

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE REAL ESTATE COMMISSION**

In the Matter of the Surety Fund Claim of:)

DIANE AND LENARD JOHNSON)

Claimants,)

v.)

ADAM J. ADAMS)

Respondent.)

) OAH No. 08-0329-RES
) Agency No. S-28-010

NOTICE TRANSMITTING FINAL DECISION

Attached is the Real Estate Commission's decision in this matter, which the commission adopted at its December 11, 2008 meeting. Under AS 44.62.520, the board's decision becomes effective 30 days after the attached decision is mailed or otherwise delivered to you.¹

A party may request reconsideration of the decision by filing a petition under AS 44.62.540 within 15 days after delivery or mailing of the decision. Send the petition requesting reconsideration to the following address:

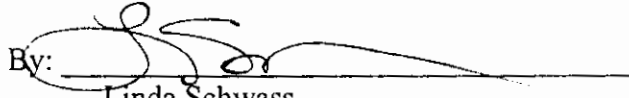
Office of Administrative Hearings
Attn. Real Estate Commission
550 W. 7th Ave Ste 1600
Anchorage, AK 99501

At the same time, send a copy of the petition to the opposing party's legal counsel, or to the opposing party if not represented by counsel.

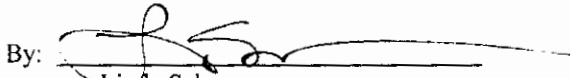
¹ This notice is the formal transmittal of this decision under 2 AAC 64.340(c). It supersedes any prior notice or distribution to the parties.

Judicial review of the commission's decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED this 19th day of December, 2008

By: 
Linda Schwass
Office of Administrative Hearings

Certificate of Service: The Undersigned hereby certifies that on the 19th day of December, 2008, a true and correct copy of this document was mailed to the following: Diane and Lenard Johnson; Adam Adams; Kristan Cole; and Sharon Walsh, Real Estate Commission.

By: 
Linda Schwass

land nearby on which to build a permanent home upon their retirement from the military several years hence.³

The Johnsons listed their existing house with RE/MAX of Wasilla, a real estate office managed by associate broker Kristan Cole. They told RE/MAX of their desire to buy land to build on later. Adam J. Adams, a buyer's representative on the "Kristan Cole team" at RE/MAX of Wasilla, came to the Johnsons' house when it was on the market and showed them some listings for lots they might wish to consider purchasing. At a followup meeting, he suggested the property that is the subject of this claim: Lots 4 and 11, Block 3, Sunset Hills Estates, located northwest of Wasilla in an area not served by any public sewer system. These adjoining lots, each about two and a half acres in size, were listed with Kibe Lucas, another RE/MAX of Wasilla licensee.⁴

Lots 4 and 11 are in a wooded subdivision of similar lots, some of which have already been built on. Mr. and Mrs. Johnson decided to seek to purchase Lots 4 and 11. With Mr. Adams's assistance, they prepared an offer of \$38,000 for the two lots together, submitting it on April 30, 2005.⁵

The seller accepted the offer on May 5, 2005, with an addendum and inspection rider added with the seller's consent on May 9. The inspection rider, a standard RE/MAX form, gave the buyers ten days to have an expert inspection of "lot square footage/acreage, location of lot corners, soil conditions, zoning, use and building permit requirements to meet your specific needs . . . as well as determining whether any defects exist."⁶ It permitted the buyers to specify any deficiencies found, and it provided that if they failed to do so in the time allowed their recourse would be waived, but it did not expressly give them a right to cancel the transaction. In any event, no expert inspection occurred. Mr. Johnson left for Bethel on May 9. The transaction closed on July 28 or 29, 2005, with the purchase payment made in cash.⁷ \$3800 was paid to RE/MAX of Wasilla for its services to buyers and seller.⁸

B. Services Provided by Mr. Adams

There was no written contract between Mr. Adams and the Johnsons. The parties agree that Mr. Adams was engaged as a professional buyers' representative for this transaction. Mr.

³ Testimony of Diane Johnson.

⁴ Testimony of Adam Adams.

⁵ Testimony of Diane Johnson; transaction documents.

⁶ Exhibit A (Inspection Rider).

⁷ Testimony of Diane Johnson; transaction documents.

⁸ Settlement Statement (\$1000 earnest money retained by broker and \$2800 disbursed from proceeds).

Adams believes his only contractual duties in this role were the ones listed in the Alaska Real Estate Commission Consumer Pamphlet of September 2004, which the Johnsons received and acknowledged at the time they made their offer.⁹ The pamphlet, which is not a contract and so states in bold letters, lists a variety of ethical duties owed by licensees. It notes expressly that licensees do not, unless there is a written agreement to the contrary, have a duty to “conduct an independent investigation of a property.”

The Johnsons had never purchased vacant land before. They expected to be guided in the purchase by their buyers’ representative.¹⁰

In this transaction, Mr. Adams played a role in filling out the original offer and handling the subsequent paperwork. He took care to ensure that disclaimers were added to protect the sellers and RE/MAX of Wasilla. He left a copy of the inspection rider in the buyers’ possession. It is undisputed that he did not otherwise advise the buyers to get a percolation test or to engage an expert to evaluate the property’s suitability for building.¹¹

Mr. Adams did not view the land himself and did not make any representations about its condition.¹²

C. Condition of the Land Purchased

In 2008, the Johnsons were ready to build on their land. They contacted Robert M. Caywood, an experienced log home builder. Mr. Caywood visited the property in May of 2008. Mr. Caywood observed large amounts of standing water and a profusion of devil’s club, an indication of high groundwater. He also could see that the city was moving the road next to the property and was installing special drainage because of apparent past glaciation problems. Mr. Caywood testified credibly that any knowledgeable person “could walk that piece of land and know it’s junk.” In his opinion, neither lot could be built on without \$50,000 to \$70,000 in extra dirt work, followed by installation of a special, expensive septic system requiring costly remote monitoring. Since these costs exceed the value of lots in the area and there are similar lots on the

⁹ This document is found in the file submitted to the record by RE/MAX of Wasilla. The acknowledgements at the end have not been filled out entirely correctly: they imply that “Kristan Cole” will be “Representing the Buyer/Lessee only,” whereas Ms. Cole, who supervised both Lucas and Adams, could not accurately be said to be representing only the buyers. However, the document was accurate in indicating that Mr. Adams’s relationship was solely with the buyers.

¹⁰ Testimony of Mr. & Mrs. Johnson.

¹¹ Testimony of Mr. Adams (lack of advice corroborated by testimony of Johnsons).

¹² Testimony of Mr. Adams and Mr. & Mrs. Johnson.

market for which the costs would not have to be incurred, Lots 4 and 11 would generally be viewed as unbuildable. There was no contrary evidence at the hearing.¹³

There was no document connected with the purchase that would have alerted a purchaser or realtor to this condition. The Lots and Acreage Disclosure form signed by the seller at the time of listing said that there were no “problems” with “drainage.”¹⁴ The subdivision plat, dating from 1972, did not designate any unusable ground.¹⁵ The condition would have to have been discovered through inspection.

Although unbuildable, the property is not entirely worthless. The Johnsons have realized \$2500 from sale of two tenths of an acre to the borough for road realignment. As to the remainder, both Mr. Adams and Mr. Caywood confirmed that there is a limited market for this kind of property to adjacent landowners. The extent by which the unbuildable nature of the property would reduce its market value was not established at the hearing.

D. Surety Fund Claim

Mr. and Mrs. Johnson filed their Surety Fund claim on June 26, 2008, the month after receiving the adverse evaluation from Mr. Caywood. In their claim, they checked “deceit” as the nature of their allegation. They alleged that Mr. Adams knew they were buying land to build on in three to four years; that he provided them with the listing in question; that they made the purchase, and that they learned on May 21, 2008 that the property was not suitable for building.

III. Discussion

This case falls under the Surety Fund statutes in place prior to the passage of substantial amendments that will become effective March 1, 2010.¹⁶ To recover from the Surety Fund under the law in effect for this transaction, an individual must show a loss in a real estate transaction resulting from a licensee’s fraud, misrepresentation, deceit, or conversion of trust funds.¹⁷ In addition, the claim must be brought within the time limit set by statute.

¹³ Testimony of Robert Caywood and Mr. & Mrs. Johnson. Caywood, who clearly felt the Johnsons had been poorly served by their professional advisor, traveled to Anchorage and testified without being compensated for his time.

¹⁴ Real Estate Disclosure/Notice to Buyers and Sellers (Lots and Acreages), July 7, 2004.

¹⁵ Talkeetna Engineering, Sunset Hills Estate Subdivision, August 30, 1972. Mr. Adams believes that in 1972 the borough may not have required such land to be designated and may not have set a minimum amount of usable land per lot.

¹⁶ CSHB 357 (L&C) (2008).

¹⁷ See AS 08.88.460(a).

A. Timeliness

At all times relevant to this case, AS 08.88.460(a) has provided:

a person seeking reimbursement for a loss suffered in a real estate transaction as a result of . . . deceit . . . on the part of a licensee licensed under this chapter shall make a claim to the commission for reimbursement on a form furnished by the commission. In order to be eligible for reimbursement by the commission, the claim form must be filed within two years after the occurrence of the . . . deceit . . . claimed as the basis for the reimbursement.

The Real Estate Commission has consistently held that the two years is counted from the date that the misrepresentation or other misconduct at issue occurred, not from the date that the claimant discovered it.¹⁸ AS 08.88.460(a) is a “statute of repose,” a type of time limit that “terminates any right of action after a specified time has elapsed, regardless of whether or not there has yet been an injury” or the injury has been discovered.¹⁹

Mr. and Mrs. Johnson filed their Surety Fund claim two years and eleven months after the transaction at issue had been completed. Thus, even if they had established deceit, they would not be able to recover from the fund. They may well have other remedies available to them by law, but the special shortcut to relief provided by the Surety Fund is not available once more than two years have elapsed. Regrettably, the Johnsons were not aware of the time limit on Surety Fund claims at the time they filed their claim and paid their filing fee.²⁰

B. Merits of Claim

The four bases listed above on which the Real Estate Commission can authorize reimbursement from the Surety Fund fall in two categories. The first category is fraud, misrepresentation, or deceit, which encompass similar and largely overlapping types of conduct. The second category is conversion of trust funds; it has no applicability here.

The Johnsons seek recovery based on “deceit.” The term “deceit” generally means a fraudulent and deceptive misrepresentation used by one or more persons to deceive and trick another person who is unaware of the true facts and is damaged as a result of the deceitful

¹⁸ *Dyer v. Gartin*, OAH No. 04-0229-RES (Real Estate Commission, Sept. 14, 2007); *Roe v. Liesek*, OAH No. 05-0323-RES (Real Estate Commission, December 14, 2006). In *Roe v. Liesek* the ruling was an alternative holding, in that another, independently sufficient ground existed for the overall outcome. In *Dyer v. Gartin* the timeliness issue was the only basis for the outcome reached.

¹⁹ See *Albrecht v. General Motors Corp.*, 648 N.W.2d 87, 90 (Iowa 2002) (detailed discussion of the different operation of ordinary limitations statutes and statutes of repose); *Turner Constr. Co. v. Scales*, 752 P.2d 467, 469 n.2 (Alaska 1988). The quoted language is from *Albrecht*.

²⁰ The commission staff seems to have discussed the time limit only with Mr. Adams.

conduct.²¹ Deceit can be found on the basis of nondisclosure in some circumstances, such as when conduct is induced through a “literally true statement [that] omits additional qualifying information likely to affect the listener’s conduct.”²² To support a recovery from the Surety Fund, however, any misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or nondisclosure is not enough.²³

In this case, Mr. Adams did not make any representations to the Johnsons about the condition of the property, and it seems clear that he knew nothing about the property’s suitability that he could have disclosed. He did not trick or deceive the Johnsons.

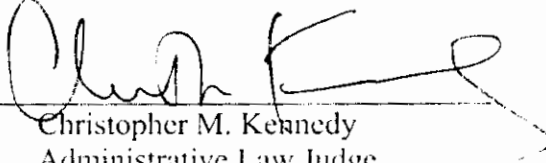
What Mr. Adams did was to permit inexperienced clients to purchase building lots in an area where septic systems are essential without ever telling them they ought to have the lots tested to see if they were suitable for a septic system. This arguably falls below the professional standard of care for a buyer’s licensee in the circumstances. Even if this is so, however, the Commission nonetheless cannot use the Surety Fund as an insurance fund to cover bad professional advice, because the Surety Fund statute does not authorize recovery on that basis. There is no basis in Mr. Adams’s conduct, as demonstrated in this proceeding, to support a payment from the Surety Fund.

IV. Conclusion

Because Mr. and Mrs. Johnson’s claim is untimely and because they have failed to prove fraud, wrongful misrepresentation, deceit, or conversion of trust funds, Surety Fund claim S-28-010 is denied.

Nothing in this decision should be construed as a determination of whether any broker or licensee has or has not engaged in conduct subject to discipline.

DATED this 9th day of October, 2008.

By: 
Christopher M. Kennedy
Administrative Law Judge

²¹ See Black’s Law Dictionary Abridged 6th Ed. (1997).

²² *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988); see also, e.g., *Spence v. Griffin*, 372 S.E.2d 595, 599 (Va. 1988).

²³ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984).

Adoption

On behalf of the Alaska Real Estate Commission, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1) and (4). Pursuant to AS 44.64.060(e)(4), the word "associate" has been inserted on page 2, line 4 of the proposed decision to correctly reflect the nature of the license held by Ms. Cole.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 11 day of December, 2008.

By:

Bradford Cole
Signature
BRADFORD COLE
Name
Chairman, AREC
Title