19 also going to contend, or they do
20 contend in their depositions that they
21 never really looked at their insurance
22 information. But the case law in South
23 Carolina is legion, when you enter into
24 an insurance contract you are bound to
25 read what your contract is; and you

1 MOTION HEARING

2 will not be heard later to say oh, I
3 just didn't read it, therefore you
4 can't bind me to the information and
5 the qualifications within my policy..
6 So the fact that they chose not to read
7 their information does not take them
8 out of the running of the statute of
9 limitations.

10 Clearly in this case the
11 Plaintiffs knew or should have known
12 through the exercise of reasonable
13 diligence that they might have a claim
14 either against the sellers, who didn't
15 alert them to any elevation issue or
16 any of the other defendants, that they
17 might have a claim; and they have three
18 years from that time to pursue, to look
19 into, to examine whether or not they
20 might have a claim. That is what the
21 statute of limitations law is, your
22 Honor.

23 And clearly the statute has run as
24 to all of the defendants. The first of
25 the defendants, which did not include

1 MOTION HEARING

2 my client; my client didn't get sued
3 until March of 2009. This case had
4 been ongoing almost a year before the
5 lawyers were added. The first of the
6 defendants or the rest of the
7 defendants I believe were sued in the
8 spring of 2008 or at some point in
9 2008.

10 MS. GRAHAM: February 18, 2008.

11 MS. WALL: February 18, 2008.

12 So at the time of closing or at
13 the latest in December of 2004 they had
14 three years to pursue a potential claim
15 and file their claim. I mean you have
16 to file it within the three years, and
17 they clearly did not do that because
18 that would take us to December of 2007,
19 right, and they didn't file their first
20 suit. That is the latest possible
21 would be December 2004. And they
22 didn't file the first of their suits
23 until February of 2008.

24 And then they didn't come after or
25 name Laurich & Deeb until March of

1 MOTION HEARING

2 2009. So they are way past their
3 statute of limitations as well with
4 regard to Laurich & Deeb.

5 Now, your Honor, we have moved on
6 two other grounds, but for your
7 purposes you may prefer to hear the
8 statute of limitations argument as to
9 and allow the other defendants and then
10 Plaintiff's counsel to discuss that
11 issue, because it may even make moot my
12 additional grounds for summary
13 judgment.

14 THE COURT: Let us do that. I am
15 happy to hear from however order you
16 want..

17 MS. GRAHAM: How do you want to do
18 it?

19 THE COURT: I am guessing it is the
20 same arguments.

21 MR. HUDSON: It is.

22 MS. WALL: Well, they may have
23 some additional.

24 THE COURT: I don't mean exactly
25 the same. I meant from the same side

1 MOTION HEARING

2 SO --

3 MS. GRAHAM: Your Honor, my name
4 is Katherine Graham and I represent Tom
5 and Jan Dye.

6 As Mrs. Wall pointed out Tom and
7 Jan Dye were the previous homeowners of
8 48 Sea Lane. 48 Sea Lane is where the
9 home is located and is the subject of
10 this suit. And I apologize, some of
11 the stuff that I am going to say is
12 redundant because we are piggybacking
13 from each other. But there are some
14 things that I would like to point out
15 that Mrs. Wall did not point out.

16 First, this home was sold to the
17 Plaintiffs on December 2, 2003. The
18 Plaintiffs filed their initial
19 complaint against my clients on
20 February 18, 2008. Plaintiffs allege
21 that my clients did not alert them of
22 the negative elevation of the home and
23 failed to alert them to any negative
24 consequences, if any, of the negative
25 elevation.

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2 They also assert that my clients
3 failed to advise them that the negative
4 elevation constituted a building code
5 violation.

6 Your Honor, as a result they filed
7 this initial complaint against my
8 clients and brought a cause of action
9 of negligent misrepresentation,
10 negligence, breach of contract, breach
11 of contract accompanied by a fraudulent
12 act, civil conspiracy fraud,
13 constructive fraud, and rescission in
14 violation of South Carolina Code
15 27-5010, which is the seller disclosure
16 form.

17 Your Honor, it is my understanding
18 that the statute of limitations on all
19 those causes of action is as Mrs. Wall
20 stated three years. It is our
21 contention as it is the Dye's
22 contention that the statute of
23 limitations did begin to run on the
24 closing date, which was December 2,
25 2003. And as I already made the court

1 MOTION HEARING

2 aware they did not file their action
3 until February 18, 2008, which is more
4 than four years after the closing of
5 the purchase.

6 Your Honor, before I go into more
7 facts of this case I just wanted to
8 bring to the court's attention a case
9 that is Dorman v. Campbell, and this is
10 also in my brief, your Honor.

11 THE COURT: Thank you.

12 MS. GRAHAM: The reason that I
13 bring this case to the court's
14 attention is that it is very similar to
15 the facts of the case that are at hand.

16 Your Honor, in Dorman the
17 purchaser of a home sued the seller of
18 the home for fraud, constructive fraud,
19 civil conspiracy, and unfair trade
20 practices; and also against the realtor
21 for negligence, breach of fiduciary
22 duties and unfair trade practices. The
23 claims in Dorman arose from the fact
24 that the ground floor of the house was
25 below base flood elevation as

1 MOTION HEARING

2 prescribed by FEMA. Exactly what or
3 very close to the allegations that the
4 Plaintiffs have brought in this case.

5 The court granted on summary
6 judgement on all causes of action
7 ruling that the applicable three year
8 statute of limitations began to run
9 when the Dorman's through exercise of
10 reasonable diligence should have known
11 of the existence of their claims by the
12 closing date. The court held that the
13 Dorman's received a plat as well as an
14 elevation certificate for the purchase
15 of flood insurance prior to the
16 closing, clearly indicating that the
17 property was located in a special flood
18 hazard and the property had a negative
19 elevation. Exactly the same in this
20 case, your Honor.

21 The court also noted that the
22 Dorman's also had hired a professional
23 home inspector, as well as a plethora
24 of other experts to look at this home
25 before they purchased. Again, your

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2 Honor, the same facts in this case.
3 The Plaintiffs had had a home
4 inspection and also had hired or had
5 contracted with an insurance agent and
6 contracted with a closing attorney.
7 Just to note, that in this closing,
8 your Honor, my clients were represented
9 by Cary Griffin, and Plaintiffs were
10 represented as Mrs. Wall noted by Bob
11 Deeb as the closing attorney.

12 Lastly, in the Dorman case the
13 court noted that a closing package was
14 sent from the seller's attorney to the
15 Dorman's closing attorney, and the
16 cover letter also indicated that the
17 home had a negative elevation. Just
18 with these three facts, your Honor, the
19 court found, the trial court found, and
20 the Court of Appeals affirmed that the
21 Dorman's through exercise of reasonable
22 diligence should have known of the
23 existence of the claims with regard to
24 a negative elevation at that closing,
25 that the statute began at that closing

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2 date.

3 Your Honor, I just want to point
4 that case out to you first and the
5 other thing is to go over some of the
6 facts that Mrs. Wall had already gone
7 over. I just wanted to add a few that
8 I believe she didn't include in her
9 argument.

10 She did include this. I just want
11 to make it clear, your Honor, that
12 before closing on the purchase of the
13 home the Plaintiffs did receive a copy
14 of that 2001 elevation certificate
15 certifying the elevation at 13.3. My
16 clients and/or their attorney provided
17 that to not only to the Plaintiffs, but
18 also to their closing attorney and that
19 is an undisputed fact. The fax dated
20 11-26 -- excuse me, I am getting ahead
21 of myself, I apologize, your Honor.

22 The Plaintiffs received a copy of
23 the 2001 elevation certificate from
24 their closing attorneys. Furthermore,
25 the Dye's attorney also sent the

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2 Plaintiffs' closing attorney and the
3 real estate agents a copy of the 2001
4 survey, which also showed that there
5 was a negative elevation on the house.

6 Furthermore, this is something
7 that Mrs. Wall didn't add, Dr.
8 Gottschlich had created a pro forma
9 spread setting forth the estimates of
10 the cost to maintain the home. And
11 your Honor, if I could direct you to my
12 brief. I have attached the pro forma
13 spread sheet as Exhibit K.

14 THE COURT: Okay. I have it.

15 MS. GRAHAM: In his estimates Dr.
16 Gottschlich testified that he estimated
17 an amount of \$592 as the annual flood
18 insurance premium. If you look about
19 midway down on that pro forma you can
20 see that there is a spreadsheet in the
21 middle of the page that starts with
22 EXT. MAINT. Do you see that, your
23 Honor?

24 THE WITNESS: My copy is not the
25 best.

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2 Oh, right down here. I see it,
3 yeah.

4 MS. GRAHAM: If you go in the
5 middle of that column you will see that
6 there is something that says flood INS.

7 THE COURT: I see it.

8 MS. GRAHAM: Dr. Gottschlich
9 testified that he had estimated prior
10 to the closing that the annual flood
11 insurance for this home should have
12 been \$592, and I just for the record
13 want to read exactly what Dr.
14 Gottschlich testified as follows:

15 "Question: Were you aware that
16 the flood insurance premium for 48 Sea
17 Lane would cost you \$2,620 before
18 closing?

19 Answer: I believe so, because I
20 believe on the Truth in Lending
21 Statement that it may have been called
22 out separately.

23 Question: Did you question anyone
24 about this difference of the estimate
25 of \$592 as noted on your Hilton Head

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2 pro forma and the quoted premium of
3 \$2,620 as noted on the Travelers flood
4 insurance application?"

5 Which was marked as Exhibit 22 in
6 that deposition, your Honor.

7 "Answer, I don't recall doing
8 that, but there were so many
9 different -- no, I don't recall doing
10 that."

11 Your Honor, clearly the difference
12 between \$2,620 and an estimate of \$592
13 would put a reasonable person on notice
14 to say hey, what is going on with my
15 flood insurance, and why is it so much
16 more than I estimated prior to closing.
17 But again, your Honor, Plaintiffs asked
18 no questions. So that is just in
19 further of Mrs. Wall's testimony. That
20 is just another thing that put these
21 clients on notice that something,
22 something was up with their flood
23 insurance.

24 Your Honor, all the other facts
25 that I was going to discuss Mrs. Wall

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2 has already addressed with the court.

3 But your Honor, we are respectfully

4 asking this court to grant my client's

5 motion for summary judgement based upon

6 that the Plaintiffs failed to bring

7 their claims within the three year

8 statute of limitations, which we

9 contend ran or started running on the

10 closing date. However, as Mrs. Wall

11 correctly pointed out at the latest we

12 would say that it began running on

13 December 14, 2004, because obviously

14 their agent had the knowledge that

15 there was a negative elevation problem

16 with this house. So again, it would

17 still even if the court saw that the

18 statute of limitations began running

19 December 14, 2004, the clients were

20 still outside the applicable three-year

21 statute of limitations.

22 THE COURT: Okay, thank you.

23 MR. MAHAFFEE: Are you ready, your

24 Honor?

25 THE COURT: Yes, sir.

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2 MR. MAHAFFEE: Your Honor, I am
3 Max Mahaffee and I am here on behalf of
4 The Byrne Corporation, doing business
5 as Dunes Marketing Group, as well as
6 the Defendant Ken Oliver.

7 I also had a copy of Dorman versus
8 Campbell. I guess the easiest thing
9 for the court, as well as for me at
10 this point, is for me to adopt by
11 reference the arguments that have been
12 made thus far by the two other
13 defendants whom you already heard from.

14 And certainly Dorman versus
15 Campbell is applicable in this not only
16 because it deals with the statute of
17 limitations, but it also dealt with a
18 flood elevation. It also dealt with
19 the knowledge being imputed to the
20 Plaintiffs through their agent, and
21 clearly it states that in that case --
22 that the Dorman case also goes on to
23 say, it is well established that a
24 principal is affected with constructive
25 knowledge of all material facts of

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2 which his agent receives notice while
3 acting within the scope of his
4 authority.

5 Now, as far as that, the insurance
6 agency, you have heard that. And in
7 the Dorman case they talk about it
8 being imputed through their attorney.
9 I just will state that however they got
10 it, it is apparent that these doctors
11 from Ohio came down here to South
12 Carolina, and they can now say oh, we
13 didn't know, we had no idea and stick
14 their heads in the sand. Well, that is
15 not South Carolina law. When you are
16 on inquiry notice, when you are on
17 constructive notice, or here when you
18 have got actual notice, you cannot
19 simply put your head in the sand and
20 say that gee, we should be allowed to
21 sue someone.

22 We talked a little bit also about
23 the insurance agency not being in here.
24 As was put on Page 15 of my memorandum,
25 which your Honor has a copy of, Bill

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2 Baldwin, who is the director of sales
3 and marketing and also was the 30(b)(6)
4 deponent for the Byrne Corporation,
5 doing business as Dunes Marketing,
6 testified the requirement of the Town
7 of Hilton Head is to insure the first
8 floor is above the required elevation
9 before the Town issues the Certificate
10 of Occupancy.

11 Well, in this particular case he
12 had said I have never until this
13 litigation came up ever knew that there
14 was any house below the flood level
15 which was built after it became a town.
16 And everybody said there is some slab
17 homes around. We aren't talking about
18 a slab home. We are talking about an
19 elevated home which should have been 14
20 feet, and we aren't sure but maybe 13.3
21 feet. That is the difference. Well,
22 we really don't know because there are
23 two separate surveys.

24 So they are asking the court to,
25 you know, allow this, even though as

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2 Ms. Wall had said that over and over
3 again were going to their insurance
4 agent. They received a copy of the
5 elevation certificate. Certainly this
6 is a joint venture, so what notice one
7 gets, it is imputable to the other
8 Plaintiff. So they can't cut it out.
9 This is not like a husband and wife, if
10 even that could occur.

11 And the talk about the survey
12 which -- the survey and elevation
13 certificate that they received November
14 16, 2003, also page 15 Mr. Baldwin on
15 behalf of Dunes Marketing say that none
16 of the involved real estate agents with
17 Dunes Marketing received a copy of the
18 survey and also states is "My testimony
19 is that we did not receive it."
20 Because the point kept pushed and
21 pushed. They didn't receive it. So
22 how can you give somebody any knowledge
23 if you don't have it.

24 Now, that is entirely different
25 than the insurance agent as Ms. Wall

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2 has gone through quite a bit. They are
3 going out to Travelers who got the base
4 flood policy, and we have taken
5 depositions of I believe four people
6 with Seacoast Insurance. All of them
7 give a slightly different but same,
8 Travelers requires an elevation
9 certificate, period, before any flood
10 policy is issued. This was not a
11 carryover policy that was transferred
12 over from the Dye's. It was a new
13 policy. So that was notice at that
14 point under Dorman versus Campbell and
15 simply bars and blocks the Plaintiffs
16 on the statute of limitations.

17 I think there are other things
18 certainly in my brief and in the
19 attachments regarding the statute of
20 limitations, but as I said I am
21 adopting what has already been said
22 before and I do not want to belabor the
23 Court, although this is a very
24 important case to my clients. Thank
25 you your Honor.

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2 THE COURT: Thank you. All right.

3 MR. HUDSON: I feel like I am
4 being ganged up on, and I don't know
5 where to start.

6 Your Honor, John Hudson, on behalf
7 of the Plaintiffs. I can understand
8 and appreciate all of the defendants'
9 arguments, but the fact of the matter
10 is that all of those arguments construe
11 the facts in the light most favorable
12 to themselves, and that is not the
13 standard at this juncture of the
14 proceedings.

15 Now, the myriad issues that are
16 relevant here, and I will concede I
17 think at the end of the day when the
18 statute of limitations started to run
19 is a question of fact that the jury is
20 going to have to decide in this case.

21 Katherine's clients, Jan and
22 Thomas Dye had all of this testimony in
23 their deposition. We told the
24 Plaintiffs everything we knew about the
25 house. We filled out the disclosure

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2 form to the best of our ability. We
3 didn't know anything about the
4 increased flood premium. This is all
5 just news to us. We are astonished.

6 Well, about a week ago when we
7 were taking the deposition of the
8 Seacoast representatives, after that
9 representative is pushed and prodded
10 for documents we get this document
11 right here. This is cited in my memo,
12 but for your Honor's convenience I have
13 copied it. This letter is dated
14 February 25 of 2003, which is, you
15 know, 9 months or so before my folks
16 put an offer on and then closed on the
17 house.

18 This letter states in no uncertain
19 terms and it is addressed to Tom and
20 Jan Dye. The address that it is being
21 mailed to is their address in Georgia.
22 Your flood policy, which is part of the
23 wrap that is referred to in this
24 letter, is being canceled. We can find
25 you flood insurance and the premium for

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2 the new flood coverage that we can
3 place for you would be approximately
4 \$2700. And then down at the bottom
5 with three asterisks beside it is the
6 statement: "Please be advised that
7 your flood premium is high due to the
8 elevation of your home. The base flood
9 is 14 feet and your home is at 13.3,
10 which makes it .07 below base flood
11 elevation." And this letter was
12 authored or prepared by Shelley Wright
13 of Seacoast Insurance.

14 Well, the Dye's never produced
15 this letter during discovery. Nobody
16 does. It comes to light about a week
17 ago. What is also interesting about
18 this information is roughly eight days
19 after the date of this letter on March
20 3 of 2003, Tom and Jan Dye enter into a
21 listing agreement with Dunes Marketing
22 to put the house on the market.

23 Now, they also testified in their
24 deposition that one of the reasons that
25 they decided to sell the house was

1 MOTION HEARING

2 because they were having financial
3 difficulty. Katherine's clients knew
4 that there was an issue with flood
5 insurance. It was in all probability
6 becoming cost prohibitive. They just
7 sat on this information. It was
8 material to the transaction. As the
9 sellers of the property they had a duty
10 to disclose it to my folks as potential
11 purchasers. They didn't do it.

12 Furthermore, they didn't produce
13 this letter during discovery. There is
14 absolutely legitimate effort that the
15 Dye's committed fraud in this case.
16 And so for that reason even were the
17 statute of limitations argument to have
18 some merit as Miss Graham has set
19 forth, it would not apply under the
20 circumstances of fraud or constructive
21 fraud as to her clients. And this
22 letter alone gets us to that point at
23 this stage of the proceedings.

24 Now Ms. Wall in her argument made
25 reference to various facts being

1 MOTION HEARING

2 undisputed. I disagree with that. I
3 think certain facts she alluded to are
4 in fact disputed. The survey and
5 elevation certificate, or at least one
6 of the elevation certificates that is
7 at issue in this case, were prepared by
8 Sea Island Land Surveying in March of
9 2001. Both documents were prepared for
10 Tom and Jan Dye when they first bought
11 the property in 2001. Well, when they
12 get a contract on the property with my
13 clients in 2003, my folks go to Laurich
14 & Deeb and contract with them to
15 represent them as their closing
16 attorneys.

17 Mr. Deeb never gets a new
18 elevation certificate or survey for my
19 clients or recommends that they do so.
20 What he does is he simply gets a copy
21 of the elevation certificate and survey
22 that has been prepared previously for
23 the Dye's, and there is conflicting
24 evidence on how, if at all, that
25 elevation certificate got to my

1 MOTION HEARING

2 clients.

3 Susan's clients can point to a fax
4 that would indicate it was sent to my
5 folks. My folks said they don't have
6 any recollection of receiving it. But
7 Bob Deeb testified in his deposition
8 under oath my office I believe sent
9 this elevation certificate directly to
10 Seacoast Insurance.

11 So part of the problem here is we
12 have the closing attorneys acting on
13 behalf of my clients getting documents,
14 signing documents, reviewing or not
15 reviewing documents, and they are not
16 keeping my clients informed. That is
17 the absolute crux of our claims against
18 the closing attorneys.

19 It is our contention, and I submit
20 to the court that there are two dates
21 that you can look to for when the
22 statute of limitations with the
23 discovery rule applying commenced
24 running in this case. The first would
25 be in April of 2006, at which time Greg

1 MOTION HEARING

2 Gottschlich went to Seacoast Insurance
3 to look into the possibility of getting
4 excess flood coverage. Up until this
5 point in time he had maintained the
6 \$250,00 of flood coverage on the
7 dwelling that is FEMA mandated, but
8 that is all he had. That is what the
9 lender required. That is what he
10 requested and was satisfied with at
11 closing.

12 After Katrina strikes the gulf
13 coast in 2005, he and Don McNeil, who
14 he bought the house with, say if an
15 event like this happens here in Hilton
16 Head are we adequately protected from
17 the peril of a flood. So they look
18 into getting additional flood coverage.
19 So they go to Seacoast insurance, and
20 they talk to a lady named Tina Farrell.
21 They have asked her to quote them a
22 price for the flood coverage, and in
23 the process of doing so she says I
24 can't do it. In looking at the
25 information on your house it has got a

1 MOTION HEARING

2 negative elevation, and we don't have
3 access to any carriers who will write
4 excess flood coverage on a house with a
5 negative elevation.

6 So Greg at that point in time says
7 well, that is news to me. What should
8 I do? And then he takes it upon
9 himself to investigate the situation.
10 He goes back to the house. He measures
11 the height in a very rudimentary
12 fashion. He also calls the Town of
13 Hilton Head Island to let them know
14 that he is having a problem getting
15 excess flood insurance. And he says
16 can you do anything to help me.

17 Trudie Johnson, who is the flood
18 plain administrator over there, sends
19 him a copy of the elevation certificate
20 that is on file with the Town of Hilton
21 Head; and I will show that to your
22 Honor just for the sake of your
23 edification, Number 5. When Greg gets
24 this document it indicates that the
25 house is in fact compliant with the

1 MOTION HEARING

2 base flood elevation.

3 THE COURT: All right. This is
4 from the Town. All right, got it.

5 MR. HUDSON: So at this point we
6 have two conflicting elevation
7 certificates. He doesn't know which
8 one might be right, which one might not
9 be right, because neither one of them
10 were prepared for him or at his
11 request. So he contacts both Sea
12 Island and Coastal and asks if they can
13 verify the information contained on the
14 Sea Island survey elevation
15 certificate, the one that showed a
16 negative elevation of 13.3 feet.

17 Well, Sea Island goes back out to
18 the house and re-shoots the elevation
19 and they say yeah, the information that
20 we are showing on the certificate is
21 checking out.

22 So Greg makes a call to Coastal
23 Surveying and asks if they will go out
24 there and verify the information
25 contained in the Sea Island Land

1 MOTION HEARING

2 survey. They go out there and say
3 yeah. It appears that that information
4 is in fact correct. And then he says
5 well, I have got this elevation
6 certificate that you guys prepared and
7 sealed back in 1987. What is the deal?
8 And he gets some kind of vague
9 response, and at that point in time he
10 simply calls his closing attorney Bob
11 Deeb and says what is the deal? And
12 Bob Deeb says well, I am not sure, but
13 I will try to help you out in whatever
14 way I can.

15 So then in December of 2006 my
16 client gets this letter and it is -- I
17 am sure or at least I produced it as an
18 exhibit to my memorandum.

19 MS. WALL: 25. Exhibit 25.

20 MR. HUDSON: 25. They get this
21 letter from Bob Deeb, and Bob clearly
22 sets forth the steps that he still
23 intends to take with regard to helping
24 these folks address the problem.

25 So even were the argument that

1 MOTION HEARING

2 Susan has set forth to have merit in
3 your opinion, I would argue, your
4 Honor, that the statute of limitations
5 defense should not be available to them
6 on the basis of equitable estoppel.

7 Mr. Deeb has clearly indicated
8 that he intends to take steps to help
9 my folks address the problem, and
10 nowhere in that letter does he leave
11 them with any other impression, and
12 they relied on that. But Mr. Deeb
13 never did that. But --

14 THE COURT: Okay, go on.. I am
15 listening.

16 MR. HUDSON: One of the points
17 that needs to be emphasized here is the
18 defendants are all referencing the fact
19 that the cost of the basic flood
20 insurance premium is critical. The
21 difference in what the premium amount
22 should have been, versus what my
23 clients were initially asked to pay for
24 the FEMA mandated coverage they got
25 through Travelers should have put them

1 MOTION HEARING

2 on notice that there was a problem with
3 the house.

4 Well, that is not necessarily the
5 case. My folks got the amount of flood
6 coverage that they requested at the
7 closing and they never had a concern
8 about the premium amount. Now, whether
9 or not they should have, that would be
10 a question of fact that the jury will
11 need to decide. The problem came to
12 light in April of 2006 when Tina
13 Farrell told them that they could not
14 get excess flood coverage, and then
15 they start investigating the problem
16 and they learn from Trudie Johnson, the
17 Town of Hilton Head, that this is not
18 just an insurance issue, because the
19 negative elevation constitutes a code
20 violation. And you guys are in
21 violation of the applicable flood plain
22 management ordinance that has been
23 adopted by the Town. We will in the
24 future require you to take corrective
25 action to fix the problem.

1 MOTION HEARING

2 So now my folks are in the
3 situation of owning a property that is
4 below the applicable base flood level
5 that they are going to have to pay to
6 get fixed, and it is going to cost
7 them -- we got two estimates. It is in
8 between 275,000 and \$375,000 to do
9 that.

10 Now, once my folks understood that
11 this negative elevation actually posed
12 something of a problem, that some right
13 of theirs had been invaded, and that is
14 when the statute of limitations began
15 to run; not back in 2003 prior to the
16 closing or at the closing simply when
17 you could argue that they should have
18 at least appreciated the fact that the
19 house had a negative elevation. I mean
20 heck, we have taken 15 to 20
21 depositions in this case and virtually
22 everybody who has been deposed, all
23 these real estate experts, the brokers,
24 the lawyers, what have you and they
25 said yeah, I got this information, but

1 MOTION HEARING

2 I either don't look at it or it didn't
3 mean anything to me the at the time
4 because I don't have a duty to pick up
5 on that type of information. And now
6 we hear the argument from all the
7 defendants saying you guys had this
8 information, Plaintiffs, and you should
9 have picked up on it and appreciated
10 the significance of it. It is just a
11 contradictory argument that doesn't
12 hold water, at least at this stage of
13 the proceedings. A jury could
14 disagree, but that is not a matter to
15 be decided in favor of the defendants
16 at this stage, your Honor.

17 THE COURT: All right.

18 Anything else?

19 MR. HUDSON: I am sure I will, but
20 I will let Susan respond.

21 THE COURT: Keep going in this
22 direction.

23 MS. WALL: Your Honor, I will
24 limit myself to addressing to what was
25 just presented to you by Plaintiffs'

1 MOTION HEARING

2 counsel. First of all, under the law I
3 respectfully disagree with counsel.

4 This is not an issue for the jury.

5 This is in fact an issue for the court.

6 Every case we have on statute of

7 limitations law almost without

8 exception in South Carolina came on

9 appeal from the granting of a motion

10 for summary judgment on statute of

11 limitations in almost every one of

12 them, because at least 50 percent of

13 them on my cases were upheld by our

14 Supreme Court, and there is a reason

15 for it. It is because when you do your

16 statute of limitations argument it is,

17 and the reason it is for the Court, is

18 because we don't get into who thought

19 what, that sort of thing.

20 The Court looks at what the

21 document is. Not someone's gloss on

22 the document, but just on the document.

23 And that is why it is -- the only facts

24 that I brought to your attention, your

25 Honor, were not disputed facts. They

1 MOTION HEARING

2 are not disputed facts. The documents
3 speak for themselves. That is why I
4 only pointed, your Honor, and that is
5 why I have only used documents in this
6 summary motion that say what they say.
7 I am not telling you what they say.
8 They say it.

9 Mr. Hudson tells your Honor, well,
10 there is some issue of fact with regard
11 to whether or not my client received
12 the elevation certificate based on the
13 fax Exhibit Number 9, your Honor. It
14 is undisputed that Laurich & Deeb as
15 this shows faxed this, and it is
16 undisputed that the fax number is
17 correct. That is the fax number. I
18 asked Dr. McNeil. That is his fax
19 number, and down at the bottom this fax
20 number for Dr. Gottschlich. That is
21 what the document says. There is
22 absolutely no evidence. The fact that
23 Dr. McNeil doesn't remember it. That
24 is his testimony. Well, I don't
25 remember if I got this or not. This

1 MOTION HEARING

2 fax went to him.

3 But that isn't the only basis that
4 we have moved on, the fact that he got
5 a copy of the elevation certificate.
6 The critical issue here, your Honor,
7 and they haven't even addressed this,
8 because they can't, the critical issue
9 is that the Plaintiffs' insurance agent
10 received all of the information
11 necessary to obtain on behalf of the
12 Plaintiffs a flood policy. You cannot,
13 it is undisputed in this record, you
14 cannot get, you cannot price a flood
15 policy without having an elevation
16 certificate, period. They all admitted
17 we had the elevation certificate, that
18 is how we filled out the application.
19 We cannot fill it out without the
20 elevation certificate.

21 Now, Counsel argues that we should
22 be looking at the statute of
23 limitations as beginning to run in
24 April 2006. Your Honor, we would only
25 do that if the law in South Carolina

1 MOTION HEARING

2 were that you have to have actual
3 knowledge. But that isn't the law, and
4 the law is crystal clear. The law in
5 South Carolina is that it is when you
6 knew or should have known through the
7 exercise of reasonable diligence, and
8 it is not a subjective standard. It is
9 an objective standard.

10 He then goes on to say, well, let
11 us look at this letter from Mr. Deeb to
12 the Plaintiffs dated December 8, 2006.
13 I am happy to look at this letter. Let
14 us see what this letter says. It is
15 undisputed that Plaintiffs waited.
16 They say they had actual knowledge that
17 the elevation was minus 1. It is
18 actually minus .7, but whatever, minus
19 1, they had actual knowledge in the
20 spring of 2006. Mr. Hudson just said
21 that and there is no question about
22 that. And yet they wait until December
23 the 1st, 2006 to call Mr. Deeb, one day
24 before the three years running of the
25 statute of limitations on a claim.

1 MOTION HEARING

2 They call him on the 1st. The 1st
3 is a Friday as he explains in here. He
4 diligently -- the file is off-site --
5 he diligently gets the file, looks at
6 it on the next business day which is
7 Monday the 4th. And he says in here he
8 is having a -- he had a discussion with
9 Greg, Greg being Greg Gottschlich.

10 Now, what I am very concerned
11 about what was just told to you is that
12 somehow Bob Deeb failed the Plaintiffs
13 because he didn't do that which is set
14 forth in the first paragraph.

15 Well, your Honor, he didn't do it
16 because the Plaintiffs hired a
17 litigation attorney; not this attorney,
18 an earlier attorney. They went out and
19 hired or spoke to Jack Qualey to get
20 him to represent them in this matter.
21 Ultimately he declined to do so.

22 But as Mr. Deeb makes crystal
23 clear in here he is not a litigator.
24 He wouldn't know how to do a litigation
25 case. He is a real estate closing

1 MOTION HEARING

2 attorney. And he goes on to say in the
3 second page that he had already given
4 Greg -- I have given Greg -- at the top
5 of page 2 -- the names and telephone
6 numbers of three litigation attorneys.
7 And then he repeats them in this letter
8 that he writes on December 8.

9 The statute does not begin in
10 2006, because that is the date when the
11 Plaintiffs now claim they had for the
12 first time actual knowledge. The
13 statute of limitations has never, ever
14 been based on actual knowledge. And
15 let us think for a minute why is that.
16 Because that would mean that you could
17 sue somebody 60 or 70 years from now by
18 simply saying well, I didn't know.
19 Other people may have known, but I sure
20 didn't have any actual knowledge. That
21 is why that is not the test. The test
22 is what we have been through more than
23 once. So we don't look at the date of
24 2006.

25 This whole concept of equitable

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2 estoppel that they raise is squarely
3 met in the latest of my appeals, which
4 was upheld where the plaintiff argued
5 no, no, lawyer, you are equitably
6 estopped. You can't claim the statute
7 of limitations, and our Supreme Court
8 said no, you are wrong. Yes, they can.
9 They are not estopped from raising the
10 statute of limitations. The case is
11 Kelly versus Logan Jolly and Smith. It
12 is a 2009 case, and as our court points
13 out for equitable estoppel you would
14 have to prove first of all that the
15 Plaintiffs lacked knowledge or the
16 means of obtaining knowledge of the
17 truth of the facts in question.

18 And we know for a fact that the
19 Plaintiffs have all of this
20 documentation and/or their insurance
21 agent has actual knowledge, is trying
22 to get them a cheaper policy in 2004,
23 is filling out an application. They
24 are getting dec sheets every single
25 year. They cannot claim equitable

1 MOTION HEARING

2 estoppel. It doesn't work in this
3 case, and I will be happy to leave a
4 copy of Kelly Versus Logan Jolly and
5 Smith with your Honor.

6 So again in response, this is a
7 decision for the court. This is not a
8 decision for the jury and the should
9 have known standard takes us to what
10 occurred in 2003 with the insurance
11 agency, the insurance agent who had all
12 of the information. And if they failed
13 to tell the Plaintiffs, well, shame on
14 them, they should have. Because that
15 is their policy and procedure, they
16 have testified to that. That their
17 policy and procedure is to tell a
18 customer if their home has a negative
19 elevation. Plaintiffs claim they
20 weren't told that. Well, if we believe
21 the Plaintiffs, then shame on the
22 insurance agency, because by their own
23 policies and procedures they should
24 have told the Plaintiffs. And that was
25 their job to tell the Plaintiffs, and

1 MOTION HEARING

2 they failed in that undertaking.

3 So, your Honor, the statute -- we
4 do not look at 2006 when the Plaintiffs
5 had actual knowledge. We look at when
6 they knew or should have known, and
7 again the Dorman case which was given
8 to you is very, very clear on when the
9 statute begins to run.

10 And I don't want to belabor the
11 point, but I have to say one other
12 thing. It is so logical as to why we
13 have the should have known standard,
14 because they have three years from that
15 point. It is not as if they
16 immediately then have to go out and
17 immediately sue. They have three full
18 years to find out, do I have a problem,
19 what is this problem, if it is even a
20 problem.

21 Which takes me to my last point
22 because I have to address this, because
23 I am concerned about this as well. We
24 took the deposition of Trudie Johnson
25 from the Town. And in my

1 MOTION HEARING

2 cross-examination of her she admitted,
3 she said the only elevation certificate
4 that we have on file shows that this
5 house is in compliance. It is 14.16 in
6 a 14 zone. We, the Town, gave the
7 builder a CO. The Town said it is
8 fine. This house is habitable. It
9 satisfies the codes. This Town has no
10 basis to do anything as to these
11 Plaintiffs, because it is the Town
12 itself who gave the CO, and more
13 importantly the only thing they have in
14 their records, and they can only act,
15 she told me this, they can only act
16 according to what is in their official
17 file. And their official file shows
18 the elevation certificate from 1987,
19 which we have given to your Honor as
20 Exhibit Number 5, which shows that the
21 elevation is 14.16.

22 So it is not correct or I would
23 beg to differ with Plaintiffs' counsel
24 that the Town of Hilton Head has not
25 acted against these Plaintiffs and

1 MOTION HEARING

2 right now has no basis to act. They
3 couldn't act because they would be
4 going against their own CO and against
5 their own official elevation
6 certificate, which they accepted and
7 acted upon, which shows that it is
8 14.16.

9 And that is all I have. Thank
10 you, your Honor.

11 THE COURT: All right.

12 MS. GRAHAM: I just want to touch
13 on a few things that Mr. Hudson brought
14 up. He is arguing on both sides of the
15 coin. He is arguing that the statute
16 shouldn't run against his client
17 because they didn't have actual notice
18 of the negative elevation until April
19 of 2006. However, he wants this court
20 to impute all this knowledge of should
21 have known, could have known to my
22 clients who are in the exact same shoes
23 as John Hudson's clients, who were in
24 the same shoes as John Hudson's
25 clients. He can't have it both sides.

1 MOTION HEARING

2 And the point I am trying to make
3 is that it is undisputed that the
4 attorney -- for one, I believe that it
5 is undisputed that his clients did
6 receive a copy of the elevation
7 certificate showing that there was a
8 negative elevation. It is also
9 undisputed that his attorney was in
10 possession of the elevation certificate
11 showing that there was a negative
12 elevation. My clients through their
13 attorney turned over all these
14 documents that showed that the home had
15 a negative elevation.

16 Your Honor, you know, he is now
17 trying to state that this letter that
18 we did all receive last week from
19 Seacoast Insurance, who after receiving
20 a subpoena from John Hudson months ago,
21 after also receiving a subpoena from
22 Susan Wall months ago, finally
23 disclosed this letter. Your Honor,
24 this letter is suspect at best. If you
25 read the first paragraph it just says:

1 MOTION HEARING

2 Please be advised that our office has
3 been notified that Seacoast brokers
4 will not be renewing the above policy
5 effective April 3, 2003. Due to the
6 market changes the coverage is no
7 longer available on the
8 above-referenced policy. However, we
9 have been able to obtain other flood
10 insurance.

11 Your Honor, my clients are not
12 contending that the home did not have a
13 negative elevation. They provided all
14 the documents showing that it had a
15 negative elevation. They also were
16 able to maintain flood insurance on it.

17 But, your Honor, also it is
18 stating that the premium for the flood
19 insurance would be -- that my client
20 still got flood insurance. That the
21 flood insurance premium was \$2,723,
22 which is exactly as we stated before,
23 that the Plaintiffs paid about \$2620
24 when they closed on the property too
25 for their flood insurance premium.

1 MOTION HEARING

2 Your Honor, also this is just what
3 concerns me. My clients don't recall
4 this letter, and for Seacoast Insurance
5 to turn it over last week with an
6 asterisk that says: Please be advised
7 that your flood premium is high due to
8 the elevation of your home. It is in
9 the salutation of the letter. Where
10 did the person even sign this letter?
11 I mean it is very suspect at best, your
12 Honor.

13 My point is, this letter -- Mr.
14 Hudson want you to believe that this
15 letter negates all the other sufficient
16 facts that are undisputed that clearly
17 put the Plaintiffs on notice that this
18 house had a negative elevation. And
19 your Honor, there has been no evidence
20 presented by the Plaintiffs that my
21 client knew that the negative elevation
22 constituted a Building Code violation,
23 none.

24 MR. MAHAFFEE: A couple of quick
25 things, your Honor.

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2 THE COURT: Sure.

3 MR. MAHAFFEE: The statement by
4 Plaintiffs' counsel that they could not
5 get excess flood coverage, it is
6 crystal clear the testimony is that
7 Seacoast Insurance goes to a limited
8 pool. They like to work with just two
9 or three carriers. We have taken
10 deposition after deposition of those
11 folks: No, we can't get excess flood
12 for you. There is even a letter from
13 them saying -- or an E-mail that says
14 gee, I have had customers say that you
15 can go get it elsewhere. All they are
16 saying is that Seacoast cannot get the
17 excess coverage.

18 MS. WALL: May I just for your --

19 MR. HUDSON: I want to clarify the
20 record on that, your Honor. If I
21 stated that as a matter of fact that
22 they could not get it, that was not my
23 intention. I might have stated that
24 Seacoast told them that they couldn't
25 get it. But I also know I referenced

1 MOTION HEARING

2 that it was not available through the
3 markets that Seacoast had access to.

4 But in any event, I will certainly
5 clarify the record on that. It is
6 possible for them to get excess flood
7 coverage on the house. It is high
8 priced, but it is out there. There is
9 a market for it. So to the extent I
10 stated something to the contrary, that
11 was not my intention.

12 MS. WALL: And I have marked those
13 as Number 18, the excess flood quotes.
14 They can get it.

15 THE COURT: Okay.

16 MR. MAHAFFEE: In that case, with
17 Mr. Hudson saying that --

18 They were also talking about well,
19 you know, they are talking about -- Mr.
20 Hudson is saying well, they are saying
21 that they had the information. They
22 were the professionals, et cetera that
23 sort of inference.

24 I read to your Honor earlier that
25 Dunes Marketing did not get that

1 MOTION HEARING

2 information, did not get that document.

3 Now, what anybody else knows, we aren't

4 surveyors, we aren't anything else. If

5 the Town of Hilton Head says that it is

6 14.16 feet, what are we supposed to do?

7 We are real estate agents and in this

8 particular case they were dual agency.

9 I know it is not the law, but basically

10 they are like a matchmaker. They just

11 put two people together. It is not

12 like saying or selling somebody a

13 horse. Well, my horse's teeth are good

14 or anything like that.

15 In a dual agency they can't get

16 into all of that. They are putting two

17 people together. The two people are

18 exchanging more information than

19 anything else. They are marketing

20 people. That is what these real estate

21 agents are.

22 And other than that I will adopt

23 their second argument, your Honor,

24 because there is more to go and miles

25 to go before we sleep as they say.

1 MOTION HEARING

2 THE COURT: Uh oh. My 8 year old
3 daughter is in the next room. I hope
4 she doesn't get exhausted.

5 But you go ahead. You have a few
6 things to say.

7 MR. HUDSON: With regard to
8 Mr. Mahaffee's last point Bill Baldwin
9 testified on behalf of the Byrne
10 Corporation that they didn't get it.
11 It was copied to the licensee for the
12 Byrne Corporation; Ken Oliver. The
13 survey is attached. This letter was
14 written by Cary Griffin, who was the
15 Dye's closing attorney, and he also
16 happens to be the corporate secretary
17 for the Byrne Corporation; and he is
18 legal counsel to The Byrne Corporation
19 as well. So that there is imputability
20 issues that would come into play there
21 as well. But there is evidence that
22 Ken Oliver as a licensee of the Byrne
23 Corporation got this letter, which had
24 attached to it the survey with the
25 negative elevation information. So

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2 while they dispute it, there is
3 evidence to the contrary.

4 MR. MAHAFFEE: Your Honor, if I
5 may -- were you through, John?

6 MR. HUDSON: Go ahead.

7 MR. MAHAFFEE: The testimony from
8 Mr. Oliver as well as Mr. Baldwin said
9 we didn't get it. IT doesn't say at
10 the bottom of it with enclosures. They
11 were just providing information to us.
12 And Mr. Hudson said well, why would Mr.
13 Griffin be doing this, sending this to
14 another attorney. He said well, I
15 guess he is trying to be a nice guy,
16 provide the information. That is what
17 it was. It does not say with or
18 without enclosures.

19 But still we are now on the
20 statute of limitations argument. That
21 is where we are going and we keep
22 getting aside from that. Anything that
23 the plaintiff's attorney says does not
24 negate the statute of limitations
25 argument, which these three sets of

1 MOTION HEARING

2 defendants have stated to your Honor,
3 and it is just absolutely crystal
4 clear. Thank you, your Honor.

5 MR. HUDSON: Your Honor, it is
6 important to focus on the context of
7 this information here, because under
8 the discovery rule the statute would
9 begin to run when the Plaintiffs knew
10 or should have known that some right of
11 theirs had been violated, or they might
12 potentially have a claim against
13 others. But for the Plaintiffs' visit
14 to Seacoast Insurance in April of 2006,
15 and their desire to seek a quote on
16 excess flood, they would never know
17 that the house had a negative
18 elevation.

19 THE COURT: What about their
20 insurance bills that they got?

21 MR. HUDSON: I just disagree with
22 Ms. Wall's analysis of the law on that.
23 An insurance broker does not have a
24 fiduciary relationship with its
25 customer and that is an arm's length

1 MOTION HEARING

2 transaction. That is what the law
3 specifies. So I don't think that
4 information can be imputed from the
5 broker to my clients.

6 MS. WALL: Your Honor, may I
7 address that case that they cite
8 because it doesn't say that. The case
9 they cite is called Pitts versus
10 Jackson National Life, and I do have a
11 copy of that because I looked at it
12 right before I came; and I promise I
13 will find it. What Pitts says is it is
14 very clear. The sale of an insurance
15 policy did not create a fiduciary duty
16 to the applicant, and when you read it
17 inside here. And it is I can even
18 quote from it. If it is talking about
19 the relationship between, as I said
20 before in my earlier remarks, between
21 the insurance carrier, that is the
22 company, here the company sued was
23 Jackson National Life Insurance
24 Company, not an agent, not an agency,
25 but the company; and he was sued by

1 MOTION HEARING

2 Mr. Pitts, because Mr. Pitts was buying
3 a life or health policy for his
4 daughter. And he thought that he was
5 getting the cheapest and best policy
6 for her for her needs, and then he
7 found later that maybe he could have
8 gotten something that was cheaper or
9 whatever and so he was furious. And so
10 he sues the insurance company for not
11 saying gosh, we have another product,
12 and it would have saved you some money,
13 and he thought it was just a terrible
14 thing.

15 But this has nothing to do A, with
16 an agency. This case never says that
17 an insurance agent is not an agent.
18 That is exactly what an insurance agent
19 is. An insurance agent or agency is
20 the agent of the customer. Secondly,
21 this case has to do with a fiduciary
22 duty. A fiduciary duty is not the same
23 thing as an agency relationship. You
24 can have agents who are also
25 fiduciaries, but you can also have an

1 MOTION HEARING

2 agent who does not undertake fiduciary
3 duties.

4 So the case says what it says. I
5 have a copy for your Honor, and I will
6 be happy to leave it with you Honor.

7 THE COURT: Thank you.

8 MR. HUDSON: The question is who
9 Seacoast Insurance is the agent for.
10 Is it for the insurance carrier or for
11 the Plaintiffs? I mean that is the
12 question here, and there has been no
13 law cited that they are the agent for
14 the Plaintiffs.

15 MS. WALL: I will be happy, your
16 Honor, to give you legions of law that
17 say that an insurance agent in placing
18 insurance for a customer is the agent
19 of the customer. The agent may also on
20 occasion be the agent for the carrier,
21 although that tends to be less often,
22 because usually what happens is you are
23 dealing with what is known as an
24 independent agent. Seacoast, by the
25 way it is undisputed, is an independent

1 MOTION HEARING

2 agent. They don't sell, for example,
3 Allstate. Those are captive agents and
4 they are agents of Allstate for all
5 purposes that they do.

6 Independent agents will become an
7 agent of a carrier on occasion,
8 depending on if they -- depending on
9 what they have done and what they have
10 been asked to do, and whether that is
11 within the scope of their agency
12 agreement that they have usually
13 written with a company. But they are
14 clearly the agent for the customer who
15 came to them. It is like anyone else.
16 When you go to someone and say I want
17 you to do, get me something such as an
18 insurance policy and here are my needs
19 and my desires and so on and so forth,
20 clearly they are the agent.

21 How do we know that? Also because
22 they signed the application. Let us
23 look at the application, and it says
24 there that they and the -- the
25 application is Number 20 something --

1 MOTION HEARING

2 the application is Number 24. And on
3 the last page they are signing that
4 there is an agent's signature. And it
5 says: The above statements are correct
6 to the best of my knowledge, the
7 property owner and I. Clearly they are
8 the agent for the property owner in
9 signing off and sending this
10 application. Because both they and the
11 property owner are now subject to -- if
12 they give a false statement in here --
13 punishment by fine or imprisonment
14 under applicable federal law. It is
15 not last page, your Honor.

16 THE COURT: A couple of quick
17 questions.

18 With regard to the as-built
19 survey, which is Number 8 and Ms.
20 Wall's submission, is it my
21 understanding that the Plaintiffs
22 neither admit nor deny that they
23 received this? They just can't
24 remember, is that right?

25 MR. HUDSON: The as-built survey,

1 MOTION HEARING

2 I don't believe there is any evidence
3 that they received it. Their testimony
4 is that they did not receive the
5 survey, and I believe that is their
6 lawyer's testimony as well. That he
7 would not have sent the survey to them.

8 The elevation certificate, there
9 is evidence out there that it was sent
10 to them. There is no doubt about that,
11 and then the Plaintiffs testified they
12 did not have a recollection of
13 receiving it and doing anything with
14 it, but --

15 THE COURT: The elevation
16 certificate is which?

17 MS. WALL: Is Number 7, your
18 Honor.

19 MS. GRAHAM: But your Honor, may I
20 just point out that pursuant to Dorman
21 it is undisputed, though, that the
22 elevation certificate as well as the
23 survey was sent from my client's
24 attorney to the Plaintiffs' closing
25 attorney. And Dorman imputes that

1 MOTION HEARING

2 knowledge to the Plaintiffs, your
3 Honor; and Dorman is clearly on point
4 on that.

5 MR. HUDSON: Your Honor, that was
6 just one of a multitude of facts that
7 was considered in Dorman to determine
8 the date on which the statute began to
9 run. And if you read the case closely
10 you will see that the Court really
11 focuses on the letter that was authored
12 by the seller's attorney and confirmed
13 the existence of an elevation problem
14 with the property and sent to the
15 purchaser's attorney.

16 THE COURT: Ms. Wall, you had
17 mentioned something about Mr. Qualey
18 was consulted at some point --

19 MS. WALL: Yes.

20 THE COURT: -- about litigation.

21 MS. WALL: Immediately, yes.

22 THE COURT: Is there evidence in
23 this record as to when or why or how
24 that occurred, or just that it was
25 prior to the December 8 letter?

1 MOTION HEARING

2 MS. WALL: No, it was -- well, it
3 was roundabout that time. Because my
4 client gave a list of names, and I
5 think the testimony was that he recalls
6 he may have given them the name of
7 Qualey; and we know for a fact that
8 they talked to Qualey, because Qualey
9 subsequently called Mr. Deeb and said I
10 have determined I am not going to take
11 this case or words to that effect.

12 THE COURT: Okay. So they saw
13 Qualey after they saw Deeb?

14 MR. HUDSON: Correct.

15 THE JUDGE: I misunderstood.

16 MS. WALL: Yes, that is correct.
17 Right.

18 THE COURT: All right. Got it.

19 MS. WALL: But the point is they
20 don't even contact Mr. Deeb until
21 December 1. The closing was December 2
22 three years before, and he immediately
23 in that conversation says I am not a
24 litigator. You may have a statute of
25 limitations issue. I will you the

1 MOTION HEARING

2 names and here are some names of some
3 litigators. And that is what he did,
4 he gave them names of litigators and
5 then he puts it into a letter dated
6 December 8.

7 THE COURT: Okay. All right.

8 MS. WALL: Now, your Honor, I have
9 an additional -- actually two grounds,
10 but I wonder if you would prefer to --
11 I mean I will be happy to argue my
12 other grounds.

13 THE COURT: Let me consider the
14 statute of limitations issue and if we
15 need to get back together -- are those
16 grounds unique to your client?

17 MS. WALL: Yes, sir.

18 Well, excuse me, my second and
19 important ground having to do with
20 there is no breach in the standard of
21 care would be unique to my client.

22 The third ground I think would be
23 shared by all defendants, because it
24 goes to the claim of damages, you know.
25 That yes, they can get excess flood

1 MOTION HEARING

2 insurance so that is not a damage; and
3 they have offered no proof of what the
4 difference is between how much it would
5 cost them without a negative elevation
6 and how much it would cost them with a
7 positive elevation. So that is a
8 failure of proof on their part, so that
9 is not an element of damage.

10 And then the second element of
11 damage which is where they have always
12 said they are focused was the cost to
13 raise the home. Well, there is no
14 basis for that damage because the Town
15 of Hilton Head testified to what I
16 already told you, your Honor, so I
17 think that would be common to all
18 defendants.

19 THE COURT: Okay.

20 Was that the argument or was there
21 more on that?

22 MS. WALL: Well, I'm sorry --

23 MR. HUDSON: Now, I have to
24 respond to that.

25 MR. MAHAFFEE: For once, your

1 MOTION HEARING

2 Honor, you have heard the "Reader's
3 Digest" version from Miss Wall.

4 MS. WALL: Well, I am sure there
5 is more. But it seems to me that since
6 the statute of limitations is common to
7 all defendants, your Honor, my wish to
8 entertain that first, and then if we
9 need to come back we will certainly be
10 happy to do so. I feel badly, it is 20
11 after 5:00.

12 MR. MAHAFFEE: I agree with
13 Ms. Wall on that. I think the only
14 person that might have a short motion
15 to be heard is perhaps Miss Graham. I
16 can't speak for her about the
17 mediation, but --

18 MS. WALL: But we can't do
19 anything until there is a ruling.

20 MS. GRAHAM: We can't do anything
21 until there is a ruling.

22 MR. MAHAFFEE: Never mind.

23 THE COURT: Thank goodness.

24 MS. WALL: We have other discovery
25 motions, but we can't do anything --

1 MOTION HEARING

2 MR. MAHAFFEE: Forget I said
3 anything, your Honor.

4 THE COURT: Did you have anything
5 to address?

6 MR. HUDSON: I want to respond to
7 her damages argument, but if that is
8 not your argument -- I will in the
9 interest of time, I disagree with her.
10 I want to say that.

11 THE COURT: Well, that doesn't
12 surprise me a bit.

13 Well, let me do this, let me try
14 to sort through all of this. Can
15 someone please send me an E-mail with
16 everyone's E-mail so I can then respond
17 in some form or fashion?

18 MS. WALL: We will be happy to do
19 that.

20 THE COURT: With everybody who
21 represents everyone.

22 MS. WALL: We will be glad to do
23 that.

24 THE COURT: If you wouldn't mind if
25 you could send that to Heather and also

1 MOTION HEARING

2 to me. That would be great.

3 MS. WALL: Of course, I will be
4 happy to do that.

5 THE COURT: I will be happy to dig
6 through all of this and get back to you
7 all as quickly as I can, which might
8 not be that quickly, but I will do my
9 best.

10 Anything else we can do.

11 MS. WALL: No, we appreciate your
12 time.

13 THE COURT: Oh, no problem.

14 MR. HUDSON: Thank you, your
15 Honor.

16 (Whereupon, the hearing
17 was concluded at 5:31 p.m.)

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1 MOTION HEARING

2 C E R T I F I C A T E

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4 STATE OF SOUTH CAROLINA:

5 BEAUFORT COUNTY:

6

7 I, Ceil Weser, CSR and Notary

8 Public in and for the above county and state, do

9 hereby certify that the foregoing testimony was

10 taken before me at the time and place

11 herein before set forth; that the witness was by

12 me first duly sworn to testify to the truth, the

13 whole truth, and nothing but the truth, that

14 thereupon the foregoing testimony was later

15 reduced by computer transcription; and I certify

16 that this is a true and correct transcript of my

17 stenographic notes so taken.

18 I further certify that I am not of

19 counsel to either party, nor interested in the

20 event of this cause.

21

22

23 Ceil Weser, CCR

24 Notary Public

25 Beaufort, South Carolina

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IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

GREGORY M. GOTTSCHLICH & DONALD L. MCNEIL,
Plaintiffs,

vs.

CIVIL ACTION NUMBER
2008-CP-07-00517

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.

COPY

The Hearing, in the above entitled
cause, taken pursuant to Notice and agreement,
before Shannon Casper, Certified Court Reporter
and a Notary Public, held before The Honorable
Marvin H. Dukes, III, at the Beaufort County
Courthouse, Master and Equity Office, Room 212,
Beaufort, South Carolina, on the 16th day of
March 2010, commencing at or about the hour of
9:30 a.m.

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FOR THE DEFENDANTS KEN OLIVER and BRYNE
CORPORATION d/b/a DUNES MARKETING GROUP
ROBERT M. DEEB JR., and CHARLES H. WISEMAN:

17

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Charleston, South Carolina 29402

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MR. FEW: Your honor, West Few on behalf of the Plaintiffs Greg and Don Gottschlich who are doctors from Ohio that bought a piece of property at what's known as 48 Sea Lane in the Palmetto Dunes development on Hilton Head Island. And, of course, this is very important to my clients, and very important to all of us, and thus all the motions that you've been hearing, Your Honor. And I think the -- while this is my first appearance at the hearings and depositions on this matter, I have been involved in it from the beginning. And the issues that are before the Court today are motion for reconsideration based on the Court's granting summary judgment on most of all the claims with a few exceptions. And I think the thing that is super important is, that at any time today there's a discussion of facts that requires an inference to be drawn, that inferences must be viewed in the light

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most favorable to my clients.

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And there are numerous disputed facts. My client's job today is merely to point to the disputed facts and inferences to show that summary judgment is not proper.

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So where we are, Your Honor -- and I don't think there's any dispute on this -- my clients hired what they perceived to be the experts in handling real estate loan closing on Hilton Head Island in order to secure the purchase of a very expensive piece of property. I believe it was in the \$1.2 million range when it was purchased. And as the Court is well aware -- and I find great irony in this -- the State v. Buyer's Service Case, 357 Southeast Second 15 decided in 1987, the same year this house was built, and apparently this house was built unfortunately for everybody about nine inches too short on the elevation.

And apparently that was

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2 undiscovered by most until at some
3 point in time the Dyes certainly became
4 aware of it, the prior owners. And
5 they became aware of it at least as
6 early as the day they got a letter from
7 Sea Coast, who was their insurer,
8 telling them that their rates were
9 going up because they had a negative
10 elevation.

11 So, Your Honor, the lawyers who are
12 represented by Ms. Wall, were two
13 lawyers. Because my clients chose to
14 close this transaction by way of a power
15 of attorney. So, you have two lawyers
16 that reviewed all these facts. And what
17 the Court has done at this point in
18 time, is held my clients to a different
19 standard than the experts they hired to
20 handle this transaction for them. There
21 can be no dispute that this is a
22 significant issue.

23 My clients discovered, and their
24 testimony has been consistent, that in
25 April of 2006, following up on their

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inquiry into Hurricane Katrina -- which
of course, was a dramatic event for
everyone -- they said wow, we should go
and get excess flood coverage for our
place down in Hilton Head. And in
doing so, that's when they discovered
that they had this negative elevation.

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Undisputed, they had been provided
documents that showed that there was a
negative elevation. They were given
those documents from the very party
that they retained as experts to tell
them the significance of anything
related to the transaction. The
lawyers, as the Court certainly knows,
have a duty to advise their clients of
all material issues related to a
transaction. And here, Your Honor,
we're talking about the estimates to
repair this property -- and I've found
this -- I personally thought there
ought to be some way they can shimmy
metal in there and gradually push the
thing up, but apparently that can't be

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2 done according to the experts. The
3 experts have testified that it would
4 cost approximately \$375,000 to repair
5 this property and raise it.

6 It's also very important to know
7 that a second part of this case is that
8 the City of Hilton Head under the FEMA
9 guidelines has the authority to come in
10 and condemn the property, which would
11 make it inhabitable, unrentable, and the
12 market value would be diminished even
13 much further than where it is right now.

14 So the question before the Court is
15 whether or not Greg Gottschlich and Don
16 McNeil, not realizing the significance
17 of the negative elevation until April of
18 2006, was reasonable under the
19 circumstances. And, so, their entitled
20 to have a jury to decide if they're
21 figuring this out later was reasonable.
22 And that determines when the statute of
23 limitations will begin to run.

24 A jury could conclude that their
25 conduct was reasonable, and we believe

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that they will. And that only gets to

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the statute of limitations issues.

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Then after that we have to go into all

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the legal issues that have not yet been

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addressed by the Court.

7

There's a case that's been cited,

8

and it's a recent case from 2009, Kelly

9

vs. Logan and Jolly -- which the Court

10

may be aware of, I'm sure counsel is --

11

that holds that Kelly cannot assert

12

equitable Estoppel against lawyers. The

13

facts of that case are totally

14

inconsistent with what's going on here.

15

Here, Your Honor, the material issues to

16

this transaction for my clients were, we

17

picked out a house at 48 Sea Lane,

18

Palmetto Dunes, we agreed upon a price,

19

and we want to get clear title so that

20

we can start practicing our quite

21

enjoyment in what appears to be --

22

Your Honor, my clients are

23

educated, smart people. Now, that does

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not mean that they are sophisticated in

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matters regarding real estate. They are

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2 not real estate developers. They are
3 doctors, allergist, in Ohio. So there's
4 no reason to believe that these
5 educated, smart people, would sit around
6 and fail to look into something as
7 significant as this on their largest
8 investment presumably outside their own
9 homes.

10 They had absolutely no reason not
11 to look into these things. If they had
12 ever realized the significance -- and
13 that's the key thing, Your Honor is, did
14 they realize the significance of the
15 terms negative elevation on the survey
16 and on any declaration pages that they
17 would have received from the insurance
18 company.

19 They've testified -- and I don't
20 think anyone would dispute this -- that
21 had they known of these elevation
22 issues, they never would have bought
23 the property. And absolutely those
24 facts are relevant to the damages
25 claims if they were ever to go and try

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to sell this property and someone is
going to come and look at it, we've got
experts lined up and ready to testify
about the damage to the value of the
property.

7

They look at one property in
Palmetto Dunes, they look at another
property in Palmetto Dunes or Sea
Pines, the buyers are trying to decide
which one they want to purchase, it's
been disclosed by my clients that they
have this elevation issue and that you
are not going to be able to get
insurance except in an extremely
elevated rate, and that the city may
come in and condemn it, the buyer is
just going to move on. So the only way
they're ever going to sell the property
is to reduce the price significantly to
account for the repairs. And they also
would loose significant rental income
because they do rent this property some
in addition to usement for their own
purposes.

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2 I've mentioned already that this
3 closing by my clients was handled by
4 not one, but two lawyers; Mr. Deeb, who
5 was the primary point of contact, and
6 Mr. Wiseman who was his partner who
7 signed the closing documents on behalf
8 of my clients pursuant to a power of
9 attorney.

10 So each one of those experts --
11 and in fact, their firm in the record
12 as advertised that they closed, I
13 believe it's maybe 2,000, but perhaps
14 as many as 3,000 loan closing in the
15 year 2003.

16 So there were two sets of lawyer
17 eyes looking at the same documents that
18 saw them before they were given to my
19 clients that never advised my clients of
20 the significances of the negative
21 elevation. Not only did those two
22 lawyers see the survey and have the
23 opportunity to determine and advise the
24 parties of the significance of it, but
25 Cary Griffin who was the closing counsel

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2 apparently for the Dyes, the owners that
3 sold to my clients, he had a copy of the
4 survey. Because it's undisputed in the
5 record that he mailed a copy, which is
6 probably a common courtesy to Mr. Deeb
7 which would I guess give the lender a
8 chance to maybe not require another
9 survey. So three sets of lawyer eyes
10 saw it.

11 Your Honor, the record will also
12 show, and this is hugely important,
13 that the Dyes received a letter from
14 Sea Coast -- and I've mentioned this
15 before telling them that their rates
16 were going up. So they knew the
17 significance of the negative elevation
18 at that point in time. Then what did
19 they do in response to that? I believe
20 it was within a week, but I'll
21 represent within 10 days, even if it
22 was 14 days, it doesn't make that much
23 difference, they put the property on
24 the market for sale. They wanted out,
25 Your Honor, and they wanted out in a

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way that they could do it without

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disclosing the true consequences of the

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very material fact that they had this

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negative elevation.

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In fairness to them, I would

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certainly think that a reasonable jury

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would conclude that they were not -- it

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was not disclosed to them when they

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purchased the property. In any event,

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it became known to someone at some

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point in time, and it certainly became

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known to the Dyes, I believe whatever

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date that letter is, but I believe it

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was March the 25th of 2003. So they so

16

knew the significance and they failed

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to disclose and the jury can certainly

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reasonably infer that they

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intentionally failed to disclose it.

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The jury would have to look into

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the questions of whether or not the Dyes

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asked their lawyer, what should we do

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about this? Their lawyer was Cary

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Griffin. He knew -- he had the survey.

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At some point in time before my clients

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bought the property, he absolutely had
3 the same document in front of him that
4 he provided to Mr. Deeb in the mail.

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The Dyes, as the Court is probably
well aware, had to sign the South
Carolina Disclosure Form regarding this
property. The Court's order as it
stands right now holds my client to a
standard of upon receipt of the survey
a couple of days beforehand being put
on notice of everything that relates to
this survey, even though that was just
one of many, many, many documents that
was provided as a part of a loan
closing for which they had retained the
experts, Deeb and Wiseman to handle for
them.

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The disclosure form filled out, as
I understand it in the record, the Dyes
testified that Dunes Marketing assisted
them in filling out the disclosure form.
And I can provide it Your Honor, but I
think it's sufficient to put in the
record that Cary Griffin has a

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relationship with Dunes Marketing behind
a mere customer relationship. In fact,
if you look at the Secretary of State's
webpage as of yesterday, he's still
their registered agent. So Cary Griffin
is an agency of Dunes Marketing, as well
as being counsel to the Dyes who listed
this house with Dunes Marketing.

The disclosure form states that
there's no code violations. If the
Dyes -- which that form was presented to
my clients some time a month or two
before they ended up closing on the
transaction -- had exercised the
diligence that's been required of my
clients to immediately ascertain the
significance of this negative elevation,
not only with respect to the increased
insurance premiums and the possible
inability to obtain more than \$300,000
FEMA minimum, but also that it was a
code violation which the Dyes should
have known if they've been held to the
same standard that my clients have been

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held to as the order stands today, would

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have checked on the form that it was a

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code violation. It they had checked on

5

the form that it was a code violation,

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the agent would have seen it and would

7

have advised my clients of it and we

8

wouldn't be sitting here today; but it

9

wasn't disclosed.

10

It's also been contended that all

11

the other Defendants want to point the

12

finger at Sea Coast which was the

13

insurer. Sea Coast handled the closing

14

transaction in the way that the

15

attorneys and the lender, Wells Fargo,

16

asked them to do. They issued the

17

policy that was required by the lender's

18

close instructions by Mr. Deeb. Sea

19

Coast had already sent a letter to the

20

Dyes advising them that they had this

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negative elevation, sort of a form

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letter, but it says -- it clearly says

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in there. And then the Dyes

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undisputedly received it and understood

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the import of it because then within a

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week they put the property up for sale.

Sea Coast could just easily have assumed, and nor are they under any duty to advise my clients as an insurer -- as the insurance agent, that the Dyes had disclosed the negative elevation to my clients, which of course they did not do.

Your Honor, the record -- and I don't mean to cast dispersions towards the Dyes, they got put in a very, very difficult situation, I think that's -- but now my clients are in that situation that the Dyes were in. My clients undoubtedly are going to have to disclose it if they ever try to sell. The Dyes did not disclose the significance of this negative elevation despite having notice of it.

The jury is going to conclude that a fraud was perpetrated and the elements can be clearly laid out and that relates to the rescission claim.

Your Honor, with respect to the

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order that the Court has issued in this matter, as a first matter, the order fails to set forth the proper standard of review. The order sites a 2002, a 2003, a 2001, and a 1976 case on page two. Spring court clarified the standard of review under preponderance of evidence cases in 2009, the Hancock case, which we sited in our motion for reconsideration.

Your honor, simply put, what the standard of review is under cases involving the preponderance of the evidence is if the Plaintiffs can put forth even a scintilla of evidence that could be viewed in the light most favorable to the Plaintiffs, than the Plaintiffs will prevail and get to trial. And here, Your Honor, all we are talking about is getting beyond the issues of summary judgment. We haven't even gotten into the merits of the claims to analyze those for summary judgment. So that's the first problem

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2 with the order is that it doesn't set
3 forth the proper standard of review. If
4 it doesn't set forth the proper standard
5 of review, then it's fair to assume that
6 it didn't apply the proper standard of
7 review.

8 Your Honor, the order also fails to
9 take notice of the different statute of
10 limitations that's provided under the
11 South Carolina Unfair Trade Practices
12 Act. 39-5-150 applies a different
13 standard for the statute of limitations
14 then is applied under the common law for
15 legal claims. 39-5-150 provides no
16 action may be brought under this article
17 more than three years after discovery of
18 the unlawful conduct which is the
19 subject of this suit.

20 Your Honor, the unlawful conduct
21 is the failure to disclose the code
22 violation on the disclosure form as a
23 first instance. My clients have
24 testified that they did not discover
25 that any of this was a code violation

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until that April 2006 time period.

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And, in fact, they may not have even

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discovered that it was actually a code

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violation until after the fact; after

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that time period. April 2006 is when

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they started to begin to understand the

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import of this problem with the

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negative elevation.

10

Your Honor, it's important also

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that the Dye's testimony, as I

12

understand it, is that Dunes Marketing

13

filled out the disclosure form for

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them. Dunes Marketing could have done

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this in numerous other instances, but

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here the Court has not even reached the

17

issue of the Unfair Trade Practices

18

Act, nor has it applied this different

19

standard. And unfortunately for all of

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us, Your Honor -- and if I'm wrong on

21

this, I beg the Court's forgiveness --

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but when I have last checked 39-5-150

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has no cases interpreting it. So all

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we have to go on is that it was issued

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after the common law statute of

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2 limitations had been well established
3 and this code -- and it set forth a
4 different standard. So clearly the
5 legislator intended to apply a
6 different law on the statute of
7 limitations for Unfair Trade Practices
8 Act claims.

9 Your Honor, the order also
10 misapplies the law with respect to
11 inquiry notice. I've talked about this
12 quite a bit already, but what is at
13 issue is the significance of negative
14 elevation. And what's happened here --
15 and I'll draw an analogy, Your Honor,
16 to a uniform commercial code case.
17 When any of us in this room receive our
18 bank statements, we are obligated under
19 the code to review the statement to
20 determine if there are any forged
21 signatures or unauthorized items or
22 forged endorsements, all the things
23 that come into play under that code.
24 The customer upon receipt of that
25 statement -- actually, Your Honor, upon

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availability of that statement is

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obligated to review it and see if there

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are any items and then report them.

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Well, clearly the primary purpose

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of the customer reviewing that

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statement, Your Honor, is to determine

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if there's a forged signature, or if

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there's a forged endorsement, or if

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there's a debit or a credit that shows

11

up that they don't remember and they

12

don't think is authorized.

13

Again, the primary purpose of my

14

clients entering into this transaction

15

with the Dyes in December -- early

16

December of 2003 -- from their view

17

point, Your Honor, was to purchase the

18

property at an agreed upon price and

19

take clear title to property that they

20

could use and quietly enjoy.

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What has happened here, Your

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Honor -- and it's also important to

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understand that before the duty of the

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customer to review that statement -- in

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making this analogy still further, Your

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2 Honor -- is triggered, the bank must
3 make that statement available. And
4 today that can be online, so on and so
5 forth. But what's happened here, as the
6 order stands today, and the motion that
7 we're seeking reconsideration of the
8 order, the Court has treated the
9 negative elevation issue as if Mr. Deeb
10 or Mr. Wiseman wrote my clients a letter
11 before the closing and said, dear Greg
12 and Don, attached is the copy of the
13 survey that I have been provided by the
14 Dye's counsel. You may note that it
15 shows a negative flood elevation. That
16 of course did not happen. The documents
17 were merely passed onto my clients.

18 My clients having hired these
19 experts, Deeb and Wiseman, to handle
20 this transaction for them to advise
21 them of all material issues related to
22 the transaction, relying on their
23 expertise, they've held themselves out
24 as expertise, their website showed them
25 as being expert real estate closing

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2 attorneys. Only a jury can determine
3 if they ever reviewed the survey to
4 even see that it had the negative
5 elevation itself. But what's happened
6 is we have been treated as if we were
7 absolutely advised of the significance
8 of the negative elevation before the
9 closing.

10 Again, my clients testimony -- and
11 any reasonable jury, even an
12 unreasonable jury, Your Honor, would
13 conclude that a prospective purchaser
14 looking into buying a piece of property
15 such as this, that was advised of the
16 true facts at issue, namely that you're
17 going to have to spend an extra \$400,000
18 to fix it, the city may condemn it, and
19 you can't fully insure it for the levels
20 that you could think you could have,
21 would walk away from this transaction.
22 But, again, it's no dispute that my
23 clients were never made aware of this
24 significance. The documents were merely
25 passed onto my clients without any

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2 indication that they needed to look into
3 the significance.

4 Having received those documents
5 without comment from their experts,
6 they rightly assumed that there were no
7 problems with it. Because they were
8 only focused on the same thing that
9 anybody -- most anyone would be focused
10 on, purchasing a property down there,
11 paying the right price, and getting
12 clear title to the property.

13 Your Honor, the order providing --
14 and opposing counsel's attempt to rely
15 on the imputed knowledge of Sea Coast
16 to my clients presents just an absurd
17 contradiction, because Sea Coast was
18 contacted by whomever with respect to
19 my clients to provide the insurance as
20 I stated before that Wells Fargo's
21 closing instruction would have required
22 Mr. Deeb or Mr. Wiseman's firm to issue
23 an order for them to properly close the
24 loan.

25 The order purports to take what --

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Tina Farrell, I believe is the primary contact there -- and say that because she knew of the negative elevation, that my clients knew of the negative elevation. We don't dispute that they received the survey.

Your Honor, you have to apply the imputed knowledge principal across all agency relationships that would be put at issue in the case with respect to the transaction, and with respect to the earlier relationships that are at issue, including those that I've mentioned. Sea Coast was also the agent to the Dyes. But we don't need to input the significance of Sea Coast's knowledge of the negative elevation to the Dyes because we have a letter that they sent to the Dyes that says you have a negative elevation, you're insurance rates are going up, and then they put the property up for sale.

Your Honor, again, Cary Griffin, register agent for Dunes Marketing --

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2 I'm not sure what all the record shows,
3 if he was also their counsel; fair to
4 assume that he has been their counsel
5 for quite some time -- and also Cary
6 Griffin as the lawyer for the Dyes.
7 And as there's no dispute, cases upon
8 cases upon cases always hold that the
9 extent, the existence, and the scope --
10 the extend and the scope being
11 redundant, pardon me -- of an agency
12 relationship are issues of fact for a
13 jury to determine.

14 So Your Honor, the agency
15 relationship issue is being used against
16 my clients upon receipt of a document
17 amongst -- in the mist of a closing for
18 which it was not the material issue, and
19 they were relying on someone else's
20 expertise that's not be applied the same
21 way to all the other Defendants.

22 And the law as our memorandum sets
23 forth in specifically rescission claims
24 and the equitable claims, not to mention
25 the fraud claims, does not allow a party

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2 to fail to disclose facts, and then
3 later use that failure to disclose to
4 their benefit. And that's what the Dyes
5 thus far have been able to get away
6 with. And perhaps, Your Honor, the
7 other parties too. The jury could
8 determine that they were involved and
9 had knowledge of it. A jury could
10 absolutely determine that Cary Griffin,
11 who was an agent for Dunes Marketing,
12 was aware of this fact and failed to
13 disclose it, and thus aided and abetted
14 or otherwise assisted in perpetrating
15 fraud on my clients in buying this
16 property with these incredible amount of
17 problems.

18 The order fails to apply latches
19 to the equitable claims of rescission
20 and equitable indemnity. The standard
21 -- the order as it stands right now
22 does not address the difference that
23 the statute of limitations does not
24 apply to the equitable claims.

25 Again, the question for equitable

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Estoppel is not could Greg and Don have read the survey, but would a reasonable person receiving the survey from their lawyers without comment, have realized the significance of the negative elevation. And we represent absolutely that they would not have. And the reason that they would not have is because they received it from the experts that they hired to handle the transaction properly for them, that have been given monopoly by our Supreme Court to handle these transactions. So the order can on one hand hold my clients bound to this imputed knowledge for which they never received actual knowledge until later on as a part of their investigation and then give the Defendants a pass.

And, Your Honor, still further, the order applies a circular logic; what would Greg Gottschlich and Don McNeil do acting reasonably anybody, what would any party in their situation

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2 do acting reasonably to begin to
3 ascertain the significance of the
4 negative elevation? They would contact
5 a lawyer. Well, they already had a
6 lawyer. They hired a lawyer for the
7 purposes of handling this transaction
8 so that they wouldn't have these types
9 of problems. It's not a situation
10 where they tried to get some local guy
11 from Ohio to do it and he just bungled
12 it. They hired the experts and this
13 thing was allowed to slip through
14 because of the facts that we've pointed
15 out in this case, Your Honor.

16 So it's reasonable for a jury to
17 look at the same facts and conclude that
18 the Dyes would have contacted their
19 lawyer. Did they? We don't know; they
20 have may have, they may not. But if the
21 Dyes contacted their lawyer, then Cary
22 Griffin was then put on notice of this
23 fact and then didn't disclose it to Deeb
24 when he sent the survey, or to his own
25 company for which he was an agent which

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also handled the sales transaction for
my clients.

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So the record has way, way, way
more than a scintilla of evidence to
support the facts that require an
inference before you can apply the
statute of limitations and say that
we're holding -- what the Court has held
thus far, that my clients were notified
of these issues in late November of
2003, before the closing occurred. It's
just not reasonable for the Court to
hold that as a matter of law when it's
undisputed at the same time that had my
clients, smart people, purchasing a
million dollar piece of property
understood the significance of the
negative elevation prior to the closing,
they simply wouldn't have purchased the
property.

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So, Your Honor, for at least these
reasons my client is entitled for this
case to continue, for the order to be
overturned if the Court then determines

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2 that it can get into the merits of any
3 of the claims for summary judgment, then
4 that can happen. And all of this is in
5 the interest of judicial economy. I
6 would also add that certain claims don't
7 survive. For example, Ms. Graham's
8 clients have represented by way of their
9 daughter that they don't have the money,
10 so they don't have the capability -- if
11 we could rescind the transaction today,
12 we would do it. They don't have the
13 capability they've represented to do
14 that. So the rescission unfortunately
15 is a fairly impractical claim because
16 they don't have the ability to restore
17 the situation to the status quo.

18 So, Your Honor, those are our
19 positions and including what we set
20 forth in our memorandum. And we very
21 much appreciate the Court's
22 attentiveness to the matter, and would
23 ask for an opportunity to respond to any
24 comments of opposing counsel. And then
25 because of this being an important

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matter involving so many parties and a significant amount of money, that if in event there are any questions that we'd be allowed to supplement the record for this hearing if necessary, and that's all.

THE COURT: Just briefly, I mean, I guess this is one of those objective versus subjective type questions; and what you emphasized in your argument was when the Plaintiffs realized the significance of the elevation, but as I recall the evidence -- and correct me if I'm wrong -- they actually had in the their hand the objective evidence of the negative elevation immediately after the closing. But as I understand your argument, the statute of limitations wouldn't begin to run until they actually recognized the significance of what they had in their hand. And I guess my questions is, doesn't that fly in the face that it's an objective standard rather than a subjective

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standard that I'm supposed to follow?

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MR. FEW: No, Your Honor, because

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what I've attempted to point out is

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that while they received certain

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documents that stated there was a

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negative elevation, they received those

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documents from the experts that they

9

hired to tell them about the

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transaction, without comment,

11

without -- and there's no question that

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if you take the Court's order as it

13

stands today that my clients by virtue

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of receiving the survey were put on

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notice, as of that day the statute

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began to run. So if the statute began

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to run at that time, and these are

18

material issues, then undoubtedly the

19

attorneys who handled the transaction

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had a duty to advise my clients of the

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significances of the issues upon their

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review of the very same documents for

23

which they're experts.

24

Again, that's why I'm saying the

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material issues to my clients who

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delegated and hired out the expertise of

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the Defendants was that they get the

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property for the price that they've

5

alleged and that they get clear title.

6

We're not here talking about -- I think

7

what the Court is asking is, under what

8

set of facts would my clients be put on

9

notice that they needed to investigate

10

to determine the truth of the matter.

11

Well, if we were talking about the

12

closing was supposed to be for 1.25

13

million, and it ended up being for 1.45

14

million, well, clearly that's something

15

we would have known about. But in this

16

situation they received these documents

17

from the lawyers. They had no reason to

18

believe that there was any problem with

19

it. They hired the lawyers to handle

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the transaction for them without

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problems, pay them the fee, they were

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experts in the field, and then all the

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sudden they're stuck with this problem.

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So we don't dispute objective

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receipt of the document, what we

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dispute is -- and what is reasonably

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disputed and requires the inferences of

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the jury on the statute of limitations,

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and we've cited the cases in our motion

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to state that the jury has to look into

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these issues related to the statute of

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limitations as well as the substance of

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issues of the claims once they get into

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the claims when an inference is

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required.

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And, again, all inference must be

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view in the light most favorable to my

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client today. And it is absolutely

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reasonable to infer that upon receiving

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the survey, or the deck page from

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whomever, before closing that they did

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not understand the significance of it,

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nor were they required to understand the

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significance of it.

21

The Supreme Court just recently

22

last year -- in consistent with the

23

Buyer Service Case which I've referred

24

to earlier -- came out with a set of

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guidelines for real estate loan closing

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2 attorneys. And one of things that
3 they've mentioned in there with specific
4 detail is that the attorney is to review
5 the survey. So it's no dispute that
6 even in the '80s and in the '90s, and at
7 the time of this transaction in 2003
8 that the attorney's office is going to
9 review the survey.

10 In fact, the lender is probably
11 going to require a survey because the
12 attorney is going to look at the title
13 work, he's going to see the description
14 of the property, and he's going to make
15 sure that what the Dyes got deeded to
16 them matches up the meats and bounds of
17 what's shown on that. So the
18 attorney's eyes, or his paralegal's
19 eyes, would have been all over that
20 survey. And then on that survey it
21 shows the negative elevation. The
22 attorney should have seen it, should
23 have advised my clients of this issue,
24 and then they would have been made
25 aware of it. And that also relates to

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the analogy that I've attempted to make
3 for to the Court related to the UCC
4 issues, Your Honor.

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And when I say -- the Court so far
as treated this as if Mr. Deeb wrote my
clients a letter on November 30th of
2003, or whenever or a few days before
the closing and said Greg and Don, this
may be an issue. You might want to look
into it. But that's not what happened.
They were never specifically made aware
of it. Did they objectively receive
those documents? We don't dispute that,
Your Honor. Those things are in the
record. The question is, what is the
significance of those things? And why
would a person -- any reasonable person
be required to go out and investigate
something that's shown on a document
that he first receives from his expert
closing attorney who he's hired for the
specific purpose of that transaction;
that's the difference, Your Honor.

The subjectivity comes in -- and

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2 that's why the jury has to look into
3 it -- the subjectivity comes in when --
4 was it reasonable for Greg and Don to
5 not ascertain the significance of the
6 negative elevation upon receipt of the
7 survey or even of the deck pages
8 whenever they received them. And we
9 submit absolutely that it was under the
10 circumstances. And that's why I've
11 also gone to the analogy of the UCC
12 case. Because everyone knows that --
13 as I said, when you review your bank
14 statements you're looking for the
15 forgery; that's the primary purpose of
16 doing it.

17 My clients -- the survey to them
18 was something that the lawyer was
19 supposed to handle. And there was no
20 reason -- and any jury we believe is
21 going to conclude that if they were --
22 if a reasonable person in the same
23 situation as my clients would never
24 have attributed any significance to
25 anything in that survey that they

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2 received from their lawyers. And
3 that's why I said the argument right
4 now is circular, because the order as
5 it stands purports to hold my clients
6 to a higher standard than it held even
7 the lawyers. And if and when my
8 clients would have received the
9 knowledge that there was great
10 significance to this, they would then
11 begin to investigate it. And their
12 testimony is that they did not, that
13 was in April of 2006; that's never been
14 disputed.

15 Thank you.

16 MS. WALL: Your Honor, on behalf
17 of Defendants Laurich & Deeb, Mr. Deeb
18 and Mr. Wiseman, I object to the
19 argument made before Your Honor this
20 morning before you. We're before you
21 on Plaintiff's motion under Rule 59,
22 and it does not allow Plaintiff to
23 raise new issues not raised in
24 opposition to the original summary
25 judgments filed by each of the

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2 Defendants, and/or argued at the time
3 that -- prior to the Judge summing
4 his order. They cannot now come in
5 under Rule 59 and make new arguments,
6 which they've done here this morning
7 that are not part of the record that
8 they did not make prior to Your Honor's
9 order.

10 Having said that, they are also
11 subject to their motion to reconsider.
12 And their motion to reconsider does not
13 include a number of the new arguments
14 that Mr. Few has attempted to make
15 before the Court this morning. So we
16 object to all of that as a matter of
17 law under Rule 59, which Plaintiff now
18 cannot do.

19 Briefly in response Your Honor,
20 your order was absolutely correct. You
21 did apply the correct standard. Now,
22 Mr. Few says oh, there's a new case that
23 talks about a scintilla of evidence.
24 The problem with that is, that Your
25 Honor did view the undisputed facts in

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2 the light most favorable to the
3 Plaintiff. And it is upon those
4 undisputed facts that this Court made
5 its order. And those undisputed facts
6 which they've agreed to -- in fact this
7 morning again -- the undisputed facts
8 are that this Plaintiff or these
9 Plaintiffs, Gottschlich and McNeil, had
10 the information from which the law
11 requires that they move forward and
12 investigate, and they had three years in
13 which to do that. They not only had
14 documents with regards to those that
15 were sent to them prior to the closing,
16 but what wasn't mentioned this morning,
17 and of course the Court took note of in
18 it's order and is undisputed, that year
19 after year after year they received
20 insurance deck pages that specified to
21 them that their home had a negative one
22 elevation. So they were put on notice
23 of the negative elevation year after
24 year after year. They also paid a great
25 deal more for their insurance than they

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2 anticipated they were going to pay for
3 prior to the closing. All of these, and
4 the other items that are noted in the
5 order and were made evidence that was
6 undisputed at the time of the summary
7 judgment argument form the basis of this
8 Court's correct order.

9 That statute of limitations law is
10 crystal clear in South Carolina; it has
11 never been when they actually knew and
12 appreciated the significance of a
13 document. The law is very clear that
14 when you have information you must act
15 as a reasonable person and ask
16 questions about that and move forward
17 in your investigation. As the law
18 clearly states, it's not when you've a
19 full blown theory of recovery, or even
20 when you hire counsel that the statute
21 begins to run.

22 Now, also here this morning, it was
23 stated to Your Honor that the order did
24 not address equitable Estoppel. Your
25 order certainly does address equitable

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Estoppel and correctly. And, Your

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Honor, Mr. Few was correct to point out

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the case of Kelly versus Jolly. In

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fact, that was my case, and I'm very

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aware of that case. And it is

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absolutely applicable to the case that

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is before Your Honor. And that is where

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a Plaintiff has numerous instances of

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information from which he or she can

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take steps to investigate, ask

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questions, and do that which a

13

reasonable person would do and is given

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three years in which to do that. If he

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or she fails to do so, then the statute

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does run as to a claim that they might

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otherwise have against various

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Defendants, including in the Kelly

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versus Jolly case against attorneys.

20

Mr. Few mentioned something about

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statute of limitations with regards to

22

the Unfair Trade Practices Act. Your

23

Honor, there were only four causes of

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action as to Laurich & Deeb, Deeb and

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Wiseman and those for were for

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2 negligence, breach of contract, breach
3 of fiduciary duty, equitable
4 indemnification. Unfair Trade Practices
5 would have been addressed in the summary
6 judgment motion filed by Mr. Mahaffee's
7 client; that he filed on behalf of his
8 client.

9 There were no fraud claims against
10 Laurich & Deeb, and if there were any
11 existing such claims in the complaint,
12 those also would have been addressed by
13 the parties to whom those claims were
14 directed, which does not include my
15 client.

16 Finally, I would simply state, Your
17 Honor, we did file memorandum in
18 opposition to Plaintiff's Rule 59
19 motion. For the first time in their
20 Rule 59 motion they raise an issue with
21 regard to the equitable indemnification
22 cause of action against Laurich & Deeb.
23 Well, they can't raise it for a first
24 time in a motion to reconsider, the law
25 is crystal clear on that. If they were

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2 going to raise any such issue ahead
3 would have been done in response to the
4 motion for summary judgment, which they
5 did not do either in their memorandum or
6 at oral argument.

7 So this Court has no jurisdiction
8 to hear any argument with regard now on
9 a motion to reconsider with regard to
10 the equitable indemnification cause of
11 action, nor can a court on appeal,
12 assuming there will be an appeal; and I
13 have no idea.

14 However, if this Court -- and I'm
15 not in any way waiving the absolute
16 right that I have that this argument
17 cannot now be heard on a Rule 59, but if
18 the Court were to hear any such
19 argument, the equitable indemnification
20 cause of action, which we did argue in
21 our summary judgment motion as the Court
22 may recall -- in addition to statute of
23 limitations we had a number of other
24 basis for the summary judgment.

25 The equitable indemnification cause

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2 of action fails on its face because, of
3 course, the Plaintiff has no evidence
4 that in fact it has had to pay a
5 third-party because of any negligence on
6 the part of my client. The Plaintiffs
7 don't even allege that, nor could they
8 because we've taken their depositions,
9 they never had to pay anybody for any
10 damages they claim were not of their own
11 doing, and at no time has the Town of
12 Hilton Head fined them or done anything
13 to them. And we took that deposition.
14 That's part of the record because we did
15 argue that before the Court in the
16 summary judgment motion.

17 And further more, Your Honor,
18 statute of limitations actually does
19 apply to an equitable indemnification
20 claim, and here's why; unlike other
21 equitable claims, indemnification is of
22 course a claim that asks for money
23 damages. And when you're asking for
24 money damages, as even a Dixon versus
25 Dixon case, specifically sets forth then

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2 statute of limitations does apply. When
3 its damages you're asking for, of
4 course, that's what an indemnification
5 claim is. It says I had to pay money to
6 a third person but I wouldn't have to
7 but for your negligence, and therefore,
8 you owe that money to me.

9 So not only is there no equitable
10 indemnification in this case because
11 they never had to pay anybody, the
12 Plaintiffs, but in fact because they're
13 asking for money damages statute of
14 limitations -- and the statute of
15 limitations that we have argued before
16 this Court absolutely does apply.

17 In Dixon versus Dixon on page nine,
18 the mother in that case had various
19 claims against her son. She was before
20 the Master in Equity. But one of her
21 claims was failure of consideration.
22 The court went onto state that absent of
23 showing of fraud or deceit -- of course,
24 there's no claim of fraud here as to my
25 clients -- setting aside a deed is not

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2 the correct remedy for failure of
3 consideration. The proper remedy is
4 damages; a remedy at law. Accordingly,
5 mother's failure of consideration cause
6 of action is subject to the statute of
7 limitations. And in that argument they
8 cite Snail versus Columbia Gun, and all
9 of the other cases that, of course, form
10 the basis for the statute of limitations
11 order that Your Honor has applied in
12 this case.

13 So in sum, there is nothing new
14 that the Plaintiffs have raised before
15 this Court today that would allow or
16 compel this Court to change its order,
17 number one. Number two, they cannot on
18 a Rule 59 motion argue new matters --
19 which they have attempted to do this
20 morning -- that they failed to argue in
21 their memorandum and/or in oral argument
22 before Your Honor. We all have a
23 transcript of that argument, and Mr. Few
24 has attempted to raise new issues here
25 this morning which we submit, Your

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Honor, that this Court cannot consider.

And in summary, we would ask that you deny Plaintiff's motion to reconsider. Thank you, Your Honor.

THE COURT: Thank you. Anyone else?

MS. GRAHAM: Yes, Your Honor. My name is Katherine Graham. I represent the Dyes.

THE COURT: What I thought I'd let you do is just respond to everything, or would you rather go one at a time?

MR. FEW: I would rather go one at a time because everything is so distinct, Your Honor. I think that would be easier for the Court and easier for me certainly.

THE COURT: Okay; just try to keep it brief.

MR. ALFORD: I'll keep it brief, Your Honor.

As a first matter, Ms. Wall has represented that we're not entitled to raise new issues before the Court. Rule

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2 59 speaks for itself. As I understand
3 what has happened in this case, Your
4 Honor, the Court ruled on statute of
5 limitations and then therefore did not
6 go into the substances of issues on all
7 the cases. And so, it is our belief
8 that the record should be as full and
9 adequate as it possibly can be now, if
10 and before any appeal goes up. And if
11 the Court has made an error because of
12 the different way that this has been
13 analyzed, we don't -- the Court has thus
14 far looked at the statute of limitations
15 and not everything else. And we think
16 just because the Court has made that
17 decision on its own, that we should not
18 be precluded from presenting all of the
19 issues that relate to the case.

20 Particularly, for example, the
21 statute of limitations related to the
22 Unfair Trade Practices Act, which Ms.
23 Wall rightly points out has not been a
24 claim against her clients, but it is a
25 claim against the other parties who are

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2 benefitting from the statute of
3 limitations order that stands in the
4 case they we are seeking to have
5 overturned.

6 Ms. Wall made comment that I think
7 shows a misunderstanding of what we're
8 talking about here today. She states
9 that the Court must view the undisputed
10 facts in the light most favorable to the
11 Plaintiffs. Your honor, if they're
12 undisputed they don't need to be viewed
13 in any light. They are undisputed by
14 either party. What's at issue is the
15 disputed facts.

16 The undisputed fact is that we
17 received these things. The disputed
18 facts are what did that reasonably put a
19 reasonable person on notice of having
20 received that document from the expert
21 they hired to handle that issue.

22 Another analogy I think is very
23 useful; suppose Mr. Deeb had mailed by
24 clients a copy of the deed, but not a
25 filed copy of the deed, were we then

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obligated to go down to the courthouse

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and see if he in fact recorded the deed?

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It's the notice that's given by my

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clients receipt of these document is

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just not sufficient for them -- for any

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reasonable person to have understood the

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import of this negative elevation.

9

Your Honor, the Kelly versus Logan

10

Jolly case decided last year on

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equitable Estoppel, I would certainly

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welcome the Court taking further review

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into the facts of that case.

14

Plaintiffs counsel, myself, has not

15

suggested that the legal principals in

16

that case of equitable Estoppel do not

17

apply. Obviously, equitable Estoppel

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principals apply to this case, but the

19

facts of that case involved a mother who

20

gave birth to a child that had a birth

21

defect and I don't -- apparently it was

22

terrible birth defects -- there were

23

multiple suites involved which I think

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at one point in time one legal guardian

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got 450,000, another time another legal

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guardian got 350,000, and then the
mother who had hired the Logan Jolly
firm, they later had to withdraw due to
some conflict. There was actually a
hearing before the Court in the record
on that case regarding their withdraw of
her representation. The Court told
Kelly to go and get other counsel within
30 days. She failed to do so. All of
that related to whether or not she knew
she had claims that she could have
pursued in that case. There's no
dispute that even Kelly, who is probably
not as educated or perhaps as astute as
my clients might have been, was on
notice of the fact that the equitable
Estoppel related to. Here there was
never any significance put to it. And
that's what I was pointing out for the
Court's benefit. The Logan Jolly case
deals with an issue that was already
before the Court for which Kelly had
appeared before the Court and been told
to go and get other counsel which she

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failed to do. When she later tried to assert the claims against them, the Court held that they would not be equitable Estopped from applying the statute of limitations because Kelly knew what was at issue there.

That's all I have, Your Honor.
Thank you very much.

THE COURT: Sorry to interrupt you.

MS. GRAHAM: No problem.

Again, my name is Katherine Graham and I represent the Dyes. The Dyes were the previous homeowners who sold the home to the Plaintiffs.

Before I start my argue, Your Honor, I just want to make the same objection that Ms. Wall made in respect to the motion for reconsideration pursuant to Rule 59, that the Plaintiffs are arguing new matters that they have failed to address in their response to their motion for summary judgment, as well as oral arguments.

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I have also -- to spare the Court
for some redundancy, I'd also like to
incorporate the arguments that Ms. Wall
made that are relative to my client.

Your Honor, I just want to touch
on a few points. Mr. Few has already
argued, again it is uncontested that my
client through their attorney disclosed
the survey which showed there was a
negative elevation. They also prior to
closing disclosed through their
attorney that the elevation certificate
showing that there a negative
elevation.

Your Honor, Mr. Few wants this
Court to not impute expert knowledge to
his clients, but roundabout he wants you
to impute that knowledge to my clients
who are not experts, who are just the
previous homeowners prior to the
Plaintiffs.

Your Honor, they filled out a
Seller Discloser Form. A seller of a
home who fills out a Seller Discloser

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2 Form is obligated -- is not an expert,
3 but is obligated to tell the truth as
4 much as they know. There is no
5 evidence in the record that my clients
6 knew that the negative elevation
7 constituted a building code violation.
8 That is undisputed. There is no
9 evidence in the record that they knew
10 it.

11 They did know that they had a
12 negative elevation, therefore, they
13 disclosed the survey, and they also
14 disclosed the elevation certificate
15 indicating that there was negative
16 elevation to the home.

17 Mr. Few also brings up this letter
18 that Sea Coast Insurance sent to my
19 clients prior to the closing. Your
20 Honor, with all do respect to Mr. Few,
21 he mischaracterized the letter. I have
22 a copy of the letter here, and just to
23 read in part the first paragraph says:
24 Please be advised that our office has
25 been notified that Sea Coast Brokers

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will not be renewing the above policy effective April 3rd, 2003. Due to the market changes, the coverage is no longer available on the above referenced policy. However, our office is able to replace coverage for you with travelers and in excess.

So nowhere in this letter does it state oh, you're having a -- your insurance premiums are going up. The insurance premiums for the floor stayed the same. It's just them writing a letter to the client saying, this company no longer will carry your insurance, however, this company will. And the next line even says, the coverage will remain the same as you currently have.

Your Honor, my clients disclosed the elevation certificate, they disclosed the survey. Therefore, we still argue that their clients had the knowledge of the negative elevation prior to closing. And so we just like

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the reiterate, Your Honor, and just ask
this Court to again deny the Plaintiffs
motion for reconsideration.

THE COURT: Okay; I assume.

MR. ALFORD: Thank you, Your
Honor. In fact, Ms. Graham as just
effectively made by clients argument.
She has argued that her clients had no
reason to understand the significance
of this issue. I sincerely apologize
if anyone thinks that I attempted to
mislead this Court and all these
parties who are familiar with these
facts even more so then myself. I
referred to the letter. I intended to
refer to the letter. I didn't intend
to deceive, nor would I think that I
was capable of deceiving anybody on
what that record shows.

What the record does show though
and what has not been disputed is that
shortly after receipt of that letter
they put that property on the market for
sale. And what this Court has done in

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it's order as it stands today, they have

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held my client to the standard of snap

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my fingers, immediate knowledge of all

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facts and circumstances such as that the

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statute begins to run on the date of

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receipt of this survey, which Ms. Graham

8

now, as I understand, presents to the

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Court that they knew they needed to

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disclose.

11

So if my clients were held to that

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standard such that they had to

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understand it immediately, then how is

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it that the Ms. Graham's clients, the

15

Dyes, the sellers, can be made aware of

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more specifically of problems

17

associated with the negative elevation

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in March of 2005. They don't do an

19

investigation to determine the code

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violation prior to the sale. And

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that's where we get into inferences,

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Your Honor. The jury could absolutely

23

conclude -- in fact, the jury is

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entitled to hear evidence and see the

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witnesses, including Cary Griffin, to

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2 determine if the Dyes sought his advice
3 over the significance of the negative
4 elevation prior to the sale. He knew
5 about it. We're not making any of
6 these things up, that's what's
7 important. There are undisputed facts,
8 and, again, the Court doesn't have to
9 look at undisputed facts in any light
10 because they're undisputed. But the
11 disputed facts, the facts that require
12 interpretation, that require inferences
13 to be drawn, are absolutely necessary
14 to determine when it was reasonable for
15 my clients to have understood the
16 significance of this negative
17 elevation, which was just absolutely in
18 all reasonable insignificant to them
19 until they realized the consequences of
20 it, the consequence of which were known
21 to the Dyes and not disclosed.

22 So Ms. Graham's argument that her
23 clients were not experts, neither were
24 mine. That's what I'm saying. They
25 are making the same argument we're

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2

making. They are in the same situation

3

as us; they're not the experts. The

4

experts were Laurich & Deeb, two

5

attorneys who looked at this, and Cary

6

Griffin who was aware of the issue and

7

nobody went out and disclosed it, Your

8

Honor. What's happened is my clients

9

spend a lot of money on this piece of

10

property and now there's no dispute

11

that it has to be fixed if it's ever

12

going to be restored to what they

13

agreed to purchase, which is to have

14

clear title, quiet enjoyment of this

15

property, and not have to go out and do

16

what could amount to be 375 to a half

17

million dollar repair and loose rental

18

income during the time period.

19

And so that's exactly right. She's

20

exactly right. Her clients were not

21

experts, and my clients were not

22

experts, but the closing attorneys

23

where. And if my clients obligated to

24

have the statute begin to run from the

25

date of receipt of a survey for which

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2 they're not an expert that they received
3 from their lawyers, then her client have
4 to be held to the same standard.

5 Therefore, they should have known of the
6 insurance premium problem, as well as
7 the potential problems with the City of
8 Hilton Head to condemn the property.
9 Had they done the same investigation
10 that we're being ordered to have done,
11 they would have known the facts, would
12 have disclosed the problem, they would
13 have never brought the property.

14 Thank you, Your Honor.

15 THE COURT: Yes, sir.

16 MR. MAHAFFEE: I'm Max Mahaffee.
17 I'm representing Defendants Ken Oliver
18 and Dunes Marketing Group. I'm going
19 to be a little disjointed because I
20 know Your Honor has gone way beyond the
21 30 minutes which has been applied to
22 here.

23 THE COURT: Oh, I'm here all day.
24 I'm all right.

25 MR. MAHAFFEE: Certainly as far as

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Ms. Wall's argument, you know, legal argument, as far it applies to my clients, I'll just adopt that. That will cut it way short. But I do want to state that the Plaintiffs have gone way behind their motion to reconsider which they filed on January the 21st, 2010. I encourage the Court to look at that and say, if they didn't raise it in that, disregard it. They've raised this Unfair Trade Practices Act, statute of limitations, it's not in there. And for them to come up at this time and try to add more even beyond what their motion to reconsider has done, is just not allowed under the law in South Carolina; such the Guardside Case which is a family court case, but still it addressed Rule 59E in 2009.

And I think Ms. Graham has clarified something that Mr. Few had said that Dunes filled out the discloser form, the Dyes filled it out. Now, just because somebody hands it to you and

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says you have to fill this out, that's

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not filling this out. The Dyes filled

4

that form out, so that's just more

5

surplusage in this case.

6

And as far as -- and I just want to

7

address very, very briefly, they keep

8

talking about damages. Your Honor has

9

not ruled that there are or are not

10

damages in this case. So whether

11

they're selling it, renting it,

12

whatever, that's just not before you.

13

The fact that Hilton Head may or may not

14

find them because their own attorney

15

went to Hilton Head and said oh, oh, you

16

know, you don't -- this is a problem

17

with the house after litigation has

18

begun, that's not before you. The

19

damages just aren't there. We're here

20

on a legal argument.

21

And my clients, as was submitted in

22

my memorandum for summary judgment, I

23

attached portions of Bill Baldwin's, the

24

30b6 of Dunes Marketing Group, and they

25

just did not receive the survey

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elevation portion of it. How can they
disclose something that they don't know;
that they don't have in their hands?

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But that's sort of the interesting
argument which the Plaintiffs are making
this morning, because as I read at the

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top of page four of their motion to
reconsider they were saying the order
was wrong because the order said,
"Plaintiffs contend that only upon
actually knowing or appreciating the
ramifications does the statute of
limitations begin to run", and they go
onto say this is not so and explain why.
I think you've heard it this morning,
Rule 43K we're in court, we're on the
record they are not bound by the fact,
yeah, we got it, but we just didn't
understand it. That's a new, new
argument which is being presented to the
Court. They had it. Mr. Few has stated
that a number of times, that they
received it, but did just didn't
understand it.

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2 I think the law on summary
3 judgment is clear in a case like this,
4 they received it, they knew about it,
5 and certainly whether the Dorman versus
6 Campbell case, which I think a number
7 of us raised which was 500 southeast
8 second 786, you know, talks a great
9 deal about summary judgment and exactly
10 regarding flood elevations. Facts are
11 different, but the law is not -- I
12 mean, there's never going to be a case
13 which is on point with another one
14 frankly, but the law in that case very
15 much supports Your Honor's order. We
16 think your order was proper. We think
17 it was the right thing to do.
18 Certainly there were some things that
19 weren't addressed, and certainly we
20 reserve the right at some point should
21 it be necessary that we argue the
22 remaining matters in our motion for
23 summary judgment, but of course that's
24 not before you either.

25 I appreciate it very much, Your

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Honor.

THE COURT: Anything on that?

MR. FEW: Your honor, yes, if it
pleases the Court, Mr. Mahaffee just
pointed out to the Court that the 30b6
deposition of Mr. Baldwin stated that
Dunes Marketing was not in receipt of
the survey or any information regarding
the negative elevation. However, as I
stated in my arguments, the Court is
imputing knowledge back and forth
between these parties as a matter of
law. And as there's no dispute, case
law in South Carolina states that the
scope existence of an agency
relationship is a question of fact.
Well, I'm not making up the fact that
Cary Griffin is the registered agent
for Dunes Marketing Company. In fact,
I want to supplement the record to add
this, which I'll represent that I
printed from the Secretary of State's
webpage on March the 14th of 2010.

MS. WALL: Your Honor, may I be

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2 heard? We object. You can not
3 supplement the record on a Rule 59E
4 motion to reconsider an order of the
5 Court.

6 MR. MAHAFFEE: And I would join in
7 that Your Honor. And whether certainly
8 whether somebody is an essential agent
9 for survey process is entirely
10 different than what Your Honor is
11 dealing with.

12 MS. GRAHAM: Same objection.

13 THE COURT: I'll sustain the
14 objection.

15 MR. FEW: Well, the Court can take
16 judicial notice of the fact of what's
17 on the Sectary of State's webpage. I
18 don't think anybody disputes that he is
19 the agency.

20 Once again, Your Honor, that lays
21 right on top of our argument that the
22 Court cannot as a matter of law, nor has
23 the courts in South Carolina ever as a
24 matter of law ruled at summary judgment
25 on the scope and existence of agency

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2 relationships. We are entitled; my
3 clients are entitled to have a jury
4 determine what Cary Griffin knew and
5 what the scope and existence of his
6 agency relationship with Dunes Marketing
7 are. He may only be their registered
8 agent for service and process; he may be
9 a lot more than that. We don't know.
10 Those are facts for which require
11 further investigation, those are facts
12 for which no matter how many depositions
13 were taken, unless everyone agreed,
14 which they don't agree because the
15 record is not that well developed -- nor
16 a record hardly ever that well
17 developed -- the scope and existence of
18 Cary Griffin's agency relationship with
19 Dunes Marketing is absolutely a fact
20 that my client is entitled to have be
21 looked at by the jury with respect to
22 not only the substance of claims, but
23 the application of the statute of
24 limitations in this case.

25 Your Honor, I, again, would stress

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what I stressed earlier that the Court

3

chose to rule only on the statute of

4

limitations issues. Rule 59 is Rule 59.

5

These parties are not so greatly

6

prejudice by any arguments that they

7

allege Plaintiffs by -- through me have

8

made today in addition to what's in our

9

motion. I would also point out that

10

they have not specifically pointed out

11

the arguments that I've made. They've

12

just laid it out for the Court that

13

additional arguments have been made. We

14

feel that it's for the Court's benefit

15

to point out what we believe are errors

16

of law in the existing order from the

17

Court.

18

Two final things, Your Honor, the

19

question is when is someone put on

20

inquiry notice. And we represent that

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inquiry notice would have only arising

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when we realized the significance of

23

the document. Particularly having

24

relied on the experts who have given it

25

to us without comment.

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Your Honor, Mr. Mahaffee made the point that the Dyes filled out the question. Well, there's also room for interpretation that has to be viewed in the light most favorable to my client about the extent of the involvement of the parties in helping them fill it out. Undoubtedly, Dunes Marketing was involved in it. We don't know exactly how involved they were in filling out the disclosure form.

And finally, and I should have mentioned this earlier, I apologize with not raising it with respect to Ms. Wall's arguments, but Ms. Wall's argument basically states that in the event the City of Hilton Head requires my client to do something, and we have to pay out to a third-party any damages then that triggers -- it opens up the equitable indemnity claim that my clients have.

Your Honor, we're asking the Court to apply the scintilla standard as set

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2 forth. We're asking the Court to
3 overrule this motion and allow this
4 case to go forward to trial, where it
5 can get to trial and the jury can look
6 at all of these issues as they relate
7 to the statute of limitations, as well
8 as the substance of claims and if and
9 then everything goes up on appeal, then
10 everything can go up on appeal, but
11 right now it's a partially developed
12 record only on the statute of
13 limitations for which we've presented
14 to the Court all the instances that we
15 believe show that there are errors of
16 law with the existing order in the way
17 that it's drafted and the way the law
18 is applied, construing the imputed
19 knowledge standard against my client,
20 and construing differently against Ms.
21 Graham's client and for all the reasons
22 that we set forth here today.

23 I appreciate the Court's time.

24 Thank you.

25 MS. WALL: Your Honor, might I

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2 just briefly response since in that
3 last colloquy we've heard something
4 about something that I said?

5 THE COURT: Go ahead.

6 MS. WALL: I'm trying to figure
7 out where to start.

8 This Court's order is based upon
9 undisputed facts. We don't need to look
10 at disputed facts. The undisputed facts
11 set the basis for this Court's order.
12 And this Court's order is then based
13 upon well settled South Carolina law.

14 The law in South Carolina on the
15 statute of limitations has never been
16 that the Plaintiffs must first
17 understand the significance of a
18 document, a statement, a fact, before
19 the statute of limitations begins to
20 run. That is not the standard, never
21 has been, and never will be. And Your
22 Honor was very clear in his order to
23 adopt the standard that is the law in
24 South Carolina.

25 For example, in the Burchase

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2 (phonetic) case, the Plaintiff had heard
3 merely that her attorney was having an
4 affair. The statute of limitations
5 began to run from that moment. She
6 didn't understand the significance of
7 it, but the court ruled she had three
8 years from that point to investigate, to
9 ask question, to take reasonable steps
10 to see whether or not she might have a
11 claim.

12 Counsel uses the term with Your
13 Honor, gosh, Your Honor, you're holding
14 my clients to snap my fingers; that is
15 not what the Court has done in this
16 order. The order simply holds these
17 Plaintiffs to the same standard under
18 statute of limitations that all other
19 Plaintiffs are held to when they try to
20 file a cause of action in the State of
21 South Carolina.

22 Finally, with regards to equitable
23 indemnity, it is for the Plaintiff to
24 come forward in phasing a motion for
25 summary judgment with admissible

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2 evidence to refute the basis for a
3 summary judgment. There is no evidence
4 in this case that the Plaintiffs have
5 paid any third-party because of any
6 claimed negligence on the part of my
7 clients, or to my knowledge, any other
8 Defendants in this case.

9 And then the very last thing I
10 would say is, we again oppose the new
11 arguments made here today, and made --
12 raised for the first time in Plaintiff's
13 motion to reconsider. And those are
14 part of the record, the objection that
15 they raised in their motion itself;
16 motion to reconsider. We objected to in
17 our response in opposition to
18 Plaintiff's motion to reconsider. So
19 those objections are part of the record.

20 And Judge, you've kindly given us
21 30 minutes today. I know that we've
22 taken far more than that time and we
23 need to bring this motion to reconsider
24 to an end, however, I put back on the
25 record one more time that I object to

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2 any new argument made be Mr. Few this
3 morning that was not part of
4 Plaintiff's argument in their
5 memorandum in opposition to summary
6 judgment, or made to this Court in
7 opposition during oral argument because
8 that of course is the time that the law
9 requires a party to come forward with
10 admissible evidence to defeat a motion
11 for summary judgment. They failed to
12 do so. Your Honor's order is correct,
13 and we ask that you deny Plaintiff's
14 motion to reconsider.

15 Thank you, Your Honor.

16 MS. GRAHAM: The Dyes make the
17 same objection.

18 MR. MAHAFFEE: And I also.

19 THE COURT: All right.

20 MR. FEW: Your Honor, if I may
21 just finally. The obligation to
22 prove -- I just ask the Court to look
23 at the cases that's been referenced,
24 the Burchase case, apparently that
25 party was put on specific notice of a

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problem. My client was never put on

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specific notice that there was any

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problem related to this issue.

5

And as far as coming up with

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admissible evidence, the evidence is the

7

evidence. It's our job to show that

8

there is evidence from which there are

9

disputed issues of fact all of which

10

must be viewed in the light most

11

favorable to my client, Your Honor.

12

THE COURT: I understand that. I

13

think there are undisputed facts

14

though. And, again, I'll review all of

15

this before I actually rule, but I

16

think my thinking the first time was,

17

there are undisputed facts, and if

18

there are undisputed facts that

19

objectively, you know, they knew or

20

should have known of this problem.

21

Then is there even a reason to deal

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with the undisputed facts?

23

One undisputed bit of evidence that

24

they objectively knew or should have

25

known of this problem means that you

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don't need to deal with the rest of
them; is that correct, or do you
disagree with that?

MR. FEW: We disagree absolutely,
Your Honor. There's no dispute that my
clients received certain documentation,
again, from the experts that they hired
to advise them of this situation for
which and through whom they relied upon
to advise them. They were never
advised properly, and so they never had
any reason to believe there was any
significance. That is what is in
dispute. What is in dispute is the
significance of a negative elevation.
That is absolutely what's in dispute.
That's what we're entitled to have a
jury look at and see if the jury agrees
with us, that would a reasonable person
have been on notice. Our clients are
reasonable. If this would have been
sufficient to put them on notice by the
same way that Ms. Graham's clients were
put on notice by way of receiving the

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2 letter and them deciding to sell, they
3 wouldn't have purchased the property.
4 That's what's at issue, Your Honor.

5 And you've asked the question about
6 objective verses subjective.
7 Objectively did they receive certain
8 documents; yes. Subjectively the Court
9 has to look into whether or not there
10 can be any significance attributed to
11 those documents, particularly in the
12 situation where we received those
13 documents from the experts that we hired
14 to handle this transaction and advise us
15 of all material issues. And we've
16 received those documents from our
17 experts without comment.

18 The only reasonable way to view
19 that, Your Honor is to assume that there
20 was not a problem with a negative
21 elevation.

22 THE COURT: We'll let that be the
23 last word. Thank you all very much.

24 (Whereupon, the hearing

25 concluded at 10:51 a.m.)

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:
BEAUFORT COUNTY:

I, Shannon Casper, Court Reporter and Notary
Public in and for the above county and state, do
hereby certify that the foregoing testimony was taken
before me at the time and place hereinbefore set
forth; that the witness was by me first duly sworn to
testify to the truth, the whole truth, and nothing
but the truth, that there upon the foregoing
testimony was later reduced by computer
transcription; and I certify that this is a true and
correct transcript of my stenographic notes so taken.

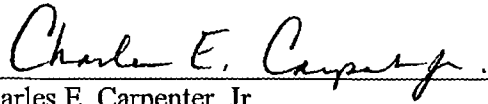
I further certify that I am not of counsel
to either party, nor interested in the event of this
cause.

Shannon Casper, CR
Notary Public
Beaufort, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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May 30, 2012.

The State Of South Carolina
In The Court Of Appeals

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

Civil Action No. 2008-CP-07-00517

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.

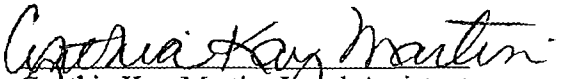
CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals & Trial Support, LLC,
attorneys for Appellants, Gregory M. Gottschlich and Donald L. McNeil, do hereby
certify that I have this date served the Record on Appeal by personally depositing a copy
of the same in a United States Postal Service mail box, postage prepaid, addressed to the
parties indicated below:

(Continued on Next Page)

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Cynthia Kay Martin, Legal Assistant
to Charles E. Carpenter, Jr.

Dated: June 4 2012.