STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CIVIL ACTION NO.: 2013-CP-40-05675
COUNTY OF RICHLAND	)	
Willie J. Riley,	)	
Plaintiff,	)	**ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT DENNIS WAYNE CATOE**
vs.	)	
Dennis Wayne Catoe and Does,	)	
Defendants.	)	

I. INTRODUCTION

This is a legal malpractice action. This matter came before the Court on March 2, 2015, for a hearing on the Defendant Dennis Wayne Catoe, Esquire's, [hereinafter "Catoe" or "Defendant"], Motion for Summary Judgment, as filed in the Court record with supporting Exhibits on December 3, 2014. Defendant Catoe's Motion for Summary Judgment is based on the grounds that the current action was not properly commenced by Plaintiff prior to the expiration of the applicable three (3) year statute of limitations as a matter of law. S.C. Code Ann. §§ 15-3-530 and 15-3-535 (Supp. 2013); Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816, 818 (2005); Kelly v. Jolley, 386 S.C. 626, 682 S.E.2d 1, 5 (Ct. App. 2009).

Present at the hearing and advancing arguments before the Court were counsel for the Defendant Catoe, Leslie A. Cotter, Jr., Esquire, ["Cotter"], and Pro-se Plaintiff Willie J. Riley, [hereinafter "Riley" or "Plaintiff"]. During the hearing, Mr. Cotter argued Defendant Catoe's Motion for Summary Judgment under Rule 56(c), S.C.R.Civ.P., and cited and referenced the legal authorities and the attached, filed Exhibits 1 and 2 contained in Defendant Catoe's Motion. Mr. Riley responded and stated his oral arguments in opposition to the Defendant's dispositive motion and handed up to the Court at copy of a letter dated June 5, 2013, written by Mr. Catoe to

Mr. Riley, which the Court marked as [Plaintiff's] Exhibit 1.

As the record, even when construed in a light most favorable to the Plaintiff as the non-moving party, contains no genuine issue as to any material fact, Defendant Catoe is entitled to a granting of summary judgment in his favor as the claims of the Plaintiff are barred and have not been properly commenced against Defendant Catoe prior to the expiration of the applicable statute of limitations. Summary Judgment shall be granted to the Defendant Catoe based on the reasons stated herein.

II. BACKGROUND

By way of background, the Plaintiff's original Complaint, [which was defective as a matter of law and did not contain an expert affidavit as mandated under S.C. Code Ann. § 15-36-100 (Supp. 2013)], was filed on September 17, 2013; but, the original Complaint was dismissed by the Court's Order as filed February 18, 2014. Thereafter, Plaintiff filed an Amended Complaint on March 4, 2014,[1] in which Mr. Riley, in essence, re-asserted the allegations contained in the original Complaint that Defendant Catoe engaged in professional negligence and legal malpractice with respect to the representation of Mr. Riley in a July 29, 2008, real estate closing transaction involving the purchase of a foreclosure property for the sum of $3,800.00 by Mr. Riley [in which Defendant Catoe was retained as the closing attorney concerning this real estate transaction involving the sale of a parcel of land located at 2181 Whittaker Parkway, Orangeburg, South Carolina 29115 (the "Subject Property")]. See, Amended Complaint, ¶¶ 4-5. In the Amended Complaint, Riley alleges that Defendant Catoe negligently failed to adequately ensure and protect Plaintiff's interests in this real estate closing transaction resulting in a defective title to the Subject Property purchased by Plaintiff and various alleged damages to

[1] Plaintiff's Amended Complaint contained an expert affidavit filed in accordance with S.C. Code Ann. §15-36-100.

Plaintiff. See, Amended Complaint (unnumbered) pp. 2-7, ¶ 4-5, 14, 15-31.

In response to Plaintiff's Amended Complaint, Defendant Catoe timely filed a Verified Answer to the Amended Complaint, with attached Exhibits, ["Answer"], on March 19, 2014. In Defendant Catoe's Answer, Mr. Catoe generally denied the material allegations of the Amended Complaint, denied that he had engaged in any actionable conduct, denied that he had any liability to the Plaintiff, and asserted various affirmative defenses. Among other affirmative defenses, Defendant Catoe asserted that Plaintiff's claims were barred by the applicable statute of limitations. S.C. Code Ann. §§ 15-3-530 and 15-3-535 (Supp. 2013). [Three year statute of limitations for legal malpractice lawsuits].

Under the Discovery Rule, the statute of limitations for legal malpractice lawsuits begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for wrongful conduct. Epstein, 610 S.E.2d at 818; See Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); S.C. Code Ann. § 15-3-535. See also Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed**. Id. (emphasis applied). Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein, 610 S.E.2d at 818; True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997).

As referenced hereinbelow, and as the record contains no genuine issue as to any material fact, Defendant Catoe is entitled to a granting of summary judgment in his favor as the purported claims of Plaintiff are barred and have not been properly commenced against this Defendant prior to the expiration of the applicable statute of limitations. Rule 56(c), S.C.R.Civ.P.

III. SUMMARY JUDGMENT STANDARD

The purpose of a summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The grant of summary judgment is proper when it is clear no genuine issue of material fact exists and that the moving part is entitled to a judgment as a matter of law. George v. Empire Fire & Marine Inc. Co., 344 S.C. 582, 545 S.E.2d 500 (2001); Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991). "A court considering summary judgement neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motions sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

"Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations." McMaster v. Dewitt, 411 S.C. 138, 148, 767 S.E.2d 451, 456 (Ct. App. 2014) (citing Kreutner v. David, 320 S.C. 283, 286-287, 465 S.E.2d 88, 90 (1995) (affirming "the grant[ing] of summary judgment because the statute of limitations has expired.")).

In ruling on a motion for summary judgment, the court must view the evidence and the inferences which can be drawn therefrom in the light most favorable to the non-moving party. Café Assocs., 406 S.E.2d at 164. "However, it is not sufficient for a party to create an influence

that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). As stated by our Supreme Court:

> [T]he plain language of Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to [that] party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

Further, under Rule 56(e), S.C.R.Civ.P.:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Viewing the record in this fashion based upon the appropriate standard of review, and construing the record in the light most favorable to Plaintiff, as a non-moving party, I find and conclude that there is no genuine issue of material fact with respect to Defendant Catoe's entitlement to summary judgment as a matter of law for the reasons herein stated.

IV. LAW / ANALYSIS

A. *Under the Discovery Rule "very little is required to start the statute of limitations clock."*

South Carolina Code Ann. §15-3-530 (Supp. 2013) provides a three year statute of limitations for legal malpractice lawsuits. Epstein, 610 S.E.2d at 818; Kelly, 682 S.E.2d at 5.

Under the Discovery Rule, the statute of limitations **begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct.** Id.; see also, Dean, 468 S.E.2d 645 (1996); S.C.Code Ann. § 15-3- 535; and Berry, at 445, 492 S.E.2d at 800.

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.** Epstein, 610 S.E.2d at 818 (emphasis in original). Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person **on notice** of the existence of a cause of action against another. Id.; Kelly, 682 S.E.2d at 5; True, 489 S.E.2d at 617 (emphasis added).

Specifically, the Discovery Rule focuses upon whether the complaining party acquired knowledge **of any facts** "sufficient to put said party on inquiry, which, if developed, will disclose" the alleged conduct. Walter J. Kline, Co. v. Kneece, 239 S.C. 478, 483, 123 S.E.2d 870, 874 (1962) (emphasis added) (quoting Tucker v. Weathersbee, 98 S.C. 402, 82 S.E. 638 (1914)). Therefore, the application of the Discovery Rule is in large measure a function of determining what facts and circumstances were known or discoverable by the plaintiff and when they were known or discoverable.

In Burgess v. American Cancer Soc'y, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989), Burgess, suing her former attorney for legal malpractice, contended that although the plaintiff claimed she was aware that a Cancer Society employee, Oullah, was having an affair with her

former attorney, McLeod, she was unaware that Oullah was passing information she had learned from McLeod about Burgess's claim to managerial level personnel at the Cancer Society office. The trial court and the Court of Appeals held "as a matter of law, that Burgess's knowledge of the alleged affair between McLeod, her attorney, and Oullah, then Executive Secretary of ACS, constituted such knowledge of existing facts which were sufficient to put Burgess on inquiry and had she pursued such inquiry, it would have disclosed alleged communications between McLeod and Oullah." Id. at pp. 800-801. Hence, in order for the statute to commence to run it is not necessary that a plaintiff need acquire precise information of the attorney's incorrect or negligent conduct but merely acquire "such facts as would have led to the knowledge thereof, if pursued with reasonable diligence." Id. at p. 800. Because Burgess was aware of the affair, the appellate court held that she was on notice to inquire further and, inasmuch as she was on notice, the statute had commenced to run. Burgess illustrates how little information the Plaintiff must possess to cause the statute of limitations to commence to run in South Carolina. As the Fourth Circuit Court of Appeals observed, South Carolina's statute of limitations requires "very little to start the clock." Roe v. Doe, 28 F.3d 404, 407 (4th Cir. 1994) (applying South Carolina law cited with approval in Maher v. Tietex Corp., 331 S.C. 371, 379, 500 S.E.2d 204, 212 (Ct. App. 1998)).

B. *Date of discovery is an objective test and one for the Court.*

Moreover, the date on which discovery should have been made is an objective, not subjective, question. Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995); Kelly, 682 S.E.2d at 5; Burgess, 386 S.E.2d at 800. Therefore, such a determination is properly one for the court, not a jury. The Discovery Rule focuses upon whether the plaintiff acquired knowledge of any facts sufficient to put him on inquiry, which if developed, would have disclosed the alleged wrongdoing. Burgess, 386 S.E.2d at 800; Berry, 492 S.E.2d 794. The fact that the injured party

may not comprehend the full extent of the damage is immaterial, where the injured party has notice that a claim against another party might exist. Dean, 468 S.E.2d 645.

As the Court of Appeals stated, "whether the particular plaintiff actually knew he had a claim is not the test. Rather, **courts must decide** whether the circumstances of the case would put a person of common knowledge and experience **on notice** that **some right** of his has been invaded, or that **some claim** against another party **might exist.**" Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001), (quoting Young v. South Carolina Dept. of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999) (emphasis added)). Moreover, the date of discovery is not dependent on when the plaintiff discovers a witness to support or prove his case. Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993).

Furthermore, "[t]he statute [of limitations] is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Kelly, 682 S.E.2d at 5-6; Maher, 500 S.E.2d at 207 (internal citations omitted).

C. ***Undisputed facts and circumstances in the Court Record which placed Plaintiff on Inquiry Notice of a Potential Claim and Application of Law to Undisputed Facts in the Record.***

It is clear that the three (3) year statute of limitations is a bar to the legal malpractice claims asserted by Plaintiff against Defendant Catoe in this action. Even under the Discovery Rule, as referenced in the statutes and cases cited herein, when applied to the undisputed record facts in this case, Mr. Riley was aware of the problem with his title to and ownership of the Subject Property, for which the real estate closing transaction occurred on July 29, 2008, **no later than early June 2009, when Mr. Riley sought and received the advice of an independent attorney, William E. Booth, III, Esquire, [hereinafter "Booth"]. Moreover, Mr. Riley's**

attorney representing him in June of 2009, Mr. Booth, wrote a letter dated June 3, 2009, to Mr. Catoe. This June 3, 2009, letter, which is attached as **Exhibit 1 to Defendant Catoe's Motion for Summary Judgment**, contains the following statements by Mr. Booth regarding the Subject Property:

> I am looking at a HUD-1 Settlement Statement dated July 29, 2009, for the purchase by Willie Riley of certain property in Orangeburg County [the Subject Property] from Aurora Loan Services, LLC [the Seller of the Subject Property to Mr. Riley].
>
> ...
>
> Based on discussions with Mr. Riley and my review of the deeds, I do not believe Aurora [the Seller] had good title for the property [the Subject Property] described in the deed.
>
> ...
>
> I believe the examination of the title should show that Aurora Loan Services [the Seller] did not have good title to this property [the Subject Property].

Thus, it is undisputed in the record before the Court that at least by June 3, 2009, Plaintiff Riley, [who is listed as receiving a carbon copy of this letter from Mr. Booth], and Mr. Riley's then attorney, Mr. Booth, knew that legitimate problems, disputes, and issues were presented concerning and involving errors in Mr. Riley's deed and title and in the examination of title and the real estate closing by Defendant Catoe involving the Subject Property and a potential legal malpractice claim against the closing attorney, Defendant Catoe, existed at that time.

Consequently, at a minimum, the three (3) year statute of limitations period began to run at least by June 3, 2009, which would require that any legal malpractice action be commenced within three (3) years of that date, or by on or about June 2, 2012, against Defendant Catoe. As referenced above, the original Complaint was not filed until September 17, 2013, more than three years later; and, the original Complaint was dismissed by the Court's Order as filed February 18, 2014. Further, the Amended Complaint was not filed until March 4, 2014, which was also more than three (3) years later than the above referenced June 3, 2009, letter from Mr. Booth to Mr. Catoe. Thus, the three (3) year statute of limitations has run on and bars Plaintiff's claims

against Defendant Catoe as a matter of law.

Additional grounds on which the Defendant Catoe's Motion for Summary Judgment are based include Requests for Admission submitted on behalf of the Defendant Catoe, pursuant to Rule 36, S.C.R.Civ.P., which were served on Plaintiff Riley on October 9, 2014, and which Plaintiff Riley provided neither any written answer nor objection to these Requests for Admission, all of which is referenced in an Affidavit of Mr. Cotter that was attached and filed on December 3, 2014, as **Exhibit 2 to the Defendant Catoe's Motion for Summary Judgment**.

Mr. Cotter's Affidavit [**Exhibit 2**] states that, as defense counsel of record for Defendant Catoe, he served Plaintiff Riley with Requests for Admission on behalf of Defendant Catoe [attached as **Exhibit A to Mr. Cotter's Affidavit**] by both email, [at the email address which Mr. Riley had previously communicated], and by U.S. Mail, [at the U.S. Mail address which Mr. Riley provided to the Court and which was previously utilized to serve Mr. Riley with other documents in this matter], on October 9, 2014. Affidavit of Cotter, ¶¶ 3 and 4. Mr. Cotter's Affidavit further states that: (a) "more than thirty (30) days after the service of these Requests for Admission has now elapsed" [in particular, more than fifty (50) days after service of these Requests for Admission has now elapsed] as of the December 3, 2014, date of Mr. Cotter's Affidavit, and, (b) Mr. Riley "has neither provided any written answer nor objection addressed to these matters contained in these Requests for Admission (**Exhibit A**) to date (as of December 3, 2014);" and, that [thus], "pursuant to Rule 36(a) and (b), S.C.R.Civ.P., and upon present information and belief, the matters contained in these Requests for Admission, [attached as **Exhibit A to Mr. Cotter's Affidavit**], are, and should be, all deemed admitted." Affidavit of Cotter, ¶¶ 5 and 6.

At the March 2, 2015, hearing before the Court, Plaintiff contended that he "did not

receive Defendant Catoe's Requests for Admission" and that he called and emailed Mr. Cotter [without indicating the date(s) of such] to advise Mr. Cotter that he did not receive the Requests for Admission of Defendant Catoe. Plaintiff provided no affidavit or evidence to support these contentions. Mr. Cotter responded and advised that Mr. Riley's verbal statement at the March 2, 2015, hearing, was the first time that he had heard such a contention. Mr. Cotter further advised that, since serving Defendant Catoe's Requests for Admission on October 9, 2014, and since also serving these Requests for Admission as an attachment (**Exhibit A**) to his December 3, 2014, Affidavit [**Exhibit 2 to Defendant Catoe's Motion for Summary Judgment**, (which, as contained on the Certificate of Service, were served on Mr. Riley on December 3, 2014, by email and by U.S. Mail to the same, respective, email and U.S. Mail address for Mr. Riley)], and up to the time of the March 2, 2015, hearing, he was not aware of any such contention by Mr. Riley or any call or email to him from Mr. Riley in regard to Mr. Riley allegedly "not receiving" these Requests for Admission on behalf of Defendant Catoe.

Therefore, on this record, even construed in the light most favorable to the Plaintiff as the non-moving party, I find and conclude that these Requests for Admission on behalf of Defendant Catoe are, and shall be, deemed admitted by operation of Rule 36, S.C.R.Civ.P.

Accordingly, there are a few additional grounds and undisputed facts in the instant record contained within these Requests for Admission which exist to further establish that the three (3) year statute of limitations has run on Plaintiff's claims against Defendant Catoe. For example, Request for Admission Nos. 7, 8 and 9 reference the same subject matters in the above referenced and discussed June 3, 2009, letter from Mr. Riley's then attorney, Mr. Booth, concerning Plaintiff's knowledge of the error or problem with Mr. Riley's deed and title to, and ownership of, the Subject Property. In addition, Request for Admission No. 11 contains a

reference to an August 4, 2009, letter from Mr. Riley's then attorney, Mr. Booth, to Kenneth W. Ebner, Esquire, [hereinafter "Ebner"], on which Mr. Riley is listed as receiving a copy (and on which Mr. Catoe is also listed as receiving a copy), that was attached as **Exhibit 3 to Request for Admission No. 11, subpart (a)**. In this August 4, 2009, letter to (**Exhibit 3**) Mr. Ebner, Mr. Booth states in the first paragraph:

> I am in the process of trying to fix some title problems that have been discovered in regards to the above referenced property [property within the historical chain of title to or involving the Subject Property]. I understand that you were the closing attorney for Mrs. Felder [who was a Purchaser of or involved with property in the historical chain of title to or involving the Subject Property].

Therefore, in the alternative, even if the above referenced and discussed June 3, 2009, letter from Mr. Booth to Mr. Catoe would not be the starting date for the running of the applicable three (3) year statute of limitations, I find and conclude this August 4, 2009, letter from Mr. Riley's then attorney, Mr. Booth, to Mr. Ebner, (**Exhibit 3**), would serve as an alternative starting date for the running of the three (3) year statute of limitations with respect to Plaintiff Riley's claims against Defendant Catoe.

In the presented record, with either the June 3, 2009, letter from Mr. Booth [and the date of June 3, 2009] or the August 4, 2009, letter from Mr. Booth [and the date of August 4, 2009] as the beginning of the applicable Discovery Rule date to commence the running of the three-year statute of limitations, Mr. Riley's claims against Mr. Catoe are time-barred as a matter of law.

In a case with somewhat similar facts, the Supreme Court held that the statute of limitations was a bar to the assertion of a legal malpractice claim. In Christensen v. Mikell, 324 S.C. 70, 476 S.E.2d 692 (1996), a landowner sued his former attorney for failing to obtain title insurance. The trial judge found that the owner knew as early as March 1986 that he did not have title insurance on the property. The Supreme Court held that the owner, therefore, was on inquiry

notice by March 1986 that he may have a potential claim against the attorney. The owner's lawsuit against the attorney, which was not brought within the statutory limitations period, was barred and the Supreme Court affirmed an order for summary judgment for the attorney.

A party's knowledge of an injury has barred legal malpractice claims in other South Carolina cases. In Mitchell v. Holler, the record established that the party contacted two other attorneys complaining of the conduct of her former attorney at her criminal trial. 311 S.C. 406, 429 S.E.2d 793 (1993). The Supreme Court found that the party knew or should have known at the time she contacted the other attorneys that she might have a claim against the former attorney. Id. The Court affirmed an order dismissing the party's legal malpractice claim as barred by the statute of limitations. Id.

In Peterson v. Richland County, the Court of Appeals found that the party had knowledge of her injury at the time she commenced an action to foreclose on a judgment. 335 S.C. 135, 515 S.E.2d 553 (Ct. App. 1999). By that time, it was clear that she knew that an error had been committed in the indexing of her judgment. Id. The Court pointed out that although she may have believed that the clerk's office was to blame for the error, she had facts before her that should have put her on notice that she might have a claim against her attorney. Id. The Court of Appeals affirmed an order for summary judgment in favor of the attorney based on the expiration of the statute of limitations. Id.

The Supreme Court has also affirmed summary judgment based on evidence in the record that a party should have known she might have a claim against her attorney when he "stonewalled" more than nine requests for the recorded mortgage and title policy following a loan closing. At that time the party was on notice that the borrower had not repaid the loan and that the attorney would not provide the mortgage or title policy. While the Supreme Court did

not condone the attorney's conduct in that case, it nonetheless affirmed the grant of summary judgment because the statute of limitations had expired on the claim. Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995).

D. ***Equitable estoppel or tolling has not been established and is not present in this record as a matter of law.***

At the March 2, 2015, Hearing before the Court, Plaintiff Riley asserted that, in essence, despite the running of the statute of limitations, Defendant Catoe should be estopped from raising the bar of the statute of limitations or the Court should apply the doctrine of equitable tolling to toll the running of the statute of limitations. As support for his argument, Mr. Riley made reference to a June 5, 2013, letter Mr. Catoe sent to Mr. Riley which Plaintiff contends establishes or justifies the tolling of the statute of limitations in this action. The Court received a copy of the June 5, 2013, letter referenced by Mr. Riley, which was marked as **[Plaintiff's] Exhibit 1** in the Court record.

At the Hearing, the Court carefully reviewed this June 3, 2013, letter, **[Plaintiff's] Exhibit 1,** and considered the Plaintiff's contentions. From the bench, I found and concluded that Plaintiff's assertions are without merit. In particular, I found and concluded that this June 5, 2013, [**Plaintiff's**] **Exhibit 1**, references, in general, Mr. Catoe's on-going voluntary pursuit, prior to and during June 2013, at Mr. Catoe's own expense, of an action to quiet title [and clear up any confusion] concerning the Subject Property.[2] This June 5, 2013, letter also contains comments about Mr. Riley's list of claimed damages (allegedly) incurred as a result of the delay in using the Subject Property until it could be legally cleared or title could be quieted. However,

[2] The Court also notes that Mr. Catoe references the non-jury civil action to quiet title Mr. Catoe voluntarily pursued in Defendant Catoe's Answer, and Exhibits B and C attached thereto, filed in the Court record.

it provides no evidence or any material issue of fact to establish any basis in fact or in law to support equitable estoppel or tolling of the statute of limitations in this case.[3]

As a preliminary or threshold matter, the Court notes that under South Carolina law, the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). Moreover, the South Carolina Supreme Court has cautioned that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Id., at 117, 687 S.E.2d at 33.

Moreover, Plaintiff, as the party claiming that Defendant Catoe should be estopped from raising the statute of limitations or that the statute of limitations should be tolled bears the burden of establishing such, has failed to bear or carry the burden of establishing any sufficient or material facts to justify equitable estoppel or tolling in this record nor do the interests of justice compel its use in this matter. Plaintiff has not directed the Court's attention to any action by Mr. Catoe that would establish Mr. Catoe led Mr. Riley to believe that he would not assert the statute of limitations as a defense. Further, Plaintiff Riley could have protected his professional negligence or legal malpractice action against Mr. Catoe while the action to quiet title with respect to the title problems existing on the Subject Property was being pursued. See, Epstein, 610 S.E.2d at 821 (the Supreme Court rejected Epstein's argument that requiring him to pursue an appeal while simultaneously pursuing a malpractice suit against his attorney would have put him in the awkward position of arguing inconsistent positions in two different courts).

Under the above referenced applicable law and after careful review of the June 5, 2013,

[3] The Court, also, notes that Plaintiff has submitted no affidavit or other evidence except this June 5, 2013, letter to support or provide any basis for equitable estoppel or tolling in this record.

letter, [**Plaintiff's**] **Exhibit 1,** and Plaintiff's contentions, I find and conclude that neither the June 5, 2013, letter from Mr. Catoe nor any other evidence presented in the record before the Court, even when construed in the light most favorable to the Plaintiff as the non-moving party, establishes any material issues of fact to justify equitable estoppel or tolling of the statute of limitations.

Therefore, as the Court is mindful the Supreme Court has cautioned that the doctrine of equitable estoppel or tolling is to be used sparingly, I find and conclude application of the doctrine is not justified or present in this record as a matter of law. Plaintiffs' claims may not withstand summary judgment as Plaintiffs' claims against Defendant Catoe are barred by the applicable three (3) year statute of limitations as a matter of law.

V. CONCLUSION

For the foregoing reasons, and based upon the applicable case and statutory law, and based upon the entire record, construed in the light most favorable to Plaintiff as the non-moving party, I am constrained to conclude that, pursuant to the Discovery Rule, the statute of limitations began to accrue or run at least by June 3, 2009, [when Plaintiff Riley's then attorney, Mr. Booth, wrote a letter to Mr. Catoe (attached as **Exhibit 1 to Defendant Catoe's Motion for Summary Judgment**, as discussed above) and Plaintiff Riley, and Mr. Booth, knew that legitimate problems, disputes, and issues existed involving errors in Mr. Riley's deed and title and in the examination of title and the real estate closing by Defendant Catoe involving the Subject Property and a potential legal malpractice claim against Defendant Catoe existed at that time], or, alternatively, by August 4, 2009, [when Mr. Booth, as Plaintiff Riley's then attorney, wrote a letter to Mr. Ebner (attached as **Exhibit 3 to Request for Admission No.**

11, as discussed above), referencing the title problems, disputes, and issues existing involving errors in Mr. Riley's deed and title and in the examination of title and the real estate closing by Defendant Catoe involving the Subject Property]; and, these dates are more than three (3) years before commencement of Plaintiff's action against Defendant Catoe here on September 17, 2013, [the filing of Plaintiff's original Complaint, which was dismissed by the Court's February 18, 2014, Order] or on March 4, 2014, [the filing of Plaintiff's Amended Complaint]. S.C. Code Ann. §§ 15-3-530 and 15-3-535 (Supp. 2013); Epstein, 610 S.E.2d at 818; Kelly, 682 S.E.2d at 5.

Thus, because the current action was initiated and commenced more than three (3) years after these dates, it is time-barred by the statute of limitations as a matter of law; and, Defendant Catoe's Motion for Summary Judgment is meritorious as no genuine issues of material fact exists in the record. Rule 56(c), S.C.R.Civ.P.

IT IS THEREFORE HEREBY ORDERED, that the Motion for Summary Judgment of Defendant Catoe shall be, and hereby is, GRANTED based upon the expiration of the statute of limitations. IT IS FURTHER ORDERED that judgment shall be entered in favor of Defendant Dennis Wayne Catoe.

AND IT IS SO ORDERED at Conway, South Carolina, this 23 day of April, 2015.

J. Ernest Kinard, Jr.
South Carolina Circuit Court Judge, Presiding
Fifth Judicial Circuit

FORM 4

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

JUDGMEN .N A CIVIL CASE

CASE NUMBER: 2013CP4005675

Willie J Riley	Dennis Wayne Catoe
	Does
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
2015 MAY 18 PM 4:30
RICHLAND COUNTY
CLERK OF COURT

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

RECEIVED
AUG 05 2015
SC Court of Appeals

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 18 May 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Willie J Riley — Mark Weston Hardee — Leslie A. Cotter Jr.

Willie J Riley

ATTORNEY(S) FOR THE PLAINTIFF(S) — **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED