

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-06529

Amber Johnson.....Respondent,

v.

Stanley E. Alexander, Mario S. Inglese and Mario S. Inglese, P.C.,
Of Whom Stanley E. Alexander is the.....Appellant,

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

v.

Charles Feeley.....Third Party Defendant.

APPELLANT'S RETURN TO PETITION FOR REHEARING

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Appellant Stanley E. Alexander (“Alexander”) hereby respectfully requests this Court deny Respondent Amber Johnson’s (“Johnson”) Petition for Rehearing. The Court of Appeals correctly reversed and remanded the trial court’s order of partial summary judgment by holding: (1) that a genuine issue of material fact exists for trial related to whether Alexander acted with reasonable care in relying on Charles Feeley’s title search and (2) any issue related to Johnson’s assertion that Charles Feeley acted as Alexander’s agent has not been established by Johnson and is a question that should be resolved on remand. Alexander incorporates by reference all arguments made before the Court and contained in his briefs as if fully restated herein as reasons to reverse the trial court’s order granting summary judgment.

Alexander responds to the particular arguments advanced by Johnson in her Petition for Rehearing as follows:

1. The Court Did Not Exceed the Proper Bounds of Its Inquiry.

Johnson first argues this Court “exceeded the proper bounds” in this appeal. (Petition p. 4). Johnson claims this Court made findings that were not appealed and “answered questions they were not asked”. *Id.*

This court is required to review a finding of summary judgment *de novo* to review the entire record to determine whether any triable issues of fact exist. On appeal, this court is permitting to utilize its own reasoning and analysis in determining whether a lower court made an erroneous finding of law. The appellate court has a “duty to undertake a thorough and meaningful review of the trial court’s order and the entire record on appeal.” *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 235, 536 S.E.2d 86, 22 (Ct. App. 2000). For Johnson to suggest that this court should be hamstrung in its legal analysis is specious, at best. Appellate Courts have for centuries included its own analysis and even *obiter dicta* in their opinions.

Nevertheless, the issues on appeal were not narrowly confined as Johnson suggests. Alexander argued on appeal that the trial court erred in determining that he committed legal malpractice as a matter of law and in finding that he had an affirmative duty to convey clear and marketable title. Alexander argued that a genuine issue of material fact existed whether Alexander breached the standard of care, and if any breach was the proximate cause of Johnson's damages. Further, Alexander appealed the fact that Johnson failed to present sufficient expert testimony to establish Alexander breached a duty of care. Johnson offered no expert testimony related to the standard of care of a real estate closing attorney, and Alexander argued that the evidence before the court demonstrated that he acted as a reasonable and prudent attorney would have acted in similar circumstances. Despite Johnson's arguments, Alexander challenged the trial court's finding that he was liable because the tax sale was allegedly "missed" based on what was reflected in the public records. Alexander never conceded that Feeley was his agent, or acted on his behalf. The facts before the court strongly suggest that Alexander never hired Feeley, and that Feeley was not acting under Alexander's direction or control. The facts are clear that Feeley had previously performed the title examination at the request of Inglese, not Alexander. Thus, this Court did not exceed the bounds of its review on appeal.

2. The Court Concluded that Alexander Did Not Commit Independent Acts of Negligence as a Matter of Law.

Johnson argues for the first time that Alexander committed independent acts of negligence, separate from Feely by examining the tax records. (Petition p. 5). Johnson complains this Court overlooked that Alexander acted negligently in a manner that was independent from Feely. As argued on appeal, "[t]he fact that an attorney is incorrect as to the ultimate marketability of a title to real estate does not establish that he was negligent" because legal malpractice only arises when the "attorney *negligently* certifies title." *Bass v. Farr*, 315 S.C. 400, 404, 434 S.E.2d 274, 277 (1993). Here, there was no expert testimony to establish that

Alexander breached the standard of care. This Court expressly found “[f]irst, Johnson offered no evidence as to the standard of care a real estate closing attorney must meet in relying on a title search performed by another attorney. (citing *Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745 (stating ‘a plaintiff in a legal malpractice action must establish this standard of care by expert testimony’)). (Opinion p. 4-5). The fact that Alexander reviewed certain tax records prior to closing, all of which suggested that no delinquent taxes existed on the property, does not establish that he was negligent as a matter of law. Alexander is not *per se* liable to Johnson because under South Carolina law the doctrine of strict liability does not apply to legal malpractice lawsuits.

3. The Court Did Not Err When it Identified The Correct Issue of Whether Alexander Acted with Reasonable Care in Relying on Feeley’s Title Search.

The Court correctly reasoned that the correct issue is whether Alexander acted with reasonable care in relying on Feeley’s title search. This is the correct analysis for determining if Alexander was negligent concerning the title examination. Alexander testified that he acted as an ordinary and reasonable attorney under the circumstances. Furthermore, Johnson’s own expert witness testified that Alexander was reasonable in relying on Feeley’s title examination. (R. pp. 155-156).

In making this argument, Johnson states “[t]his Court agreed with the lower court that it was negligent to have missed the public tax sale records.” (Petition p. 6). Johnson mischaracterizes this Court’s decision. This Court did not conclude that Feeley was negligent as a matter of law for failing to discover the contents of public record. Rather the court reasoned “*If* Feeley was negligent, Feeley is liable.” (Opinion, p. 4) (emphasis added). Liability in this case is not as simple as failing to inspect public records. Based on Feeley’s affidavit, a clear factual dispute remains as to what public records were reasonably available. (R. pp. 126-127). For example, the ten year history of the tax records contained on the Charleston County Online Tax

System website did not reveal the existence of any recorded back taxes or tax sale. (Id.). Also, the tax sale was not filed until after the closing. (Id.). As such, the evidence contains disputed facts for a reasonable jury to consider what the delinquent tax records showed and what public records were reasonably available before the closing.

4. The Court Correctly Reasoned that Alexander Was Not the Only Attorney Involved in this Transaction.

Johnson argues that this Court misapprehends the duty of care because “the only person in the transaction with whom Johnson had a lawyer-client relationship was Alexander.” (Petition p. 7). This argument is based on an obvious misstatement of fact. Alexander was not the only attorney involved. In the Complaint, Johnson alleges that an “attorney-client relationship existed between Plaintiff and the Defendants”, which would include, Mario S. Inglese and Mario S. Inglese, PC, the attorney that retained Feeley for the title examination. There is simply no evidence in the record that Alexander delegated any duties of the closing to Feeley. The title examination by Feeley was previously preformed for Inglese. As this Court reasoned, any evidence of agency should be resolved on remand. Thus, the reversal of summary judgment was proper.

5. Alexander Did Not Admit the Standard of Care and Duties Owed.

This Court correctly found that Alexander did not admit the standard of care and the legal duties that he owed Johnson. As this Court held, Alexander did not have a legal duty to make sure that Johnson received the property free and clear with good and marketable title. The Supreme Court in *Bass v. Farr* held “[t]he fact that an attorney is incorrect as to the ultimate marketability of a title to real estate does not establish that he was negligent” and that a duty is breached when an “attorney *negligently* certifies title.” Therefore, failing to ensure good and marketable title to the property at closing is not a *per se* breach of the standard of care. To hold

otherwise would require this Court to apply the rejected doctrine of *res ispa loquitur* or create strict liability for real estate closing attorneys.

Alexander presented both affidavit and deposition testimony that created a genuine issue of fact that he acted as a reasonable and ordinary attorney would have acted under the circumstances. (R. pp. 109-111; 127; 130-133; 265-266). The facts are clearly disputed and Johnson failed to meet her burden of proving that Alexander was liable as a matter of law. Further, Johnson was required to present evidence from an expert witness attorney that Alexander's conduct fell below the standard of care and that he *negligently* certified the title. Instead, Johnson's expert witness Brown conceded he would not have discovered the title irregularity if he had conducted the title examination or conducted the closing. Brown also admitted that marketable title cannot be guaranteed even with a proper title examination and that public records are not always accurate. (R. pp. 148-149). The Court correctly held, "we do not believe Alexander's statement can be fairly interpreted as a concession that he had an absolute responsibility to deliver good and marketable title." (Opinion, p. 5). The Court properly reasoned that "considering Alexander's statements in the light of most favorable to him, he concede only that he must act with reasonable care in closing the transaction, including his decision to rely on Feeley's title search and no do a title search himself." (Opinion, p. 5). Based on the disputed facts in the record, the Court correctly reversed summary judgment because a genuine issue of fact exists as to whether Alexander breached a legal duty of care.

6. Johnson's Arguments Raising Public Policy Considerations are without Merit.

In a last final effort to persuade this Court that it's ruling was in error, Johnson makes a "public policy" argument that the Court has created "a new immunity for attorneys." (Petition, p. 9). South Carolina law has not established any affirmative or non-delegable duties for attorney in conducting a real estate closing. This Court did not create "a new immunity for attorneys",

but rather reminded Johnson of the well-established law in South Carolina for providing legal malpractice. South Carolina law has not established any affirmative or non-delegable duties for attorney in conducting a real estate closing.

Johnson believes that a title irregularity following a closing creates negligence per se, strict liability, or a *res ipsa loquitur* type liability on a real estate closing attorney. This is not law and never has been the law in South Carolina. “The law does not require that an attorney be infallible and simply because an attorney has made a mistake does not establish negligence or malpractice as a matter of law.” See *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 789 (D.S.C. 1992), aff’d, 10 F.3d 806 (4th Cir. 1993). The law does not require absolute accuracy either in practice or decision-making. The law does not hold an attorney to such standards of perfection. Alexander’s acts or omissions are to be weighed using the standard of reasonableness. Reasonableness is based on the facts and circumstances reasonably known at the time, not in light of what hindsight may reveal. See *Harris Teeter, Inc.*, at 291, 701 S.E.2d at 750 (“We adhere to the principle that the exercise of a professional’s judgment (and accompanying acts and omissions) must be considered at the time the professional service is rendered and not through the lens of hindsight.”). Further, Johnson’s public policy arguments lack merit especially in a case where she did not have expert testimony regarding the standard of care, or any breach thereof. As this Court aptly reminds Johnson in the Opinion “a plaintiff in a legal malpractice action must established this standard of care by expert testimony.” (Opinion, p. 5).

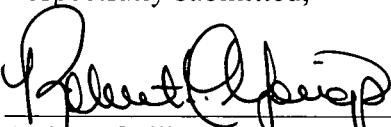
Thus, the public policy argument by Johnson is irrelevant to the determination of whether a genuine issue of material fact exists for the granting of summary judgment and whether the circuit court erred as a matter of law in awarding summary judgment to Johnson.

The standard does not contemplate the weighing of public policy considerations for the granting or denial of a motion for summary judgment.

CONCLUSION

For the reasons stated above, Alexander respectfully requests this Court deny Johnson's Petition for Rehearing.

Respectfully submitted,

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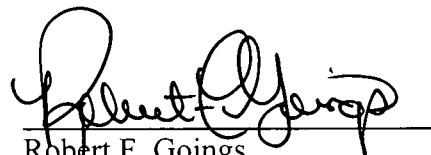
Charles Feeley.....Third Party Defendant.

PROOF OF SERVICE

I certify that I have served the Appellant's Return to Petition for Rehearing by mailing a copy of same, via United States Mail, on April 25, 2014, to the following:

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April 25, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
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Re: Amber Johnson v. Stanley Alexander
Case No.: 2009-CP-10-06529

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Appellant's Return to Respondent's Petition for Rehearing along with Proof of Service in the above-referenced matter. Please file the original and return the filed-stamped copy to me via my courier.

By copy of this letter I am serving these documents on all counsel. Thank you for your assistance and please feel free to contact me should you have any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Robert".

Robert F. Goings

cc: Justin S. Kahn, Esq. (via U.S. Mail)
Mary Leigh Arnold, Esq. (via U.S. Mail)
Joel W. Collins, Jr., Esq. (via U.S. Mail)

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