THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi Curtis, Circuit Court Judge

Case No.: 2018-CP-43-01583
Appellate Case No. 2019-000873

M.B. Hutson.....Appellant,

v.

A. Paul Weissenstein.....Respondent.

FINAL BRIEF OF RESPONDENT A. PAUL WEISSENSTEIN

This 30th day of April 2021.

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2. Did the Circuit Court have jurisdiction to hear Appellant's purported motion to alter or amend judgment when Appellant did not serve a motion to alter or amend the Circuit Court's order granting summary judgment to Respondent within ten (10) days of notice of entry of the order?

3. Did the Circuit Court err in determining that Respondent Weissenstein could not be liable for legal malpractice to Appellant?

4. Did the Circuit Court err in determining that the Statute of Limitations had run on Appellant's legal malpractice claim against Respondent?

STATEMENT OF THE CASE

In this appeal, Appellant MB Hutson ("Hutson") appeals the trial court's denial of his purported "motion to reconsider" the Circuit Court's order granting summary judgment to Respondent A. Paul Weissenstein (hereinafter "Weissenstein") on Appellant's legal malpractice action.

On December 15, 2010, Hutson entered into a lease purchase agreement ("LPA") with TLC Holdings, LLC ("TLC") and TLC's Members (collectively the "TLC Sellers") related to approximately thirty (30) acres of real property located in Clarendon County, South Carolina ("Property") and the purchase of an entity, BWR, LLC, that operated a campground on the Property. Hutson was represented by a Tennessee attorney, Andrew F. Tucker, with respect to the LPA and purchase of BWR, LLC, and hired a separate South Carolina attorney, Ron Nestor, to investigate all title issues concerning the Property.

Pursuant to the LPA, Hutson had ninety (90) days from the "Effective Date" to investigate and identify any title defects or problems. If any title defects or problems were found, Hutson could terminate the LPA if the TLC Sellers did not cure the subject title issues. At the time, the TLC Sellers disclosed to Hutson that BWR, LLC had sold "lifetime memberships" to third-party customers allowing access to the campground, and Hutson inquired as to whether the "lifetime memberships" would affect clear title and his ability to develop the Property.

Hutson later defaulted on his monthly payment obligations under the LPA and in November 2011 the TLC Sellers sought to eject him from the Property. ("2011 Ejectment Action"). Hutson hired Respondent Weissenstein to defend him in the ejectment action, which concluded in a settlement agreement incorporated into a consent order. Subsequently, Hutson defaulted on the settlement agreement and the TLC Sellers sought again to eject Hutson from the

Property. Weissenstein did not defend Hutson is the second ejectment action. Ultimately, Hutson was ejected from the Property by Court order dated March 20, 2014.

On September 4, 2018, Hutson filed this legal malpractice action against Weissenstein. Appellant alleges Weissenstein (1) failed to recognize that the "lifetime memberships" created a cloud on title to the Property; and (2) failed to assert a counterclaim in the 2011 ejectment action for fraud seeking to rescind the LPA based upon the TLC Sellers' alleged concealment of the cloud on title created by the "lifetime memberships."

By Order entered February 25, 2019, Weissenstein's Motion for Summary Judgment was granted holding that Weissenstein could not be held liable for an alleged failure to identify alleged title defects created by the "lifetime memberships" since Weissenstein was not Hutson's attorney in the LPA transaction, and Hutson had knowledge of potential title defects created by the "lifetime memberships" prior to signing LPA ("Summary Judgment Order"). The Circuit Court also held that Hutson's claim for legal malpractice was barred by the statute of limitations.

Prior to entry of the Summary Judgment Order, on February 13, 2019, Hutson filed a document entitled "Motion to Reconsider." Hutson did not file or serve a motion to alter or amend within ten (10) days of entry of the Summary Judgment Order, nor did he serve a notice of appeal within thirty days of the Summary Judgment Order. Respondent objected to the timing of the "motion to reconsider", however, the Circuit Court heard and denied the same on April 22, 2019. Hutson now appeals the trial court's decision to deny his motion to reconsider.

INTRODUCTION

A. Hutson purchases the campground business and enters into the LPA

In the fall of 2010, Appellant Hutson and the TLC Sellers began discussing a potential real property and business transaction wherein Hutson would take over a campground known as 'Big Water Resort" ("BWR"), along with the real property on which it was located. (R. pp. 141-177). At the time of this transaction, Hutson was represented by a Tennessee lawyer, Andrew F. Tucker, Esq. (R. p. 152). Additionally, Hutson hired Ron Nester, an attorney in Santee, South Carolina, to investigate title to the Property. (R. p. 277). On December 15, 2010, Hutson entered into the LPA for the use and eventual ownership of the Property. (R. pp. 141-166). Hutson also purchased the limited liability company that operated BWR ("BWR, LLC"). (R. pp. 167-177).

Prior to entering into the 2010 transaction with Hutson, BWR, LLC sold "lifetime retail membership agreements" ("Lifetime Memberships") to individuals and families who became members of the BWR campground. (R. p. 178). These agreements were entered into between BWR, LLC and the campground members, and were represented to give the members exclusive access to the campground. Hutson was aware of the Lifetime Memberships prior to entering into the LPA. (R. p. 246).

On November 11, 2010, before Hutson signed the LPA, Hutson's realtor wrote to the realtor for the TLC Sellers:

> Attached is Susan's lifetime membership info. (sic) regarding Big Water camp ground. My buyer is concerned about the "life time" members and the impact they can have on the future development of the property. In other words, in your opinion, what is the easiest, legal way to terminate the lifetime memberships of Big Water? Will these memberships have an impact on obtaining clear title for the property?

(R. p. 246)(emphasis added).

Pursuant to the LPA, Hutson was provided an opportunity to examine title to the Property, identify any exceptions to title that were not acceptable to him, and potentially terminate the transaction if those title issues were not cured. (R. pp. 144-146). Page 5 of the LPA states:

> Purchaser shall, within ninety (90) days after the Effective Date (of the LPA), investigate Seller's title to the Premises and identify any exceptions to title which are not acceptable to Purchaser. Purchaser shall within ninety (90) days after the Effective Date provide Seller notice of any such Title Exception. If Purchaser does not notify Seller in writing of Title Exceptions within ninety days after the Effective Date, then the Purchaser shall be deemed to have accepted title to the premises with all exceptions and conditions. If Purchaser timely notifies Seller of Title Exceptions (other than the Title Exceptions that can be cured by the payment of money to satisfy any liens as of the Closing, which Title Exceptions shall be cured as of the Closing), Seller may (but shall not required to) cause all Title Exceptions to be deleted as Exceptions from the Title Commitment, as the case may be, on or prior to 30 days prior to closing (the "Cure Deadline"). If Seller fails or refuses to cure any Title Exceptions prior to the Cured Deadline, then Purchaser may, as its sole and exclusive remedy for the existence of, or Seller's failure to cure, such Title Exceptions before the Cured Deadline, elect to terminate this Agreement, or waive its right to terminate this Agreement in writing and accept the Title Commitment with all uncured Title Exceptions.

In other words, the LPA expressly provides that Hutson had ninety (90) days from December 15, 2010 to identify any concerns about clear title to the Property. If those issues were not cured, Hutson could terminate the LPA. Although Hutson expressed concerns that the Lifetime Memberships may affect clear title to the Property no later than November 11, 2010, Hutson did not terminate the LPA based upon the Lifetime Memberships.

B. Hutson breaches the LPA

On November 29, 2011, after Hutson defaulted on his monthly payment obligations under the LPA, the TLC Sellers filed an ejectment action against Hutson ("2011 Ejectment Action"). (R.

pp. 247-248). Hutson hired Respondent Weissenstein to defend him in the 2011 Ejectment Action, in which Hutson asserted counterclaims against the TLC Sellers for various misrepresentations, including a sewer moratorium, issues with the utility provider, and pending litigation which was to have been dismissed prior to closing on the LPA but allegedly remained pending as of November 2011. (R. pp. 183-186).

The 2011 ejectment action ended in a settlement agreement incorporated into a consent order that extended Hutson's time to comply with his payment obligations and provided Hutson addition time to attempt to develop the Property. (R. pp. 187-190).

Thereafter, Hutson breached the settlement agreement, and the TLC Sellers again initiated an ejectment action against Hutson. (R. pp. 15-24). Respondent Weissenstein did not defend Hutson in this subsequent ejectment action, which concluded with an order ejecting Hutson from the property on March 20, 2014. (R. pp. 15-24).

C. Class action lawsuit and third-party federal litigation with the TLC Sellers

Shortly after Hutson's ejectment from the Property, in April 2014, a class action lawsuit was filed by over one-thousand (1,000) putative class members who purchased Lifetime Memberships against the TLC Sellers in Federal District Court. (R.27-46); *Reed et al. v. Big Water Resorts et al.*, Case no. 2:14-cv-01583 (U.S. Dist. Court, D.S.C.). The TLC Sellers then filed a third-party complaint against Hutson alleging he was responsible for the damages allegedly incurred by the putative class members. (R. pp. 27-46). Hutson counterclaimed against the TLC Sellers alleging that the TLC Parties defrauded him by failing to disclose that the Lifetime Memberships created a cloud on title and that the settlement agreement resolving the 2011 Ejectment Action was procured by fraud since Hutson alleges he was unaware of the alleged cloud on title created by the Lifetime Memberships. (R. pp. 28-34).

The Federal Court found that documentary evidence, deposition testimony, and open court statements by Hutson established that he was aware of the Lifetime Memberships prior to closing, he was aware that the Lifetime Memberships could affect clear title to the Property prior to closing, and was therefore aware of such issues prior to entering into the settlement agreement that resolved the 2011 Ejectment Action. (R. pp. 27-80). In light of these findings, the Federal Court held that the subject settlement agreement was not procured by fraud. The Court further held that the settlement of the 2011 ejectment action precluded any attempt the re-litigate an alleged fraudulent nondisclosure claim that could have been asserted by Hutson in previous litigation with the TLC Sellers. (R. pp. 27-80); *Reed et al. v. Big Water Resorts et al.*, Case no. 2:14-cv-01583 (U.S. Dist. Court, D.S.C.) (5-20-2016 order of Judge D. Norton) (4-5-2016 Report & Recommendation of Judge M. Baker).

D. Hutson files suit against Weissenstein for legal malpractice

On September 4, 2018, Hutson filed suit for legal malpractice against Weissenstein. (R. pp. 101-136). In his action, Hutson advanced two theories. First, that Weissenstein allegedly failed to advise him that the Lifetime Memberships were a cloud on title that was concealed by the TLC Sellers at the time of the LPA. (R. pp. 101-136). Second, that Weissenstein failed to assert a fraudulent nondisclosure counterclaim in the 2011 Ejectment Action, which Hutson alleges would have successfully set aside the LPA. (R. pp.101-136).

On December 10, 2018, the Circuit Court heard Weissenstein' s motion for summary judgment. (R. pp. 320-343). After oral arguments, the Court took the motion under advisement. (R. p. 342). Thereafter, on February 4, 2019, the Circuit Court sent a letter to Hutson and counsel for Weissenstein advising that she was granting the motion for summary judgment and requesting that counsel for Weissenstein submit a proposed order. (R. p. 82). On February 13, 2019, *prior to*

entry of the order granting summary judgment, Hutson filed a document entitled "Motion to Reconsider." (R. pp. 263-283). On February 25, 2019, the Court entered the Summary Judgment Order holding that Weissenstein could not be held liable for an alleged failure to identify title defects allegedly created by the Lifetime Memberships since Weissenstein was not Hutson's attorney during the LPA transaction, and Hutson had knowledge of potential title issues created by the Lifetime Memberships prior to signing the LPA. (R. pp. 83-97) The Circuit Court also held that Hutson's claim for legal malpractice was barred by the statute of limitations. (R. pp. 83-97).

Hutson did not serve a Rule 59(e) motion within ten days of entry of the Summary Judgment Order. Likewise, Hutson did not serve a notice of appeal within thirty (30) days of notice of entry of the Summary Judgment Order.

On April 12, 2019, a hearing notice was served on the parties related to Hutson's premature motion to reconsider, setting a hearing on the motion for April 22, 2019. (R. pp. 292-295). Respondent objected to the motion as Hutson did not timely serve and file a Rule 59(e) motion after entry of the Summary Judgment Order, and therefore, the Circuit Court lacked jurisdiction over the case. (R. pp. 292-295). Although the motion was improper, the Circuit Court heard and denied the motion on April 22, 2019. (R. pp. 98-100).

Hutson now appeals the Circuit Court's denial of his purported motion to reconsider. Hutson's appeal does not indicate that he is appealing the Summary Judgment Order[1].

STANDARD OF REVIEW

"A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP. "A motion under Rule 59(e) is

[1] Appellant did not include a statement of issues on appeal in his Initial Brief, and therefore, it is unknown what specific errors Hutson contends were made by the Circuit Court.

timely if it is served not later than 10 days after receipt of written notice of the entry of the order." *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 3, 518 S.E.2d 56, 57 (Ct. App. 1999) (emphasis added).

As it relates to an appeal of an order granting summary judgment, "in reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); *Young v. South Carolina Dep't of Disabilities & Special Needs*, 374 S.C. 360, 649 S.E.2d 488 (2007); *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007); *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct.App.2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). Summary judgment is appropriate 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 and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 68 (2007); *Helms Realty, Inc. v. Gibson–Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005); *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct.App.2005).

ARGUMENT

I. This appeal is untimely as Hutson did not properly serve a motion to alter or amend the Summary Judgment Order, and therefore, the Circuit Court lacked jurisdiction to hear Hutson's purported motion to reconsider

The Circuit Court entered the Summary Judgment Order on February 25, 2019, and Hutson received notice of entry of the Summary Judgment Order no later than February 26, 2019. (R. p. 297). Thereafter, no Rule 59(e), SCRCP motion was served. Likewise, Hutson did not serve a

notice of appeal within thirty (30) days of notice of entry of the Summary Judgment Order. Accordingly, this appeal is untimely and should be dismissed.

Although Hutson filed a document entitled "Motion to Reconsider" on February 13, 2019, the Court did not enter the Summary Judgment Order until twelve (12) days later on February 25, 2019. This preemptive motion to reconsider was not proper, timely or valid under well-established South Carolina law, and therefore, Hutson's time to serve a notice of appeal was not tolled pursuant to Rule 59(e), SCRCP. Upon his failure to serve a notice of appeal within thirty (30) days of notice of entry of the Summary Judgment Order, Hutson waived appellate review of the Summary Judgment Order.

Similar facts were considered by the South Carolina Supreme Court in *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432-433 (2018). In *Overland*, the Supreme Court reiterated that the strict time limitation of Rule 59(e), SCRCP cannot be altered under any circumstances. *Id.* A motion to alter or amend must be served within ten (10) days of notice of *entry* of the subject order. *Id.*

More particularly, the Supreme Court expressly held that the Circuit Court loses jurisdiction over a case after the time period for filing post-judgment motions expires. *Id.*, (citing, *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006)("Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."); *Doran v. Doran*, 288 S.C. 477, 343 S.E.2d 618 (1986) (holding the trial court lost the power to modify its order after the end of the term of court, and noted that under Rule 59(e) the trial court would only have the power to alter or amend such an order for a ten-day period after entry of judgment).

In summarizing its clarification of the rule, the Supreme Court held that "the failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the

order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal." *Overland*, 423 S.C. at 257, 815 S.E.2d 431, 433 (emphasis added).

Here, Hutson received notice of entry of the Summary Judgment Order on February 26, 2019. (R.297). He did not serve a Rule 59(e) motion within ten (10) days of notice of entry of the Summary Judgment Order. At that point, the Circuit Court lost jurisdiction over the case. *See, Russell*, 370 S.C. at 20, 633 S.E.2d at 730. Accordingly, on April 22, 2019 when it heard and denied Appellant's purported motion to reconsider, the Circuit Court did not have jurisdiction over this action, and the purported motion to reconsider should have been dismissed.

Furthermore, Hutson did not serve a notice of appeal within thirty (30) days of notice of entry of the Summary Judgment Order. Although Hutson filed a purported motion to reconsider on February 13, 2019, there was no order entered by the Circuit Court at that time. The Circuit Court's Summary Judgment Order was not entered until February 25, 2019.

Thus, Hutson's purported Motion to Reconsider was not proper or valid, and it did not toll Hutson's thirty (30) day deadline to serve a notice of appeal of the Summary Judgment Order. As Hutson did not serve a notice of appeal within thirty (30) days of notice of entry of the Summary Judgment Order, he has waived appellate review of the Summary Judgment Order.

Accordingly, this appeal is untimely, and should be dismissed.

II. On the merits, the Circuit Court correctly held that Weissenstein cannot not be liable to Hutson for legal malpractice.

A. Respondent Weissenstein did not represent Hutson in the LPA transaction during which the alleged cloud on title to the Property was discovered and identified

Under South Carolina law, a plaintiff must establish four elements in a legal malpractice action: "(1) The existence of an attorney-client relationship; (2) A breach of duty by the attorney; (3) Damage to the client; and (4) Proximate cause of the client's damages by the breach." *Argoe*

v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010) (quoting *Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009)).[2] Failure to establish any one of the four elements of a legal malpractice renders the legal malpractice claim insufficient as a matter of law. *See, e.g., Henkel v. Winn*, 346 S.C. 14, 18, 550 S.E.2d 577, 579 (Ct. App. 2001).

Here, it is undisputed that no attorney-client relationship existed between Weissenstein and Hutson with respect to the 2010 transaction during which Hutson entered into the LPA. Hutson was represented by an attorney from Tennessee, Andrew Tucker, Esq., and also engaged a South Carolina lawyer, Ron Nester, Esq., to research and investigate any potential title issues related to the Property. To the extent that an error was made, such errors were made by Hutson and his lawyers during due diligence of the 2010 LPA transaction.

As Weissenstein was not Hutson's attorney at the time, nor any time prior to the 2011 Ejectment Action, Hutson cannot maintain a legal malpractice action against Weissenstein for an alleged failure to identify a cloud on title created by the Lifetime Memberships during the due diligence period of the 2010 LPA transaction. Similarly, Weissenstein did not represent Hutson during the ninety (90) day period after closing of the LPA during which Hutson was to identify any issues affecting title to the Property.

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[2] Although Plaintiff asserts separate causes of action; each cause of action arises out of the same underlying facts and are premised on the same alleged professional negligence. Therefore, the Circuit Court determined that all of Hutson's causes of action simply allege one claim for legal malpractice. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 336, 732 S.E.2d 166, 173 (2012) (where a "claim for breach of fiduciary duty ar[ises] out of the duty inherent in the attorney-client relationship and it ar[ises] out of the same factual allegations," the "claim for legal malpractice necessarily encompasse[s] a breach of the fiduciary duty an attorney has to his or her client"). Hutson did not challenge this holding in his purported motion to reconsider nor did he challenge this holding in his initial brief. Therefore, to the extent Hutson objects to this holding, he has not preserved this issue for appellate review. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Accordingly, the Circuit Court properly held that Weissenstein cannot be held liable for the alleged failure to identify a cloud on title created by the Lifetime Memberships during due diligence of the LPA transaction.

B. Hutson was aware of the Lifetime Memberships prior to Closing the 2010 LPA Transaction

Appellant suggests that the Circuit Court incorrectly held that Weissenstein cannot be liable for an alleged failure to identify title issues created by Lifetime Memberships after the LPA closed. Supporting this argument, Hutson now suggests that although he had knowledge of the Lifetime Memberships, he did not recognize that the Lifetime Memberships created a cloud on title. This allegation is without merit and refuted by the unambiguous documentary evidence in the record, and Hutson's own statements in open Court. (R. p. 327; pp. 329-331).

As an initial matter, assuming *arguendo* that the Lifetime Memberships did create a cloud on title, discovery of the alleged title defect was the responsibility of the attorney representing Hutson in the 2010 LPA transaction, and the attorney who investigated title prior to closing of the LPA. Weissenstein was not Hutson's attorney with respect to the subject transaction, and therefore, he cannot be liable for this alleged error.

Moreover, the unambiguous documentary evidence shows that Hutson had raised concerns about the impact of the Lifetime Memberships on clear title to the Property prior to closing on the LPA. On November 11, 2010, Hutson's realtor sent an email to the TLC Sellers' realtor stating, **"my buyer is concerned about the "life time" members and the impact they can have on future development of the property...will these memberships have an impact on obtaining clear title for the property."** (R. p. 246)(emphasis added).

Just as the Federal Court found in the Federal class action litigation, the Circuit Court held that Hutson had knowledge of the Lifetime Memberships prior to signing the LPA, and Hutson

was aware of potential title issues concerning the Lifetime Memberships during the ninety (90) day period in which he was required investigate title and raise any title issues under the LPA. (R. pp. 83-97).

Therefore, pursuant to the terms of the LPA, Hutson was required to identify all potential title issues created by the Lifetime Memberships within ninety days of closing on the LPA. Despite knowledge that the Lifetime Membership could potentially affect clear title to the Property, Hutson did not seek to terminate the LPA within he subject ninety (90) day period.

Accordingly, by the time Weissenstein represented Hutson in the 2011 Ejectment Action, Hutson's time to seek termination of the LPA due to alleged title defects created by the Lifetime Memberships had expired. Thus, the Circuit Court correctly held that Weissenstein cannot be liable to Hutson for an alleged failure to discover alleged title defects caused by the Lifetime Memberships.

C. Weissenstein cannot be liable for an alleged failure to assert a fraudulent nondisclosure counterclaim in the 2011 Ejectment Action

In addition to the Circuit Court's holding that Weissenstein cannot be liable to Hutson for the failure to discover alleged title problems caused by the Lifetime Memberships, the Circuit Court also correctly rejected Hutson's argument that Weissenstein committed legal malpractice by failing to seek rescission of the LPA through a counterclaim in the 2011 Ejectment Action due to alleged fraudulent nondisclosure. (R. pp. 83-97). The Circuit Court correctly held that such a counterclaim would have been without merit. Therefore, Hutson could not establish that he "most probably" would have prevailed on a fraudulent nondisclosure counterclaim. (R. pp. 83-97).

It is well established in South Carolina that integral to defeating summary judgment in a legal malpractice case is expert testimony stating that the Plaintiff "most probably" would have

obtained a better result in the underlying matter "but for" the alleged breach of an attorney's standard of care. See, *Doe v. Howe*, 367 S.C. 432, 445-46, 626 S.E.2d 25 (Ct. App. 2005)(affirming summary judgment for attorney when plaintiff's expert did not testify that plaintiff would have received a greater settlement "but for" the attorney's breach of the standard of care); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 290, 701 S.E.2d 742 (2010)(affirming summary judgment for attorney when plaintiff's expert did not testify that plaintiff would have obtained a better outcome had the attorneys not breached their standard of care).

In this case, Huston did not provide any expert testimony opining that Hutson "most probably" would have prevailed on a counterclaim in the 2011 Ejectment Action that alleged the TLC Sellers fraudulently concealed the alleged cloud on title created by the Lifetime Memberships. Thus, Hutson could not satisfy the elements of a legal malpractice action against Weissenstein for failure to interpose a fraudulent nondisclosure counterclaim.

Moreover, the undisputed facts and Hutson's own admissions show that a fraudulent nondisclosure counterclaim in the 2011 Ejectment Action would have been baseless. Hutson was aware of the Lifetime Memberships prior to the closing on the LPA, and Hutson was aware that these memberships may affect clear title to Property and his ability to develop the property in the future. (R. p. 246; p. 327; pp. 329-331). Hutson did not seek to terminate the LPA within the ninety (90) day title investigation period set forth on page 5 of the LPA, and therefore, Hutson was foreclosed from later seeking to challenge the LPA based upon this known title issue.

To establish a claim for fraud in the 2011 Ejectment Action, Hutson would have needed to prove: (1) a representation or nondisclosure of a material fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on

its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 586, 527 S.E.2d 371, 378 (Ct. App. 2000).

By the time the 2011 ejectment action was initiated, Hutson had accepted title to the premises "with all exceptions and conditions" based upon the plain and unambiguous terms of the LPA. (R. pp. 141-166). Likewise, as Hutson knew about the Lifetime Memberships at the time he entered into the LPA, and knew the Lifetime Memberships could potentially impact his ability to obtain clear title to the Property, Hutson could not have demonstrated that he was ignorant to an alleged false misrepresentation or omission by the TLC Sellers. (R. p. 246; p. 327; pp. 329-331). Thus, a counterclaim for fraudulent concealment of the alleged cloud on title created by the Lifetime Memberships in the 2011 Ejectment Action would have necessarily failed.

Indeed, at the December 10, 2018 hearing on Weissenstein's Motion for Summary Judgment, Hutson confirmed that he was aware of the Lifetime Memberships before entering into the LPA, and that he hired a lawyer to specifically examine the Lifetime Memberships. At the hearing, the Court and Hutson had the following exchange:

> The Court: I understand, but when you entered into the lease/purchase agreement with TLC and Big Water, you had a Tennessee attorney representing you in that transaction, is that correct?
>
> Mr. Hutson: That's correct. And I had an attorney that was actually, his purpose was to go over the membership agreements. Now, I had a 90-day time period to run title to the property and I did that. I hired a lawyer to do that.

(R. pp. 327-328).

Based upon these undisputed admissions by Hutson, the Circuit Court correctly determined that Hutson could not have succeeded on a fraudulent nondisclosure counterclaim in

the 2011 Ejectment Action, and therefore, Hutson could not establish a legal malpractice claim against Weissenstein for an alleged failure to assert a fraudulent nondisclosure counterclaim in the 2011 Ejectment Action.

III. The Circuit Court correctly held that Hutson's legal malpractice claim against Weissenstein was barred by the statute of limitations

The statue of limitations for a legal malpractice action is three (3) years. S.C. Code Ann. § 15-3-530(5) (2005); *see Berry v. McLeod*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997)(concluding that section 15-3-530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions).

Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct.App.1989); *see* S.C. Code Ann. § 15–3–535 (2005). "This standard as to when the limitations period begins to run is *objective* rather than subjective." *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. "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." *Id.*

Here, it is undisputed that Hutson was aware of the Lifetime Memberships and was aware that the Lifetime Memberships may affect clear title to the Property prior to closing on the LPA. (R. p. 246; p. 327; pp. 329-331). Thus, to the extent that Hutson alleges that Weissenstein should have asserted a fraud counterclaim in the 2011 Ejectment Action, Hutson knew or should have known that no such counterclaim had been asserted when Hutson himself signed the 2011

Ejectment Action settlement agreement on March 30, 2012 and Judge James entered a consent order adopting the settlement agreement signed by the parties on April 12, 2012.

Moreover, in addition to the March 30, 2012 settlement agreement, Hutson was ejected from the Property by Court Order on March 20, 2014 after failing to comply with the obligations of the March 30, 2012 settlement agreement. (R. pp. 15-24). Thus, at the latest, by March 20, 2014 Hutson knew or should have known of each and every issue precluding him from developing the Property and complying with the terms of the LPA or the March 30, 2012 settlement agreement. This includes the alleged cloud on title created by the Lifetime Memberships.

Therefore, Hutson knew or should have known that a fraudulent nondisclosure counterclaim seeking rescission of the LPA was not asserted in the 2011 Ejectment Action by Weissenstein no later than March 20, 2014.

In this respect, the statute of limitations to sue Weissenstein for legal malpractice for the failure to assert a fraudulent nondisclosure counterclaim in the 2011 Ejectment Action expired no later than March 20, 2017. Accordingly, when Hutson filed suit against Weissenstein alleging legal malpractice on September 9, 2018, his action was barred by the three (3) year statute of limitations.

Therefore, the trial court correctly found that Hutson's legal malpractice action against Weissenstein was time-barred.

CONCLUSION

Based on the foregoing, Respondent Weissenstein respectfully requests that this Court dismiss the appeal as untimely. Furthermore, to the extent that the Court deems this appeal timely, Respondent respectfully requests that the Circuit Court's April 22, 2019 order denying Appellant's motion to alter or amend the Circuit Court's February 25, 2019 Summary Judgment Order be affirmed.

Respectfully Submitted,

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April 30, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi Curtis, Circuit Court Judge

Case No.: 2018-CP-43-01583
Appellate Case No. 2019-000873

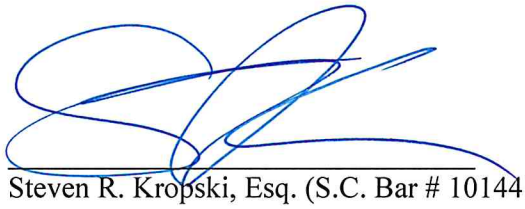
M.B. Hutson.....Appellant,

v.

A. Paul Weissenstein.....Respondent.

CERTIFICATE OF COUNSEL

I certify that the *Final Brief of Respondent A. Paul Weissenstein* complies with Rule 211(b), SCACR.



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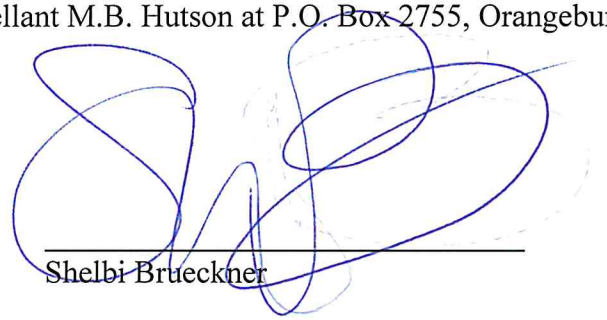
PROOF OF SERVICE

I, Shelbi Brueckner, an employee of Earhart Overstreet LLC, paralegal for the attorney for Respondent A. Paul Weissenstein certify that I served a copy of the attached *Respondent's Final Brief* by depositing a copy of it in the United States Postal Service, postage prepaid, on April 30, 2021, addressed to Pro Se Appellant M.B. Hutson at P.O. Box 2755, Orangeburg, SC 29116.

April 30, 2021



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