

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

Appeal from Charleston County  
Court of Common Pleas  
Hon. J.C. Nicholson, Jr., Circuit Court Judge

**RECEIVED**

APR 03 2014

**SC Court of Appeals**

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Case No. 2009-CP-10-6529  
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Amber Johnson.....Respondent,

v.

Stanley E. Alexander, Mario S. Inglese and Mario S. Inglese, P.C.,  
of whom Stanley E. Alexander is the .....Appellant.

v.

Mario S. Inglese and Mario S. Inglese, P.C.....Third Party  
Plaintiffs,

v.

Charles Feeley.....Third Party  
Defendant.

\_\_\_\_\_  
**PETITION FOR REHEARING**  
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This Petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221, SCACR governs rehearing. Rule 240, SCACR governs motions and petitions generally.

This Court issued the decision in this matter on March 19, 2014. *See* Op. No. 5208 (Ct. App. Filed March 19, 2014). Petitioner received this Court's Opinion No. 5208 on March 21, 2014. This Petition is therefore timely. *See* Rule 221(a), SCACR.

The principal purpose of this Petition is to preserve Amber Johnson's (hereinafter "Johnson") ability to request further review of the arguments that she offered to this Court on the merits. To that end, Johnson wishes to incorporate by reference all the arguments made before the Court and contained in her brief. Johnson respectfully disagrees with the decision to reverse the Circuit Court's partial finding of summary judgment and believes this Court misconstrued the facts and mischaracterized the issues.

As this Court will recall, Stanley Alexander (hereinafter "Alexander") filed this appeal seeking to overturn the lower court's grant of partial summary judgment for legal malpractice. The claim arose from his alleged negligence in closing Johnson's real estate purchase. Johnson alleged he (or his agent) failed to discover public records showing the property had been sold at a delinquent tax sale prior to closing. As a result, Johnson lost the home just weeks after she closed when the redemption period ended and the delinquent tax deed was issued.

On Johnson's motion for partial summary judgment, the trial court found there was no question of fact as to whether the delinquent tax sale was a matter of public record and, as such, her closing attorney was liable. The trial court left open the issue of damages.

The gravamen of Alexander's limited appeal was whether the trial court erred in finding there was no material question of fact as to what existed in public records. Following affirmation of the lower court's determination that the public tax sale records existed, this Court improperly turned its focus on the *unraised* question of whether Alexander, her closing lawyer, could be liable for a negligent title exam performed by another. This Court sent that issue back to the trial court.

As a threshold matter, this Court completely overlooked Alexander's own negligence in missing the tax sale when he twice checked the public records before the closing. (R. 109-111. *See e.g.* "Based on the results of the title examination and in particular, the official public records of the Charleston County Tax Assessor's Office, I understood that no back taxes were due or owing..." R. 111 (referencing the two public records created after the title examination).)

It also appears from the first line of the Opinion that the Court was under the mistaken impression that Johnson hired Defendant Mario Inglese,

Esq. (hereinafter “Inglese”) to handle the closing. This is not accurate. The *only* closing attorney she hired in this matter was Alexander. (R. 82). This is undisputed. Alexander hired and paid Inglese for the title search. (R. 24, R. 42). Alexander *contends* that Inglese delegated that task to Charles Feeley, Esq. (hereinafter “Feeley”).

To the extent this Court premised its decision, in part, on the incorrect assumption Johnson hired Inglese to handle the closing, the decision is erroneous. It is also irrelevant to Johnson’s theory of liability whether Alexander relied, reasonably or otherwise, on the work of Feeley. (App. Br. p. 12). No evidence exists that Alexander ever told Johnson of the involvement of Inglese or Feeley. She presented her claim against Alexander, the one person with whom she had an attorney-client relationship, and Inglese, the person to whom Alexander issued escrow check number 5607 for “Title work – 2640 Ranger Drive.” (R. 23, 31).

Appellee Johnson respectfully asks this Court to rehear the matter and affirm the trial court based on the issues originally presented, the issues set forth above and the issues addressed below.

**First, the Court exceeded the proper bounds in its inquiry.** Although the Court reviews a finding of summary judgment *de novo*, Alexander’s appeal did not raise the question this Court undertook to answer.

As former Chief Judge Alex Sanders wrote, “[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985). *See also Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 331, 730 S.E.2d 282, 286 (2012).

Alexander, for example, did not contest the trial court’s finding that Alexander or his agent *missed* the tax sale. Rather, Alexander asserted there was an issue of fact as to the *existence* of the public record. Alexander did not appeal the trial court’s finding that he was Johnson’s closing attorney and fiduciary, and that he owed various duties to her. Alexander did not challenge or deny that Feeley conducted a title search for him, which made Feeley his agent.

**Second, this Court erred in overlooking the fact that Alexander acted negligently independently of Feeley’s negligent work.** In making its ruling, this Court ignored the fact that Alexander also looked for and negligently missed the public tax records.

In his affidavit, Alexander states *he* examined Charleston County tax records dated *after* Feeley performed the title abstract and failed to discover the tax sale. (R. 110-111). The question the trial court considered was not

whether Alexander could be liable for delegating the task of title search as this Court did, but whether the Charleston County public records about the tax sale existed and should have been found by him (or his agent). (R. 18).

The trial court specifically found that Alexander “was estopped to argue such information was not available to him.” (R. 13, fn. 4). Johnson’s expert, upon whom the trial court relied in determining Alexander was negligent, also testified that “Alexander fell below the standard of care for a closing lawyer by failing to discover the Property had been sold.” (R. 14).

**Third, the Court erred when identified the “correct issue” as “whether Alexander acted with reasonable care in relying on Feeley’s title search.”** This Court agreed with the lower court that it was negligent to have missed the public tax sale records. However, this Court failed to make an important distinction in finding that Alexander himself was not negligent as a matter of law: While Alexander could delegate the *task* of performing the title search, as a fiduciary he could not delegate his duty to perform it properly or his liability for any errors. *See* Rule 407, SCACR, Rule 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances *and the client gives informed consent.*”) (emphasis added). Nothing in the record suggests Alexander limited his scope of representation for closing the purchase in any way. Thus, the

Court's remand to determine whether Alexander reasonably relied on Feeley's work is irrelevant as to Johnson's claim against Alexander.

**Fourth, only Alexander was Johnson's closing attorney, and he alone is responsible for a proper title search.** There is no evidence in the record to suggest Alexander did not owe Johnson the duty of care associated with that role, or that he limited the scope of his representation, liability or responsibilities to her, or that he even disclosed the fact that someone else would be conducting a title search. The only person in the transaction with whom Johnson had a lawyer-client relationship was Alexander.

Thus, as a matter of law Alexander, as Johnson's fiduciary and closing attorney, is liable for any negligence associated with the process he undertook to perform and oversaw. This is not a strict liability standard. Alexander, as Johnson's attorney, is responsible for his own negligence and that of others to whom he delegated tasks related to the closing. Alexander's recourse for Feeley's negligence was to sue Feeley, which he has done. (R. 47-50).

Further, this Court incorrectly suggests that merely by virtue of being an attorney, Feeley could be liable to Johnson if he was negligent. This is error because there was no privity or direct legal relationship between Feeley and Johnson. Indeed, Feeley stated "the abstract was completed on Aug. 9,

2006, *for Mario S. Inglese, P.C.*” (R. 126). Neither Alexander nor Feeley ever claimed that Feeley had any relationship with Johnson. Neither did Johnson.

**Fifth, Alexander admitted the standard of care and duties owed.**

As the trial court found, Alexander admitted he “had a duty or responsibility to make sure that she got the property free and clear with good and marketable title.” (*See e.g.* R. 9, 82, 89). Johnson did not get that.

While the Court may understandably be wary about creating negligence *per se* generally for a closing attorney whose client does not receive good title, in deciding that Alexander did not mean what he said, this Court improperly ignored its ruling in *Sims v. Hall*, 357 S.C. 288, 296, 592 S.E.2d 315, 319 (Ct. App. 2003) (A professional in a professional negligence case can establish the standard of care owed to a client).<sup>1</sup>

Here, Alexander made a number of binding admissions, including that he represented Johnson in the closing (R. 82, 89) and that he had a duty to convey good and marketable title to Johnson (R. 266). Alexander further admitted that he as a closing lawyer was required to exercise good and

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<sup>1</sup> This Court held “we do not believe Alexander’s statements can be fairly interpreted as a concession that he had an absolute responsibility to deliver good and marketable title. Rather, considering Alexander’s statements in the light most favorable to him, he conceded only that he must act with reasonable care in closing the transaction, including his decision to rely on Feeley’s title search and not do a title search himself.”

prudent judgment and use the tools available. (R. 265). Lastly, Alexander admitted that the title work was defective (R. 131) because it did not uncover the delinquent tax sale. (R. 132).

Alexander himself established the applicable standard of care and its breach. Under *Sims* it is error not to hold him to that standard. This Court attempted to negate his binding statements by observing, “Alexander also stated in the same discussion, however, that his responsibility was ‘to close [Johnson's] transaction for her to the best of my abilities and based on the information I had at the time.’”

However, “to the best of my abilities” is not the standard of care because it is subjective. For the professional, there is only the *objective* standard of care. *State v. Brown*, 240 S.C. 590, 595, 533 S.E.2d 308, 310 (2000). The Court’s attempt to free Alexander from his admissions and create a question of fact with the “best of my abilities” statement is error.

**Sixth, this Court’s ruling runs counter to the public policy of protecting consumers in real estate closings.** By suggesting a closing attorney such as Alexander may not be liable because of his claimed reliance on Feeley to conduct the title search, this Court creates uncertainty and a new immunity for attorneys who delegate tasks to others without informing

the client or limiting the scope of representation in writing pursuant to Rule 407, SCACR, Rules 1.2 (scope of representation) and 1.4 (informed consent).

*Quare:* Where does the client who suffers damage from legal malpractice find relief, if not from the attorney she hired to do the work?

The inequitable result of the Court's ruling is that, in the absence of her attorney's own negligence, a client such as Johnson has no recourse against her lawyer. Johnson is not in privity with Feeley. She did not even know of his existence. Alexander never disclosed Feeley's role and his name does not appear on any of her closing documents. Here, any duty Feeley owed was to Alexander or Inglese, not Johnson. And yet, under the Court's rationale, Alexander, the one attorney with whom Johnson had an attorney client relationship, could escape liability if Feeley alone made the error.

Certainly, Alexander may have a claim against Feeley to contribute or indemnify for damages he must pay Johnson. Alexander, of course, recognized this by making Feeley a third-party defendant. This Court creates an immunity for a closing lawyer by declaring Alexander may not be liable for defective tasks or work done by his undisclosed agent. This novel issue was neither argued nor addressed by the lower court.

An essential act of a lawyer conducting a closing is to ensure that the client receives proper unencumbered title to avoid loss of the property. It is

well established that only an attorney can close a real estate sale in South Carolina. In discussing the unique role of a closing attorney in this State, this Court explained “the policy determination requiring the use of an attorney to close a real estate sale is necessary to protect the participants in the transaction and the public from the numerous things that can go wrong when transferring real estate.” *Inglese v. Beal*, 403 S.C. 290, 296, 742 S.E.2d 687, 690 (Ct. App. 2013), *citing State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987). In this context, this Court recognized that “[w]hen an attorney is aware of such a potential problem, it is the responsibility of the attorney to ensure that the potential never materializes.” *Id.* One potential problem is dealing with property previously sold at a delinquent tax sale. As with the uncured judgment lien in *Inglese*, a missed tax sale can cause the client to lose the property after the closing.

Johnson argues a simple standard applies: The closing attorney is responsible for negligence arising from any of the tasks he chooses to delegate, unless he properly limits his scope of representation and liability. *See e.g.* Rules 1.2 and 1.4, Rules of Professional Conduct.

South Carolina has long recognized the doctrine of nondelegable duty in other contexts. In *Simmons v. Tuomey Regional Medical Center*, 533 S.E. 2d 312, 341 S.C. 32 (2000), the Supreme Court affirmed this Court’s

imposition of a nondelegable duty on hospitals with regard to physicians who work in their emergency rooms. As the Supreme Court held,

The term “nondelegable duty” is somewhat misleading. A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor.

*Simmons*, 533 S.E. 2d at 317, 341 S.C. at 42. See also *Smith v. Regional Medical Center of Orangeburg and Calhoun Counties*, 394 S.C. 110, 113, 713 S.E.2d 656, 658 (Ct. App. 2011) and F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 654 (1997).

The Supreme Court has recognized a nondelegable duty in other situations as well: an employer has a nondelegable duty to provide a reasonably safe work place; a landlord has a nondelegable duty to undertake repairs through a contract and see that the repair is done properly; a common carrier has a nondelegable duty to ensure cargo is properly loaded and secured; a bail bondsman has a nondelegable duty to supervise the work of his employees; and a municipality has a nondelegable duty to provide safe streets. *Simmons*, 533 S.E. 2d at 317-18, 341 S.C. 42-43, fn. 6, fn. 7, fn. 8. As noted by the Supreme Court, “a person or entity entrusted with important

duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.” *Id.* at 44.

Here, things went wrong when both Alexander and the person to whom he delegated the task missed public tax records. Alexander should not be allowed to walk away unscathed.

### **Conclusion**

Johnson respectfully submits that the Court may have overlooked or misapprehended these points, along with the other points Johnson raised in her brief, in the course of making its decision. Johnson respectfully requests that the Court withdraw its previous decision and issue a decision that upholds the Circuit Court finding of partial summary judgment.

Respectfully Submitted,



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Charleston, South Carolina  
April 2, 2014

**STATE OF SOUTH CAROLINA  
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**Appeal from Charleston County  
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Hon. J.C. Nicholson, Jr., Circuit Court Judge**

**Case No. 2009-CP-10-6529**

Amber Johnson.....Respondent,

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v.

Mario S. Inglese and Mario S. Inglese, P.C.....Third Party Plaintiffs,

v.

Charles Feeley.....Third Party Defendant.

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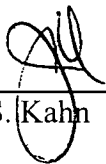
**SC Court of Appeals**

I, Justin S. Kahn, do hereby affirm that on April 2, 2014, I served one copy of the Petition for Rehearing on the following named individuals by placing a copy in the United States Mail, first class, postage prepaid addressed to the following:

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April 2, 2014

VIA FEDERAL EXPRESS

Hon. Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
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**Re: Amber Johnson v. Stanley Alexander**  
**Case No.: 2009-CP-10-06529**

**Appellate Case No.: 2011-196007**

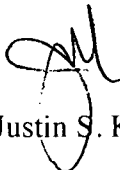
Dear Ms. Kitchings:

Enclosed for filing is an original and 7 copies of a Petition for Rehearing along with Proof of Service and a check for the filing fee. By copy of this letter I am serving these documents on all counsel.

Please file the original and 6 copies. Please also mark the extra copy filed and return it to us in the enclosed, postage-prepaid envelope.

Thank you very much.

Sincerely,



Justin S. Kahn

JSK/pm

cc: Joel W. Collins, Esq. (via U.S. Mail)  
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