

2013-000375

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

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APPEAL FROM BEUFORT COUNTY
COURT OF COMMON PLEAS
The Honorable Marvin H. Dukes, III,
Master-In-Equity

S.C. Supreme Court

Civil Action No. 2008-CP-07-00517

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

Gregory M. Gottschlich and Donald L. McNeil,

PETITIONERS,

versus

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

DEFENDANTS,

Of whom

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.

Appendix

Charles E. Carpenter, Jr.
CARPENTER APPEALS &
TRIAL SUPPORT, LLC
P.O. Box 1774
Columbia, SC 29201
803-758-2886
Attorney For
Petitioner Gregory M. Gottschlich and
Donald L. McNeil

Max G. Mahaffee, Esquire
GRIMBALL & CABANISS, LLC
Post Office Box 816
Charleston, SC 29402-0816
Attorney for Respondents Ken Oliver
and The Byrne Corporation d/b/a Dunes
Marketing Group

Susan Taylor Wall, Esquire
MCNAIR LAW FIRM, P.A.
Post Office Box 1431

Charleston, SC 29402

**Attorneys for Respondents Laurich &
Deeb, P.A., Robert M. Deeb, Jr., and
Charles H. Wiseman**

INDEX

Final Appellants' Brief of Appellants Gottschlich and McNeil,
dated June, 21, 2012

Final Reply Brief of Appellants, dated June 21, 2012

Final Brief of Respondents Ken Oliver, The Byrne Corporation d/b/a Dunes
Marketing Group

Respondents Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H.
Wiseman Final Brief, dated June 2, 2012

PAGE

Unpublished Court of Appeals Opinion No. 2012-UP-676,
filed December 19, 2012.....1

Petition for Rehearing, dated January 3, 2013.....3

Respondents' Joint Reply to Appellants' Petition for Rehearing.....16

Order Denying Petition for Rehearing, filed January 25, 2013.....24

The State Of South Carolina
In The Court Of Appeals

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Appellants,

versus

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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.

Final Appellants' Brief of Appellants Gottschlich and McNeil

Charles E. Carpenter, Jr.
Carmen V. Ganjehsani
Carpenter Appeals & Trial Support, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
(803) 758-2886
Attorneys for Appellants
Gregory M. Gottschlich &
Donald L. McNeil

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW FOR SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS.....	6
STATEMENT OF FACTS	7
ARGUMENT WHY SUMMARY JUDGMENT SHOULD BE REVERSED.....	21
CONCLUSION.....	34

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Benton v. Roger C. Peace Hospital</i> , 313 S.C. 520, 443 S.E.2d 537 (1994)	22
<i>Brown v. Finger</i> , 240 S.C. 102, 124 S.E.2d 781 (1962)	6, 33
<i>Cline v. J.E. Faulkner Homes, Inc.</i> , 359 S.C. 367, 597 S.E.2d 27 (Ct. App.2004)	21
<i>Dean v. Ruscon Corp.</i> , 321 S.C. 360, 468 S.E.2d 645 (1996)	21
<i>Dillon County Sch. Dist. No. 2 v. Lewis Sheet Metal Works, Inc.</i> , 286 S.C. 207, 332 S.E.2d 555 (Ct. App.1985), cert. granted, 287 S.C. 234, 337 S.E.2d 697 (1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986).....	6
<i>Dixon v. Dixon</i> , 362 S.C. 388, 608 S.E.2d 849 (2005)	21
<i>Doe v. McMaster</i> , 355 S.C. 306, 585 S.E.2d 773 (2003)	30
<i>Garner v. Houck</i> , 312 S.C. 481, 435 S.E.2d 847 (1993)	34
<i>Graniteville Company, Inc. v. IH Services, Inc.</i> , 316 S.C. 146, 447 S.E.2d 226 (S.C. App. 1995)	7
<i>Hancock v. Mid-South Management Co., Inc.</i> , 381 S.C. 326, 673 S.E.2d 801 (2009)	6
<i>Johnston v. Bowen</i> , 313 S.C. 61, 437 S.E.2d 45 (1993)	24
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S.1003 (1992).....	23
<i>Santee Portland Cement Co. v. Daniel Int'l Corp.</i> , 299 S.C. 269, 284 S.E.2d 693 (1989)	6, 34
<i>Snell v. Columbia Gun Exchange, Inc.</i> , 276 S.C. 301, 278 S.E.2d 333 (1981)	7, 21

<i>State v. Buyers Service Company, Inc.</i> , 292 S.C. 426, 357 S.E.2d 15 (1987)	30, 31
--	--------

STATUTES

S.C. Code Ann. § 27-50-10	2
S.C. CODE ANN. § 15-3-530.....	21
S.C. CODE ANN. § 40-57-137.....	26, 29

RULES

1.1, SCRPC, Rule 407, SCACR	32
-----------------------------------	----

STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

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

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

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

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

Nature of the Case

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

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

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

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

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

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

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

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

Burden of Proof under Standard of Review

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

Standard of Proof When on Summary Judgment

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

Parties and Witnesses Identified

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

Buyers

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

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

Sellers

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

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

Previous Owners

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

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

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

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

Lawyers and Law Firms

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

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

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

* Deceased

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

Real Estate Sales Persons and Brokers

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

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

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

Surveyors

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

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

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

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

Builder

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

* Deceased

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

Lender

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

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

Insurance

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

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

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

Programs, Organizations

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

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

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

Expert Witnesses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chronological Dates

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

After Joseph Reeve 2nd Owner Ben Muldong, Myra Muldong purchased the house.
[R.p. 574; Pls. Answers to Oliver Interrogatories, p. 4]

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

April 3, 2001 3rd Owner -- Thomas N. Dye, Jan H. Dye purchased 2001 [R.p.
523-524; Settlement Statement between Muldongs and Dyes.]

February 25, 2003 - Seacoast Insurance's Shelley Wright wrote the Dyes and told
them their insurance had ended because of the elevation
information and also they needed to send premium [R.p. 503;
Letter.]

Shortly Before
Closing In the seller's residential sale disclosure statement Item 17 asks if
there are any violations of codes or ordinances . The Dyes who
were being assisted by Ken Oliver of Byrne Corp. d/b/a Dunes
Marketing Group, and they "no" for Item 17. [R.p. 77-79;
Disclosure.]

November 4, 2003- The beginning effective date for the Dunes Marketing
Exclusive Buyer Agency Agreement as stated in No. 3 of the
agreement. This exclusive buyer's agency agreement was for six
months until June 4, 2004 [R.pp. 75-76; Agreement.]

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

November 6, 2003 - Dr. Gottschlich signed Agency Relationships in Real Estate which
is a single page document that has on the bottom a Consent to Dual
Agency which our clients signed. [R.p. 481; Agency Relationship
Document.]

November 6, 2003 - date Contract of Sale -- Offer and Acceptance (purchase price
\$1,395,000.00) [R.pp. 80-84; Contract.] (at this point they are still
under the exclusive agency agreement with Dunes Marketing and
Greg Merrill) (item 7 refers to a possible dual agency later)

November 2003
Prior to closing -- Dr. Gottschlich and Dr. McNeil have an inspection and inspection
report done between contract of sale and closing

November 12, 2003 - date of appraisal (\$1,4426,801.00)

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

March or April, 2006 Dr. Gottschlich was in Teena Farrell's office at Seacoast Insurance when she turned to her computer and pulled up the file. It is his impression she was surprised. She said we can't issue insurance on the house because it doesn't meet code. [R.p. 591; Pls. Answers to Oliver Interrogatories, p. 21.]

April to Oct. , 2006 Dr. Gottschlich went on extended research effort to determine if there was some kind of mistake, or if it was grandfathered, or if there was a way to fix the problem. [R.p. 591; Pls. Answers to Oliver Interrogatories, p. 21.]

April 10-20, 2006 Seacoast Insurance Company told the doctors the house was not eligible for excess flood insurance because of the elevation of the lowest finished floor being less than 14 feet. R.pp. 591; 734-735; Pls. Answers to Oliver Interrogatories, p. 21; Gottschlich Dep. pp. 14-15.]

May 9, 2006 Shelley Wright called Seacoast and declined coverage because of elevation. [R.p. 577; Pls Answers to Oliver Interrogatories, p. 7.]

June 5, 2006- Seacoast Insurance prepared another application for excess insurance.

Mid-2006 Dr. Gottschlich got Sea Island Land Survey and Coastal Surveying to verify the March 28, 2001 survey [R.p. 574; Pls Answers to Oliver Interrogatories, p. 4.]

December 1, 2006 - Friday, the day before the three year anniversary of closing contact closing attorneys about elevation concerns. [R.pp. 738; 89-90; Gottschlich Dep. p. 63; December 8, 2006 Letter from Deeb.]

December 4, 2006 - The lawyer pulled the file from storage on Monday [R.p. 89; December 8, 2006 Letter.]

February 18, 2008 – Complaint [R.pp. 10-43.]

March 20, 2009 - Amended Complaint adding Laurich & Deeb as a defendant [R.pp. 44-106.]

January 11, 2010 – Order granting summary judgment. [R.pp. 1-7.]

Argument Why Summary Judgment Should Be Reversed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) perform the terms of the written brokerage agreement made with the buyer;

(2) in accordance with subsection (A), promote the interest of the buyer by performing the buyer's agent's duties which include:

(a) seeking property at the price and terms stated in the brokerage agreement or at a price and terms acceptable to the buyer, except that the licensee is not obligated to seek additional properties unless the brokerage agreement provides otherwise for a buyer once the buyer becomes a party to a contract of sale;

(b) presenting in a timely manner all offers and counteroffers to and from the buyer;

(c) disclosing to the buyer all relevant facts concerning the transaction which are actually known to the licensee or, if acting in a reasonable manner, should have been known to the licensee, except as directed otherwise in this section. Nothing in this chapter shall limit a buyer's obligation to inspect the physical condition of the property which the buyer may purchase;

(d) advising the buyer to obtain expert advice on material matters that are beyond the expertise of the licensee;

(e) accounting in a timely manner, as required by this chapter, for all money and property received in which the buyer has or may have an interest;

(3) exercising reasonable skill and care in discharging the buyer's agent's agency duties;

(4) complying with all provisions of this chapter and with any regulations promulgated by the department;

(5) complying with all applicable federal, state, or local laws, rules, regulations, and ordinances related to real estate brokerage, including laws which relate to fair housing and civil rights;

(6) preserving confidential information provided by the buyer during the course of or following the agency relationship that might have a negative impact on the buyer's real estate activity unless:

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

(b) disclosure is required by law; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(M)(1) A licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties. The informed consent must be evidenced by a dual agency agreement, promulgated by the commission, and must be signed by the buyer before writing an offer and by the seller before signing the sales contract. The agreement must specify the transaction in which a licensee is serving as dual agent and must state that:

- (a) in acting as a dual agent, a licensee represents clients whose interests may be adverse and that agency duties are limited;
- (b) the dual agent may disclose information gained from one party to another party if the information is relevant to the transaction, except if the information concerns:
 - (i) the willingness or ability of a seller to accept less than the asking price;
 - (ii) the willingness or ability of a buyer to pay more than an offered price;
 - (iii) confidential negotiating strategy not disclosed in an offer as terms of a sale; or
 - (iv) the motivation of a seller for selling property or the motivation of a buyer for buying property.
- (c) the clients may choose to consent to disclosed dual agency or may reject it; and
- (d) the clients have read and understood the agency agreement and the agency disclosure form and acknowledge that their consent to dual agency is voluntary.

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

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

The Duties of the Real Estate Lawyer

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

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

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

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

“1) *Title Search*

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

2) *Loan Documents*

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

3) *Closing*

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

4) *Recordation of Documents*

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

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

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

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

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

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

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

RULE 1.1: COMPETENCE

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

Comment

Thoroughness and Preparation

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

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

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

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

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

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

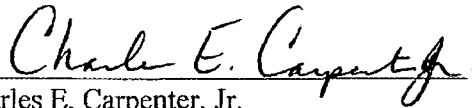
At an absolute minimum this is an issue for a jury to resolve. If there is conflicting evidence as to whether a claimant knew or should have known he or she had a

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

CONCLUSION

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

Respectfully submitted

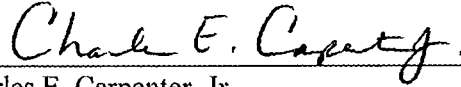


Charles E. Carpenter, Jr.
Carmen V. Ganjehsani
CARPENTER APPEALS AND TRIAL SUPPORT, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
(803) 758-2886
ATTORNEYS FOR APPELLANTS
GREGORY M. GOTTSCHLICH
DONALD L. MCNEIL

June 21, 2012.

CERTIFICATE OF COMPLIANCE

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



Charles E. Carpenter, Jr.
Carmen V. Ganjehsani
CARPENTER APPEALS AND TRIAL SUPPORT, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
(803) 758-2886
Attorneys for Appellants
Gregory M. Gottschlich and Donald L. McNeil

June 21, 2012.

CERTIFICATE OF SERVICE

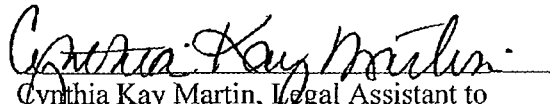
I, the undersigned, an employee of CARPENTER APPEALS AND TRIAL SUPPORT, LLC for Appellants, Gregory M. Gottschlich and Donald L. McNeil, do hereby certify that I have this date served the foregoing Final Appellants' Brief of Appellants, dated June 21, 2012, by causing same to be deposited in an United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

Max G. Mahaffee, Esquire
GRIMBALL & CABANISS, LLC
Post Office Box 816
Charleston, SC 29402-0816

**Attorney for Respondents Ken Oliver
and The Byrne Corporation d/b/a Dunes
Marketing Group**

Susan Taylor Wall, Esquire
MCNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, SC 29402

**Attorneys for Respondents Laurich &
Deeb, P.A., Robert M. Deeb, Jr., and
Charles H. Wiseman**


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

June 21, 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.

**FINAL REPLY BRIEF
OF APPELLANTS**

Charles E. Carpenter, Jr.
Carmen V. Ganjehsani
Carpenter Appeals & Trial Support, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
(803) 758-2886
Attorneys for Appellants
Gregory M. Gottschlich &
Donald L. McNeil

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	21

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Brown v. Finger</i> , 240 S.C. 102, 124 S.E.2d 781 (1962)	3, 4
<i>Dillon County Sch. Dist. No. 2 v. Lewis Sheet Metal Works, Inc.</i> , 286 S.C. 207, 332 S.E.2d 555 (Ct. App.1985); cert. granted, 287 S.C. 234, 337 S.E.2d 697 (1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986)	2
<i>Epstein v. Brown</i> , 363 S.C. 372, 610 S.E.2d 816 (2005)	3
<i>Graniteville Company, Inc. v. IH Services, Inc.</i> , 316 S.C. 146, 447 S.E.2d 226 (Ct. App. 1995)	2
<i>Hancock v. Mid-South Management Co., Inc.</i> , 381 S.C. 326, 673 S.E.2d 801 (2009)	3, 4
<i>McNaughton-McKay Elec. Co. v. Andrich</i> , 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1997)	10
<i>Snell v. Columbia Gun Exchange, Inc.</i> , 276 S.C. 301, 278 S.E.2d 333 (1981)	2
<i>Tupper v. Dorchester County</i> , 326 S.C. 318, 487 S.E.2d 187 (1997)	9
 <u>STATUTES</u>	
S.C. Code Ann. § 15-3-535	2

**This Reply Brief is a Consolidated Reply Brief to both Lawyers and
Realtors Respondents' Briefs**

The appellant doctors consolidate their Reply Briefs to provide clarity and economy on the single issue in the case. Both the lawyers and realtors set up straw men arguments to claim the doctors somehow abandoned the very issue they have consistently and vigorously fought from the beginning of this case until the present.

Both the defendant lawyers and realtors argue that if they are wrong and the discovery rule extends the triggering date for the statute of limitations, then they should still get out because either they knew nothing or they owed no duty.

This is summary judgment on the discovery rule. In asking this Court to reverse the trial court we are not asking to win the case. We are not even asking to win on the discovery rule. We only ask that this Court recognize we have some evidence, any evidence for the discovery rule.

We believe the trial court was in error in granting summary judgment on the discovery rule and should be reversed.

I. The Order of Summary Judgment Should Be Reversed Because:

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

A. The Statutory “Discovery Rule” of S.C. Code Section 15-3-535 states:

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

The statute does not begin to run until the date *the injury* resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *Dillon County Sch. Dist. No. 2 v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App.1985), cert. granted, 287 S.C. 234, 337 S.E.2d 697 (1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986).

B. A “Person” Is Someone of Common Knowledge and Experience.

“An injured party must act with some promptness where the facts and circumstances of an injury would put *a person of common knowledge and experience* on notice that some right ... has been invaded or that some claim against another party might exist.” *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Graniteville Company, Inc. v. IH Services, Inc.*, 316 S.C. 146, 447 S.E.2d 226 (Ct. App. 1995).

C. The Realtors Impose a Higher Standard than the Law.

This Reply Brief will use the law’s standard of a person of common knowledge and experience despite the realtor’s attempt to impose a higher standard on the plaintiffs because they are doctors.

The realtors introduce a standard of their own not recognized by the law as follows: “These medical doctors are more than people of common knowledge and

experience. It is just that they did not act, even though they were at least on inquiry notice if not on actual notice.” Respondents’ Brief, p. 4.

The test is an objective test of what a person of common knowledge and experience would be able to see that some legal right had been invaded. *Epstein v. Brown*, 363 S.C. 372, 376, 610, S.E.2d 816, 818 (2005).

It is the defendants, not the plaintiffs, who are professional practicing in real estate and real estate law but these doctors have no expertise in these fields. That is precisely why they hire professionals to protect their interest in this purchase of a house.

1.) Burden of Proof is, and remains, on the Defendants

The burden of establishing the bar of the statute of limitations rests on the party that asserts it. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962).

a.) Because it is an affirmative defense

A statute of limitations defense is an affirmative defense that a defendant must plead and a defendant must prove to a jury by the preponderance of the evidence. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). It is not the burden of the plaintiffs to disprove the applicability of the statute of limitations.

b.) Because they are the moving party

The moving party has the burden of establishing a right to have a motion granted and if it is a summary judgment motion the non-moving party successfully defeats it with *a mere scintilla of evidence*. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

2.) Defendants' subtle effort to shift their burden of proof

The Defendant's subtly imply a shift of the burden by citing the obligation of the non-moving party to come forward with some evidence. The Appellants have met that burden of coming forward with some evidence to meet the Motion. The burden of proof of the statute of limitations by the preponderance of the evidence remains with the Respondents.

3.) The Amount of Evidence opposing summary judgment need only be a scintilla

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

4.) No Summary Judgment with Conflicting Evidence under the Discovery Rule

When the testimony is conflicting upon the question, it becomes an issue for the jury to decide. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962).

D. Facts related to this Reply Brief

1.) Events that Occurred Before the Doctors Bought the House

Joseph Reeve of Strimpfel Custom Homes built the house in 1987 [R.pp. 69; 538; Building permit; Gottschlich Dep. p. 87]. When he achieved an elevation of 13.3', he persuaded the city inspector to take his word he would complete it at 14.1'. The builder left it at 13.3' but the inspector trusted his word and issued an occupancy permit showing an elevation certificate of 14.1'.without verifying it in fact complied. [R.pp. 538-539; 72; 71; Gottschlich Dep. pp. 87-88; Certificate of Occupancy; Coastal Surveying's Work

Order.] The next owners were Ben and Myra Muldong who bought the house from Joseph Reeve. Tom and Jan Dye bought the house from Ben and Myra Muldong on April 3, 2001. [R.pp. 93; 508; 523-524; C. Joseph Roof Aff. pp. 3, ¶¶ 11 and 15; Tom Dye Dep. p. 45, lns 2-9; Settlement Statement (Ex. 2 to Tom Dye Deposition).]

It is an undisputed fact that on March 28, 2001, Coastal Survey sent an elevation certificate to Jan and Tom Dye which showed the 13.3' elevation. [R.pp. 73-74; Elevation Certificate.]. However, the Dyes did not recognize the significance of this fact and went ahead with their purchase of the house on April 3, 2001. [R.pp. 523-524; 517-518; Settlement Statement (Ex. 2); Tom Dye Dep. pp. 74-75.]

It would only be later that the Dyes would learn information that enabled them to recognize the meaning and significance of that fact. They were paying approximately \$500.00 for flood insurance until getting a notice from Shelly Wright of Seacoast Insurance. On February 25, 2003, Shelley Wright wrote Tom and Jan Dye notifying them of nonrenewal of their Excess Windstorm and Flood Insurance policy. [R.p. 503; February 25, 2003 Tuesday Electronic Letter from Wright to the Dyes.]

At the bottom of the letter, set off by three asterisks, was a notice advising the Dyes that the flood insurance premium was more expensive due to the house's negative elevation of 13.3 Id.

Once they knew the meaning and significance of 13.3' elevation on Tuesday, February 25, 2008, they only took eight days to engage Ken Oliver of Byrnes Corp. d/b/a Dunes Marketing to sell the house. [R.pp. 820-821; Oliver Dep. Ex. 8 (Listing Agreement effective on Thursday February 27, 2003 and signed March 3, 2003 to engage Ken Oliver of Byrnes Corp. d/b/a Dunes Marketing to sell the house).]

At the direction of Ken Oliver, they completed a 24 point South Carolina Residential Property Condition Disclosure Statement. [R.pp. 77-79; Tuesday, March 4, 2003 Signed Disclosure Statement.] They did not comply with their legal duty to honestly reveal the elevation problem which was the very reason they were motivated to sell. [R.pp. 510-511; 77-79; Tom Dye Dep. p. 52, ln. 13 - p. 53 ln. 19; Disclosure Statement.]

Later, Ken Oliver gave this disclosure statement, which stated there were no code violations, to Dr. Gottschlich and Dr. McNeil through their buyer's agent Greg Merrill. [R.pp. 811-814; Oliver Dep. pp. 44-47.]

2.) Facts Surrounding the Purchase of the House

When Dr. Gottschlich and Dr. McNeil decided to buy a vacation home together on Hilton Head Island, they hired Greg Merrill, a real estate agent with the Dunes Marketing Group, to be their exclusive buyer's agent to find a house. [R.pp. 75-76; Exclusive Buyer Agency Agreement effective November 4, 2003 – June 4, 2004 and signed November 6, 2003.]

They were shown a number of houses and settled on 48 Sea Lane. Dr. Gottschlich did an informal pro forma to approximate the costs and confirm that they could complete a purchase. He used the previous year's numbers that Greg Merrill got for him to estimate the costs. [R.pp. 799-800, 802, 210; Gottschlich Dep. pp. 56, 111, 212, 215.] They decided to buy the house. They made an offer of \$100,000.00 less than the listed price which was accepted and they signed a contract. [R.pp. 820-821; 80-84; \$1,495,000.00 Listing Agreement; \$1,395,000.00 Contract of Sale.]

Their exclusive buyer's agent, Greg Merrill of the Dunes Marketing Group, recommended they hire the Hilton Head Island real estate lawyers Robert M. Deeb Jr.

and Charles H. Wiseman of the Laurich & Deeb law firm to represent them and they did. Also, at Greg Merrill's suggestion they got their insurance from the same agency that already had placed insurance on the house. [R.pp. 799-800, 802; Gottschlich Dep. pp. 56, 111, 212.]

Having now engaged an experienced exclusive buyer's agent and an experienced real estate law firm, arrangements were made to have the house inspected and appraised and to obtain a loan from Wells Fargo and insurance from Sea Coast Insurance. They did not need to engage a surveyor for themselves because the survey for the Dyes was recent enough to meet the bank's requirements.

The Exclusive Buyer's Agent Contract between the doctors and Greg Merrill of Dunes Marketing Group was stated to be effective November 4, 2003. [R.pp. 75-76; Exclusive Buyer Agency Agreement, ¶ 3.] However, it was signed on Nov. 6, 2003, the very same day they signed the contract of sale and also a dual agency agreement. [R.pp. 76; 481; Id. at p. 2; Consent to Dual Agency.] The doctors were told that it was to facilitate the commission sharing between Greg Merrill of Dunes Marketing Group and Ken Oliver of Dunes Marketing Group. [R.p. 850; Gottschlich Dep. p. 144.]

When everything had supposedly been done by the professionals, a closing was set for December 3, 2003. [R.pp. 328-334; Closing Statement.] Dr. Gottschlich was scheduled to do surgery on the date so the law firm prepared and he and Dr. McNeil executed a Power of Attorney appointing the lawyers as attorney in fact. [R.pp. 85-88; Gottschlich Power of Attorney and McNeil Power of Attorney.].

Cary Griffin, a lawyer for the Dyes and also counsel and Corporate Secretary for The Byrne Corporation d/b/a Dunes Marketing Group, sent a copy of the Dyes' survey to

Bob Deeb of Laurich and Deeb which reached the Doctors on or about the day of the closing [R.pp. 835; 204-205; Baldwin Dep. p. 110; Griffin Letter dated Sunday, November 16, 2003] which was sent by Laurich & Deeb to the Doctors on November 26, 2003, a Wednesday, for a December 3, 2003 closing for which the Doctors had previously signed Powers of Attorney on November 20 and 21, 2003 because they were in Ohio and could not be physically present at the December 3, 2003 closing. [R.pp. 455-457; 328-334; 85-88; Letter dated November 26, 2003 to the Doctors; Settlement Statement; Powers of Attorney.]

The transaction was completed, the doctors bought the house and began using it for a vacation house as they had planned.

3.) Facts that gave the doctors reason to think some right of theirs may have been violated

Several years later, Hurricane Katrina destroyed New Orleans. Dr. Gottschlich and Dr. McNeil reacted by realizing they should consider increasing the amount of their flood insurance from what the bank required to the full replacement value of the house. [R.pp. 734-735; Gottschlich Dep. pp. 14-15.] The next time Dr. Gottschlich was on Hilton Head with his children around spring break, he went to the Seacoast Insurance Co. where he met with Teena Ferrell to see about increasing the amount of insurance. *Id.* She pulled up the computer file on the property and saw that the house was only 13.3 feet elevation. [R.pp. 888; 734-735; 562; December 16, 2009 Hearing Tr. p. 7 lines 16-18; Gottschlich Dep. p. 14 lines 6 – p. 15 line 1; Ferrell Dep. p. 34.]

She knew that was a violation of the City Code and a violation of the FEMA guidelines for flood insurance and told Dr. Gottschlich the agency could not increase the insurance. [R.pp. 735; 73; Gottschlich Dep. p. 15; Elevation Certificate.]

Dr. Gottschlich was stunned and thought it must be some mistake. He immediately undertook an extensive and thorough investigation far beyond any ordinary diligence and was ultimately able to piece together what had happened to cause this drastic consequence of an elevation problem.

Although he learned what the problem was and how it came to be, he was not able to get it resolved short of this lawsuit.

E.) Circuit Court's Erroneous Ruling - Summary Judgment in the face of the Disputed Meaning and Significance of Facts Was Error

The trial court decided there is no evidence a person of common knowledge and experience would not see they had a cause of action. The trial court said that once it is undisputed that the survey was sent by Cary Griffin to Bob Deed, the Court need go no further. [R.pp. 204-205; Griffin November 16, 2003 Letter.] The Court refused to take into account what meaning the content of the document would have to a person of common knowledge and understanding.

1.) The Existence of Undisputed Evidentiary Facts is not the question the Court should decide

"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" or when "further inquiry into the facts is desirable to clarify the application of the law." *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

Both the evidentiary facts and any inferences that can be drawn from those facts may support a different conclusion. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence

must be viewed in the light most favorable to the nonmoving party." *McNaughton-McKay Elec. Co. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct. App. 1997).

The trial court confused the concept that an undisputed piece of evidence, the survey, is the same thing as satisfying the objective standard of review. In addition to the survey is a huge amount of other evidence to demonstrate what a person of common knowledge of experience should know from it.

This is exactly the error in the decision of the Circuit Court and the reason the Order should be reversed.

The judge took the view that if there is an undisputed fact that the Dye's lawyer sent a copy of an elevation certificate to the doctor's lawyer then it is not necessary to deal with the disputed facts. The Appellants tried unsuccessfully to bring this to the trial court's attention at the hearing on reconsideration as can be seen from the colloquy between the Appellant's attorney, Wes Few, and the trial court:

THE COURT: I understand that. I think there are undisputed facts though. And, again, I'll review all of this before I actually rule, but I think my thinking the first time was, there are undisputed facts, and if there are undisputed facts that objectively, you know, they knew or should have known of this problem. Then is there even a reason to deal with the undisputed facts? One undisputed bit of evidence that they objectively knew or should have known of this problem means that you 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 would 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 letter and them deciding to sell, they wouldn't have purchased the property. That's what's at issue, Your Honor. And you've asked the question about objective verses subjective. Objectively did they receive certain documents; yes. Subjectively the Court has to look into whether or not there can be any significance attributed to those documents, particularly in the situation where we received those documents from the experts that we hired to handle this transaction and advise us of all material issues. And we've received those documents from our experts without comment. The only reasonable way to view that, Your Honor is to assume that there was not a problem with a negative elevation.

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

[R.pp. 1043-1045; Hearing transcript, pp. 78-80]

2.) Some of the Evidence and Inferences That A Person of Common Knowledge and Experience Would Not Know of the Hidden Elevation Problem

1. A person would not knowingly choose a house that had an elevation problem.
2. A person would not recognize they had a cause of action or that some right had been violated simply by received a copy a survey with the number 13. 3'.
3. A person would not recognize from premiums that some right had been violated where monthly payments are a single payment into escrow which is for a.) principal, b.) interest, c.) property insurance for loss from fire and other risks, d.) flood insurance, e.) liability insurance, and f.) taxes.

4. A person who immediately investigates when learning the number 13.3' means trouble would not sit on their rights after the closing if there had been reason to know at that time.

5. A person who engages an exclusive buyer's real estate agent does not have reason to suspect the agent will lead them to a house with an elevation problem.

6. A person who engages a law firm for their closing does not have reason to investigate when their lawyer receives a copy of a survey document with 13.3' among myriad numbers and data.

7. A person would expect if the sellers knew of a problem they would follow the law to disclose it rather than conceal it. This concealment would reassure a person there was nothing to investigate.

8. A person from out of state who hires a variety of local experts to protect them from mistakes would not launch an investigation about a document faxed by the sellers' lawyer to their lawyer.

9. A person who is required to purchase flood insurance by Wells Fargo, would not launch an investigation by virtue of Wells Fargo receiving flood insurance statements, taking money from escrow, paying the premium together with taxes, property insurance, liability insurance, interest and principal.

10. A person buying a house lived in by several owners for 16 years would not investigate for an elevation problem.

11. A person would have no reason to suspect that the original builder would misrepresent the elevation to the city building inspector and hide the fact.

12. A person would have no reason to expect the city building inspector to accept an elevation promise from the builder rather than seeing compliance for himself before certifying the house for occupancy.

13. A person would have no reason to expect that a house passing through three previous buy and sell transactions with owners had an elevation problem.

14. A person would have no reason to expect that a house undergoing three previous lender's scrutiny had an elevation problem.

15. A person would not have professional knowledge in the fields of law, real estate, surveying or other related fields with which to interpret 13.3' on a survey.

The Respondents point out three evidentiary facts they contend trump or override any conflicting inferences or other factual evidence.

The elevation certificate faxed to Laurich & Deeb for the closing.

The lawyers and realtors first assert that because a copy of the survey that bore 13.3' was sent to the doctors, the doctors had notice and that it is undisputed. The document itself is evidence to support a jury finding that a person of common knowledge and experience would not recognize that they had a cause of action or that some right of theirs had been violated. There is nothing about 13.3' that sets off alarm bells. It is not self-explanatory that a problem exists. Only a professional in a field related to real estate, practicing in a flood zone area would understand the significance of 13.3'. [R.pp. 205; 455-457; Survey; Letter dated Wednesday, November 26, 2003 by the Doctors' Lawyers who were also the Doctors' Attorneys in Fact for the closing on December 3, 2003.]

There is also the evidence the Dyes did not recognize the undisputed fact of 13.3' as a violation of their rights until they were told the same information by Sea Coast

Insurance that Sea Coast later told to the doctors. [R.p. 503; Shelley Wright February 25, 2003 Letter to the Dyes.]

Sea Coast knew of the elevation problem and Sea Coast's knowledge is imputed to the doctors.

In 2003, the communication Seacoast had was with the Dyes, not the doctors. This had nothing to do with the doctors. The house was not even on the market at that time and Seacoast was not doing anything for the doctors. Seacoast was working with the Dyes and had not even met the doctors. Seacoast was not acting as an agent of the doctors and the information exchanged between whoever communicated with the Dyes is not imputable to the doctors. [R.p. 503; Electronic Seacoast Letter dated February 25, 2003 to the Dyes showing the house elevation of 13.3' which made it .7 below the base of 14.1' and reporting that Seacoast Brokers would not renew his wind and flood insurance on the April 3, 2003 policy date but it could be replaced by Travelers for \$4,578.00.]

The contrast between the cost of insurance on Dr. Gottschlich's pro forma and the premium that eventually was incurred.

When the defendants isolate the \$592.00 in the pro forma and juxtapose it with the eventual annual premium of \$2,800.00, a misleading impression is given. When Dr. Gottschlich wrote down an informal pro forma, it was before the agreement to buy the house and was nothing more than a rough estimate of costs to get a sense of whether the doctors were comfortable with going forward. [R.pp. 207; 799-800, 210; Pro forma; Gottschlich Dep. pp. 56, 111, 215.] The figures were not quotes of what it would cost the doctors, they were figures from the previous year that the Dyes had paid. [R.pp. 799-800, 210; Gottschlich Dep. pp. 56, 111, 215.]

The doctors decided to go through with the purchase.

Much later, after they negotiated a contract of sale and went through the closing and became the owners they began paying for the insurance, but not in a way that would cause them to recognize the hidden elevation problem.

They did not pay the premium directly nor any other major fixed costs related to the purchase of the house and the loan from Wells Fargo. The doctors paid into an escrow account with the bank in monthly amounts that covered principal, interest, flood insurance, property insurance, liability insurance, and taxes. [R.pp. 314-324; Loan Closing Instructions.]

In addition to the note and mortgage and related expenses being lumped together in paying the bank, this annual premium was never paid on an annual basis directly from the doctors. They paid the bank a monthly single payment. The bank escrowed a portion of each monthly payment to use when the annual premium came due. [R.pp. 314-324; Loan Closing Instructions.]

If we take the annual premium of \$2,800.00 and divide it into the 12 monthly payments that were escrowed at the bank, the number drops down to \$233.33 per month. Then, because each doctor paid his half of the payments due the bank, the cost to each doctor would be \$116.66.

This amount as part of a single combined payment of principal, interest, flood insurance, property insurance, liability insurance, and taxes. This is not something that would cause a person of common knowledge and experience to deduce that they had a major problem with the elevation level of the house.

II. Additional Grounds Claimed by the realtors and lawyers

A. The Standard of Care and the Professional Duty to Clients of Realtors and Real Estate Lawyers.

The lawyers deliberately restate and greatly exaggerate the claim of the doctors that the real estate lawyers have breached a duty to their clients. Nobody is claiming the lawyers have a duty to know every detail of the building and zoning codes and investigate a house to see if it complies. But, there is a duty to act as a reasonable professional would under the same of similar circumstances.

A lawyer is under a duty to be competent in the area of the lawyer's practice, such as law that affects real estate, and, when facts are presented to the lawyer without any need to investigate, there is a duty to recognize the presented facts apply to the familiar applicable law.

Different areas of land properties have different characteristics. Sometimes the character of the land is a distinct and defining character of the region and is known by local experts to have important legal restrictions.

Wetlands and beachfront legal constraints are a standard part of the real estate law context in those areas. The coast of South Carolina is so vulnerable to flooding that we even name part of the year our hurricane season which brings floods with the winds.

All of our coastal land is in that physical and legal context.

Hilton Head Island even more so is in this legal context because of its defining natural land attributes. [R.p. 832; Baldwin Dep. p. 56 stating that all of Hilton Head is in the flood plain and has a required minimum elevation of 14' everywhere except the surge zones where it is 17'.]

The legal context of an expensive resort island entirely within both a coastal area and a flood zone is not some obscure fact buried in a municipal building code. That there must be some legal elevation requirement only requires a person to look around. To expect a real estate lawyer and a realtor, who practice their profession on the island, to know the requirement is 14 feet and protect a client from spending \$1,395,000.00 on a house that they can see from the transaction documents is only 13.3 feet, is appropriate. [R.pp. 650; 833; Deeb Dep. p. 51 stating it has been common knowledge on Hilton Head of the 14' requirement since the late 1980s; Baldwin Dep. p. 57 acknowledging as real estate broker he is to have knowledge of flood elevations.]

In support of the fact that it is within the standard of care for a real estate lawyer, the plaintiffs submitted expert testimony from Joe Roof. [R.pp. 91-106; 361-372, 710-714; Roof Aff.; Roof Dep. Excerpts.] In support of the fact that it is within the standard of care for a realtor, the plaintiffs submitted expert testimony from Thomas Hartnett. [R.pp. 418-421, 557-559, 761-767, 852-856; Hartnett Dep. Excerpts.]

The trial court's order granting summary judgment is an error of law and summary judgment should be reversed. If any party should be entitled to summary judgment it should be the plaintiffs. However, we are not asking this Court to rule that we win the case. We are only asking this Court to see that there is some evidence, at least a scintilla of it, to overcome summary judgment and let the disputed facts be decided by a jury.

B. The Doctors Have Not Abandoned The Statute Of Limitations Issue.

The Respondents use the technique of restating a question in their own words to make it different and easy. They turn the statutory discovery rule into two rules, calling

one actual notice and the other constructive notice. They then say your appellants only made one argument so the appeal must be dismissed. The Appellants have not abandoned the issue. They have been urging from the beginning of the case until the present that the discovery rule extends the statute on these facts.

The issue is the discovery rule in the statute that extends the triggering date under the facts of the case, until a person of common knowledge and experience would have reason to know they had a cause of action or that their rights had been violated.

This appeal is from a summary judgment. That even further narrows this single issue to whether there is *any evidence* the discovery rule extends the statute in this case.

The appellants are not trying to say at this stage that we win the case, or even that we win on the discovery rule. We are only trying to say that we have at least a scintilla of evidence to support our position on the discovery rule.

C. Dunes Marketing Group cannot escape responsibility with the defenses of “we didn’t know anything,” and, by the way, we have a dual agency agreement that excuses us from any obligation to you as our client.

The Dunes Marketing Group knew more than anybody. Ken Oliver was involved with the Dyes when they first bought the house. [R.p. 809; Oliver Dep. p. 25.] Ken Oliver was the person the Dyes called immediately for help when they learned the consequences of the elevation. [R.pp. 503; 820-821; February 25, 2003 Seacoast Letter to the Dyes; Listing Agreement with Oliver effective February 27, 2003.] Ken Oliver provided the Dyes with the Disclosure for which they signed March 4, 2003. [R.pp. 77-79; 511; Disclosure; Tom Dye Dep. p. 53.]

Dunes Marketing Group’s counsel and Corporate Secretary was Cary Griffin. [R.p. 835; Baldwin Dep. p. 110.] Cary Griffin also was the lawyer representing the Dyes

in selling the property. Cary Griffin, Corporate Secretary for the Dunes Marketing Group, is the very person who sent the elevation certificate to Bob Deeb at the time of the closing. [R.p. 204; November 16, 2003 Griffin Letter.]

Furthermore, Cary Griffin's law firm, Bethea, Jordan & Griffin, hired Sea Island Land Survey on behalf of Tom and Jan Dye to do the March 23, 2001 survey which he later sent to Bob Deeb just at the time of the closing. [R.pp. 204; Griffin Letter dated November 16, 2003.]

Dunes Marketing Group knew plenty.

The dual agency document is no shield for the Dunes Marketing Group. At the time it was signed, Dunes Marketing Group had already done all of the work necessary to the sale while serving as the Exclusive Buyer's Agent for the doctor's. [R.pp. 481; 850; Dual Agency signed November 6, 2003; Gottschlich Dep. p. 144.] They had been shown a number of houses. They selected this house. [R.pp. 80-84; Contract of Sale dated November 6, 2003.] With Greg Merrill of the Dunes Marketing Group as their exclusive buyer's agent, they negotiated a price with the seller. [R.pp. 820-821; 80-84; Listing Agreement with price of \$1,495,000.00; Contract of Sale for \$1,395,000.00.]

They signed a written version of the Exclusive Buyer's Agent Agreement. [R.pp. 75-76; Exclusive Buyer Agency Agreement effective November 4, 2003 and signed November 6, 2003.] They signed the contract of sale with the sellers. [R.pp. 80-84; Contract of Sale.]

There was nothing for Dunes Marketing Group to do for the doctors in the capacity of a dual agent. Dunes told the doctors on the day they signed the contract of sale that Dunes needed them to sign the dual agency agreement so Ken Oliver could

share the \$78,700.00 commission with Greg Merrill. [R.pp. 328-334; 839-840; Settlement Statement; Baldwin Dep. pp. 164-65.]

It wasn't in effect while the work was being done. The doctors didn't know who Ken Oliver was until the contract of sale was signed and he showed up to be sure he got his share of the money. It was not executed as required by the statute that governs dual agency agreements. There was no consideration for it. It violates the rights under the exclusive buyers agency relationship which led to the purchase.

D. The Real Estate Lawyers did have a duty to their clients to protect them from buying a house without knowledge of the elevation problem

1.) This "no duty" assertion appears for the first time in the appeal and was not a ground of the Motion for Summary Judgment

The Lawyers Claim for the first time on appeal that they had no duty to their clients, the doctors. They never stated this as a ground of their Motion for Summary Judgment and never argued it to the Circuit Court. [R.pp. 158-159; 882-965; Lawyers' Motion for Summary Judgment; Transcript of Hearing On Motion for Summary Judgment.] Their stated ground was that the plaintiffs had no evidence of a breach of a standard of care.

If there is such an issue, it is answered fully above.

2.) The "no evidence of a breach of duty" issue was a ground of the Motion but it is not argued and is abandoned.

If there is still an issue about whether there is any evidence of a breach of a standard of care, it is answered fully above.

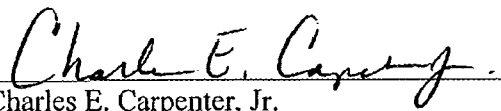
III. Conclusion

When the trial court's decision is properly analyzed it is clear that the trial court imposed a higher burden on the doctors to understand the meaning of the survey and insurance than the trial court imposed on the real estate agents and the real estate lawyers who would and should understand the significance of an inadequate elevation of a house on Hilton Head Island.

Your Appellants are not trying to say at this stage that we win the case, or even that we win on the discovery rule. We are only trying to say that we have at least a scintilla of evidence to support our position on the discovery rule. For that reason the single issue presented by us as the error of law of the Circuit Court is:

There is at a minimum some evidence that the doctors did not nor should they have known they had a cause of action before the meeting with the insurance agency to seek full replacement value coverage in the aftermath of Hurricane Katrina.

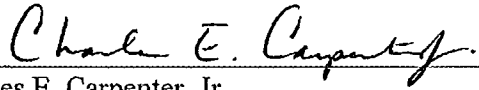
The trial court's Order granting summary judgment should be reversed and the case remanded for trial.


Charles E. Carpenter, Jr.
Carmen V. Ganjehsani
CARPENTER APPEALS AND TRIAL SUPPORT, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
(803) 758-2886
Attorneys for Appellants
Gregory M. Gottschlich and Donald L. McNeil

June 21, 2012.

CERTIFICATE OF COMPLIANCE

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



Charles E. Carpenter, Jr.
Carmen V. Ganjehsani
CARPENTER APPEALS AND TRIAL SUPPORT, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
(803) 758-2886
Attorneys for Appellants
Gregory M. Gottschlich and Donald L. McNeil

June 21, 2012.

CERTIFICATE OF SERVICE

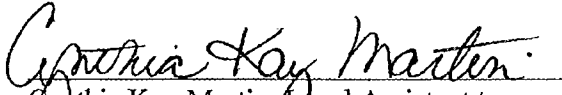
I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC for Plaintiffs, Gregory M. Gottschlich and Donald L. McNeil, do hereby certify that I have this date served the foregoing Final Reply Brief, dated June 21, 2012, by causing a copy of the same to be placed in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

Max G. Mahaffee, Esquire
GRIMBALL & CABANISS, LLC
Post Office Box 816
Charleston, SC 29402-0816

**Attorney for Respondents Ken Oliver
and The Byrne Corporation d/b/a Dunes
Marketing Group**

Susan Taylor Wall, Esquire
MCNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, SC 29402

**Attorneys for Respondents Laurich &
Deeb, P.A., Robert M. Deeb, Jr., and
Charles H. Wiseman**


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

June 21, 2012.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Hon. Marvin H. Dukes, III, Special Circuit Court Judge

Beaufort County Case No. 2008-CP-07-00517

S.C. Court of Appeals no. 2010161986

Gregory M. Gottschlich & Donald L. McNeil.....Appellants,

v.

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

Of whom Ken Oliver; The Byrne Corporation d/b/a Dunes Marketing
Group; Laurich & Deeb, PA; Robert M. Deeb, Jr; and Charles H.
Wiseman are the.....Respondents.

**FINAL BRIEF OF RESPONDENTS KEN OLIVER AND THE BYRNE
CORPORATION D/B/A DUNES MARKETING GROUP**

MAX G. MAHAFFEE
GRIMBALL & CABANISS, LLC
P. O. BOX 816
CHARLESTON, SC 29402-0816
Max.Mahaffee@grimcab.com
Tel: (843) 722-0311
Fax: (843) 722-1374

ATTORNEYS FOR RESPONDENTS
KEN OLIVER & THE BYRNE CORPORATION
D/B/A DUNES MARKETING GROUP

TABLE OF CONTENTS

Table of Authorities	ii-iii
Statement of Issues on Appeal	1
Statement of the Case	1
Facts.	2
Arguments	
I. JUDGE DUKES, THE BEAUFORT COUNTY MASTER-IN-EQUITY, DID NOT ERR IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND RULING THAT THE STATUTE OF LIMITATIONS HAD RUN AGAINST APPELLANTS.	6
II. APPELLANTS ABANDONED ON APPEAL THAT THEY HAD CONSTRUCTIVE NOTICE OF THEIR CLAIMS OVER THREE YEARS PRIOR TO FILING THIS LAWSUIT BY FAILING TO ARGUE AGAINST THE PORTION OF THE ORDER GRANTING SUMMARY JUDGMENT IN WHICH THE BEAUFORT COUNTY MASTER-IN-EQUITY RULED THAT APPELLANTS HAD SUCH CONSTRUCTIVE NOTICE	15
Conclusion	15

TABLE OF AUTHORITIES

Cases

<u>Abba Equipment, Inc. v. Thomason</u> , 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999)	12
<u>Allstate Ins. Co. v. Smoak</u> , 256 S.C. 382, 392-93, 182 S.E.2d 749, 754 (1971)	14
<u>Brown v. Pearson</u> , 326 S.C. 409, 483 S.E.2d 477 (Ct. App.1997)	10
<u>Burgess v. American Cancer Society</u> , 300 S.C. 182, 386 S.E.2d 798 (Ct. App.1989)	10, 11
<u>Dean v. Ruscon Corporation</u> , 321 S.C. 360, 468 S.E.2d 645 (1996)	11
<u>Doe v. Batson</u> , 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001)	9
<u>Dorman v. Campbell</u> , 331 S.C. 179, 184-185, 500 S.E.2d 786, 789 (1998)	11, 14
<u>Hoard ex rel. Hoard v. Roper Hosp., Inc.</u> , 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).	9
<u>Kreutner v. David</u> , 320 S.C. 283, 465 S.E.2d 88 (1995).	10
<u>Martin v. Companion Healthcare Corp.</u> , 357 S.C. 570, 576 593 S.E.2d 624, 628 (Ct. App. 2004)	11
<u>Santee Portland Cement Co. v. Daniel Int'l Corp.</u> , 299 S.C. 269, 384 S.E.2d 693 (1989), <u>overruled on other grounds</u> by <u>Atlas Food Sys. & Servs., Inc. v. Crane Nat'l</u> <u>Vendors Division of Unidynamics Corp.</u> , 319 S.C. 556, 462 S.E.2d 858 (1995)	12
<u>Snell v. Columbia Gun Exchange, Inc.</u> , 276 S.C. 301, 278 S.E.2d 333 (1981)	10
<u>SSI Med. Servs., Inc. v. Cox</u> , 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990)	9
<u>Strother v. Lexington County Recreation Com'n</u> , 332 S.C. 54, 64 at n. 6, 504 S.E.2d 117, 122 at n. 6 (1998).	13, 14

Statutes

S.C. Code Ann. § 15-3-530(5)	9, 10
S.C. Code Ann. § 15-3-535.	10

Rules of Civil Procedure

Rule 56, SCRCF	9
Rule 208(b)(6), SCACR	15

STATEMENT OF ISSUES ON APPEAL

- I. DID JUDGE DUKES, THE BEAUFORT COUNTY MASTER-IN-EQUITY, ERR IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND RULING THAT THE STATUTE OF LIMITATIONS HAD RUN AGAINST APPELLANTS?
- II. DID APPELLANTS ABANDON AN ISSUE ON APPEAL THAT THEY HAD CONSTRUCTIVE NOTICE OF THEIR CLAIMS OVER THREE YEARS PRIOR TO FILING THIS LAWSUIT BY THEIR FAILING TO ARGUE AGAINST THE PORTION OF THE ORDER GRANTING SUMMARY JUDGMENT IN WHICH THE BEAUFORT COUNTY MASTER-IN-EQUITY RULED THAT APPELLANTS HAD SUCH CONSTRUCTIVE NOTICE?

STATEMENT OF THE CASE

The Plaintiffs/Appellants filed this lawsuit on February 18, 2008, alleging some nine (9) causes of action against Ken Oliver and The Byrne Corporation d/b/a Dunes Marketing Group, who are Respondents in this appeal (collectively referred to simply as "Dunes Respondents"). In their Amended Complaint of March 20, 2009, the Appellants also added as Defendants Laurich & Deeb, PA; Robert M. Deeb, Jr; and Charles H. Wiseman, the Appellants' closing attorneys (collectively referred to simply as "Closing Attorney Respondents"). The Dunes Respondents timely answered the Complaint, as well as the Amended Complaint, each time asserting, among other defenses, the defense of the statute of limitations.

After lengthy discovery, the Dunes Respondents filed a Motion for Summary Judgment on December 4, 2009 on grounds which included, but were not limited to, the statute of limitations. (R. pp. 160-163, 424-488; Motion for Summary

Judgment and Memorandum of Dunes Respondents) The Honorable Marvin H. Dukes, III, the Beaufort County Master-in-Equity, heard the motions but only on the statute of limitations grounds, deferring to a later time for the other grounds, and granted summary judgment in his January 11, 2010 Order. (R. p. 1, fn 1; Order, p. 1, fn. 1) Appellants on March 16, 2010 timely filed a Motion to Reconsider, which Judge Dukes denied by his Order dated May 3, 2010. Plaintiffs/Appellants timely filed a Notice of Appeal on May 28, 2010. This appeal followed.

FACTS

The Plaintiffs/Appellants, who are medical doctors from Ohio, on November 6, 2003 signed a Contract of Sale in the amount of \$1,395,000 for the lot and house at 48 Sea Lane, Hilton Head Island, SC ("the house"). (R. pp. 80-84; Contract of Sale-Offer and Acceptance, which was Exhibit H to Amended Complaint) On December 2, 2003, the Plaintiffs/Appellants closed on the house utilizing the Closing Attorney Respondents. (R. pp. 328-334; HUD-1 Settlement Statement)

The history on the house and on its construction is necessary in this case, in that on November 14, 1987 a building permit application was submitted by Strimpfel Custom Homes, a former Defendant in this lawsuit, in "Flood Zone A7"

which requires a base flood elevation ("BFE") of 14 feet, per the Town of Hilton Head and per FEMA. The original survey of the house and lot took place on November 24, 1987 and stated that the elevation of the house was at 14.16 feet. (R. p. 70; Exhibit B to Amended Complaint) It was on May 23, 1988 that a Certificate of Occupancy was obtained and issued for the house by the Town of Hilton Head. (R. p. 72; Exhibit D to Amended Complaint) In early 2001, Thomas N. Dye and Jan H. Dye, both of whom previously were Defendants in this case, purchased the house. A surveyor, Jack Stuart Jones, issued a 13.3 foot elevation certificate to Thomas N. Dye and Jan H. Dye on March 28, 2001. (R. p. 73; Exhibit E to Amended Complaint) It is this elevation certificate that the Appellants physically received or knowledge about which that they received. At a minimum, their insurance agency, Seacoast Insurance, received this certificate and information about it and its contents on Appellants' behalf, making a flood insurance application on Appellants' behalf as of December 2, 2003. (Appellants' Initial Brief at 19.)

Appellants contend that the number 13.3 in the provided survey meant nothing to them and thus did not give rise to any duty to investigate, citing the appellate case of a boy with Down's syndrome falling down where the extent of the injury was not appreciated until later (Appellants' Initial Brief at

p. 22); however, when the elevation survey showing 13.3 feet also was accompanied by a higher insurance premium than the pro forma, the Appellants at a minimum had inquiry or constructive notice of the "injury" and the source of that injury was readily discoverable. Further, Appellants contend that the "13.3 in a survey is not something a person of common knowledge and experience could recognize and understand." (Appellant's Initial Brief at 22.) These medical doctors are more than people of common knowledge and experience. It is just that they did not act, even though they were at least on inquiry notice if not on actual notice.

The Plaintiffs/Appellants, as well as Thomas N. Dye and Jan H. Dye, were represented under a dual agency agreement by agents associated with The Byrne Corporation d/b/a Dunes Marketing Group, one of the Respondents in this case. (R. p. 481; Exhibit 5 to depo of Dr. Gottschlich) Despite the indications from Appellants that Respondent Oliver assisted in filling out the disclosure statement (Appellant's Initial Brief at p. 14), it was the Seller Tom Dye who, along with his wife, filled out the Seller's Disclosure Form. (R. pp. 510-511; Depo of Tom Dye, pp. 52-53) Plaintiffs/Appellants closed on the house on December 3, 2003. (R. pp. 328-334; HUD-1 Settlement Statement) Appellants allege that they were not properly represented by the agents with Dunes Marketing by not

being informed by the Dunes Respondents of the lower elevation certificate on the house at 48 Sea Lane, but Appellants do not present any evidence that the Dunes Respondents knew of the elevation being below base flood elevation, as there is no such evidence. One of the multiple defenses of the Dunes Respondents to this lawsuit in each of their Answers is the statute of limitations in that the Appellants had actual or constructive knowledge of the alleged failure of the house to meet the 14 foot BFE.

The claim against all Respondents by the Appellants, both of whom are medical doctors as noted above, was that they were not told or informed that the elevation certificates and/or surveys were below the BFE and should have been told by one or more of the Respondents (or one or more of the former Defendants). Seacoast Insurance, the flood insurance agency for the Appellants and for the house's prior owners Thomas and Jan Dye, knew of the house not meeting BFE. (R. pp. 393-396; Depo of Tommy Faye Lyons for Seacoast Insurance, pp. 60-63) This also was provided as actual notice to the Appellants and/or constructive notice was given to the Appellants, more than three (3) years prior to the filing of the original Complaint in this litigation.

ARGUMENTS

- I. JUDGE DUKES, THE BEAUFORT COUNTY MASTER-IN-EQUITY, DID NOT ERR IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND RULING THAT THE STATUTE OF LIMITATIONS HAD RUN AGAINST APPELLANTS

Plaintiffs/Appellants knew that flood insurance was required, particularly due to their pro forma and the HUD-1 Settlement Statement. Prior to the purchase, the Appellants would have different tasks taken care of by various authorized people, including Dr. McNeil's wife (R. p. 443; Depo of Dr. McNeil, p.51). It is not important whether or not either of the two Plaintiffs can recall specifically if the [below-BFE] elevation certificate was sent to either of them prior to the closing. The elevation certificate from 2001 showing the clear negative or below base flood elevation statements (or on the survey, an elevation of 13.3' which is below the required elevation of 14') was provided with the fax of 11/26/03 to Dr. McNeil, one of the two Appellants (R. pp. 455-457; Fax of 11/26/03 to Dr. McNeil, showing Dr. Gottschlich's name and fax number also; Exhibit 2 to Dr. Gottschlich's deposition; Appellants' Initial Brief at 19.) We do know with clarity, however, that from 2003 up to 2009 that the Plaintiffs received yearly notices and policies that noted the elevation was a minus one foot and thus below BFE. (R. pp. 393-396; Depo of Tommy Faye Lyons for Seacoast Insurance, pp. 60-63) This

was not just one notice, but a repeated notice and knowledge to the Appellants of the elevation being below BFE.

Specifically, the testimony of the Corporate Representative of Seacoast Insurance was as follows:

Q. And to your knowledge, did the insureds -- Plaintiffs, in this case--receive a copy [of] such a document each year, that the flood insurance was renewed through Travelers/NFIP from 2003 to the present?

A Yes.

Q And on each one of those documents, would it indicate elevation difference minus one?

MR. HUDSON: Object to the form.

A Yes.

(R. p. 394, lines 13-22; Depo of Tommy Faye Lyons for Seacoast Insurance, p. 61, lines 13-22). Travelers was the flood insurance company who handled 48 Sea Lane for the Appellants in the NFIP--the National Flood Insurance Program. This also was confirmed through the deposition testimony of Patricia Farrell, an employee with Seacoast Insurance who testified "that the elevation difference is minus one." (R. p. 416; Depo of Patricia Farrell, p. 115, lines 1-25)

As part of the exhibits obtained from the depositions of Plaintiffs' insurance agency Seacoast Insurance were the annual flood insurance declaration page showing the home was built below the base flood elevation by a "minus one." (R. pp. 335-343; Exhibit 16 to Motion of Laurich & Deeb). By

that time of closing, the Plaintiffs' insurer absolutely knew of the negative elevation, as attorney Cary Griffin supplied the 2001 survey which showed a negative elevation. (R. pp. 325-327; Exhibit 14 to Motion of Laurich & Deeb) With the Complaint having been filed on February 18, 2008, this means that the Complaint's filing occurred more than three (3) years after the documented closing activity on December 2, 2003 and the prior notification of negative elevation.

Further, and also importantly, there is no showing or testimony that the Dunes Respondents (Ken Oliver and Dunes Marketing Group) knew of any purported lack of proper elevation on the house. Indeed, William Baldwin in his 30(b)(6) deposition for the Byrne Corporation d/b/a Dunes Marketing Group, unequivocally stated "[m]y testimony is we did not receive" the below BFE elevation certificate before the start of this lawsuit. (R. p. 478, lines 11-19; Depo of William Baldwin for Dunes Marketing, p. 181, lines 11-19).

SUMMARY JUDGMENT In opposing the Motions for Summary Judgment of the Dunes Respondents, the Appellants essentially did not counter the above testimony. Most importantly, some of the above testimony came from the Appellants themselves, as well as from the Dunes Respondents.

One may not, however, avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. This argument, if accepted, would render

summary judgment obsolete, and it is in any event at odds with Rule 56, SCRCp, and our summary judgment jurisprudence:

[R]ule 56(e), SCRCp, requires that when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. The adverse party's response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial.

SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); see also Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001) (explaining that "a party opposing summary judgment [must] come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial").

A plaintiff cannot create a genuine issue of material fact with the argument that the jury does not have to believe a witness. A party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact. As Rule 56(e), SCRCp, states, a party "may not rest upon the mere allegations or denials of his pleading[s]."

Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).

STATUTE OF LIMITATIONS Appellants' actions or inactions here are subject to the three (3) year statute of limitations pursuant to S.C. Code Ann. § 15-3-530(5) (Supp.1997). Further, they are subject to the discovery rule provision of

S.C. Code Ann. § 15-3-535 (Supp.1997) (providing actions initiated under S. C. Code Ann. § 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action). It is clear that from the depositions and from the Appellants' actions and inactions that the Dunes Respondents were entitled to summary judgment in their favor, particularly based upon the statute of limitations, the only grounds on which Dunes Respondents' motions were heard.

The exercise of reasonable diligence means that an injured party must act promptly 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. Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981); Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct. App.1997). The date on which discovery should have been made is an objective rather than subjective question. Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995). Therefore, the statutory period of limitations begins to run 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. Burgess v. American Cancer Society, 300 S.C. 182, 386 S.E.2d 798 (Ct. App.1989). Moreover, the fact that

the injured party may not comprehend the full extent of the damage is immaterial. Dean v. Ruscon Corporation, 321 S.C. 360, 468 S.E.2d 645 (1996).

Dorman v. Campbell, 331 S.C. 179, 184-185, 500 S.E.2d 786, 789 (1998) (lawsuit involving real estate agents and a home purchased below base flood elevation). Thus, the triggering of the statute of limitations is when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that a claim exists. Martin v. Companion Healthcare Corp., 357 S.C. 570, 576 593 S.E.2d 624, 628 (Ct. App. 2004).

Under the discovery rule, the statutory period of limitations begins to run 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. Burgess v. American Cancer Society, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). The rule requires an injured party to act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim against another party might exist. Dean [v. Ruscon Corp.], 321 S.C. 360, 468 S.E.2d 645 (1996)], supra at 363-364, 468 S.E.2d at 647. The discovery rule has evolved as a means of mitigating harsh and unjust results from a rigid application of the statute of limitations where an injury or cause is not immediately evident to the plaintiff. The rule protects plaintiffs' interests in prosecuting actions and pursuing their

rights where circumstances prevent them from knowing they have been harmed. Santee [Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989), overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Division of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995)], supra at 271, 384 S.E.2d at 694. In some situations, "... the accrual upon discovery rule represents the more equitable and rational view." Id. at 272, 384 S.E.2d at 695.

Abba Equipment, Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239(Ct. App. 1999). As educated people, with or without knowledge of flood areas, the Plaintiffs still are charged with their own notice and that of their flood insurance agency Seacoast Insurance.

The Appellants had actual notice of the house being less than base flood elevation from them receiving documents stating or indicating such or, at a minimum, by specific conversations and consultations with Seacoast Insurance, the Appellants' insurance agency. (R. pp. 200-202; Depo of Tommy Faye Lyons, p. 68) In the record, Dr. Gottschlich was sent a fax in which it was shown that Dr. McNeil also had received the elevation certificate before closing. (R. pp. 455-457; Plaintiff's Exhibit 25). That November 26, 2003 fax shows that the Defendant Closing Attorneys sent to Dr. McNeil and apparently to Dr. Gottschlich the fax which states in part as follows: "Copy of Elevation Cert [sic] which your Ins. Co

[sic] will need to give you a quote on the Flood Ins. [sic]"

Id.

There is actual notice, and then there is constructive or inquiry notice. Either way, the result is the same.

Actual notice means all the facts are disclosed and there is nothing left to investigate. Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 176 S.E.2d 131 (1970) (Brailsford, J., dissenting). Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him. 58 Am.Jur.2d Notice § 5. Generally, actual notice is synonymous with knowledge. Hannah v. United Refrigerated Services., Inc., 312 S.C. 42, 430 S.E.2d 539 (Ct. App.1993). Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the undisclosed facts. Multimedia Publishing of South Carolina, Inc. v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993); Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 176 S.E.2d 131 (1970) (Brailsford, J., dissenting) (inquiry notice is constructive notice); 58 Am.Jur.2d Notice §§ 8-12; Black's Law Dictionary 1062 (6th ed. 1990).

Strother v. Lexington County Recreation Com'n, 332 S.C. 54, 64 at n. 6, 504 S.E.2d 117, 122 at n. 6 (1998).

The Appellants drew up a pro forma, upon which they

relied, but which turned out not to be accurate. They expected that the flood insurance would be \$592.00 a year, but it turned out to be \$2,620.00 a year, which the Appellants did not question. (R. pp. 910-911; Depo of Dr. Gottschlich, p. 214, lines 9-25, quoted in December 16, 2009 hearing at pp. 29-30) Of course, had they questioned it or questioned Seacoast Insurance, then the negative elevation as shown on the Flood Insurance Application would have been brought brutally home to the Appellants' attention. (R. pp. 411-412; Exhibit 26 to Laurich & Deeb's Motion.) Instead, they went ahead with the closing on 48 Sea Lane despite all of their notice and knowledge, including this inquiry notice, which is equivalent to actual notice. Strother, 332 S.C. at 64, n. 6, 504 S.E.2d at 122, n. 6.

Notice to Seacoast Insurance, an agency that represented many different insurance companies, but which was hired by the Appellants to procure insurance means that notice to Seacoast in turn was notice to Appellants. Allstate Ins. Co. v. Smoak, 256 S.C. 382, 392-93, 182 S.E.2d 749, 754 (1971); Dorman, 331 S.C. at 185-86, 500 S.E.2d at 789.

Thus, Appellants knew of the house being below BFE even before closing and most assuredly well before three years prior to the Appellants filing their Complaint on February 18, 2008. The Order granting Summary Judgment to the Dunes

Respondents on the statute of limitations should be affirmed.

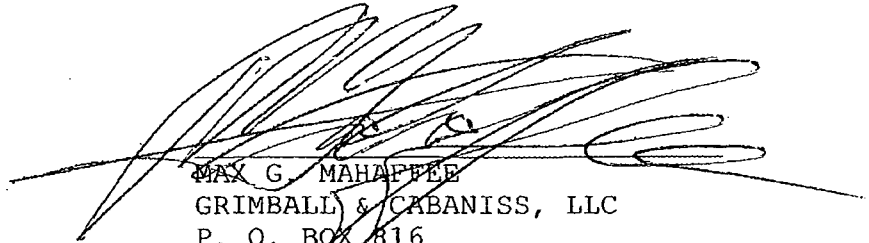
II. APPELLANTS ABANDONED ON APPEAL THAT THEY HAD CONSTRUCTIVE NOTICE OF THEIR CLAIMS OVER THREE YEARS PRIOR TO FILING THIS LAWSUIT BY FAILING TO ARGUE AGAINST THE PORTION OF THE ORDER GRANTING SUMMARY JUDGMENT IN WHICH THE BEAUFORT COUNTY MASTER-IN-EQUITY RULED THAT APPELLANTS HAD SUCH CONSTRUCTIVE NOTICE

Pursuant to Rule 208(b)(6), SCACR, Respondents Oliver and The Byrne Corporation d/b/a Dunes Marketing Group adopt by reference the argument on pages 11-12 on this argument in the brief of Respondents Laurich & Deeb, P.A.; Robert M. Deeb, Jr.; and Charles H. Wiseman. Of note is that the filing of the original Complaint by Plaintiffs/Appellants on the Dunes Respondents was February 18, 2008, while the Closing Attorneys Respondents were not brought into this case until the Amended Complaint was filed on March 20, 2009. Having abandoned any argument against constructive notice to them, the Appellants likewise cannot oppose the Order granting summary judgment.

CONCLUSION

The ruling of the Master in Equity granting summary judgment to the Dunes Appellants on the grounds of the statute of limitations was properly granted. Thus, his Order should be affirmed, based upon the foregoing and the record presented to this Honorable Court by all of the Appellants.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Max G. Mahaffee', is written over the printed name and company information.

MAX G. MAHAFFEE
GRIMBALL & CABANISS, LLC
P. O. BOX 816
CHARLESTON, SC 29402-0816
Max.Mahaffee@grimcab.com
Tel: (843) 722-0311
Fax: (843) 722-1374

ATTORNEYS FOR RESPONDENTS
KEN OLIVER & THE BYRNE CORPORATION
D/B/A DUNES MARKETING GROUP

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

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

**RESPONDENTS LAURICH & DEEB, P.A., ROBERT M. DEEB, JR. AND
CHARLES H. WISEMAN'S FINAL BRIEF**

Susan Taylor Wall
MCNAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 723-7831

**Attorneys for Respondents Laurich &
Deeb, P.A., Robert M. Deeb, Jr. &
Charles H. Wiseman**

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
A. 1987 to 2002: Construction of the Subject Property and First Recognition of the Negative Elevation Issue.....	4
B. 2003: Plaintiffs' Purchase of the Subject Property, Engagement of the Closing Attorneys for the Limited Purpose of Closing the Purchase Transaction, and Plaintiffs' Pre-Closing Discovery of the Negative Elevation Issue.....	5
C. 2004 to 2005: Plaintiffs, Through Their Agent and Personally, Continue to Receive Notice of the Property's Negative Elevation.	7
D. 2006 – Present: Plaintiffs Belatedly Investigate the Negative Elevation and File Suit Against Numerous Parties.....	8
STANDARD OF REVIEW	9
ARGUMENT.....	9
I. PLAINTIFFS ABANDONED THEIR APPEAL BY FAILING TO ADDRESS IN THEIR BRIEF THE MASTER-IN-EQUITY'S RULING THAT THEY WERE ON CONSTRUCTIVE NOTICE OF THEIR CLAIMS MORE THAN THREE YEARS BEFORE THEY FILED SUIT.	11
II. PLAINTIFFS WERE ON NOTICE OF THEIR CLAIMS AGAINST THE CLOSING ATTORNEYS MORE THAN THREE YEARS BEFORE THIS ACTION WAS FILED.....	13
A. Plaintiffs Had Constructive Notice of the Negative Elevation Issue Through Their Agent, Seacoast.....	14
B. Plaintiffs Personally Received Information Disclosing the Negative Elevation Issue in 2003, 2004, and 2005.....	17
III. THE CLOSING ATTORNEYS HAD NO COMPREHENSIVE DUTY TO DETERMINE WHETHER THE PURCHASED PROPERTY COMPLIED WITH APPLICABLE BUILDING CODES, RULES, OR REGULATIONS.....	21
A. The Closing Attorneys Had No Duty to Advise Plaintiffs on Building Code Compliance Because No Such Service Was Listed in the Engagement Letter.....	22

B.	Attorneys Engaged to Oversee the Closing of a Real Estate Transaction Have No Duty to Ensure that the Purchased Property Complies with Applicable Local, State, or Federal Building Codes.....	24
CONCLUSION.....		27

TABLE OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Smoak</i> , 256 S.C. 382, 182 S.E.2d 749 (1971)	15
<i>AmBase Corp. v. Davis Polk & Wardwell</i> , 866 N.E.2d 1033 (N.Y. 2007).....	23
<i>Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions</i> , 388 S.C. 394, 697 S.E.2d 551 (2010)	22
<i>Benton v. Roger C. Peace Hosp.</i> , 313 S.C. 520, 443 S.E.2d 537 (1994)	20
<i>Berry v. McLeod</i> , 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).....	12
<i>Bloom v. Ravoira</i> , 339 S.C. 417, 529 S.E.2d 710 (2000)	9
<i>Boyd v. Bellsouth Tel. Tel. Co., Inc.</i> , 369 S.C. 410, 633 S.E.2d 136 (2006)	9
<i>Burgess v. Am. Cancer Soc’y</i> , 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989).....	13
<i>Burwell v. South Carolina Nat’l Bank</i> , 288 S.C. 34, 340 S.E.2d 786 (1986)	19
<i>Cannon v. Cannon</i> , 321 S.C. 44, 467 S.E.2d 132 (Ct. App. 1996).....	12
<i>Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.</i> , 273 S.C. 306, 257 S.E.2d 496 (1979)	16
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003)	26
<i>Doe Law Firm v. Richardson</i> , 371 S.C. 14, 636 S.E.2d 866 (2006)	25
<i>Doe v. McMaster</i> , 355 S.C. 306, 585 S.E.2d 773 (2003)	25
<i>Doub v. Weathersby-Breeland Ins. Agency</i> , 268 S.C. 319, 233 S.E.2d 111 (1977)	19
<i>Epstein v. Brown</i> , 363 S.C. 372, 610 S.E.2d 816 (2005)	13
<i>Hiott v. Guar. Nat’l Ins. Co.</i> , 329 S.C. 522, 496 S.E.2d 417 (Ct. App. 1997).....	16
<i>Holmes v. McKay</i> , 334 S.C. 433, 513 S.E.2d 851 (Ct. App. 1999).....	15
<i>Holy Loch Distribs., Inc. v. Hitchcock</i> , 340 S.C. 20, 531 S.E.2d 282 (2000)	24
<i>Joe v. Two Thirty Nine Joint Venture</i> , 145 S.W.3d 150 (Tex. 2004).....	22
<i>Kansas Pub. Employees. Ret. Sys. v. Kutak Rock</i> , 44 P.3d 407 (Kan. 2002).....	23

<i>Kelly v. Logan, Jolley & Smith, L.L.P.</i> , 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009).....	13
<i>Klippel v. Mid-Carolina Oil, Inc.</i> , 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990).....	19
<i>Miller v. City of Camden</i> , 317 S.C. 28, 451 S.E.2d 401 (Ct. App. 1994), <i>aff'd as modified by</i> , 329 S.C. 310, 494 S.E.2d 813 (1997)	26
<i>Mitchell v. Holler</i> , 311 S.C. 406, 429 S.E.2d 793 (1993)	13
<i>Moore v. Benson</i> , 390 S.C. 153 700 S.E.2d 273 (Ct. App. 2010).....	13
<i>Nienow v. Nienow</i> , 268 S.C. 161, 232 S.E.2d 504 (1977)	12
<i>Regions Bank v. Schmauch</i> , 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).....	19
<i>Smith v. Grub</i> , 84 N.E.2d 421 (Ill. 1949).....	20
<i>Spence v. Spence</i> , 368 S.C. 106, 628 S.E.2d 869 (2006)	20
<i>State v. Buyers Serv. Co., Inc.</i> , 292 S.C. 426, 357 S.E.2d 15 (1987)	25
<i>Turner v. Irving Finkelstein & Meirowitz, LLP</i> , 879 N.Y.S.2d 145 (N.Y. App. Div. 2009)	23
Statutes	
S.C. Code Ann. § 15-3-530.....	13
Rules	
Rule 1.2(c), RPC, Rule 407, SCACR	23
Rule 220(c), SCACR	21
Rule 56, SCRCP.....	9
Other Authorities	
1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 2:11 (2011)	23
Restatement (Third) of the Law Governing Lawyers § 50 cmt d.	22

STATEMENT OF ISSUES ON APPEAL

1. WHETHER PLAINTIFFS ABANDONED THEIR APPEAL BY FAILING TO ADDRESS IN THEIR BRIEF THE MASTER-IN-EQUITY'S HOLDING THAT SUMMARY JUDGMENT IS WARRANTED BECAUSE PLAINTIFFS HAD CONSTRUCTIVE NOTICE OF THEIR CLAIMS THROUGH THEIR INSURANCE AGENT MORE THAN THREE YEARS BEFORE FILING THIS ACTION.
2. WHETHER THE MASTER-IN-EQUITY PROPERLY IMPUTED THE KNOWLEDGE OF PLAINTIFFS' INSURANCE AGENT TO PLAINTIFFS FOR PURPOSES OF HOLDING THAT THE STATUTE OF LIMITATIONS BARS PLAINTIFFS' CLAIMS.
3. WHETHER PLAINTIFFS, WHO RECEIVED SUBSTANTIAL INFORMATION CONCERNING THEIR PROPERTY'S NEGATIVE ELEVATION MORE THAN THREE YEARS BEFORE THIS LAWSUIT WAS FILED, ARE BARRED BY THE STATUTE OF LIMITATIONS FROM BRINGING A LEGAL MALPRACTICE ACTION AGAINST THEIR CLOSING ATTORNEYS.
4. WHETHER REAL ESTATE CLOSING ATTORNEYS HAVE A DUTY TO PROVIDE SERVICES OUTSIDE THE SCOPE OF THOSE SET FORTH IN THEIR WRITTEN ENGAGEMENT LETTER.
5. WHETHER REAL ESTATE CLOSING ATTORNEYS HAVE A COMPREHENSIVE DUTY TO ENSURE THAT PROPERTY IS FREE FROM ANY VIOLATIONS OF APPLICABLE LOCAL, STATE OR FEDERAL BUILDING CODES.

STATEMENT OF THE CASE

This is a legal malpractice action that arises out of Plaintiff-Appellants Gregory M. Gottschlich and Donald L. McNeil's purchase of an investment house in Hilton Head that allegedly was built below the fourteen foot elevation required by the local building code and FEMA flood insurance rules. Respondents Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman (collectively, the "Closing Attorneys") served as closing attorneys on Plaintiffs' purchase of the subject property.

Plaintiffs filed their initial Complaint on February 18, 2008. The Complaint did not name the Closing Attorneys as defendants. (R. p. 12, Compl. p. 1.)

Plaintiffs filed an Amended Complaint on March 20, 2009, naming the Closing Attorneys, among many others, as defendants. (R. p. 45, Am. Compl. p. 1.) In the Amended Complaint, Plaintiffs alleged professional negligence, breach of fiduciary duty, breach of contract, and equitable indemnification claims against the Closing Attorneys. (R. pp. 63-67, Am. Compl. pp. 19-23.) They pleaded eleven other causes of action against a variety of additional defendants, including Strimpfel Custom Homes, Inc.; Joseph A. Reeve; Jerry L. Richardson; Coastal Surveying Co., Inc.; Thomas H. Dye; Jan N. Dye; Ken Oliver; and the Byrne Corporation d/b/a Dunes Marketing Group. (R. pp. 45-62, Am. Compl. pp. 1-18.) The claims against the Closing Attorneys center on allegations that the Closing Attorneys had a duty to recognize and apprise Plaintiffs that a structure on the property they were purchasing did not comply with local building codes and flood insurance regulations. (R. pp. 63-67, Am. Compl. pp. 19-23.)

The Closing Attorneys answered the Amended Complaint on April 30, 2009. (R. pp. 141-55, Answer of Closing Attorneys.) The Closing Attorneys asserted numerous

defenses, including the statute of limitations. (*Id.*) The Closing Attorneys also denied that they breached any duty to Plaintiffs, or that Plaintiffs had any damages. (*Id.*)

Following extensive discovery, the Closing Attorneys moved for summary judgment on December 1, 2009 on three grounds: (1) statute of limitations, (2) lack of evidence that the Closing Attorneys breached any duty to Plaintiffs, and (3) lack of evidence that Plaintiffs have any non-speculative damages. (R. pp. 158-59, Closing Attorney's Motion for Summary Judgment.) The Closing Attorneys filed a Memorandum in Support of their Motion for Summary Judgment on December 16, 2009. (R. pp. 222-37, Closing Attorney's Memorandum in Support of Motion for Summary Judgment.) The Court heard various motions, including the Closing Attorneys' Motion for Summary Judgment, on December 16, 2009, and granted the Motion by Order dated January 11, 2010. (R. p. 882, 12/16/09 Hearing Tr.; R. pp. 1-7, Order of January 11, 2010.) Plaintiffs moved to reconsider the Order on January 26, 2010, and the Court held a hearing on this motion on March 16, 2010. (R. p. 862, Motion to Reconsider; R. p. 966, 3/16/10 Hearing Tr.) The Court denied the Motion to Reconsider by Order dated May 3, 2010, and this appeal followed. (R. pp. 8-9, Order of May 3, 2010.)

STATEMENT OF FACTS

Plaintiffs' case against the Closing Attorneys concerns a real estate transaction that closed on December 3, 2003, by which Plaintiffs – two doctors from Ohio – purchased investment / vacation property on Hilton Head Island. (R. pp. 44-51, Am. Compl. pp. 1-7.) According to Plaintiffs, a structure on that property does not comply with the local building code and federal flood insurance rules, and Plaintiffs contend that the Closing Attorneys are somehow responsible for that issue. (R. pp. 44-51, 63-68, Am. Compl. pp. 1-7, 19-24.) Although Plaintiffs' and the Closing Attorneys' involvement

with the property began in 2003, the facts relevant to Plaintiffs' claims and the applicable defenses go back to the construction of the structure in 1987.

A. 1987 to 2002: Construction of the Subject Property and First Recognition of the Negative Elevation Issue.

The structure at issue was built in 1987 by a local developer. (R. p. 265, lines 9-12, Strimpfel Dep. p. 11.) During construction, the builder obtained an elevation certificate from Jerry Richardson of Coastal Surveying Co. ("Coastal"), certifying that the elevation of the lowest finished floor of the structure was 14.16 feet. (R. p. 267, 1987 Elevation Certificate.) According to the FEMA Flood Insurance Rate Map, the base flood elevation ("BFE") for the subject property is 14 feet. Flood insurance rates are substantially higher when a property's lowest finished floor is below the property's BFE. (R. p. 562, lines 7-14, Farrell Dep. p. 34.) Moreover, local building codes require that the lowest finished floor be built at an elevation at or above the property's BFE. (R. p. 547, lines 11-12, 21-24, Johnson Dep. p. 30.) Thus, the 14.16-foot elevation set forth on the 1987 elevation certificate was permissible, and, in 1988, the Town of Hilton Head Island issued a Certificate of Occupancy for the structure. (R. p. 31, Certificate of Occupancy.)

From 1988 until 2001, the property was occupied, bought, and sold. Nothing in the record suggests that anyone questioned the 1987 elevation certificate during this time period.

In 2001, Thomas and Jan Dye purchased the property from the then-owner, Myra Muldong. (R. p. 508, lines 7-9, Thomas Dye Dep. p. 45.) In connection with this purchase, the Dyes obtained an updated elevation certificate from Sea Island Land Survey, which listed the lowest finished floor elevation as 13.3 feet. (R. pp. 277-78, 2001 Elevation Certificate.) The 2001 elevation certificate conflicted with the 1987

elevation certificate in that it reflected a “negative elevation,” meaning that the property’s lowest finished floor was built below BFE. (*Id.*) Nothing happened with regard to the potential building code violation revealed by this elevation certificate because the only elevation certificate in the Town of Hilton Head Island’s file was – and remains to this day – the 1987 elevation certificate that does not reflect negative elevation. (R. p. 271, lines 15-23; p. 273, lines 22-25 to p. 274, lines 1-8, Johnson Dep. pp. 23, 48-50.)

B. 2003: Plaintiffs’ Purchase of the Subject Property, Engagement of the Closing Attorneys for the Limited Purpose of Closing the Purchase Transaction, and Plaintiffs’ Pre-Closing Discovery of the Negative Elevation Issue.

On November 6, 2003, Plaintiffs entered into a contract to purchase the property from the Dyes. (R. pp. 258-62, Purchase Contract.) There is no evidence that Plaintiffs made any attempt to determine the property’s compliance with any applicable building codes or flood regulations before signing the purchase contract.

On November 13, 2003, Plaintiffs hired the Closing Attorneys to oversee the closing of the purchase transaction. (R. pp. 284-89, Engagement Letter.) The Closing Attorneys provided Plaintiffs with a written engagement letter outlining in detail the services that they were engaged to perform. (*Id.*) Specifically, the engagement letter listed the following eight services that the Closing Attorneys would provide:

1. Review of the Contract of Sale to determine Plaintiffs’ rights and obligations thereunder;
2. Determination with Plaintiffs as to how title would be taken (e.g., tenancy in common, joint tenancy, etc.);
3. Review of the proposed Deed to ensure that good, marketable title passed to Plaintiffs;
4. Examination of the title abstract to determine any title defects;

5. Recordation of appropriate transaction documents with the Beaufort County RMC's Office;
6. Coordination of disbursement and distribution of settlement proceeds;
7. Insure compliance by Plaintiffs with any obligations necessary to close in accordance with the lender's loan commitment;
8. Preparation of necessary closing documents, including, if necessary, a legal opinion as to title.

(*Id.*) Plaintiffs have not claimed any defect in these services, and there is no evidence that Plaintiffs asked the Closing Attorneys to perform any other or additional services.

Plaintiffs were required by their lender to obtain flood insurance on the property before closing. (R. p. 315, Closing Instructions p. 2.) In November 2003, the Closing Attorneys forwarded a copy of the 2001 elevation certificate to Plaintiffs with a note that they might need the certificate to obtain flood insurance. (R. p. 282, Fax dated 11/26/03.) Furthermore, on a pre-closing pro forma, Plaintiffs estimated that flood insurance would cost them approximately \$592 per year – a good estimate for property with positive elevation (*i.e.*, lowest finished floor elevation at or above BFE). (R. p. 207, Pro Forma p. 1.) Plaintiffs engaged Seacoast Insurance, Inc. (“Seacoast”) to procure flood insurance on their behalf. (R. p. 330, Settlement Statement.) In December 2003, Seacoast used the 2001 elevation certificate to fill out a flood insurance application that reflected the structure's elevation – 13.3 feet – and the BFE – 14 feet. (R. p. 404, Flood Insurance Application.)

Because the structure had negative elevation, flood insurance cost \$2,800, which was substantially more than the \$592 figure that Plaintiffs had estimated in their own pro forma. (R. pp. 207, 330, 407, Flood Insurance Application, Settlement Statement, Pro

Forma). Plaintiffs were aware of the \$2,800 flood insurance cost before closing and did not question the difference between the quoted premium and their pro forma estimate. (R. p. 209, lines 18-25, Gottschlich Dep. p. 214.) Plaintiffs accepted the \$2,800 cost and insured the property through Seacoast. (R. p. 330, Settlement Statement.) In connection with the purchase of flood insurance, Plaintiffs received an insurance policy declarations page that noted the property's negative elevation. (R. pp. 336-43, Declaration Pgs.; R. p. 394, lines 3-25, Lyons Dep. p. 61; R. p. 416, lines 10-25, Farrell Dep. p. 115.)

Plaintiffs' purchase closed on December 2, 2003. (R. p. 329-31, Settlement Statement.) Before the closing, the Closing Attorneys sent all of the closing documents to Plaintiffs for their review. (R. p. 302, lines 12-25, p. 303, lines 21-25 to p. 304, lines 1-5, Deeb Dep. pp. 192, 197-98.) Plaintiffs asked no questions about the documents or the closing. (*Id.*) The Closing Attorneys oversaw the closing in accordance with Plaintiffs' and the lender's instructions, and the Closing Attorneys performed the services listed in the engagement letter. (R. p. 301, lines 19-22, Deeb Dep. p. 185.) Again, Plaintiffs have not claimed that these services were defective in any way.

C. 2004 to 2005: Plaintiffs, Through Their Agent and Personally, Continue to Receive Notice of the Property's Negative Elevation.

Following the closing, Plaintiffs took possession of the property. Since the closing in 2003, they personally received annual flood policy declarations pages from their insurance agent Seacoast, all of which expressly stated that the structure has negative elevation. (R. pp. 336-43, Declaration Pgs.; R. p. 394, lines 13-25, p. 395, line 1, Lyons Dep. pp. 61-62; R. p. 416, lines 12-25, Farrell Dep. p. 115.) These declarations pages are part of Plaintiffs' insurance policy. (*Id.*)

In 2004, Seacoast, acting on Plaintiffs' behalf, explored re-underwriting the flood insurance to obtain a lower premium. (R. p. 412, Activity Log.) As part of this process, Seacoast contacted the surveyor "regarding the fact that the home was built below the base flood elevation." (*Id.*) Because of the property's negative elevation, Seacoast was unable to obtain a lower premium for Plaintiffs. (*Id.*)

D. 2006 – Present: Plaintiffs Belatedly Investigate the Negative Elevation and File Suit Against Numerous Parties.

In early 2006, Plaintiffs contacted Seacoast to attempt to buy excess flood insurance. (R. p. 533, lines 19-25, Gottschlich Dep. p. 14.) They were advised that excess flood insurance was not available through Seacoast's carriers because of the negative elevation issue. (R. pp. 534, lines 21-25, Gottschlich Dep. p. 15.) Plaintiffs claim that this was the first time they were apprised of the negative elevation issue, despite the information that they and their insurance agent admit to receiving in 2003, 2004, and 2005. (*Id.*)

On February 18, 2008, Plaintiffs filed this lawsuit against four groups of people: (1) the original developer and owner, (2) the original surveyors, (3) the Dyes, (4) and Plaintiffs' real estate agents. (R. pp. 12-27, Complaint.) Plaintiffs added the Closing Attorneys to the suit by Amended Complaint filed on March 20, 2009. (R. pp. 45-68, Amended Complaint.)

To date, the Town of Hilton Head Island, despite being deposed in connection with this case and informed of the elevation issue, has never taken any action against Plaintiffs with regard to the structure at issue. (R. p. 273, lines 19-25 to p. 274, lines 1-8, Johnson Dep. p. 49-50.) Indeed, the Town has confirmed that the only elevation information in its file is the 1987 elevation certificate, which reflects positive elevation.

(*Id.*) Nonetheless, Plaintiffs claim as their damages the costs associated with raising the lowest finished floor elevation of the structure to 14 feet, which they speculate is needed to avoid a possible future town enforcement action.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, this Court applies the same standard as the court below. *Boyd v. Bellsouth Tel. Tel. Co., Inc.*, 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). “Under Rule 56, SCRPC, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *Id.* Summary judgment is appropriate when the evidence is such that a reasonable jury could not resolve the case in favor of the non-moving party. *Bloom v. Ravoira*, 339 S.C. 417, 421, 529 S.E.2d 710, 712 (2000).

ARGUMENT

Plaintiffs’ brief does not address the Master-in-Equity’s holding that Seacoast’s undisputed knowledge of the negative elevation in 2003-2004 is imputed to Plaintiffs through principles of agency law. Thus, any argument Plaintiffs might have on that issue is abandoned as a matter of law. The Master-in-Equity’s ruling on the constructive notice issue, which Plaintiffs now cannot challenge, is wholly sufficient on its own to support the Master-in-Equity’s grant of summary judgment on statute of limitations grounds. Accordingly, the grant of summary judgment must be affirmed for that reason alone, and the other issues on appeal need not be addressed.

Even if Plaintiffs’ appeal is considered on the merits, Plaintiffs did not file their claims against the Closing Attorneys within the three-year statute of limitations. As the Master-in-Equity held, Plaintiffs received notice, both constructively and personally, of

the negative elevation issue on several occasions in 2003 and 2004, yet they did not file this action against the Closing Attorneys until March 2009, more than three years later. There is no dispute that Plaintiffs' insurance broker knew about the negative elevation issue in 2003 and 2004, and insurance brokers are agents of their insured as a matter of law. Thus, following basic principles of agency law, the brokers' knowledge is imputed to the Plaintiffs, and this lawsuit was filed out of time. In addition, Plaintiffs had personal knowledge of the negative elevation issue in 2003 and 2004 through their receipt of numerous documents reflecting the issue. Because Plaintiffs knew or should have known that they might have claims against the Closing Attorneys more than three years before this suit was filed, their claims against the Closing Attorneys are barred by the statute of limitations as a matter of law.

Plaintiffs are also barred from bringing claims against the Closing Attorneys because the engagement letter that the Closing Attorneys sent to Plaintiffs properly limits the scope of the representation, and that letter does not list as one of the services to be provided that the Closing Attorneys will certify that the structure at issue complies with applicable building codes. Thus, the Closing Attorneys had no duty to determine whether the lowest finished floor elevation complied with applicable codes or to advise Plaintiffs on that issue, and Plaintiffs' claims against the Closing Attorneys fail as a matter of law.

Similarly, unless the parties expressly agree otherwise (which is not alleged here), real estate closing attorneys have duties to provide only a discrete set of services that center on ensuring that the transaction documents are properly executed and recorded, and that clear title is conveyed from seller to purchaser. Closing attorneys do not have a comprehensive duty to determine whether the property being transferred or any structures

thereon comply with all applicable codes, rules, or regulations. Since the negative elevation issue was not related to the proper execution and recording of the transaction documents or the conveyance of clear title, it fell outside the scope of the Closing Attorneys' duties, and it cannot serve as the basis for Plaintiffs' claims as a matter of law. For all of these reasons, the Master-in-Equity's grant of summary judgment in favor of the Closing Attorneys was proper, and his Order should be affirmed.

I. PLAINTIFFS ABANDONED THEIR APPEAL BY FAILING TO ADDRESS IN THEIR BRIEF THE MASTER-IN-EQUITY'S RULING THAT THEY WERE ON CONSTRUCTIVE NOTICE OF THEIR CLAIMS MORE THAN THREE YEARS BEFORE THEY FILED SUIT.

In his Order, the Master-in-Equity analyzed in successive discussions whether Plaintiffs had actual notice, inquiry notice, or constructive notice of their claims more than three years before this suit was filed. (R. pp. 4-7, Summary Judgment Order at 3-6.) In the course of this discussion, the court reached two holdings. First, the court held that, more than three years before this lawsuit was filed, Plaintiffs *personally* had information sufficient to inform them, through the exercise of reasonable diligence, that they might have claims against the Closing Attorneys. (R. p. 5, Summary Judgment Order at 5.) This holding was based on information that was actually in Plaintiffs' possession, such as the 2001 elevation certificate and Plaintiffs' annual flood policy declarations pages. Second, the Court held that, more than three years before this lawsuit was filed, Plaintiffs *constructively* had information sufficient to inform them, through the exercise of reasonable diligence, that they might have claims against the Closing Attorneys. (R. pp. 3-6, Summary Judgment Order pp. 3-6.) Unlike the first holding, this holding was based on information that was in possession of Plaintiffs' insurance broker Seacoast, which the Court imputed to Plaintiffs through basic principles of agency law.

Each holding is independently sufficient to support the Court's decision that the Closing Attorneys are entitled to summary judgment on statute of limitations grounds because "[t]he statute of limitations begins to run at the time the [plaintiff] has inquiry or constructive notice [that a claim might exist]." *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 800 (Ct. App. 1997) (emphasis added). Either form of notice is sufficient. *Id.* Thus, to overturn the order below, Plaintiffs must demonstrate that both holdings are wrong and that they had neither personal nor constructive knowledge of information sufficient to run the statute of limitations.

Plaintiffs' brief on appeal, however, only addresses the actual knowledge holding. The brief argues at length that the information available to Plaintiffs personally was insufficient to put them on notice of their claims. But the brief does not address the Master-in-Equity's imputation of Seacoast's knowledge to Plaintiffs, which independently leads to the conclusion that Plaintiffs failed to file this lawsuit within the legally required time. Therefore, any argument on the issue of constructive notice is abandoned on appeal as a matter of law. *Nienow v. Nienow*, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977) ("[A]ppellant has failed to specifically argue this contention in her brief and is deemed to have abandoned this exception."); *Cannon v. Cannon*, 321 S.C. 44, 54, 467 S.E.2d 132, 138 (Ct. App. 1996) (holding that failure to raise issue in brief constitutes abandonment of the issue on appeal). Since Plaintiffs have abandoned any argument against constructive notice, which independently supports the grant of summary judgment in the Closing Attorneys' favor, the Master-in-Equity's Order must be affirmed for this reason alone, and there is no need to address any further issues in this appeal. *Id.*

II. PLAINTIFFS WERE ON NOTICE OF THEIR CLAIMS AGAINST THE CLOSING ATTORNEYS MORE THAN THREE YEARS BEFORE THIS ACTION WAS FILED.

On the merits of Plaintiffs' appeal, the parties agree that the three-year statute of limitations in S.C. Code Ann. § 15-3-530 applies to the claims against the Closing Attorneys. (Appellants' Br. p. 21.) The statute of limitations began to run when the plaintiffs "could or should have known, through the exercise of reasonable diligence that a cause of action might exist." *Moore v. Benson*, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010) (emphasis added). "The statute of limitations begins to run at the time the [plaintiff] has inquiry or constructive notice [that a claim might exist]." *Berry*, 328 S.C. at 445, 492 S.E.2d at 800. The statute is not delayed until "advice of counsel is sought or a full-blown theory of recovery developed." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (emphasis omitted). "The standard as to when the limitations period begins to run is objective rather than subjective." *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1, 4 (Ct. App. 2009).

In assessing when a complaining party (in this case, Plaintiffs) knew or should have known the operative facts for purposes of the statute of limitations, the focus is upon "whether the *complaining party* acquired knowledge of any existing facts 'sufficient to put said party on inquiry....'" *Berry*, 328 S.C. at 445, 492 S.E.2d at 799 (quoting *Burgess v. Am. Cancer Soc'y*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989)) (emphasis added). The injured or complaining party must act with promptness and exercise reasonable diligence when 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." *Id.* (quoting *Mitchell v. Holler*, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993)). Accordingly, in determining

whether Plaintiffs had actual or constructive notice of the negative elevation, the Court must evaluate Plaintiffs' knowledge and diligence in seeking to appreciate the import of the documents and information before them, not the knowledge or duties of the Closing Attorneys.

The Closing Attorneys were first named as defendants in the underlying lawsuit on March 20, 2009. Thus, for Plaintiffs' claims against them to survive, those claims must have accrued no earlier than March 20, 2006. However, as the Master-in-Equity held, through facts that were known by Plaintiffs' agent, Seacoast, and through facts that Plaintiffs knew personally, Plaintiffs were on notice that their claims might exist well before that date, specifically in 2003, again in 2004, and again in 2005. Thus, the Master-in-Equity properly granted the Closing Attorney's Motion for Summary Judgment on statute of limitations grounds.

A. Plaintiffs Had Constructive Notice of the Negative Elevation Issue Through Their Agent, Seacoast.

Plaintiffs received constructive notice of the negative elevation issue through their insurance broker, Seacoast. As an initial matter, Seacoast was inarguably aware of the negative elevation issue before March 20, 2006. In connection with the December 3, 2003 closing, Seacoast received a copy of the 2001 elevation certificate and submitted a flood insurance application on Plaintiffs' behalf expressly setting out the property's negative elevation. Indeed, the second page of that application stated:

ELEVATION INFORMATION

~~Lowest Floor:~~	~~13.3~~	Source of Certificate:	Elevation Certificate
~~Base Flood:~~	~~14.0~~	Prior Policy Number:	6004611874
Lowest Adjacent Grade:	9.2	Certificate Date:	03/28/2001
Diagram Number:	8	Certificate Type	Elevation/Survey

(R. p. 404, Application p. 2 (emphasis added).) Then, in December 2004, according to Seacoast's own activity log, it explored re-underwriting the property to obtain a lower rate, which included contacting the surveyor "regarding the fact that the home was built below the base flood elevation." (R. p. 412, Activity Log p. 7 (emphasis added).) Seacoast determined that, because of the negative elevation issue, there was "nothing [they could] do to re-underwrite the policy and improve the premium for the insured." (*Id.*) Thus, there is no question that Seacoast was aware of the negative elevation issue well before March 20, 2006.

Seacoast's knowledge of the negative elevation issue is imputed to Plaintiffs because Seacoast, as Plaintiffs' insurance broker, was Plaintiffs' agent. Absent circumstances not alleged to be present here,¹ the relationship between insurance broker and insured is an agency relationship in which the insured is the principal and the broker is the agent. *Allstate Ins. Co. v. Smoak*, 256 S.C. 382, 393, 182 S.E.2d 749, 754 (1971) ("[W]here [an insurance broker] is employed to procure insurance, he is the agent of the insured."); *Holmes v. McKay*, 334 S.C. 433, 440, 513 S.E.2d 851, 855 (Ct. App. 1999)

¹ In limited circumstances, such as when a broker works for a single insurance company, it may be an agent of that insurer for some purposes. *Hiott v. Guar. Nat'l Ins. Co.*, 329 S.C. 522, 530, 496 S.E.2d 417, 422 (Ct. App. 1997). Here, however, there is no dispute that Seacoast was an independent insurance agency not affiliated with any single insurance company, and there has been no claim that Seacoast was an agent of any insurance carrier.

(same); *Hiott v. Guar. Nat'l Ins. Co.*, 329 S.C. 522, 530, 496 S.E.2d 417, 422 (Ct. App. 1997) (same). Since there is no dispute that Plaintiffs engaged Seacoast to procure flood insurance for them on the property at issue, there can be no dispute that Seacoast was Plaintiffs' agent as a matter of law. *See Allstate Ins. Co.*, 256 S.C. at 393, 182 S.E.2d at 754.

As Plaintiffs' agent for purposes of procuring flood insurance on the property, Seacoast's knowledge of the negative elevation issue is imputed to Plaintiffs. "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979). Seacoast was plainly acting within the scope of its authority when it received the 2001 elevation certificate, filled out a flood insurance application, reviewed policy declarations pages, and explored the negative elevation issue for purposes of attempting to negotiate a lower premium, and Plaintiffs have never claimed otherwise. In addition, there is no dispute that negative elevation is material to the purchase of flood insurance. Thus, Seacoast's knowledge is imputed to Plaintiffs as a matter of law and, as a result, the statute of limitations ran before Plaintiffs filed suit against the Closing Attorneys in March 2009.

Finally, it is clear why Plaintiffs' brief fails to address the constructive knowledge issue that serves as a definitive basis for the running of the statute of limitations, mandating the court to affirm the Order below. Plaintiffs' argument on appeal – that the statute of limitations did not begin running until Plaintiffs finally "appreciated" the import of the negative elevation issue – is satisfied by the fact that Plaintiffs' agent

Seacoast “appreciated” the import of the negative elevation issue in 2003-2004. Seacoast understood the ramifications associated with negative elevation, and, indeed, Seacoast’s policy and procedure was to explain those ramifications to its customers. (R. pp. 396-98, 401, Lyons Dep. pp. 63, 65, 68, 74.) As Plaintiffs’ agent, Seacoast’s knowledge and understanding are imputed to Plaintiffs. *See Crystal Ice*, 273 S.C. at 309, 257 S.E.2d at 497. Thus, even if “appreciating” the import of negative elevation were somehow required for the statute of limitations to begin to run, (and it is not), then the statute began to run in 2003-2004 when Seacoast, Plaintiffs’ agent, became aware of and “appreciated” the negative elevation problem, not in 2006 when Plaintiffs claim to have “appreciated” the import of the issue. Accordingly, as the Master-in-Equity held, the three-year statute of limitations expired long before this action against the Closing Attorneys was filed, and Plaintiffs’ claims against the Closing Attorneys are barred as a matter of law.

B. Plaintiffs Personally Received Information Disclosing the Negative Elevation Issue in 2003, 2004, and 2005.

Plaintiffs personally received sufficient information to put them on inquiry notice of their claims against the Closing Attorneys well before March 20, 2006. Specifically, Plaintiffs received:

- In **November 2003**: the 2001 elevation certificate, which reflected a lowest finished floor elevation of 13.3 feet (R. p. 282, Fax dated 11/26/03);
- In or around **November 2003**: according to Seacoast’s regular policies and procedures, notice from Seacoast that the property had negative elevation and an explanation of the ramifications associated therewith (R. pp. 398, 401, Lyons Dep. pp. 68, 74);
- In or around **November / December 2003**: a flood insurance quote that was more than five times higher than the amount Plaintiffs previously expected to pay (R. pp. 207, Pro Forma, Settlement Statement);

- In or around **December 2004**: according to Seacoast's regular practices and procedures, notification that Seacoast could not improve their flood insurance premium because of the negative elevation issue (R. pp. 398, 401, Lyons Dep. pp. 68, 74; R. p. 412, Activity Log p. 7); and
- In **2003, 2004, and 2005**: annual declarations pages for their flood insurance policy, which expressly stated that the property had negative elevation (R. pp. 335-43, Declarations Pages).

In their brief, Plaintiffs do not dispute receiving information regarding the property's negative elevation. Rather, they claim that, from such information, a person of common knowledge and experience could not have been expected to recognize a potential problem with the property's elevation. This is incorrect because Plaintiffs received multiple red flags warning them of the need to inquire further about the property's elevation.

First, Plaintiffs prepared a pro forma before closing in which they predicted that flood insurance would cost \$592 per year. (R. p. 207, Pro Forma.) According to Plaintiffs, this figure was based on what they understood the Dyes were paying for flood insurance. (R. p. 210, lines 12-21, Gottschlich Dep. 215.) Using this figure made sense because Plaintiffs decided to purchase the same minimum required coverage that the Dyes had purchased. (*Id.*) Yet, at or before the closing on December 3, 2003, Plaintiffs received and accepted a flood insurance quote from Seacoast that was \$2,800, more than five times the amount they had expected to pay. (R. p. 330, Settlement Statement.) **Plaintiffs admit that they did not question this five-fold increase.** (R. p. 209, lines 18-25, Gottschlich Dep. p. 214.) A year later, however, Plaintiffs sought to decrease their premium, evidencing their knowledge of the dramatic increase in the cost of flood insurance on the property. (R. p. 412, Activity Log p. 7).

Second, Plaintiffs received annual flood policy declarations pages clearly stating that the property had negative elevation. (R. pp. 336-43, Declaration Pgs.; R. p. 394, lines 3-25, Lyons Dep. p. 61; R. p. 416, lines 12-25, Farrell Dep. p. 115.) As a matter of law, Plaintiffs had a duty to read and understand these documents, which were all part of their flood insurance contracts. See *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986); *Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 326, 233 S.E.2d 111, 114 (1977); *Regions Bank v. Schmauch*, 354 S.C. 648, 663-64, 582 S.E.2d 432, 440 (Ct. App. 2003). A party to a contract cannot avoid the effect of the document's contents by claiming he did not read it. *Burwell*, 288 S.C. at 39, 340 S.E.2d at 789; *Doub*, 268 S.C. at 326, 233 S.E.2d at 114; *Regions Bank*, 354 S.C. at 663, 582 S.E.2d at 440. There is no evidence that Plaintiffs questioned the negative elevation plainly reflected on these declarations pages.

Third, Seacoast's regular policy and procedure was to discuss negative elevation issues with flood insurance customers. (R. p. 398, lines 5-11, Lyons Dep. p. 68.) There is no evidence indicating that such a conversation did not take place here. (*Id.*) Without evidence to the contrary, for purposes of summary judgment, the court must assume that Seacoast followed its regular policies and informed Plaintiffs of the negative elevation and its ramifications. Cf. *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 129, 399 S.E.2d 163, 164 (Ct. App. 1990) (noting that party opposing summary judgment must marshal evidence, not mere pleadings or arguments of counsel, to dispute material facts put forward by the moving party).

Each of these red flags taken separately would be enough to put a reasonable person on notice that there might be a problem with the elevation of the property and that

they should inquire further. Taken together, the notice is overwhelming. The concept of inquiry notice centers on unusual circumstances and unexpected occurrences – things that would alert a reasonably cautious person that a situation warrants further inquiry. *See Spence v. Spence*, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) (holding that inquiry notice arises when facts known provide “a clue” that a “reasonably cautious and prudent” person would investigate (internal citations omitted)); *see also Smith v. Grub*, 84 N.E.2d 421, 428 (Ill. 1949) (holding that parties have a duty to investigate “unusual circumstance[s]”). Here, Plaintiffs’ own pro forma demonstrates that their flood insurance premiums were unusually high and unexpected, and their own flood policy declarations pages revealed a negative elevation, which a reasonable person would not expect, yet *they did not inquire further*. These are exactly the kinds of circumstances that would trigger the Plaintiffs’ duty of reasonable inquiry. Thus, as the Master-in-Equity correctly held, Plaintiffs’ decision to bury their heads in the sand is fatal to their claims.

Plaintiffs’ entire contrary argument in their brief appears to be based on a single inapposite case: *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 443 S.E.2d 537 (1994). There, the Supreme Court held that statute of limitations on a medical malpractice claim did not begin to run until the plaintiff’s parents could reasonably discover that the plaintiff suffered neurological damage from a fall from a wheelchair. *Id.* at 524, 443 S.E.2d at 538. *Benton* has no application here because, as noted above, these Plaintiffs *could* reasonably have discovered their claims in this case based on the information they possessed long before March 20, 2006. Unlike the neurological damages at issue in *Benton*, the negative elevation issue was not hidden from view; to the contrary, it was readily apparent from the exponential increase in Plaintiffs’ flood insurance, the flood

policy declarations pages, and the notice received from (and, as noted above, through) Seacoast. Thus, Plaintiffs' claims are barred as a matter of law for failure to bring suit within the statute of limitations.

III. THE CLOSING ATTORNEYS HAD NO COMPREHENSIVE DUTY TO DETERMINE WHETHER THE PURCHASED PROPERTY COMPLIED WITH APPLICABLE BUILDING CODES, RULES, OR REGULATIONS.

As an alternate sustaining ground, Plaintiffs' claims against the Closing Attorneys fail as a matter of law because determining compliance with applicable building codes, rules, and regulations was outside the scope of their representation. Plaintiffs claim that the Master-in-Equity erred in imposing a higher standard for notice as to the Plaintiffs than the professionals they hired. (Appellants' Initial Br. p. 32.) However, the issue of whether or not the Closing Attorneys had a duty to review the survey for elevation purposes was a separate ground for summary judgment that was not ruled upon by the Master-in-Equity in his Order. (R. p. 1, Summary Judgment Order at n. 1.) In fact, the court reserved argument and ruling on the Closing Attorneys' additional grounds for summary judgment. (*Id.*) As discussed in Part II above, the focus in a statute of limitations defense is only on the Plaintiffs and their knowledge and duty to inquire; thus, the question of whether or not the Closing Attorneys had a duty to review the survey for elevation purposes is irrelevant to this appeal of the underlying court's Order. Nevertheless, even if the duties of the Closing Attorneys were relevant, Plaintiffs' argument still fails as a matter of law because the Closing Attorneys had no duty to review the survey for elevation purposes. Pursuant to Rule 220(c), SCACR, "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."

A legal malpractice claim has four essential elements: (1) an attorney-client relationship, (2) breach of a duty of care, and (3) damages to the client, and (4) proximate cause. *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010). Attorneys have no duty to provide services outside the scope of their representation. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159-60 (Tex. 2004) (holding that attorney was not liable for failing to provide services outside scope of his representation of client); Restatement (Third) of the Law Governing Lawyers § 16, cmt c. (2000) (“[A] lawyer’s duties are ordinarily limited to matters covered by the representation.”). While a lawyer must exercise care within the scope of the representation, “[t]he lawyer is not liable for failing to act beyond that scope.” Restatement (Third) of the Law Governing Lawyers § 50 cmt d. (emphasis added).

Here, the Closing Attorneys’ representation was limited by the engagement letter that they sent to Plaintiffs, which did not include examination of building code compliance as one of the services to be provided. The scope was also limited by the nature of the engagement – overseeing the closing of a real estate transaction – which does not include ensuring that the property or any of its structures comply with applicable building codes, rules, or regulations. Thus, the Closing Attorneys had no duty to advise the Plaintiffs on building code compliance, and Plaintiffs’ case fails as a matter of law for lack of that essential element.

A. The Closing Attorneys Had No Duty to Advise Plaintiffs on Building Code Compliance Because No Such Service Was Listed in the Engagement Letter.

The Closing Attorneys did not have a duty to advise Plaintiffs on any potential building code or elevation issues because no such service was listed in the parties’ engagement letter. Under South Carolina law, attorneys may reasonably limit their

representation of a client to particular issues or transactions. Rule 1.2(c), RPC, Rule 407, SCACR. The preferred method of defining the scope of a lawyer's representation is through a written engagement letter. *See, e.g.*, 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 2:11 (2011) (noting that written engagement letters are "a critical tool to defining the contours of a representation").

Thus, in accordance with recommended practice, the Closing Attorneys sent Plaintiffs a detailed engagement letter that set forth the services they had agreed to provide. (R. pp. 284-89, Engagement Letter.) Those services centered on reviewing the purchase contract, performing the necessary title work, preparing the necessary property transfer documents, complying with the lender's closing instructions, overseeing the closing, and ensuring that the necessary property documents were properly recorded. (*Id.*) The engagement letter does not include any services related to ensuring building code compliance, determining flood insurance regulation compliance, examining the elevation of the property, or any other activity that would reasonably require determining whether the elevation of the property complied with any applicable building codes. (*Id.*)

It is well-settled that engagement letters reasonably limiting the scope of representation must be enforced. *See, e.g.*, *Kansas Pub. Employees Ret. Sys. v. Kutak Rock*, 44 P.3d 407, 418-19 (Kan. 2002) (holding that attorney's duties are limited to services set forth in engagement letter and that attorney has no duty as a matter of law to provide other services); *AmBase Corp. v. Davis Polk & Wardwell*, 866 N.E.2d 1033, 1036-37 (N.Y. 2007) (dismissing legal malpractice action because alleged breach of duty concerned services outside the scope of the attorney's engagement letter); *Turner v. Irving Finkelstein & Meirowitz, LLP*, 879 N.Y.S.2d 145, 147 (N.Y. App. Div. 2009)

(dismissing legal malpractice action because attorney's duties were limited by terms of the engagement letter). Here, there is no evidence that the Closing Attorneys' engagement letter was unreasonable. To the contrary, Plaintiffs' expert has not opined on the engagement letter, and it is undisputed that it sufficiently defined and limited the Closing Attorneys' services. Thus, the engagement letter must be enforced, and the Master-in-Equity's Order should be affirmed on the grounds that the Closing Attorneys had no duty to make determinations or advise Plaintiffs regarding any building code or flood insurance regulation issues.

B. Attorneys Engaged to Oversee the Closing of a Real Estate Transaction Have No Duty to Ensure that the Purchased Property Complies with Applicable Local, State, or Federal Building Codes.

Plaintiffs' claims against the Closing Attorneys also fail because real estate closing attorneys have no duty to ensure compliance with applicable building codes or flood insurance regulations. Closing attorneys are not insurers of the purchased property or the sales transaction. *Cf. Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 27, 531 S.E.2d 282, 286 (2000) (holding that attorneys are required to exercise reasonable care and skill, not to ensure a particular result). Rather, they are professionals hired to perform a discrete set of tasks that focus on successfully transferring clear title to property that the purchaser has already agreed to buy. Thus, unless there is express agreement to the contrary (which is not alleged here), duties of closing attorneys are limited to those normally attendant to overseeing the closing of a real estate transaction.

In South Carolina, our Supreme Court has defined the tasks associated with overseeing the closing of a real estate transaction. Specifically, the Court has held that closing attorneys are required to oversee four steps of the closing process:

1) Title Search

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

2) Loan Documents

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

3) Closing

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

4) Recordation of Documents

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

Doe Law Firm v. Richardson, 371 S.C. 14, 17, 636 S.E.2d 866, 868 (2006); *see also Doe v. McMaster*, 355 S.C. 306, 312-16, 585 S.E.2d 773, 776-78 (2003); *State v. Buyers Serv. Co., Inc.*, 292 S.C. 426, 430-34, 357 S.E.2d 15, 19-20 (1987). By their terms, none of these tasks include examining the elevation of any structures on the purchased property, ensuring compliance with any building codes, determining compliance with any flood insurance regulations, or any similar tasks. *Id.*

There is no legal basis to suggest that the Closing Attorneys had any duty to recognize the negative elevation issue and advise Plaintiffs of the issue. Plaintiffs’ only argument to the contrary is that their purported expert, C. Joseph Roof, Esq., baldly asserts that such a duty exists. However, Mr. Roof admitted that he could cite nothing –

no treatise, case law, CLE materials, rules, regulations, or articles – for that opinion. (R. pp. 365, 369-70, Roof Dep. pp. 65, 101-02.) Thus, his opinion on the legal question of a closing attorney's duties should be disregarded. *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (disregarding expert testimony on issues of law). Indeed, expert testimony on this point is irrelevant because “[t]he existence and scope of [a] duty are questions of law” that the Court must determine. *Miller v. City of Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994), *aff'd as modified by*, 329 S.C. 310, 494 S.E.2d 813 (1997). Based on the applicable case law, the Closing Attorneys had no duty with regard to the negative elevation issue, and Plaintiffs' claims fail as a matter of law.

Holding otherwise would endanger the practice of every residential real estate closing attorney in South Carolina. Plaintiffs' claim is that “[l]aws and codes and zoning are well known as important in South Carolina coastal areas,” so closing attorneys should ensure compliance with this undefined and nearly unlimited group of requirements. (Appellants' Initial Br. p. 23.) Indeed, Plaintiffs argue that “real estate lawyers are well aware of the importance of compliance with property requirements,” and thus should ensure the purchaser's compliance with all such requirements. (Appellants' Initial Br. p. 24.) Regulations concerning flood plain management alone consist of numerous technical documents, zoning ordinances, building and construction codes, and many other local, state, and/or federal rules. Plaintiffs' contention that residential real estate closing attorneys are responsible for ensuring that the purchased property complies with the mountain of potentially applicable requirements is absurd, as it would transform closing attorneys from professionals with a discrete set of tasks into insurers of the purchased property, tasked with expertise in numerous fields such as architecture, engineering,

surveying, contracting, and insurance. Plaintiffs' argument should be rejected out of hand, and the Master-in-Equity's Order should be affirmed on the additional sustaining grounds that the Closing Attorneys had no duty, as a matter of law, to determine whether the purchased property complied with any applicable building codes or flood insurance regulations.

CONCLUSION

Plaintiffs' actual and constructive knowledge, placing them on inquiry notice, is undisputed and thus dispositive. Plaintiffs failed to bring this lawsuit against the Closing Attorneys within the applicable statute of limitations and have waived any dispute on that issue by not discussing in their brief all grounds concerning the Order below. Plaintiffs have therefore abandoned their appeal on the statute of limitations issue and the Order below must be affirmed.

For these and all of the foregoing reasons discussed herein, and any other reason supported by the Record, the Master-in-Equity's Order granting Summary Judgment in favor of the Closing Attorneys on all of Plaintiffs' claims should be AFFIRMED.

Respectfully submitted,



Susan Taylor Wall
MCNAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 723-7831
Fax: (843) 722-3227

ATTORNEYS FOR RESPONDENTS
LAURICH & DEEB, P.A., ROBERT M. DEEB,
JR. AND CHARLES H. WISEMAN

June 20, 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,

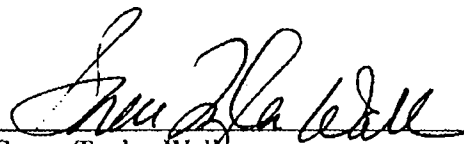
Of whom

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

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that Respondents Laurich & Deeb, P.A., Robert
M. Deeb, Jr. and Charles H. Wiseman's Final Brief complies with Rule 211(b), SCACR.

June 20, 2012



Susan Taylor Wall
MCNAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, SC 29401
Telephone: (843) 723-7831
Fax: (843) 722-3227
Email: swall@mcnair.net

**Attorneys for Respondents Laurich & Deeb,
P.A., Robert M. Deeb, Jr. & Charles H.
Wiseman**

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

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

PROOF OF SERVICE

The undersigned hereby certifies that on June 20, 2012, the foregoing
**RESPONDENTS LAURICH & DEEB, P.A., ROBERT M. DEEB, JR. AND
CHARLES H. WISEMAN'S FINAL BRIEF** was served on all counsel of record
addressed as follows:

Charles E. Carpenter, Jr., Esq.
Carmen V. Ganjehsani, Esq.
Carpenter Appeals and Trial Support, LLC
1201 Main Street, Suite 980
Columbia, SC 29201

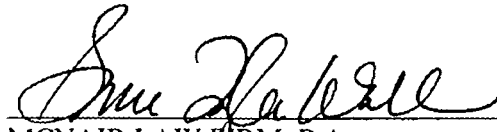
Attorneys for Appellants

Served via U.S. Mail

Max G. Mahaffee, Esq.
GRIMBALL & CABINISS, LLC
P.O. Box 816
Charleston, SC 29402-0816

*Attorneys for Respondents Ken Oliver and
The Byrne Corporation d/b/a Dunes
Marketing Group*

Served via U.S. Mail



MCNAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 723-7831

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Gregory M. Gottschlich and Donald L. McNeil,
Appellants,

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,

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.

Appellate Case No. 2010-161986

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Unpublished Opinion No. 2012-UP-676
Heard November 14, 2012– Filed December 19, 2012

AFFIRMED

Charles E. Carpenter, Jr. and Carmen Vaughn
Ganjehsani, of Carpenter Appeals & Trial Support, LLC,
of Columbia, for Appellants.

Susan Taylor Wall, of McNair Law Firm, PA, of
Charleston, for Respondents Laurich & Deeb, PA, Robert
Deeb, Jr. & Charles Wiseman.

Max G. Mahaffee, of Grimball & Cabaniss, LLC, of
Charleston, for Respondents Ken Oliver and The Byrne
Corporation d/b/a Dunes Marketing Group.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *id.* at 346, 692 S.E.2d at 903-04 (noting that the two issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525-26, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 80 (2nd ed. 2002) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." (citations omitted)).

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

Appeal from Beaufort County
Court Of Common Pleas
The Honorable
Circuit Court Judge

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; The Byrne)
Corporation D/B/A Dunes Marketing Group;)
Laurich & Deeb, P.A.; Robert M.)
Deeb, Jr. And Charles H. Wiseman,)

3

evidence that a person of common knowledge and experience did not and should not “have known that he had a cause of action” more than three years prior to filing this case.

The Court of Appeals has misapprehended and misapplied the two issue rule in its Opinion affirming the Trial Court and failing to reach the only issue on appeal which is the statute of limitations found in S C Code Ann 15-3-535. The Court of Appeals has overlooked or misapprehended and failed to correctly rule on the question decided by the Trial Court, the error being that the two issue rule does not apply.

The Court of Appeals has overlooked or misapprehended and failed to correctly find there is some evidence sufficient to overcome the Summary Judgment in which the Trial Court found no evidence that the plaintiffs satisfied the requirements of the Statute of Limitations found in S C Code Ann 15-3-535.

There were three different grounds for Summary Judgment in the defendants Laurich & Deeb, P.A., Robert M. Deeb, Jr., and Charles H. Wiseman’ Motion for Summary Judgment, but only one of those three grounds was a ground for the decision of the Trial Court and therefore only that one ground is subject to appeal. The three specific grounds, only one of which was decided by the Trial Court state:

“The specific grounds for this Motion include, without limitation, that the Amended Complaint should be dismissed under Rule 56, SCRPC, because

Plaintiffs' claims are barred by the applicable statute of limitations.

Plaintiffs have no competent evidence of any breach in the standard of care by these Defendants, and.

Plaintiffs' damages are speculative.”

The defendants Ken Oliver; and The Byrne Corporation D/B/A Dunes Marketing Group also moved on the ground of the statute of limitations.

The Order of the Trial Court reached only the statute of limitations ground. The Trial Court did not just reach the single issue of the statute of limitations, it went further and affirmatively stated in its Order that it was only reaching the statute of limitations ground and reserving consideration of the two other grounds of the existence of competent evidence and the speculativeness of damages.

The Trial Court's Footnote 1 states:

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

The Court of Appeals has erroneously affirmed the Trial Court's error of law based on a misapplication of the two issue rule. The Order of the Trial Court Granting Summary Judgment was based on only one of the three grounds raised in the Motions of the Defendants. The Trial Court committed legal error in that single ground. That single ground was and is challenged on appeal and the two issue rule does not apply. The grant of summary judgment should be reversed.

Why and How the Two Issue Rule Works

The two issue rule arises when a jury returns a general verdict in a case involving two or more causes of action or defenses, and the verdict is supported as to at least one. *Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct.App.1985). Most often the rule is discussed in the context of general jury verdicts but is applicable for review of other trial court decisions.

In pointing out that verdicts other than general jury verdicts are subject to review under the two issue rule the South Carolina Supreme Court stated in *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420 n. 1, 472 S.E.2d 253, 255 n. 1 (1996).: “For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the “two issue” rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.”

This very example given by the Supreme Court shows why the Court of Appeals is mistaken in invoking the rule in this case. The Supreme Court’s example posits two separate issues: the statute of limitations and contributory negligence.

In the present cases there was only the issue of the statute of limitations under S C Code 15-3-535. The entire statute consists of a single sentence establishing the discovery rule.

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

This statute is not broken down into three subsections, The one sentence is the full statutory discovery rule.

It is a single affirmative defense which must be pled. A party cannot prevail under a defense not included in the pleadings. A judgment must be in accord with the pleadings of the party in whose favor it is rendered, or it is fatally defective. *Brockington v. Lynch*, 119 S.C. 273, 112 S.E. 94 (1922). A party may not have the benefit of the “two issue” rule where an issue is not included in the pleadings. *Blackburn and Company, Inc. v. Dudley*, 289 S.C. 415, 338 SE2d 151 (1985).

While your plaintiffs firmly maintain that this is a grant of summary judgment on the single ground of the statute of limitations, if one were to imagine that this one ground could be somehow

transmuted into three grounds, is still does not matter because the Answers of these two defendants do not plead it as three grounds and may not have the benefit of the two issue rule with respect to an issue that is not included in their pleadings. *Blackburn and Company, Inc. v. Dudley*, 289 S.C. 415, 338 SE2d 151 (1985).

The plaintiffs have appealed the Order which rests on the single ground found in the Answers of the defendants and in the Motions for Summary Judgment of the defendants. The plaintiffs have fully responded to the issue of the statute of limitations.

It is not an unusual strategy for defendants to take a single defense and give it three faces to give an impression that there are three obstacles a plaintiff must overcome. Sometimes plaintiffs take that bait and sometimes not. But the statute doesn't have subsections and the statute is a single ground.

The Two Issue Rule Is to Prevent a Reviewing Court from Having to Grope in the Dark to Ascertain the Issue

"Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct.App.1990) (citation omitted). *Jones v. Lott*, 387 S.C. 339, 663 S.E.2d 30 (2010).

In the present case no one has to grope in the dark to see that the issue is whether there is any evidence, even a scintilla of evidence, that a person would not and should not know they had a cause of action more than three years prior to filing this case. The defendant realtors and lawyers who failed to protect the house buyers claim they did not and should not have known this house was in violation of Hilton Head Zoning Laws and the Federal Emergency Agency requirements for

elevation of at least 14 ft. Yet they persuaded the Trial Court that there was not any evidence on which a jury might find that the two laymen plaintiffs should not have known.

There are some useful observations in the recent and difficult case in which a divided Supreme Court, upon a grant of Rehearing, made in *Atlantic Coast Builders and Contractors, LLC, v. Lewis*, 398 S.C. 323, SE2d (2012). One observation is that issue preservation rules “are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” In the present case there is no doubt that the trial court knew what issue it was deciding. In fact, the trial court expressly limited its ruling to the statute of limitations issue and refrained from deciding either of the two additional grounds raised in the summary judgment motion of one of the defendants.

Also in *Atlantic Coast Builders*, both the majority and the dissent say it is not to be used as a “gotcah” game aimed at embarrassing attorneys or harming litigants. The Trial Court and every party before it knew exactly the issue in dispute. Did the plaintiff present any evidence that the plaintiffs did not know and should not have known more than three years prior to the filing of this action that they had a cause of action within the meaning of SC Code 15-3-535?

The Chief Justice observed that “the primary purpose of the judiciary...is to serve the citizens and the business community of this state by settling disputes and promoting justice.” That is what Dr. Gottschlich and Dr. McNeil are asking. They contend that the professionals they paid to protect their interest in buying a beach house failed in their legal duties to them and they want to recover the damages they have sustained as a result of the professional liability of the realtors and the lawyers.

Professionals like the realtors and the lawyers know they are paid for their services and that they are held to professional standards. They protect themselves and their lay clients by maintaining

professional liability insurance.

The clients are entitled to receive competent professional services. Because clients are lay persons it is not unusual for the client to be unaware of a deviation from professional standards until later when some consequences arise.

The Two Issue Rule Is Not Satisfied by the Statute, the Answers, the Motions, or the Order. Each assert the single ground of the statute of limitations.

1. The controlling statute of limitations shows a single issue and states:

“SECTION 15-3-535. Limitation on actions commenced under Section 15-3-530(5).

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

2. The Answer of Laurich & Deeb, P.A.; Robert M. Deeb, Jr. And Charles H. Wiseman pled the statute of limitations as a single issue. The Answer states:

“FOR AN EIGHTH DEFENSE
(Statute of Limitations and/or Laches)

57. Further answering the Amended Complaint, and as and for a further defense thereto, Laurich & Deeb alleges that some or all of Plaintiffs' claims are barred by the applicable statute of limitations and/or doctrine of laches. “

3. The Answer of Ken Oliver and The Byrne Corporation D/B/A Dunes Marketing Group pled the statute of limitations as a single issue and states:

“FOR A SEVENTEENTH DEFENSE

27. These Defendants assert as complete defenses laches and the applicable statute of limitations.”

4. The Motion for Summary Judgment of Laurich & Deeb, P.A.; Robert M. Deeb, Jr. and

Charles H. Wiseman sets forth the statute of limitations as a single issue and states:

“... hereby move the Court, by and through their undersigned counsel, for an Order granting summary judgment to Launch & Deeb on the claims asserted by Plaintiffs in the Amended Complaint. The specific grounds for this Motion include, without limitation, that the Amended Complaint should be dismissed under Rule 56, SCRPC, because Plaintiffs' claims are barred by the applicable statute of limitations, Plaintiffs have no competent evidence of any breach in the standard of care by these Defendants, and, Plaintiffs' damages are speculative.”

5. The Motion for Summary Judgment of Ken Oliver; The Byrne Corporation D/B/A Dunes

Marketing Group sets forth the statute of limitations as a single issue and states:

“Further, in paragraph 28 of the Plaintiffs' Amended Complaint and Exhibit K which the Plaintiffs attached, the statute of limitations "expired on December 2, 2006." This also are grounds for the Motion for Summary Judgment by these Defendants.

6. The Order of the Circuit Court rules on the statute of limitations as a single issue saying:

“The applicable three year statute of limitations relevant to the various causes of action are found under S.C. Code Ann. § 15-3-530.”

7. The Order of the Circuit Court went further in its footnote to make clear that it was only ruling on a single ground and not reaching the other grounds. The footnote states:

“¹ Laurich & Deeb moved for summary judgment on three separate grounds. The Court has only considered the statute of limitations basis for summary judgment and reserves argument and ruling on the additional grounds should that be necessary.”

Summary Judgment Should Be Reversed On the Merits

This is summary judgment on the statutory discovery rule. The Order of Summary Judgment should be reversed because there was evidence that the Ohio doctors who bought the vacation home in Hilton Head did not know, and under the objective standard, should not have known, that they had a cause of action more than three years prior filing this case. The issue should at least be submitted to a jury. S.C. Code Section 15-3-535 states: “Except as to actions initiated under Section 15-3-545, all actions initiated under Section 15-3-530 (5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”

A “person” is someone of common knowledge and experience. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Graniteville Company, Inc. v. IH Services, Inc.*, 316 S.C. 146, 447 S.E.2d 226 (Ct. App. 1995).

The test is an objective test of what a person of common knowledge and experience would be able to see that some legal right had been invaded. *Epstein v. Brown*, 363 S.C. 372, 376, 610, S.E.2d 816, 818 (2005).

The burden of proof establishing the bar of the statute of limitations rests on the party that asserts it. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). A statute of limitations defense is an affirmative defense that a defendant must plead and a defendant must prove. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). The lawyers and realtors are the moving party and the doctors who purchased the property overcome it with *a mere scintilla of evidence*. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). When the testimony is conflicting upon the question, it becomes an issue for the jury to decide. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962).

"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" or when "further inquiry into the facts is desirable to clarify the application of the law." *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

The trial court confused the concept that an undisputed piece of evidence is the same thing as satisfying the objective standard. In most cases dealing with the two issue rule there is some evidence that is undisputed. Other evidence is disputed. The conclusion of what a person of common knowledge and experience would do is for the jury to decide. In this case there is much other evidence to demonstrate that a person of common knowledge of experience would not know of the hidden elevation problem. For example:

1. A person would not knowingly choose a house that had an elevation problem.
2. A person would not recognize they had a cause of action or that some right had been violated simply by received a copy a survey with the number 13.3'.
3. A person would not recognize from premiums that some right had been violated where monthly payments are a single payment into escrow which is for a.) principal, b.) interest, c.) property insurance for loss from fire and other risks, d.) flood insurance, e.) liability insurance, and f.) taxes.
4. A person who immediately investigates when learning the number 13.3' means trouble would not sit on their rights after the closing if there had been reason to know at that time.
5. A person who engages an exclusive buyer's real estate agent does not have reason to suspect the agent will lead them to a house with an elevation problem.
6. A person who engages a law firm for their closing does not have reason to investigate when their lawyer receives a copy of a survey document with 13.3' among myriad numbers and data.
7. A person would expect if the sellers knew of a problem they would follow the law to disclose it rather than conceal it. This concealment would reassure a person there was nothing to investigate.
8. A person from out of state who hires a variety of local experts to protect them from mistakes would not launch an investigation about a document faxed by the sellers' lawyer to their lawyer.
9. A person who is required to purchase flood insurance by Wells Fargo, would not launch an investigation by virtue of Wells Fargo receiving flood insurance statements, taking

money from escrow, paying the premium together with taxes, property insurance, liability insurance, interest and principal.

10. A person buying a house lived in by several owners for 16 years would not investigate for an elevation problem.

11. A person would have no reason to suspect that the original builder would misrepresent the elevation to the city building inspector and hide the fact.

12. A person would have no reason to expect the city building inspector to accept an elevation promise from the builder rather than seeing compliance for himself before certifying the house for occupancy.

13. A person would have no reason to expect that a house passing through three previous buy and sell transactions with owners had an elevation problem.

14. A person would have no reason to expect that a house undergoing three previous lender's scrutiny had an elevation problem.

15. A person would not have professional knowledge in the fields of law, real estate, surveying or other related fields with which to interpret 13.3' on a survey.

Conclusion

There is evidence to support the plaintiffs issue that they met the requirements of the statute of limitations. The two issue rule does not apply. The Court should grant a rehearing, reverse the Order of the Trial Court and deny summary judgment on the statute of limitations.

There remain the grounds the trial court did not reach. This Court has the authority to decide those two issues and in the interest of avoiding delay and conserving judicial resources these plaintiffs request that this court consider and deny summary judgment on the two grounds upon which the Trial Court reserved decision, to wit: There is some competent evidence in the form of affidavits of expert witnesses that the defendants breached a duty to these plaintiffs, and there is evidence in the record in the form of expert testimony that establish damages that are not speculative.

The Motions for Summary Judgment should be reversed in all respects and this case should be remanded for trial.

Respectfully submitted,

Charles Carpenter /AC

Charles E. Carpenter, Jr.
Carpenter Appeals and Trial Support LLC
1201 Main St. Suite 980
Columbia, South Carolina 29201
(803) 758-2886
Attorney for Appellant - Petitioners,

January 3, 2013

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served the foregoing Petition for Rehearing, dated January 3, 2013 by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

Max G. Mahaffee, Esquire
Grimball & Cabaniss, LLC
Post Office Box 816
Charleston, SC 29402-0816

Susan Taylor Wall, Esquire
McNair Law Firm, P.A.
Post Office Box 1431
Charleston, SC 29402

The Honorable
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211



Charles E. Carpenter, Jr.

Date: January 3, 2013

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

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

Of whom

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

**RESPONDENTS' JOINT REPLY TO APPELLANTS' PETITION FOR
REHEARING**

Susan Taylor Wall
Amanda C. Williams
MCNAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 723-7831

Max G. Mahaffee
GRIMBALL & CABANISS, LLC
P.O. Box 816
Charleston, SC 29402-0816
(843) 722-0311

**Attorneys for Respondents Laurich &
Deeb, P.A., Robert M. Deeb, Jr. &
Charles H. Wiseman**

**Attorney for Respondents Ken Oliver
and The Byrne Corporation d/b/a
Dunes Marketing Group**

Respondents Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman and Ken Oliver and The Byrne Corporation d/b/a Dunes Marketing Group (collectively, "Respondents"), by and through their undersigned counsel, hereby reply to Appellants' Petition for Rehearing.

A. The Appellate Court's Decision Affirming the Lower Court's Order Must Be Upheld on the Two Issue Rule.

In its decision, the Court of Appeals affirmed the lower court's order granting Respondents' summary judgment and held that Appellants did not appeal all grounds set forth in the trial court's order. Thus, "[u]nder the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

Appellants argue the appellate court improperly applied the two issue rule because Respondents' summary judgment was granted based on one single ground – the statute of limitations. What Appellants fail to recognize, however, is that the statute of limitations defense begins to run when a plaintiff has actual OR constructive notice that he might have a claim. As reflected in both S.C. Code Ann. § 15-3-535 and the South Carolina case law, the statute of limitations begins to run when a plaintiff "knew OR by the exercise of reasonable diligence should have known that he had a cause of action. S.C. Code Ann. § 15-3-535 (emphasis added); *see also Moore v. Benson*, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010). Accordingly, "[t]he statute of limitations begins to run at the time the [plaintiff] has inquiry OR constructive notice [that a claim might exist]." *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 800 (Ct. App. 1997) (emphasis added). Either form of notice is sufficient. *Id.*

In this case, the trial court made two separate findings regarding the knowledge possessed by Appellants. The trial court found that Appellants possessed both actual knowledge (knew) and constructive/imputed knowledge (should have known) more than three years before they filed their lawsuit against Respondents. Thus, the trial court's Order may be affirmed on a finding of either type of knowledge possessed by Appellants more than three years before their lawsuit was filed. There is different evidence and different case law to support each finding, and thus, under the two issue rule, Appellants had to address the trial court's findings on both types of knowledge in order to notify the appellate court that it was appealing the trial court's finding that Appellants had both actual knowledge and constructive/imputed knowledge more than three years before filing their lawsuit against Respondents. "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Jones*, 387 S.C. at 346, 692 S.E.2d at 903.

In their appellate brief, Appellants address and argue the trial court's ruling on actual knowledge only. They never argue or take issue with the trial court's finding that Appellants had imputed or constructive knowledge through their insurance agency more than three years before the lawsuit was filed. Thus, Appellants did not put the Appellate Court on notice that it was appealing the trial court's ruling on the constructive knowledge issue. Unlike the first holding on actual or inquiry notice, the constructive knowledge holding was based on information that was in possession of Appellants' insurance broker, which the trial court imputed to Appellants through basic principles of agency law. Because constructive/imputed knowledge was a separate ground for finding

the statute of limitations had run, this issue has been abandoned by Appellants on appeal as a matter of law. See *Nienow v. Nienow*, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977) (“[A]ppellant has failed to specifically argue this contention in her brief and is deemed to have abandoned this exception.”); *Cannon v. Cannon*, 321 S.C. 44, 54, 467 S.E.2d 132, 138 (Ct. App. 1996) (holding that failure to raise issue in brief constitutes abandonment of the issue on appeal).

Because the trial court held that Appellants’ claims were barred on two separate grounds, each of which is independently sufficient to support the trial court’s decision on the statute of limitations, Appellants’ failure to address one of these grounds (the constructive/imputed knowledge ground) constitutes an abandonment of that issue and the Court of Appeals’ Order affirming the lower court’s grant of summary judgment must stand.

B. The Lower Court’s Order Must Be Upheld on the Merits.

Appellants again attempt to re-argue the merits of the statute of limitations in their Petition for Rehearing. On the merits, the trial court’s ruling must be affirmed because Appellants’ claims are clearly barred by the statute of limitations. Contrary to the argument made by Appellants, the application of the statute of limitations is a question of law for the Court as indicated by the numerous appellate court cases upholding the circuit court grant of summary judgment to defendants. See, e.g., *Epstein v. Brown*, 363 S.C. 72, 610 S.E.2d 816 (2005); *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995); *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); *Kimmer v. Wright*, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011); *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009); *Binkley v. Burry*, 352 S.C. 286, 573 S.E.2d

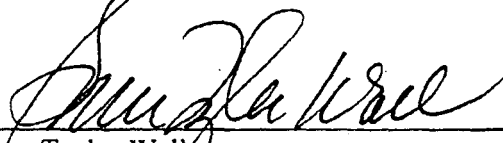
838 (Ct. App. 2002); *Dorman v. Campbell*, 331 S.C. 179, 500 S.E.2d 786 (Ct. App. 1998); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997); *Burgess v. Am. Cancer Soc., S. Carolina Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989).

The standard for the statute of limitations is what a plaintiff knew or should have known, through the exercise of reasonable diligence, not, as Appellants argue, what a plaintiff fails to know. *See Moore v. Benson*, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010). In determining whether Appellants had actual or constructive notice of the negative elevation, the Court must evaluate Appellants' knowledge and diligence in seeking to understand the import of the documents and information before them. As set forth in Respondents' Final Brief, there is undisputed evidence that Appellants had both actual notice and constructive notice of a potential claim against Respondents more than three years before filing their lawsuit. Thus, Appellants' attempt in their Petition for Rehearing to outline the things a person of common knowledge would not know is not the test. A review of the affirmative evidence in this case, including the declaration pages, pro forma sheet, and the knowledge of Appellants' insurance agency, leads to only one reasonable conclusion: a person of common knowledge and experience would be on notice that he might have a claim. Thus, as numerous courts have held, the determination as to whether the statute of limitations has run under the existing facts and circumstances is a question of law for the court.

Accordingly, Respondents Laurich & Deeb, P.A., Robert M. Deeb, Jr. and Charles H. Wiseman and Ken Oliver and The Byrne Corporation d/b/a Dunes Marketing Group respectfully request that the Court uphold its Order affirming the trial court's

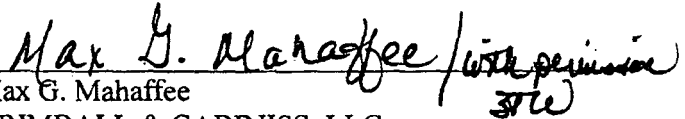
Order granting summary judgment based on the two-issue rule, or in the alternative, affirm the trial court's order on the merits.

Respectfully submitted,



Susan Taylor Wally
Amanda C. Williams
MCNAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 723-7831
Fax: (843) 722-3227

ATTORNEYS FOR RESPONDENTS
LAURICH & DEEB, P.A., ROBERT M. DEEB,
JR. AND CHARLES H. WISEMAN



Max G. Mahaffee
GRIMBALL & CABINISS, LLC
P.O. Box 816
Charleston, SC 29402-0816
Phone: (843) 722-0311
Fax: (843) 722-1374
ATTORNEYS FOR RESPONDENTS KEN
OLIVER AND THE BYRNE CORPORATION
D/B/A DUNES MARKETING GROUP

January 11, 2013

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

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

PROOF OF SERVICE

The undersigned hereby certifies that on January 11, 2013, the foregoing
**RESPONDENTS' JOINT REPLY TO APPELLANTS' PETITION FOR
REHEARING** was served on all counsel of record addressed as follows:

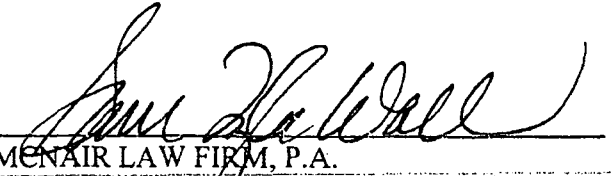
Charles E. Carpenter, Jr., Esq.
Carpenter Appeals and Trial Support, LLC
1201 Main Street, Suite 980
Columbia, SC 29201

Attorney for Appellants

Served via U.S. Mail

Max G. Mahaffee, Esq.
Grimball & Cabaniss, LLC
P.O. Box 816
Charleston, SC 29402-0816

*Attorneys for Respondents Ken Oliver and
The Byrne Corporation d/b/a Dunes
Marketing Group*



MENAIR LAW FIRM, P.A.
100 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 723-7831

The South Carolina Court of Appeals

Gregory M. Gottschlich and Donald L. McNeil,
Appellants,

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,

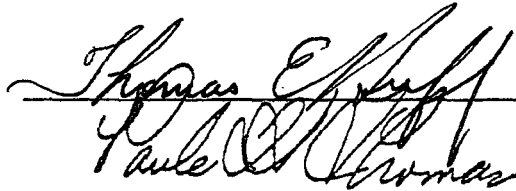
Of whom Ken Oliver, The Byrne Corporation d/b/a
Dunes Marketing Group, Laurich & Deeb, P.A., Robert
M. Deeb, Jr. and Charles H. Wiseman are Respondents.

Appellate Case No. 2010-161986

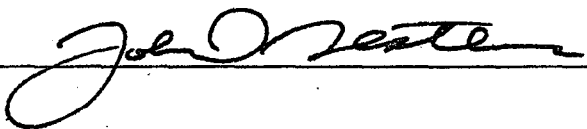
ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Petitioners' appellate brief did not challenge the master's conclusion that Petitioners were imputed with the knowledge of their insurance agent, Seacoast. Therefore, it is the law of the case. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

Based on the foregoing, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

Charles E. Carpenter, Jr.
Max G. Mahaffee
Susan Taylor Wall
Thomas N. Dye, Jan H. Dye
Marvin H. Dukes, III

FILED

Jan. 25, 2013