

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUL 21 2014

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

S.C. Supreme Court

Case No. 2009-CP-10-6529
Op. No. (5208)

Amber Johnson.....Petitioner,

v.

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

v.

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

v.

Charles Feeley.....Third Party Defendant.

Appellate Case No. 2014-001167

APPENDIX

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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

RECEIVED
MAR 13 2013

SC Court of Appeals

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.

CORRECTED RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Amber Johnson,)

Plaintiff,)

vs.)

Stanley E. Alexander, Mario S.)
Inglese, and Mario S. Inglese, PC,)

Defendants.)

C.A. Number: 09-CP-10-6529

FILED
2010 NOV -8 AM 9:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER DENYING
DEFENDANTS'
REQUEST FOR STAY
AND FOR PROTECTION

This discovery matter came before the Court on November 2, 2010. Defendants filed two motions seeking to stop litigation in this matter: 1) Motion For Protective Order dated October 13, 2010 and 2) Defendants' Motion to Stay, filed October 5, 2010.

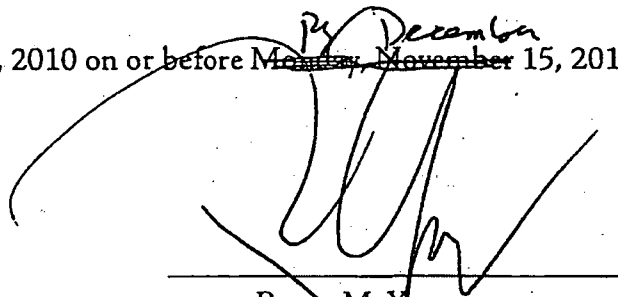
The Defendants claim that other cases in which Ms. Johnson is a party *may* determine what damages she may seek in this case. Thus, Defendants ask this Court to await the disposition of two other cases to ascertain whether any damages that may be awarded in those cases should be considered in this case. The Defendants seek a protective order to prevent further discovery in this matter, pursuant to SCRCP, Rule 26(c).

py abrogation of this Court's responsibility "to safeguard the rights" of Ms. Johnson to the discovery to which she is entitled. A continuance is not the proper relief to be sought as this case has not been called for trial. Thus, the request for continuance is denied and Defendant has not demonstrated good cause for protecting Ms. Johnson from engaging in discovery.

Having carefully listened to oral argument and considered the materials submitted by counsel,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Defendants' Motion For Protective Order, dated October 13, 2010, is DENIED and Defendants' Motion to Stay, filed October 5, 2010 is DENIED. Further, Defendants are ordered to provide Plaintiff's counsel with alternative dates when they will be available by *py* ~~December 1, 2010~~ *py* ~~November 8, 2010~~ *py* ~~Tuesday~~ *py* ~~December~~ *py* ~~November~~ 30, 2010 and Defendants are to fully and completely answer Plaintiff's discovery request dated October 6, 2010 on or before *py* ~~Monday~~ *py* ~~November~~ 15, 2010.

IT IS SO ORDERED.



Roger M. Young
Circuit Court Judge
Ninth Judicial Circuit

November ✓ 2010,

Charleston, South Carolina

py
~~2~~ 2

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Case No.: 2009-CP-10-6529

Amber Johnson

versus

Stanley E. Alexander, Mario S. Inglese,
Mario S. Inglese PC, Charles Feely

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

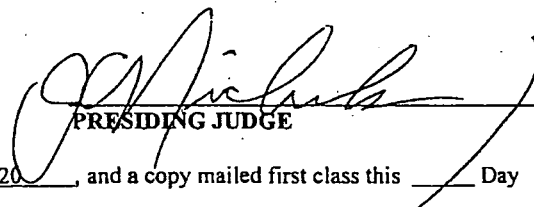
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☒ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. nonsuit)
☐ Rule 43(k), SCRCP(Settled); ☐ Other -
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING THE LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Motion for Partial Summary Judgment is being taken under advisement per Judge's Nicholson's allowance for ten (10) days to submit additional documents.

Dated at Charleston, South Carolina, this 26th day of May 2011.


PRESIDING JUDGE

This judgment was entered on the ____ Day of _____, 20____, and a copy mailed first class this ____ Day of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCCA SCRCP Form 4 Revised 6/2008

Clerk of Court

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Case No.: 2009-CP-10-6529

Amber Johnson

versus

Stanley E. Alexander, et al

PLAINTIFFS

DEFENDANT(S)

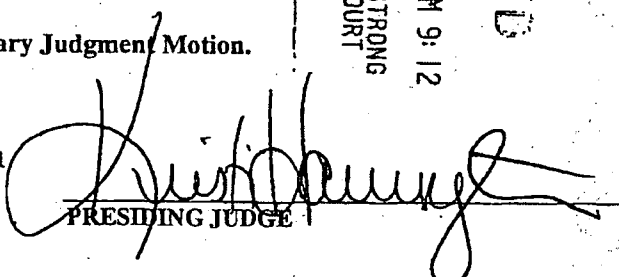
CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☒ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. nonsuit)
☐ Rule 43(k), SCRCP(Settled); ☐ Other -
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING THE LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

-Case is protected until Judge Nicholson rules on Summary Judgment Motion.

Dated at Charleston, South Carolina, this 31st day of May, 2011


PRESIDING JUDGE

BY
JULIE J. ARMSTRONG
CLERK OF COURT
2011 JUN -6 AM 9:12

FILED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Amber Johnson,

Plaintiff,

v.

Stanley E. Alexander, Mario S. Inglese and
Mario S. Inglese, PC,

Defendants,

Mario S. Inglese and Mario S. Inglese, PC,

Third Party Plaintiff,

vs.

Charles Feeley,

Third-Party Defendant.

Case No. 09-CP-10-6529

ORDER GRANTING PLAINTIFF
JOHNSON'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AS TO DEFENDANT
STANLEY E. ALEXANDER'S
LIABILITY

2011 JUL -6 PM 12:50
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

gfn
This matter is before the Court on Plaintiff, Amber Johnson's (hereinafter "Johnson"), Motion for Partial Summary Judgment filed January 14, 2011 against Defendant Stanley Alexander, Esq. (hereinafter "Alexander"). After careful consideration of the Motion, pleadings, materials submitted, and the extensive oral arguments, this Court finds Johnson's Motion for Partial Summary Judgment related to Alexander's liability should be granted.

PROCEDURAL HISTORY SUMMARY

On October 15, 2009, Johnson filed a complaint against Alexander for professional negligence. The complaint was supported by the affidavit of John Brown, Esquire. The gravamen of the complaint is that Alexander negligently conducted a closing in September 2006 related to property located at 2640 Ranger Drive, North Charleston, S.C. (hereinafter the "Property"). In

part, it is alleged that Alexander failed to discover or disclose that the Property had been sold on October 5, 2005 for delinquent 2004 taxes. The October 2005 tax sale resulted in a tax deed being issued by Mary Scarborough, the Charleston County Delinquent Tax Collector, in December of 2006 in the name of the tax sale purchaser.

After engaging in discovery and various depositions, on January 14, 2011, Johnson filed a Motion for Partial Summary judgment seeking judgment solely as to liability against Alexander. In part, the motion was supported with excerpts of Alexander's deposition testimony. On May 5, 2011, Alexander filed his own affidavit in opposition to the motion. A hearing was held on May 9, 2011. After carefully listening to argument, this Court gave specific instructions to the parties to inform the Court as to what public records were publicly available to a title abstractor or real estate closing attorney regarding the delinquent 2004 taxes and the October 5, 2005 tax sale at the time Alexander conducted the closing.

Johnson filed affidavits of Mary Scarborough, Charleston County Delinquent Tax Collector, and Todd Balish, a local abstractor who had conducted a title examination on the property in 2007. Alexander filed the affidavit of Charles M. Feeley, Esquire, a named defendant. Alexander offered no information from the Register Mesné Conveyance (RMC) Office, Auditor's Office, or Delinquent Tax Collector's Office to address the Court's instructions.

A second hearing was held May 26, 2011 to address the additional submissions and hear argument by the parties. Alexander's counsel strongly requested a continuance to address the affidavits submitted by Johnson (although this court notes that Johnson had timely submitted the affidavits to Alexander before the hearing). When asked, Alexander could not articulate any reason why there needed to be a continuance or what additional evidence the continuance would produce that concerned the Court's request for public records regarding the delinquent taxes and

subsequent tax sale. Although the Court denied the request for a continuance, to accommodate Alexander this Court gave both sides an additional ten (10) days to submit any additional counter-affidavits or materials for the Court to consider. No additional materials were submitted.

ISSUE

The issue before the Court is whether there is a material question of law or fact as to Alexander's liability for departing from the duty of care he owed Johnson, as his client, by failing to ensure good and marketable title to the property at closing.

STANDARD OF REVIEW



The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); *Matsell v. Crowfield Plantation Community Services Ass'n, Inc.*, -- S.E.2d -- (S.C. Ct. App. 2011), 2011 WL 1643557 *2. Summary judgment is available when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." SCRPC, Rule 56(c). The evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

The moving party has the initial burden of demonstrating no issue of material fact exists. ~~*Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991).~~
This initial burden "may be discharged by 'showing' — that is, pointing out to the court — the absence of evidence to support the nonmoving party's case." *Baughman*, 306 S.C. at 115, 410 S.E.2d at 165, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving

party carries its initial burden, the opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts," and "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545, quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (emphasis in original). SCRCP Rule 56(e) prohibits the nonmoving party from relying on mere allegations or denials in its pleadings. *Baughman* at 115, 545. For purposes of contesting the motion, the dispute must be genuine, and the court is not required to attach great significance to evidence introduced solely to create an issue of fact that is not genuine. See James F. Flanagan, *South Carolina Civil Procedure 3d*, 463-64 (S.C. Bar 2010). Unsupported and conclusory statements contesting the critical issues are not genuine disputes of material facts. *Id.*

Alexander failed to show why a continuance was needed or that it would produce additional evidence or create a genuine question of fact regarding his liability for his admitted failure to discover that the Property had been sold at a tax sale. Further, Alexander does not explain how a continuance would allow him to show that records concerning the delinquent taxes and tax sale were not publicly available at or near the time of closing.

With the argument and materials presented to the Court, the Court finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Alexander represented Johnson and was her closing attorney for the purchase of a property and a house at 2640 Ranger Drive, N. Charleston, S.C. (Alexander Affidavit, May 5, 2011, p. 2, ¶2, Alexander Dep. p. 10, lines 15-18.)
2. Alexander conducted the real estate closing and it took place on September 14, 2006.

3. Alexander admits he owed duties to Johnson, he breached those duties and there was resulting damage as a result thereof.¹ Those admissions include:

Duties to Make Sure Purchaser Gets Good and Marketable Title

- a. A lawyer handling a closing has the responsibility to make sure the purchaser gets good and marketable title to the property. Alexander Depo. p. 16-17. ("That would be your job." Alexander Dep. p. 17, line 7.) Alexander Depo. p. 23.
- b. Alexander had a duty to make sure Ms. Johnson got the property free and clear with good and marketable title. Alexander Depo. p. 102. 13-16; p. 16, 16-20.
- c. Mr. Alexander conducted a closing precisely to ensure that Johnson got good and marketable title. Alexander Depo. p. 16, lines 4-6 and 16-24.

Reliance by Johnson

- d. Johnson relied upon Alexander telling her she was getting good and marketable title. Depo. Alexander, p. 98, lines 24-25, p. 99, lines 1-17.

Failure of Title

- e. There was a failure in the title and Johnson did not get a marketable title to the property. Alexander Depo. p. 16, lines 7-12. Alexander Depo. p. 23. Alexander Depo. pp. 23-24 "There's no dispute about that."

Foreseeable Damage

- f. It is foreseeable that a property purchaser would end up in litigation, need to hire a lawyer and incur costs associated with that litigation. Depo. Alexander, pp. 17-18. It was foreseeable that the purchaser would be "in some litigation or negotiation to get the problem resolved." Alexander Depo., p. 18, lines 22-24.

gn

¹ In an attempt to create a question of fact, Alexander provided certain materials to the Court. Alexander submitted an affidavit dated May 17, 2011 from co-defendant Charles M. Feeley, Esq. who Alexander claims searched the property records for the closing. That affidavit does not create a question of fact for several reasons, including the fact that it states "I do not recall the details from this title examination" (Feeley Affidavit, ¶ 2, p. 2) and "I cannot recall the specific details of this title examination" (Feeley Affidavit, ¶ 3, p. 3).

Mr. Feeley states he routinely performs a ten year tax records search from the Charleston County Online Tax System that allows one to determine whether the taxes were current or delinquent. Mr. Feeley did not produce a copy of a 10 year screen from the search at issue or otherwise. Mr. Feeley's contentions that there was no notice because there was no *lis pendens*, a chain of title that would show a tax sale or a tax deed from 2006 are not relevant here. The issue is, Were public records about the tax sale and delinquent taxes available at the time of closing?

Mr. Alexander also argued that Defendants looked at the tax records, saw the property tax was paid in 2005, and assumed the taxes for previous years had been paid. Alexander offered no admissible evidence to support this assertion.

- g. Because of this situation, Ms. Johnson could not rent or resell the house. Depo. Alexander, p. 14, lines 14-17 and Alexander's letter dated July 13, 2009, Ex. 2 to his deposition. The issuance of the tax deed made Ms. Johnson unable to rent or sell the property. Depo. Alexander, p. 19 and 20, lines 8-14.

Resulting Damage and Lack of Johnson's Fault

- h. Johnson suffered direct, incidental and consequential damage as a result of the subject property being transferred by virtue of the tax deed. Depo. Alexander, p. 98, lines 9-16. Further, Johnson suffered damage as a result of not obtaining clear and marketable title to the property.
- i. Johnson was put into the situation through no fault of her own, and because of the litigation the property has been out of Ms. Johnson's control. Depo. Alexander, Ex. 2 thereto (Letter by Alexander, dated July 13, 2009).
4. The Property was sold on October 3, 2005 to pay for 2004 delinquent taxes nearly a year before Johnson's closing. Scarborough Aff. ¶¶ 6, 10, 11, Depo. Alexander, p. 34, lines 21-23.
5. Information concerning the 2003 and 2004 delinquent taxes on the Property was a public record and publicly available on the Charleston County On-Line Tax System July through September of 2006.² (Scarborough Aff. p. 3, ¶13).
6. By at least October 14, 2005, public records showed delinquent taxes on the property for 2004 and the October 3, 2005 tax sale. This information was publicly and readily available for abstractors, closing attorneys and the general public in the county's Register Mesné Conveyance Office, where delinquent tax data is maintained on a publicly accessible mainframe computer system known as the Vista 3270. (Scarborough Aff., pp. 2-3, ¶¶6-12).
7. Ms. Scarborough was personally familiar with the Vista system. It has been in continuous use since Ms. Scarborough helped design and implement it in 1997. (Scarborough Aff., p. 2, ¶8).

Abstractors and closing attorneys routinely use the information available in the RMC-Office

² Mr. Alexander contends that no "records were *discovered* at the time of the title examination that would have put me on notice that property taxes were delinquent or that a tax sale had occurred on the property." Alexander Aff. May 5, 2011, ¶ 11 (emphasis added).

to ensure property being sold is not encumbered by a Charleston County tax lien or been sold at a county tax sale. (Scarborough Aff. p. 2, ¶6-7).

8. In August 2006, when Alexander contends that the title examination of the Property occurred, Charleston County Delinquent Tax records showed the property taxes were delinquent in the years 2003 and 2004, and that the Property had been sold at a tax sale on October 3, 2005. (Scarborough Aff. p. 2-3, ¶¶ 9-12). Further, during the relevant time, the public records concerning these issues were available either by using the Charleston County On-Line Tax System via the web or the Vista system. (Scarborough Aff. p. 3, ¶ 12).

A. Standard of Care Established

To establish liability for legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of the attorney's duty; (3) damage; and (4) proximate cause of the client's damages by the breach. *Harris Teeter, Inc. v. Moore & Van Allen PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). Attorneys must "render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." *Id.* A plaintiff generally must use expert testimony to establish the standard of care. *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 437-38, 472 S.E.2d 612, 614 (1996).

Attorney Client Relationship

There is no dispute and the Court finds the existence of the attorney-client relationship between Johnson and Alexander.

Breach of Attorney's Duty

The Court finds and Alexander admits he breached duties owed to Johnson by being negligent in failing to determine the Property had been sold October 3, 2005 at a tax sale and in failing to

ensure Johnson was conveyed good and marketable title at the closing he conducted. (Alexander Depo., pp. 16-17). Johnson established Alexander was negligent with more than reasonable certainty. Alexander admitted to the duties he owed, including ensuring the property had good and marketable title. Mr. Brown also opined the closing attorney has the duty to ensure that good and marketable title is conveyed to a purchaser. Alexander Memo, p. 9; Brown Depo. pp. 69-71.

The proof that Alexander conducted the closing negligently is apparent from his failure to determine from the public records that the property had been sold at a tax sale. The gravamen of Alexander's argument against summary judgment is there exists a question of fact about whether public records existed concerning the status of delinquent taxes and tax sale.

With Ms. Scarborough's affidavit, Johnson proved to the Court what the public records reflected at the time of closing - taxes for the Property were delinquent for the tax years 2003 and 2004 and the Property had been sold on October 5, 2005 at a tax sale. Alexander offered no admissible facts to contradict those facts.³

gn Alexander argues this is not really a legal malpractice issue but rather a title examination issue and Plaintiff's expert is not competent to render an opinion about how to conduct a title examination. Further, Alexander argues that Johnson's expert witness, Mr. Brown failed to establish to the standard of care for a closing attorney. (Defendant's Memorandum in Opposition of Plaintiff's Motion for Summary Judgment, pp.10-12). These arguments are without merit. First, the standard of care for a title examination is not the issue. The issue is the standard of care

for an attorney conducting a real estate closing. In South Carolina, only an attorney can conduct a real estate closing. Although a closing lawyer may rely upon the title examination performed

³ Alexander's citation to "documentation from the seller's mortgagee" (Alexander Memo. p. 7) concerning the status of payment of taxes is nothing more than an unauthenticated document and inadmissible hearsay. If documentation from seller's mortgagee generally sufficed, South Carolina homebuyers would have no need to obtain title searches.

by others, the closing attorney must not be negligent in ensuring the purchaser gets good and marketable title to the property. Alexander argues that Johnson posits a strict liability theory for legal malpractice by imposing on an attorney the absolute requirement to ensure good and marketable title. Alexander Memo pp. 5-6. This is not the case. Alexander was negligent in not ensuring good and marketable title because he (or his agent) failed to determine that public records showed the delinquent taxes on the property for 2003 and 2004 and that the property had been sold at a tax sale in October of 2005.⁴ It was the failure to discover and properly act upon public records that results in Alexander being negligent and liable to Johnson.

Second, South Carolina recognizes expert testimony is *not* necessary to establish the standard of care if the professional defendant himself "admits the standard of care that was owed to the plaintiff." *Sims v. Hall*, 357 S.C. 288, 296, 592 S.E.2d 315, 319 (Ct. App. 2003). This rule was further explained in *Mali v. Odom*, 295 S.C. 78, 81, 367 S.E.2d 166, 168 (Ct. App. 1988) which also concerned a real estate transaction. The Court of Appeals found the defendants did not need an expert to testify to the standard of care required for closing attorneys in such situations because the defendant himself, a practicing lawyer, established the applicable standard during his deposition. Odom admitted "it was incumbent upon [him] to disclose [the]...covenants or restrictions on the property," which the appeals court held firmly established the duty he owed the plaintiff. *Mali v. Odom*, 295 S.C. at 80-81, 367 S.E.2d at 168-169 (Ct. App. 1988).

Here, Alexander, the attorney-defendant, admitted in his deposition that he had a duty and responsibility to ensure Johnson received good and marketable title to the property. (See e.g.

⁴ In his Answer and Crossclaim in this matter, Alexander alleges that he hired Inglese to conduct a title exam (¶ 69) and that Inglese was negligent or breached other duties in failing to detect the delinquent taxes and the subsequent tax sale. ¶¶ 72-83. Answer and Cross Claim of Defendant Stanley E. Alexander, March 5, 2010. Alexander is estopped to argue such information was not available to him.

Alexander Dep., pp. 16 and 102). Once Alexander admitted the duty, whether Johnson's expert did or did not establish it as well is purely academic. In any case, Johnson's expert is competent to testify about the standard of care of a closing attorney. He testified that Alexander fell below the standard of care for a closing lawyer by failing to discover the Property had been sold for 2004 delinquent taxes, failing to ensure Johnson received good marketable title at the time of closing and that Alexander's conduct was a proximate cause of Johnson losing title to the property. Brown Depo. pp. 69-71 Ex. 5 to Alexander Memo May 24, 2011.

Proximate Cause

The Court finds the proximate cause of Johnson's alleged damages was Alexander's breach of his duties to discover the property had been sold at a tax sale before Johnson closed on the property and his failure to convey good and marketable title to her. This failure directly resulted in a tax deed being issued that gave title to the property to the tax sale purchaser.

gem
In an attempt to break the proximate cause chain, Alexander claims Johnson engaged in fraudulent conduct with regard to obtaining financing for the purchase of the subject property. Alexander Memo. pp. 1, 12-13 May 25, 2011. Alexander claims there were various false statements on a document entitled Residential Loan Application. This is an attempt to divert the Court from determining Alexander's liability and failures. More importantly, fraud has not been alleged as a defense in Alexander's answer, Johnson denies any fraudulent conduct between herself and the third party bank and Alexander fails to demonstrate the lender asserted fraud.

Alexander also claims Johnson submitted a false and fraudulent mortgage application to obtain financing to purchase the property. These assertions lack proof and are irrelevant to the Court's consideration as to Alexander's liability for legal negligence for the reasons stated herein.

Alexander's unsupported and bald assertions of fraud based upon inadmissible documents do not create a material issue of fact as to his liability or break the chain of causation. The loan application process with a third party is separate and distinct from Alexander's duty to ensure good and marketable title to Johnson at the closing. Johnson's failure to get good and marketable title and loss of the property was not the consequence of any alleged fraud. Rather, it was the direct consequence of Alexander's negligence.

Finally, Alexander himself admits the failure to properly and fully examine "the title and all matter of public record available on the subject property" was "the proximate cause of the damages sustained by ... Johnson." Answer and Crossclaim of Defendant Stanley E. Alexander, March 5, 2010, ¶¶ 73, 78.

Given the above, Johnson establishes that Alexander's negligence was the proximate cause of her injuries and damages.

Damage

gn
The Court finds Johnson suffered damage from Alexander's breaches of his duties. Alexander admits that his failure to obtain good and marketable title for Johnson did result in foreseeable "problems" or damages for Johnson, including the inability to sell or rent the property and resulting legal action or litigation concerning it. (Alexander Depo., pp. 17-19).

Alexander argues that a foreclosure action that was filed against Johnson was not his fault and that he is not responsible for damages and litigation associated with that.⁵ However, as a direct result of Alexander's negligence, Johnson did not receive good and marketable title to the property and the tax deed transferred the property out of her name in December of 2006.

⁵ This Court dismissed the foreclosure action filed against Johnson on May 26, 2010 because the party bringing the action did not exist. The undersigned signed the orders concerning the dismissal.

Whether she stopped paying on a note in April of 2007 is irrelevant as to Alexander's negligence in September of 2006.

This Court makes no finding as to the value of damage Johnson suffered, if any as a result of a foreclosure action or otherwise. The amount of damage Johnson may be entitled to as the result of Alexander's breaches, including not getting good and marketable title to the Property, the loss of the Property, the loss of the ability to sell or rent the property and her need to engage legal assistance, is for a later determination.

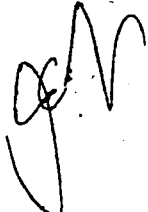
B. Establishing the Breach of the Duty of Care

There is no material question of law or fact as to whether Alexander breached his duty of care to Johnson. It is undisputed that the Property was sold in 2005 for 2004 delinquent taxes. Alexander offered an affidavit from Mr. Feeley who merely states what he usually does but does not remember what he did for this particular title examination.

gm By contrast, Johnson provided an affidavit of Mary Scarborough. She is the Charleston County Delinquent Tax Collector, whose office maintains delinquent tax records, organizes tax sales to cover tax liens, and notices and makes public the details of delinquent taxes and tax sales. She was interim Delinquent Tax Collector at the time of the closing on the subject property in 2006, and she has worked in that office for 30 years. (Scarborough Affidavit, p. 1, ¶ 2). She establishes the delinquent tax records were public and readily available on both the Charleston County On-Line Tax System via the World Wide Web, as well as in the county's RMC Office via the mainframe computer known as the Vista 3270. Further, Johnson established that the records available in the RMC Office were updated to reflect the October 3, 2005, tax sale on October 14, 2005, the day on which the proceeds of the sale were applied to the tax lien.

(Scarborough Affidavit, p. 3, ¶¶ 10-11, and Scarborough Ex. 2). Alexander produces no admissible evidence to rebut these facts.

Second, Alexander suggests that the only way to view and obtain the complete Charleston County Delinquent Tax file about the property is to file a state Freedom of Information Act request, and that such steps are not usually taken as part of a title search. That may be true, but obtaining the full file is not relevant to the Court's consideration. Johnson establishes with a disinterested county official charged with maintaining the delinquent tax records, conducting the tax sale, and providing public notice of tax liens and sales, the fact that the property taxes were delinquent in 2004 was a public record available in the RMC Office and on-line via the Charleston County Tax Office On-Line. Information regarding the October 3, 2005, tax sale also was readily and publicly available in the RMC Office.⁶

 Although in a motion for summary judgment the moving party must carry the burden of showing no material questions of fact exists, once Johnson met that burden, Alexander must affirmatively come forward with admissible facts that dispute the moving party's contention. See *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545 (the non-moving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'"). Alexander fails to meet his burden. Even Alexander's affidavit from co-defendant Charles M. Feeley, Esquire, attesting to his usual practice of checking county tax records does not dispute the facts provided by Johnson

⁶ Further, Johnson provided the affidavit of Todd Balish, an abstractor and owner of Edisto Title Services Inc., who swore that he routinely used the system available in the RMC Office for years, including in 2006, to check for delinquent taxes and tax sales (Balish affidavit, p.2-3, ¶¶6-10). In November 2007, Mr. Balish ran a title search on the subject property and discovered the delinquent taxes and the October 3, 2005 tax sale. (Balish affidavit, pp. 1-2, ¶¶ 4-7). It is not necessary for the Court to rely upon Mr. Balish's affidavit as to what was available during the relevant time of 2006 for this motion because of Mary Scarborough's affidavit.

showing that the records regarding the delinquent taxes and the tax sale were public and existed for all to see.

For the above reasons, Alexander fails to meet his burden to demonstrate that a material question of fact or law exists.

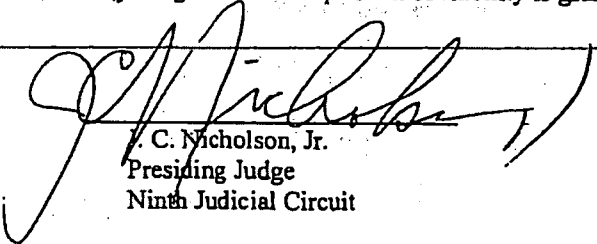
CONCLUSION

Johnson established the standard of care Alexander owed to Johnson, that Alexander breached the duties owed by failing to ensure good and marketable title to the property purchased by Johnson in September 2006 and that as a proximate result of that breach Johnson suffered damage.

Johnson also establishes that the records showing both the taxes on the subject property had been delinquent and that the property had been sold at a Charleston County tax sale to pay those taxes were readily and publicly available when the Defendants conducted the title examination. Therefore, there exist no material questions of facts as to the Alexander's liability for legal malpractice for failing to take note of the fact that the Property Johnson believed she was purchasing already had been sold in a tax sale.

IT IS THEREFORE ORDERED, for the reasons set forth above, based on the record of the case, extensive arguments presented by able counsel, and upon careful consideration of the facts and the law, that Johnson's Motion for Summary Judgment on the question of liability is granted.

IT IS SO ORDERED.


J. C. Nicholson, Jr.
Presiding Judge
Ninth Judicial Circuit

Charleston, South Carolina
June 30, 2011

The South Carolina Court of Appeals

Amber Johnson,

Respondent,

v.

Stanley E. Alexander, Mario S. Inglese
and Mario S. Inglese, PC,

Defendants,

Of Whom Stanley E. Alexander is the, Appellant,

Marios S. Inglese and Mario S. Inglese,
PC,

Third Party Plaintiff,

v.

Charles Feeley,

Third Party Defendant.

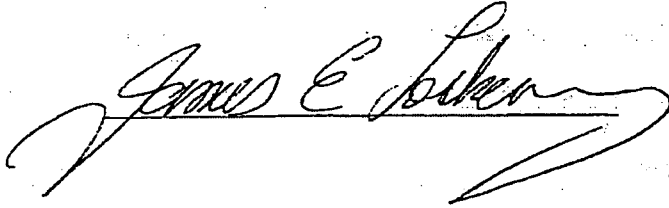
The Honorable J. C. Nicholson, Jr.
Charleston County
Trial Court Case No. 2009-CP-10-06529

ORDER

Appellant has filed a motion to remand for reconstruction of the record. In his motion, Appellant explains that the South Carolina Court Administration is unable to locate the records and tape from the first day of the hearing. Respondent filed a return. After careful consideration, Appellant's motion is granted. This Court will hold this appeal in abeyance and partially remand this action to the circuit court for a reconstruction hearing. Appellant shall provide this Court with a status report in thirty days, and every thirty days thereafter, until resolution of the remand.

IT IS SO ORDERED.

Columbia, South Carolina



cc: Joel W. Collins, Jr., Esquire
Robert F. Goings, Esquire
Justin S. Kahn, Esquire
Mary L. Arnold, Esquire

FILED

W. Carter 4/8/10

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Amber Johnson,

Plaintiff,

vs.

Stanley E. Alexander, Mario S. Inglese and
Mario S. Inglese, P.C.,

Defendants.

vs.

Charles Feeley,

Third-Party
Defendant

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION No.: 2009-CP-10- 6529

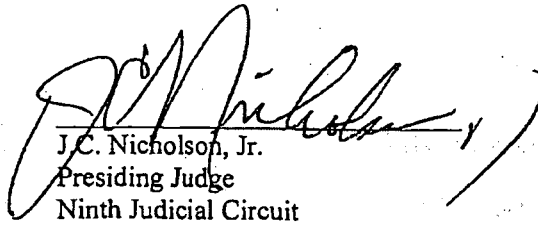
**CONSENT ORDER ON REMAND TO
RECONSTRUCT THE RECORD**

FILED
2012 JUN 18 PM 4:34
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court on an order dated April 2, 2012 from the South Carolina Court of Appeals to reconstruct the record from the May 9, 2011 hearing on Plaintiff's Motion for Partial Summary Judgment. With agreement of the parties, the Court hereby finds as follows:

For purposes of reconstructing the record of the hearing of May 9, 2011, arguments presented to the Court on May 9, 2011 were contained in the filings made in the Court as of that date along with those contained in Stanley Alexander's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment dated May 25, 2011. Those filings shall serve as a reconstruction of the proceeding before the court on May 9, 2011.

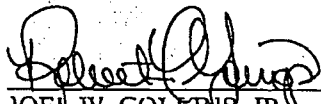
IT IS SO ORDERED.


J.C. Nicholson, Jr.
Presiding Judge
Ninth Judicial Circuit

June 18, 2012

Charleston, South Carolina

WE CONSENT:



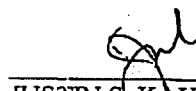
JOEL W. COLLINS, JR.
COLLINS & LACY, P.C.
jcollins@collinsandlacy.com
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (phone)
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ROBERT F. GOINGS
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914 Richland Street, Suite A-101
Post Office Box 436 (29202)
Columbia, South Carolina 29201
(803) 350-9230 (phone)
(877) 789-6340 (facsimile)

Date: June 13, 2012

ATTORNEYS FOR DEFENDANT
STANLEY E. ALEXANDER

WE CONSENT:



JUSTIN S. KAHN
KAHN LAW FIRM, LLC
jskahn@kahnlawfirm.com
Post Office Box 31397
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(843) 577-2128 (phone)

MARY L. ARNOLD
MARY LEIGH ARNOLD, PA
749 Johnnie Dodds Blvd., Ste. b
Mount Pleasant, South Carolina 29464
(843) 971-6053 (phone)
(843) 971-6055 (facsimile)

Date: June 16, 2012

ATTORNEYS FOR PLAINTIFF
AMBER JOHNSON

State of South Carolina)
)
County of Charleston)

Court of Common Pleas
Ninth Judicial Circuit
09-CP-10- 6529

Amber Johnson,)
)
Plaintiff,)
)
vs.)
)
Stanley E. Alexander, Mario S.)
Inglese, and Mario S. Inglese, PC)
)
Defendants.)
)
_____)

Complaint
(Negligence, Breach of Contract)

JURY TRIAL DEMANDED

FILED
2009 OCT 15 PM 4:21
JULIE J. ALEXANDER
CLERK OF COURT
BY _____

Plaintiff, Amber Johnson, complaining of the Defendants, Stanley E. Alexander, Mario S. Inglese and Mario S. Inglese, PC would respectfully show unto the Court as follows:

1. Plaintiff is a citizen and resident of the State of Florida.
2. Defendant Stanley E. Alexander, is upon information and belief, a citizen and resident of Charleston County, South Carolina, and is an attorney licensed to practice law in this State.
3. Defendant Mario S. Inglese, is upon information and belief, a citizen and resident of Charleston County, South Carolina, and is an attorney licensed to practice law in this State.
4. Defendant Mario S. Inglese P.C., is upon information and belief, a professional corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County, South Carolina.
5. Defendant, Alexander accepted the representation of Plaintiff to conduct a closing with regard to the purchase of certain real property located at 2640 Ranger Drive, North Charleston, South Carolina.

6. On information and belief, Defendant Alexander retained the professional services of Defendants Mario S. Inglese and Mario S. Inglese, PC, to conduct a title search of the subject property to ensure that Plaintiff was receiving good and marketable title (a fee simple estate), all of which was for the benefit of Plaintiff. Defendant Alexander hired and paid Defendants for their professional services for the benefit of Plaintiff. (See Exhibit A attached hereto.)
7. A real estate closing took place in September 2006 in the offices of Defendant, Alexander.
8. Defendant, Alexander prepared a title to real estate warranting good and marketable title to the subject property to Plaintiff.
9. Several months after the closing and unknown to the Plaintiff at the time, in December of 2006, the subject property was transferred by virtue of a Tax Deed for past due taxes due and owing for the year 2004.
10. Sometime thereafter, Plaintiff was notified that title to the property had transferred to another entity as a result of the Tax Deed.

FOR A FIRST CAUSE OF ACTION

(Legal Professional Negligence)

11. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.
12. At all times relevant hereto, an attorney-client relationship existed between Plaintiff and Defendants for various reasons including they were paid to render legal services for the benefit of Plaintiff.
13. By virtue of their attorney client relationship, Defendants owed duties to Plaintiff,

including the duty to protect, preserve and advance the rights and interests of Plaintiff by possessing and exercising that degree of care, skill, and learning which other reasonable and competent attorneys would be expected to possess and exercise under the same or similar circumstances.

14. Defendants had professional duties to properly and fully examine the title to the relevant property, including reviewing all tax records for past due taxes or taxes that may be due and owing or otherwise not subject to tax sale or execution.
15. Defendants had professional duties to meet the standard of care in conducting real estate closings, including determining the status of the property with regard to the tax sale that had taken place before going forward with the closing on the property.
16. Defendants had professional duties to ensure that Plaintiff was receiving good and clear title to the subject property free of any encumbrances, liens or clouds on title before conducting the closing and if there was a problem after the closing, to correct said deficiencies and/or advise Plaintiff how to correct said deficiencies.
17. Defendants failed to meet the minimum standard of care thereby breaching their professional duties to Plaintiff and otherwise acted in a negligent, grossly negligent, willful, wanton or reckless manner by failing to protect, preserve and advance the rights and interests of Plaintiff.
18. Defendants failed to meet the minimum standard of care thereby breaching their professional duties to Plaintiff by other such particulars as the evidence in this case may demonstrate.
19. As a direct and proximate result of Defendants' breach of their professional duties

by the actions and omissions as specified herein, Plaintiff sustained actual, consequential, incidental, and special damages in an amount to be determined by the jury at the trial of this case.

20. In addition to the actual, consequential, and incidental damages suffered, Plaintiff is informed and believes that Defendants' highly reckless, wanton, and irresponsible conduct as specified in certain causes of action in this Complaint entitle Plaintiff to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION

(Breach of Fiduciary Duty)

21. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.
22. Defendants were in a fiduciary relationship with Plaintiff.
23. Defendants owed Plaintiff fiduciary duties of a very delicate, exacting and confidential nature, requiring a high degree of fidelity and good faith, undivided loyalty, and competence, as well as the duty to act single-mindedly in preserving, protecting, and advancing the rights and interests of Plaintiff.
24. Defendants had fiduciary duties to Plaintiff to ensure she was receiving good marketable title without liens, encumbrances or clouds on title before conducting the closing and if there was a problem after the closing, to correct said deficiencies and/or advise Plaintiff how to correct said deficiencies.
25. Defendants failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Plaintiff and otherwise acted in a manner inconsistent with the fiduciary duties to Plaintiff.

26. As a direct and proximate result of Defendants' breach of their fiduciary duties by the actions and omissions as specified herein, Plaintiff sustained actual, consequential, incidental, and special damages in an amount to be determined by the jury at the trial of this case.
27. In addition to the actual, consequential, and incidental damages suffered, Plaintiff is informed and believes that Defendants' highly reckless, wanton, and irresponsible conduct as specified in certain causes of action in this Complaint entitle Plaintiff to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION

(Breach of Contract)

28. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.
29. Defendants entered into a contract with Plaintiff, the terms of which Defendants agreed and contracted to provide competent and prudent legal services.
30. Plaintiff fulfilled all necessary preconditions, if any, of the contract with Defendants.
31. By virtue of their contract, Defendants owed duties to Plaintiff, including the duty to protect, preserve and advance the rights and interests of Plaintiff by possessing and exercising that degree of care, skill, and learning which other reasonable and competent attorneys would be expected to possess and exercise under the same or similar circumstances.
32. Defendants failed to meet the minimum standard of care thereby breaching their contractual duties to Defendants and otherwise acted in a negligent, grossly

negligent, willful, wanton and reckless manner.

33. Defendants failed to meet the minimum standard of care thereby breaching their contractual duties to Plaintiff by other such particulars as the evidence in this case may demonstrate.
34. As a direct and proximate result of Defendants breach of their contractual duties by the actions and omissions as specified herein, Plaintiff sustained actual, consequential, incidental, and special damages in an amount to be determined by the jury at the trial of this case.

TRIAL BY JURY.

35. Plaintiff demands a jury trial on all claims and issues so triable.

EXPERT AFFIDAVIT

36. Pursuant to S.C. CODE ANN. § 15-36-100(B) (2006), attached hereto and incorporated herein by reference as Exhibit 2, is the affidavit of John Brown, Esq., an attorney licensed in South Carolina who is qualified render opinions relevant as to the acceptable conduct of the professionals whose conduct is at issue.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, for all actual damages, consequential damages, special damages, and incidental damages, for disgorgement of attorney's fees paid in the underlying action, for prejudgment interest, and for punitive damages, all in an amount to be more specifically proven at trial, and the costs of this action, and for such other and further relief as this Honorable Court may deem just and proper.

Submitted By:

MARY LEIGH ARNOLD, P.A.

Mary Leigh Arnold, P.A.
749 Johnnie Dodds Blvd., Suite B
Mount Pleasant, SC 29464
(843) 971-6053
Attorney for Plaintiff

and

Justin Kahn, Esquire
KAHN LAW FIRM
P.O. Box 31397
Charleston, S.C 29417
(843) 577-2128
Attorneys for Plaintiff

October 15, 2009

EXHIBIT 1

STAN ALEXANDER ATTORNEY AT LAW - ESCROW ACCOUNT 3010 WATERWAY BLVD. ISLE OF PALMS, SC 29451		CAROLINA FIRST ISLE OF PALMS, SC 29451 67-219/539	5607 9/14/2008
PAY TO THE ORDER OF Inglese Law Offices:		\$ 195.00	
One Hundred Ninety-Five and 00/100		DOLLARS	
Inglese Law Offices 445 Folly Road Charleston, S.C. 29412		 AUTHORIZED SIGNATURE	
MEMO Title work - 2840 Ranger Drive			
		60	0000019500

Date 10-04-2008 Account [REDACTED] Serial 5607 Amount 195.00 TR 5390219 Sequence 35869900 BankNum 1 TranCode 0 DocType

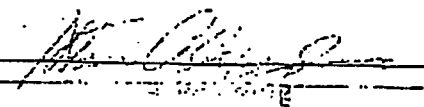
	 AUTHORIZED SIGNATURE 251500 0000019500 FIRST FEDERAL BANK FOR DEPOSIT ONLY MARIO S. INGLESE, PO OPERATING ACCOUNT ACCT. [REDACTED]

EXHIBIT 2

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE MATTER OF:)

STANLEY EUGENE ALEXANDER and)

MARIO INGLESE)

AFFIDAVIT OF JOHN G. BROWN II ESQUIRE

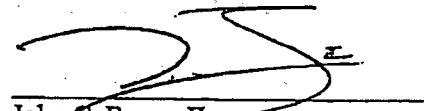
PERSONALLY APPEARED before me the undersigned, after being duly sworn, depose and says:

1. I am a licensed attorney in the State of South Carolina, and have been practicing law since 1998.
2. For approximately the last six (6) years, my practice has focused on real estate matters and conducting real estate closings.
3. I received my Juris Doctorate degree from the University of South Carolina School of Law and was Admitted to practice law in South Carolina in 1997. I have remained in good standing since my admission.
4. I am familiar with the standards, procedures and accepted practices to which real estate lawyers and their staff are required to adhere in performing their professional duties at all times relevant.
5. I have reviewed the foreclosure complaint filed by The Bank of New York for the Certificate holders CWABS, Inc., Asset-Backed Certificates Series 2006-23, the Answer submitted on behalf of Defendants Amber Johnson, Charleston County, Mary Scarborough, as Delinquent Tax Collector for Charleston County, Responses to Local Civil Rule 26.01 Interrogatories and documents provided by Mr. Stanley Alexander relating to the subject closing.
6. On September 14, 2006, Mr. Stanley Alexander, a licensed South Carolina attorney, conducted a closing for Amber Johnson relating to real property generally described as 2640 Ranger Drive, North Charleston, South Carolina.
7. According to the papers reviewed, Mr. Alexander used and relied upon the Inglese Law Offices and Mr. Mario Inglese to conduct a title review concerning the property at issue. It appears that Mr. Alexander wrote a check to Inglese Law Offices for title work associated with 2640 Ranger Drive.
8. In order to consummate the purchase Ms. Johnson executed a Note and Mortgage in

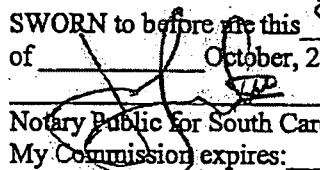
the amount of \$75,000 in favor of the original lender for property and the deed prepared by Mr. Alexander provided that Ms. Johnson was receiving good, clear and marketable title.

9. Sometime after the closing, it was learned that the subject property was sold on or about October 3, 2005 by the Delinquent Tax Collector for Charleston County for failure to pay 2004 Charleston County real property taxes for the subject real property.
10. Through a legal process, the subject property was conveyed to Westwood Properties, LLC by way of a Tax Deed dated December 12, 2006. This deed was recorded December 13, 2006 in the Charleston County RMC Office in Book N608 at Page 628.
11. Although there may be more acts of negligence, Stanley Alexander and Mario Inglese departed from the applicable standard of care by failing to discover and address the tax sale concerning the property at issue and address that matter before allowing Ms. Amber Johnson to close on the property.
12. Based upon the forgoing, it is my opinion to a reasonable degree of legal certainty, most probably, that the legal services rendered to Ms. Johnson by Stanley Alexander and Mario Inglese of the Inglese Law Firm fell below and departed from the accepted standard of care.
13. It is further my opinion to a reasonable degree of legal certainty, that the failure of either Stanley Alexander or Mario Inglese to discover and timely address the issues concerning the tax sale related to the non-payment of taxes concerning the subject property, that resulted in the deeding of the subject property to another entity is a proximate cause of Ms. Johnson's damage, loss of the subject property and other damage and losses, including being a defendant and having to defend herself in a lawsuit.

AFFIANT FURTHER SAYETH NAUGHT.


John G. Brown II

SWORN to before me this 8 day
of October, 2009


Notary Public for South Carolina

My Commission expires: July 23, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Amber Johnson,

Plaintiff,

vs.

Stanley E. Alexander, Mario S. Inglese, and
Mario S. Inglese, PC,

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 09-CP-10-6529

ANSWER AND CROSSCLAIM OF
DEFENDANT STANLEY E. ALEXANDER
(Jury Trial Demanded)

FILED
MAR -5 PM 3:28
J. ARTHUR ROY
CLERK OF COURT

Defendant Stanley E. Alexander, by and through his undersigned counsel, answers the Complaint of Plaintiff Amber Johnson by denying each and every allegation not hereinafter specifically admitted, demands strict proof and asserts the following crossclaims against Mario S. Inglese and Mario S. Inglese, P.C. as follows:

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Admits the allegations contained in Paragraph 1 of the Complaint.
2. Admits the allegations contained in Paragraph 2 of the Complaint.
3. Admits the allegations contained in Paragraph 3 of the Complaint.
4. Admits the allegations contained in Paragraph 4 of the Complaint.
5. Admits the allegations contained in Paragraph 5 of the Complaint.
6. Admits the allegations contained in Paragraph 6 of the Complaint.
7. Admits the allegations contained in Paragraph 7 of the Complaint.
8. Admits so much of Paragraph 8 that Defendant prepared title documentation subject to the real estate closing. Defendant denies the remaining allegations contained in Paragraph 8 and demands strict proof thereof.

9. Admits the allegations contained in Paragraph 9 of the Complaint.
10. Admits the allegations contained in Paragraph 10 of the Complaint.
11. The allegations contained in Paragraph 11 are procedural in nature and Defendant need not answer; however, to the extent an answer is required, Defendant denies the allegations contained in Paragraph 11 and demands strict proof thereof.
12. Defendant admits the allegations contained in Paragraph 12 of the Complaint.
13. Defendant admits the allegations contained in Paragraph 13 of the Complaint.
14. Defendant admits the allegations contained in Paragraph 14 of the Complaint.
15. Defendant admits the allegations contained in Paragraph 15 of the Complaint.
16. Defendant admits the allegations contained in Paragraph 16 of the Complaint.
17. Defendant denies the allegations contained in Paragraph 17 and demands strict proof thereof.
18. Defendant denies the allegations contained in Paragraph 18 and demands strict proof thereof.
19. Defendant denies the allegations contained in Paragraph 19 and demands strict proof thereof.
20. Defendant denies the allegations contained in Paragraph 20 of the Complaint and demands strict proof thereof.
21. The allegations contained in Paragraph 21 are procedural in nature and Defendant need not answer; however, to the extent an answer is required, Defendant denies the allegations contained in Paragraph 21 and demands strict proof thereof.
22. Defendant admits the allegations contained in Paragraph 22 of the Complaint.
23. Defendant admits the allegations contained in Paragraph 23 of the Complaint.

24. Defendant denies the allegations contained in Paragraph 24 and demands strict proof thereof.

25. Defendant denies the allegations contained in Paragraph 25 and demands strict proof thereof.

26. Defendant denies the allegations contained in Paragraph 26 of the Complaint and demands strict proof thereof.

27. Defendant denies the allegations contained in Paragraph 27 of the Complaint and demands strict proof thereof.

28. The allegations contained in Paragraph 28 are procedural in nature and Defendant need not answer, however, to the extent an answer is required, Defendant denies the allegations contained in Paragraph 28 and demands strict proof thereof.

29. Defendant denies the allegations contained in Paragraph 29 of the Complaint and demands strict proof thereof.

30. Defendant denies the allegations contained in Paragraph 30 of the Complaint and demands strict proof thereof.

31. Defendant denies the allegations contained in Paragraph 31 of the Complaint and demands strict proof thereof.

32. Defendant denies the allegations contained in Paragraph 32 of the Complaint and demands strict proof thereof.

33. Defendant denies the allegations contained in Paragraph 33 of the Complaint and demands strict proof thereof.

34. Defendant denies the allegations contained in Paragraph 34 of the Complaint and demands strict proof thereof.

35. The statement contained in Paragraph 35 is not an allegation of fact to which a response is required.

36. The statement contained in Paragraph 36 is not an allegation of fact to which a response is required. However, to the extent Paragraph 36 relating to the Affidavit of John Brown, Esq. can be deemed an allegation, the same is denied and strict proof thereof is required.

37. Defendant will show that Plaintiff is not entitled to any relief from this Defendant sought in the WHEREFORE paragraph of the Complaint.

FOR A SECOND DEFENSE

38. The Complaint fails to set forth facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

39. Plaintiff's claims are barred by the applicable statute of limitations.

FOR A FOURTH DEFENSE

40. Plaintiff's claims are barred by the doctrine of laches.

FOR A FIFTH DEFENSE

41. Plaintiff's claims are barred by the doctrine of estoppel.

FOR A SIXTH DEFENSE

42. Plaintiff's claims are barred by the doctrine of waiver.

FOR A SEVENTH DEFENSE

43. Plaintiff's claims are barred or otherwise reduced due to Plaintiff's failure to mitigate damages required by law.

FOR AN EIGHTH DEFENSE

44. Plaintiff's claims are barred or otherwise reduced by the doctrine of set-off.

FOR A NINTH DEFENSE

45. Any injuries or damages sustained by the Plaintiff are due to and caused and occasioned by Plaintiff's own negligence, gross negligence, recklessness, willfulness, and wantonness to which the direct and proximate cause of Plaintiff's alleged injuries or damages, if any and without which the same would not have occurred, and therefore, due to the Plaintiff's sole negligence, gross negligence, recklessness, willfulness and wantonness, Plaintiff's claims are barred.

FOR A TENTH DEFENSE

46. Such injuries or losses as Plaintiff sustained, if any, were caused by Plaintiff's assumption of a known risk, and this Defendant pleads Plaintiff's assumption of a known risk as a complete defense of this action.

FOR AN ELEVENTH DEFENSE

47. Such injuries or losses as Plaintiff sustained, if any, were caused by the contributory negligence, carelessness, recklessness, willfulness, and wantonness of the Plaintiff, and this Defendant pleads the Plaintiff's contributory negligence as a complete defense to this action.

FOR A TWELFTH DEFENSE

48. Even if this Defendant was negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiff's injuries, if any, which is expressly denied, this Defendant alleges Plaintiff's negligence, gross negligence, recklessness, willfulness and wanton conduct contributed to more than fifty percent (50%) to the cause of the accident and, therefore, Plaintiff's claims are barred.

FOR A THIRTEENTH DEFENSE

49. Even if this Defendant was negligent in any respect, which is expressly denied, and even if such conduct on the part of the Defendant operated as a greater than fifty percent (50%) cause of Plaintiff's injuries, if any, which is also denied, this Defendant is entitled to a determination as to the percentage which Plaintiff's negligence, gross negligence, reckless, willful, and wanton conduct contributed to Plaintiff's resulting injuries, if any, and the reduction of any amount awarded to the Plaintiff by an equal amount to the percentage of Plaintiff's own negligence.

FOR A FOURTEENTH DEFENSE

50. Any injuries sustained by the Plaintiff were due to and caused by the sole negligence, error, omission, or conduct of a third party over whom this Defendant had no control, and therefore, this Defendant should not be liable to the Plaintiff in any sum whatsoever.

FOR A FIFTEENTH DEFENSE

51. Plaintiff is not entitled to recover because Defendant had a right to rely on documentation, materials, and statements filed or contained as a matter of public record in Charleston County.

FOR A SIXTEENTH DEFENSE

52. Plaintiff's claims may be barred by the doctrine of unavoidable accident.

FOR A SEVENTEENTH DEFENSE

53. Plaintiff's claims are barred for failure to join an indispensable party.

FOR AN EIGHTEENTH DEFENSE

54. Plaintiff's claims are barred by the doctrine of justification.

FOR A NINETEENTH DEFENSE

55. Plaintiff's claims are barred for a lack of standing.

FOR A TWENTIETH DEFENSE

56. Punitive damages, as currently awarded in South Carolina, are violative of the United States Constitution and South Carolina Constitution, as well as the holding of *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and the cases upon which it is based.

FOR A TWENTY-FIRST DEFENSE

57. Pursuant to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424, 121 S.Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages "[are] not really a fact tried by the jury" therefore, Plaintiff's request for punitive damages "to be determined by the jury" violates the United States Constitution.

FOR A TWENTY-SECOND DEFENSE

58. The U.S. Constitution's Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly [do not] represent," *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (U.S. 2007), and, therefore, to the extent that Plaintiff seeks an award of punitive damages for potential or speculative harm to non-parties to the present action, such prayer for relief is unconstitutional and must be struck from the pleadings and is otherwise inadmissible at trial.

FOR A TWENTY-THIRD DEFENSE

59. Notwithstanding Defendant's prior defenses incorporating *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 522 U.S. 424 (2001) and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), and the cases upon which they are based,

in the event the trial court permits the jury to return a punitive damages award in the instant case, such damages are to be limited to an amount that is no greater than the jury's award of actual damages, as explicated within *Exxon Shipping Company v. Baker*, 128 S.Ct. 2605 (2008).

**FOR A TWENTY-FOURTH DEFENSE AND BY WAY OF CROSSCLAIM, IN THE
ALTERNATIVE, AGAINST MARIO S. INGLESE AND MARIO S. INGLESE, P.C.**

60. Defendant Stanley E. Alexander is a citizen and resident of Charleston County, South Carolina, and is an attorney in good standing licensed to practice law in this State.

61. Defendant Mario S. Inglese, is upon information and belief, a citizen and resident of Charleston County, South Carolina and is an attorney in good standing and licensed to practice law in this State. Defendant Mario S. Inglese, P.C. a professional corporation organized and existing pursuant to the laws of the State of South Carolina for the purposes of rendering professional legal services in the State of South Carolina. Defendant Mario S. Inglese and Mario S. Inglese, P.C. are hereinafter collectively referred to as "Inglese."

62. Defendant Stanley E. Alexander makes the following allegations and claims against Inglese in the alternative pursuant to Rule 8 of the South Carolina Rules of Civil Procedure.

63. On or about September 2006, Defendant Stanley E. Alexander contracted with Inglese to conduct a title search attendant to a real estate closing that occurred on or about September 14, 2006 involving real property located at 2640 Ranger Drive in North Charleston, South Carolina ("subject property").

64. Upon information and belief, Inglese, their employee, agent, or assign, performed a title examination on subject property for the benefit or reliance upon Defendant Stanley E. Alexander.

65. Inglese warranted and represented to Defendant Stanley E. Alexander that he properly and fully examined the title to subject property, including a review of all matter of public record, including but not limited to all tax records for past due taxes or taxes that may be due and owing or otherwise not subject to lien, tax sale, or execution.

66. Inglese warranted and represented to Defendant Stanley E. Alexander that the subject property was free of any encumbrances, liens, or deficiencies to title.

67. Defendant Stanley E. Alexander paid Inglese for these services.

FOR A FIRST CROSS CLAIM
(Breach of Contract)

68. The foregoing paragraphs are incorporated by reference as if fully repeated herein.

69. Defendant Stanley E. Alexander entered into a contract with Inglese, through words, actions, and conduct, for him to properly and fully examine the title to subject property and to advise if the subject property was free of any encumbrances, liens, or deficiencies to title.

70. Inglese breached this contract by failing to properly, thoroughly, and fully examine the title to subject property and by failing to advise or disclose that title of the subject property was subject to past due taxes or taxes that may be due and subject to lien, tax sale, or execution.

71. As a result of this breach, Defendant Stanley E. Alexander has suffered direct, incidental, and consequential damages because, upon information and belief, the subject property was transferred by virtue of a tax deed for past taxes due and owing for the year of 2004. Furthermore, Defendant Stanley E. Alexander is entitled to contribution and indemnification from Inglese for any damages suffered or judgment obtained by Amber Johnson.

FOR A SECOND CROSS CLAIM
(Negligent Misrepresentation)

72. The foregoing paragraphs are incorporated by reference as if fully repeated herein.

73. Inglese, through their words, actions, and conduct, represented they properly and fully examined the title and all matter of public record available on the subject property. Inglese further represented the subject property was free of any encumbrances, liens, or deficiencies to title.

74. Upon information and belief, the representations of Inglese were false.

75. Inglese had a pecuniary interest in making these statements and representations about the subject property.

76. Inglese owed Defendant Stanley E. Alexander a duty of care to ensure that information communicated to him was accurate, complete and truthful and Defendant Stanley E. Alexander had a right to rely on the representations of Inglese.

77. Inglese breached this duty through false representations.

78. The false representations by Inglese were the proximate cause of the damages sustained by Defendant Stanley E. Alexander and Plaintiff Amber Johnson. Defendant Stanley E. Alexander is entitled to judgment against Inglese for such amounts to be determined at trial which represents a sum equal to or greater than any judgment awarded to Plaintiff Amber Johnson.

FOR A THIRD CROSS CLAIM
(Breach of Fiduciary Duty)

79. The foregoing paragraphs are incorporated by reference as if fully repeated herein.

80. Defendant Stanley E. Alexander placed a special confidence and trust in Inglese to perform a thorough and proper title examination on subject property and to make representations that title was free of any encumbrances, liens, or deficiencies and Defendant Stanley E. Alexander, in equity, law and good conscience, was entitled to rely on Inglese's performance of these obligations.

81. Inglese owed Defendant Stanley E. Alexander a fiduciary duty.

82. Inglese breached their fiduciary duty owing to Defendant Stanley E. Alexander, and the intended beneficiaries of the real estate closing, by failing to perform a thorough and proper title examination on subject property as a reasonable person, attorney, or fiduciary would be expected to possess and exercise under the same or similar circumstances.

83. As a direct and proximate cause of Inglese's breach, Defendant Stanley E. Alexander has sustained actual, consequential, and special damages and is entitled to judgment against Inglese for such amounts to be determined at trial which represents a sum equal to or greater than any judgment awarded to Plaintiff Amber Johnson.

FIRST A FOURTH CROSS CLAIM
(Equitable Indemnification)

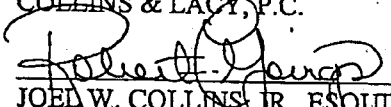
84. The foregoing paragraphs are incorporated by reference as if fully repeated herein.

85. Defendant Stanley E. Alexander and Inglese had a special relationship, incumbent with a fiduciary status and a duty of care which other reasonable and competent attorneys would be expected to possess and exercise under the same or similar circumstances, which imposes, as a matter of equity, an obligation on Inglese to indemnify Defendant Stanley E. Alexander for any sum he is required to pay to Plaintiff Amber Johnson in resolution of this matter, as well as for attorney's fees and other costs of litigation.

86. Because Inglese exposed Defendant Stanley E. Alexander to liability as a result of Inglese's acts or omissions which he did not join and were specifically subcontracted to Inglese to perform, Inglese is obligated to indemnify Defendant Stanley E. Alexander for any sum he is required to pay to Plaintiff in resolution of this matter or by way of judgment, as well as for attorney's fees and other costs of litigation.

WHEREFORE, having fully answered the Complaint of Plaintiff, Defendant Stanley E. Alexander prays for the following relief from this Honorable Court:

- a) Plaintiff takes nothing by this action;
- b) A judgment of dismissal be entered in favor of Defendant Stanley E. Alexander;
- c) A judgment be entered against Defendant Inglese on Defendant Stanley E. Alexander's crossclaims; and
- d) An award of the cost of the suit incurred, attorney's fees, and awarded such other and further relief as the Court deems proper.

Respectfully submitted,
COLLINS & LACY, P.C.
By: 
JOEL W. COLLINS, JR., ESQUIRE
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ROBERT F. GOINGS, ESQUIRE
rgoings@collinsandlacy.com
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(803) 256-2660
(803) 771-4484 (f)

ATTORNEYS FOR DEFENDANT
STANLEY E. ALEXANDER

Columbia, South Carolina

March 4, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Amber Johnson,

Plaintiff,

vs.

Stanley E. Alexander, Mario S. Inglese, and
Mario S. Inglese, PC,

Defendants,

Mario S. Inglese and Mario S. Inglese, PC,

Third-Party Plaintiff,

vs.

Charles Feeley,

Third-Party Defendant

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 09-CP-10-6529

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2010 DEC -2 PM 1:55

FILED

DEFENDANT STANLEY E.
ALEXANDER'S ANSWER TO
CROSSCLAIM OF AND THIRD PARTY
COMPLAINT OF DEFENDANTS MARIO
S. INGLESE AND MARIO S. INGLESE,
P.C.

(Jury Trial Demanded)

Defendant Stanley E. Alexander, by and through his undersigned counsel, answers the crossclaim asserted by Defendants Mario S. Inglese and Mario S. Inglese, P.C. in the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C. by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof and further responding as follows:

FOR A FIRST DEFENSE AND BY WAY OF ANSWER

1. Admit the allegations contained in paragraph 83 of the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C.

2. Deny the allegations contained in paragraph 84 of the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C.

3. Deny the allegations contained in paragraph 85 of the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C.

4. Deny the allegations contained in paragraph 86 of the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C.

5. Deny the allegations contained in paragraph 87 of the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C.

6. Deny the allegations contained in paragraph 88 of the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C. This Defendant will further show that any liability was proximately caused by Defendants Mario S. Inglese and Mario S. Inglese, P.C. and Third-Party Plaintiff.

FOR A SECOND DEFENSE

7. The Crossclaim fails to set forth facts to constitute a cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

8. The Crossclaim is barred by the applicable statute of limitations.

FOR A FOURTH DEFENSE

9. The Crossclaim is barred by the doctrine of laches.

FOR A FIFTH DEFENSE

10. The Crossclaim is barred by the doctrine of estoppel.

FOR A SIXTH DEFENSE

11. The Crossclaim is barred by the doctrine of waiver.

FOR A SEVENTH DEFENSE

12. The Crossclaim is barred or otherwise reduced due to a failure to mitigate damages required by law.

FOR AN EIGHTH DEFENSE

13. The Crossclaim is barred or otherwise reduced by the doctrine of set-off.

FOR A NINTH DEFENSE

14. Any losses or damages sustained by Defendants Mario S. Inglese and Mario S. Inglese, P.C. are due to and caused and occasioned by their own wrongful conduct or acts, negligence, gross negligence, recklessness, willfulness, and wantonness to which the direct and proximate cause of Plaintiff's alleged injuries or damages.

FOR A TENTH DEFENSE

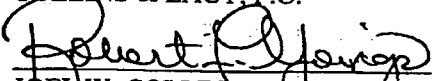
15. To the extent liability is entered against Defendant Stanley E. Alexander, any fault should be apportioned and attributed to Defendants Mario S. Inglese and Mario S. Inglese, P.C. and Third-Party Defendant.

WHEREFORE, having fully answered the Answer, Reply, Crossclaim of and Third Party Complaint of Defendants Mario S. Inglese and Mario S. Inglese, P.C., Defendant Stanley E. Alexander prays for the following relief from this Honorable Court:

- a) A judgment of dismissal be entered in favor of Defendant Stanley E. Alexander;
- b) A judgment be entered against Defendant Inglese on Defendant Stanley E. Alexander's Crossclaims; and
- c) An award of the cost of the suit incurred, attorney's fees, and awarded such other and further relief as the Court deems proper.

Respectfully submitted,
COLLINS & LACY, P.C.

By:


JOEL W. COLLINS, JR., ESQUIRE
jcollins@collinsandlacy.com
ROBERT F. GOINGS, ESQUIRE
rgoings@collinsandlacy.com
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(803) 771-4484 (f)

ATTORNEYS FOR DEFENDANT
STANLEY E. ALEXANDER

Columbia, South Carolina

December 1, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Amber Johnson,

Plaintiff,

vs.

Stanley E. Alexander, Mario S. Inglese, and
Mario S. Inglese, PC,

Defendants.

IN THE COURT OF COMMON PLEAS

9th JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 09-CP-10-6529

MOTION TO STAY

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2010 OCT -5 PM 3:48

FILED

Defendants Stanley E. Alexander, Mario S. Inglese, and Mario S. Inglese, PC, by and through their undersigned counsel, hereby jointly move for an order to stay the above-referenced matter until a final adjudication in a foreclosure action presently pending in this court captioned *The Bank of New York Mellon as Trustee for the Certificateholdings CWABS, Inc., Asset Backed Certificates, Series 2006-23 v. Westwood Properties, LLC, Amber Johnson, and Carla Anderson*, 2010-CP-10-4973 ("Foreclosure Action")¹ and a class action for damages for violations of the Fair Debt Collection Practices Act filed in the United States District Court of South Carolina captioned *Johnson v. Korn Law Firm PA & Callison Tighe & Robinson LLC*, 2:10-cv-01726-RMG ("Class Action").

"The court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 104, 674 S.E.2d 524, 530 (Ct. App. 2009). A continuance or stay is not a drastic remedy, but is preferred in order to obtain the benefit of the outcome of a companion case. Id. "The authority of the court to grant continuances and to determine the order in which

¹ A previous foreclosure action concerning this property was filed prior to the commencement of the present case captioned *The Bank of New York as Trustee for the Certificateholdings CWABS, Inc., Asset Backed Certificates, Series 2006-23 v. Amber Johnson, et. al.*, 2009-CP-10-4488. This matter was dismissed and then refiled.

cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)

The grounds to stay the above-referenced matter based on the interest of justice and judicial economy are as follows:

1. The above-captioned matter is a legal malpractice action. Plaintiff purchased real property described as 2640 Ranger Drive, North Charleston, South Carolina ("subject property") on or about September 14, 2006. Thereafter, Plaintiff learned the subject property was sold by the Delinquent Tax Collector of Charleston County as a result of the seller's failure to pay 2004 Charleston County real property taxes. Plaintiff alleges Defendants were involved in the real estate closing. Plaintiff alleges that Defendants breached their duty owed to her by failing to conduct a thorough and accurate title examination which should have discovered a delinquent tax notice and tax sale concerning the subject property.

2. The damages Plaintiff seeks to recover against these Defendants in this legal malpractice are wholly contingent on and directly related to the outcome of the Foreclosure Action. Ex. 1, Plaintiffs' Supplemental Discovery Responses. As relevant herein, Plaintiff is seeking a judgment as follows:

- (a) Total Principal and Interest of Note and Mortgage for 30 years: \$295,493.98
- (b) Cost of defending the foreclosure action, including attorneys' fees
(over \$350.00/hr. at \$400.00 per hour)
- (c) Loss of sale of property: \$110,000.00
- (d) Deprivation of Tax Sale proceeds of \$19,000.00 plus interest.

(e) Property with diminished value
(difference between property with a Quit Claim deed without a warranty
and a Fee Simple with General Warranty)

(f) Costs to Quit Title to eliminate Quit Claim deed status

3. Plaintiff's claim for damages alleged in this lawsuit is dependent on the resolution of the Foreclosure Action. Without a final order in the Foreclosure Action, damages sought in this legal malpractice case cannot be reasonably certain, are speculative in nature, and can only result in a double recovery for the Plaintiff. Should the subject property be properly foreclosed, Plaintiff will be unable to claim the alleged indebtedness on the Note and Mortgage to this property. After the foreclosure, any claim or right to recover for the diminished value of the property, the right to recover overage funds resulting from the foreclosure, and the costs to quit title will be determined. Finally, Plaintiff's claim to recover costs and attorneys' fees for defending the foreclosure action cannot accrue until the conclusion of that foreclosure action. The defenses to recovery of attorneys' fees cannot be determined until a resolution of the merits of the Foreclosure Action. In addition, Defendants would be entitled to a set-off for any recovery obtained by Plaintiff in the Foreclosure Action as asserted in their counterclaims.

4. Additionally, Plaintiff's Class Action seeks to recover damages and statutory-based attorneys' fees against the law firms of Korn Law Firm PA & Callison Tighe & Robinson LLC concerning subject property. However, in this legal malpractice action, Plaintiff is seeking to "double dip" and recover the very same damages and attorneys' fees against these Defendants. Ex. 1, Plaintiffs' Supplemental Discovery Responses. In any event, Defendants should be entitled to a set off for any damages she may recover in this Class Action.

WHEREFORE, for these reasons and any additional ground that may be presented to the Court, the above-referenced matter should be stayed pending a final order adjudicating the Foreclosure Action and the Class action filed by Plaintiff.

Respectfully submitted,
COLLINS & LACY, P.C.

By:


JOEL W. COLLINS, JR., ESQUIRE
ROBERT F. GOINGS, ESQUIRE
1330 Lady Street, Sixth Floor (29201)
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(803) 771-4484 (f)
Attorneys for Stanley E. Alexander

Columbia, South Carolina

October 4, 2010

SIMONS & DEAN

By:


DEREK F. DEAN, ESQUIRE
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843)-762-9132
(843)-406-9913 (f)
*Attorney for Defendants Mario S. Inglese
and Mario S. Inglese, P.C.*

Charleston, South Carolina

October 4, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Amber Johnson,

Plaintiff,

vs.

Stanley E. Alexander, Mario S. Inglese, and
Mario S. Inglese, PC,

Defendants.

IN THE COURT OF COMMON PLEAS

9th JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 09-CP-10-6529

MOTION FOR PROTECTIVE ORDER

2010 OCT 18 PM 2:03
JULIE J. BRONSTRONG
CLERK OF COURT

FILED

10-17680

Defendants Stanley E. Alexander, Mario S. Inglese, and Mario S. Inglese, PC, by and through their undersigned counsel, hereby jointly move for a protective order pursuant to Rule 26(c), SCRCF to protect the Defendants from further discovery in this matter until such time as their previously filed Motion to Stay has been heard by the Court. Defendants incorporate by reference as if fully set forth herein the grounds set forth in the Motion to Stay in support for this motion. In particular, Defendants seek protection of the following:

- (a) from appearing for the unilaterally scheduled videotape deposition of Defendants Stanley E. Alexander, Esq. and Mario S. Inglese Esq. on Wednesday, October 27, 2010. A copy of deposition notices are attached hereto as *Exhibit 1*.
- (b) from answering Plaintiff's Discovery Requests and Request to Admit dated October 6, 2010. As copy of these discovery requests are attached hereto as *Exhibit 2*: See Baughman v. Amer. Tel. And Tel. Co., 306, S.C. 101, 109, 410 S.E.2d 537, 542 (1991) (holding that a motion for protective order is an appropriate response of a party upon whom a request for admission is served and operates to prevent the matters from being deemed admitted).

(c) Any further discovery that may be served until the presently pending Motion to Stay is ruled upon.

WHEREFORE, for good cause and in the interest of justice, the Court should issue a protective order to prevent and/or stay discovery served by Plaintiffs.

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

JOEL W. COLLINS, JR., ESQUIRE
ROBERT F. GOINGS, ESQUIRE
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
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Attorneys for Stanley E. Alexander

Columbia, South Carolina

October 13, 2010

SIMONS & DEAN

By:  (with express permission for)

DEREK F. DEAN, ESQUIRE
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843)-762-9132
(843)-406-9913 (f)
*Attorney for Defendants Mario S. Inglese
and Mario S. Inglese, P.C.*

Charleston, South Carolina

October 13, 2010

EXHIBIT I

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AMBER JOHNSON,

PLAINTIFF,

V.

STANLEY E. ALEXANDER, MARIO
S. INGLESE AND MARIO S.
INGLESE, PC,

DEFENDANTS.

COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Case No. 09-CP-10-6529

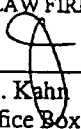
PLAINTIFF'S AMENDED NOTICE
OF VIDEOTAPED DEPOSITION
OF
STANLEY E. ALEXANDER

TO: ROBERT F. GOINGS, ESQ., ATTORNEY FOR DEFENDANT STANLEY E.
ALEXANDER:

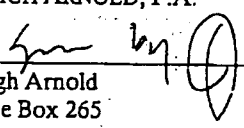
PLEASE TAKE NOTICE that pursuant to the South Carolina Rules of Civil Procedure, commencing on Wednesday, October 27, 2010 at 9:30 a.m., at the Kahn Law Firm, located at 562 Savannah Highway, Charleston, South Carolina, Plaintiff will take the videotaped deposition of Defendant Stanley E. Alexander, Esq. (Alexander), before a duly authorized notary public.

Defendant Alexander is to PRODUCE and bring with him the original file concerning Amber Johnson and the closing he performed and all documents he has reviewed in preparation for the deposition and/or which form a basis of his testimony and defense.

KAHN LAW FIRM


Justin S. Kahn
Post Office Box 31397
Charleston, South Carolina 29417-1397
Telephone (843) 577-2128
Facsimile (843) 577-3538
email to: jskahn@kahnlawfirm.com

MARY LEIGH ARNOLD, P.A.


Mary Leigh Arnold
Post Office Box 265
Mt. Pleasant, South Carolina 29465
Telephone (843) 971-6053
Facsimile (843) 971-6055
email: Sammie@maryarnoldlaw.com
ATTORNEYS FOR PLAINTIFF
AMBER JOHNSON

Charleston, South Carolina
October 6, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served upon opposing counsel by United States mail, with sufficient postage affixed thereto this 6th day of October, 2010.

Signed: 

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AMBER JOHNSON,

PLAINTIFF,

V.

STANLEY E. ALEXANDER, MARIO
S. INGLESE AND MARIO S.
INGLESE, PC,

DEFENDANTS.

COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Case No. 09-CP-10-6529

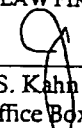
PLAINTIFF'S AMENDED NOTICE
OF VIDEOTAPED DEPOSITION
OF
MARIO S. INGLESE

TO: DEREK F. DEAN, ESQ., ATTORNEY FOR DEFENDANT STANLEY E.
ALEXANDER:

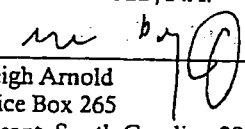
PLEASE TAKE NOTICE that pursuant to the South Carolina Rules of Civil Procedure, commencing on Wednesday, October 27, 2010 at 2:00 p.m., at the Kahn Law Firm, located at 562 Savannah Highway, Charleston, South Carolina, Plaintiff will take the videotaped deposition of Defendant Mario S. Inglese, Esq. (Inglese), before a duly authorized notary public.

Defendant Inglese is to PRODUCE and bring with him all documents he has reviewed in preparation for the deposition and/or which form a basis of his testimony and defense.

KAHN LAW FIRM


Justin S. Kahn
Post Office Box 31397
Charleston, South Carolina 29417-1397
Telephone (843) 577-2128
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email to: jskahn@kahnlawfirm.com

MARY LEIGH ARNOLD, P.A.


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Telephone (843) 971-6053
Facsimile (843) 971-6055
email: Sammie@maryarnoldlaw.com
ATTORNEYS FOR PLAINTIFF
AMBER JOHNSON

Charleston, South Carolina
October 6, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served upon opposing counsel by United States mail, with sufficient postage affixed thereto this 6th day of October, 2010.

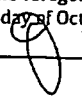
Signed: 

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AMBER JOHNSON,

PLAINTIFF,

V.

STANLEY E. ALEXANDER, MARIO
S. INGLESE AND MARIO S.
INGLESE, PC,

DEFENDANTS.

COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Case No. 09-CP-10-6529

PLAINTIFF'S DISCOVERY
REQUESTS AND REQUEST TO
ADMIT TO DEFENDANTS

TO: ROBERT F. GOINGS, ESQ., ATTORNEY FOR DEFENDANT STANLEY E. ALEXANDER AND DEREK F. DEAN, ESQ., ATTORNEY FOR DEFENDANTS MARIO S. INGLESE AND MARIO S. INGLESE, PC.

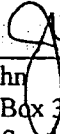
Pursuant to the SCRCPP, Plaintiff Amber Johnson, requests that Defendants respond to the following discovery request and requests to admit within the time allowed by the applicable rules of civil procedure:

1. Admit that the attached July 13, 2009 letter was signed by Stanley E. Alexander, Esq., the Defendant in this matter.
2. Admit that the statement contained in the attached July 13, 2009 letter, "the property has been out of Ms. Johnson's control, and still is" was true when written.
3. Admit that the statement contained in the attached July 13, 2009 letter "She was put into the situation she is in through no fault of her own" refers to Amber Johnson and is true.
4. Admit that the statement in the attached July 13, 2009 letter, "I was asked if I would buy the title work from the other law firm, and I did." is a false statement.

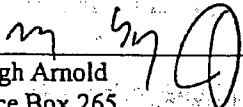
5. Admit that the statement in the attached July 13, 2009 letter "because of the situation Mrs. Johnson could not rent or resale the house." is a true statement.
6. Admit that the attached check number 5607 is an accurate copy of the front and back of the check issued by the Defendant Stanley Alexander to the Defendant Inglese Law Offices on September 14, 2006.
7. Admit that the attached check was payment Stanley Alexander, Esq. made to Inglese Law Offices for title work Mario S. Inglese, Esq. and/or Mario S. Inglese, PC was to have performed for property located at 2640 Ranger Drive.
8. Admit that Mario S. Inglese, P.C. deposited the check attached in its operating account on or about October 4, 2006.
9. Admit that Defendants performed no title work concerning the property located at 2640 Ranger Drive on or before September 14, 2006.
10. Admit that Defendant Stanley Alexander, Esq. did not inform Amber Johnson in writing of her right to choose a title insurer.
11. Admit that Defendant Stanley Alexander, Esq. did not inform Amber Johnson as to the availability and cost of an owner's type policy from a title insurer at or near the time of the closing at issue in this case.
12. Admit that the property located at 2640 Ranger Drive, North Charleston was sold by Charleston County at a tax sale prior to September 14, 2006 and this information was not disclosed to Amber Johnson by the Defendants on or before the closing that took place on September 14, 2006.

13. Admit that a tax deed was issued by Charleston County and recorded in the Charleston County RMC's office at Book 608 Page 628 in December of 2006 and that tax deed took title to the property out of the name of Amber Johnson.
14. Admit that neither Defendant has taken any action to assist Ms. Johnson in challenging the tax sale or recovering her title to the property located at 2640 Ranger Drive, North Charleston.
15. Produce a copy of the deposit and business records reflecting that Defendant Mario S. Inglese, PC deposited the attached check into the operating account.
16. Fully set forth the amount of the damages you believe Ms. Johnson has sustained as a result of losing title to the property located at 2640 Ranger Drive.
17. Should any of the requests to admit above not be unqualifiedly admitted, please produce all documents supporting the failure to admit said items and explain the basis of denying the same.
18. Produce a copy of all applications for and reapplications for legal malpractice coverage that the Defendants have made in the last 4 years.

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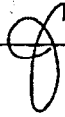
ATTORNEYS FOR PLAINTIFF

AMBER JOHNSON

Charleston, South Carolina
October 6, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served upon opposing counsel by United States mail, with sufficient postage affixed thereto this 6th day of October, 2010.

Signed: 

STANLEY E. ALEXANDER
Attorney at Law
1102 Ventura Place
Mount Pleasant, South Carolina 29464
E-mail address: S.ALEXANDER1@COMCAST.NET

PHONE/FAX: (843) 388-9497

MOBILE: (843) 813-7273

July 13, 2009

Florida State Bar Association

Re: Amber Johnson

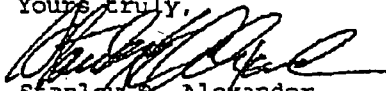
To Whom It May Concern:

I am acquainted with and have done work for Ms. Amber Johnson and I am very impressed with her and I think she would make a fine lawyer.

I have been asked to address the property issue that I understand is causing a problem for Ms. Johnson in regards to taking the bar exam. I was asked by a mortgage broker, who I have known for some time, if I would close a loan for some friends of hers. She apparently was friends of Ms. Johnson's parents. She informed me that another law firm was supposed to close the loan, but for some reason had to back out. I was asked if I would buy the title work from the other law firm, and I did. The loan closed on September 14, 2006; shortly thereafter we were told that the property had been sold at a tax sale the year before and had now been deeded to the new owner. Unfortunately because of the situation Ms. Johnson could not rent or resale the house. Likewise because of the litigation with the title insurance company the property has been out of Ms. Johnson's control, and still is. She was put into the situation she is in through no fault of her own.

If you need any further information from me, or if you have any questions, please do not hesitate to call.

Yours truly,



Stanley B. Alexander

STAN ALEXANDER ATTORNEY AT LAW - ESCROW ACCOUNT 3010 WATERWAY BLVD. ISLE OF PALMS, SC 29451		CAROLINA FIRST ISLE OF PALMS, SC 29451 67-219/539		5607
PAY TO THE ORDER OF Inglese Law Offices		8/14/2008 \$ 195.00		DOLLARS AUTHORIZED SIGNATURE
One Hundred Ninety-Five and 00/100				
Inglese Law Offices 445 Folly Road Charleston, S.C. 29412				
MEMO Title work - 2640 Ranger Drive		00000019500		

Date 10-04-2008 Serial 5607 Amount 195.00 Sequence 35869900 BankNum 1 TranCode 0 DbCr D;

[REDACTED]		[REDACTED]		PAY TO THE ORDER OF FIRST FEDERAL BANK 25271845 MARIO S. INGLESE, PO OPERATING ACCOUNT ACCT 070800289
[REDACTED]		[REDACTED]		
[REDACTED]		[REDACTED]		

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

AMBER JOHNSON,

Case No. 09-CP-10-6529

PLAINTIFF,

v.

PLAINTIFF'S NOTICE AND
MOTION FOR PARTIAL
SUMMARY JUDGMENT

STANLEY E. ALEXANDER,
MARIO S. INGLESE AND MARIO
S. INGLESE, PC,

DEFENDANTS.

TO: ROBERT F. GOINGS, ESQ., ATTORNEY FOR DEFENDANT
STANLEY E. ALEXANDER, ESQ.:

PLEASE TAKE NOTICE that at such time and place as may be set by the Court, no sooner than 10 days from the date hereof, Plaintiff Amber Johnson will move before the Court for an order granting partial summary judgment in her favor. The basis for this request is outlined below and also based upon the attached documents.

2011 JAN 14 PM 2:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY JSR

FILED

Summary Judgment is Proper Because Alexander Admits Duties and Breaches Thereof Resulting in Damage to Johnson.

Plaintiff Ms. Amber Johnson moves, pursuant to SCRC, Rule 56 for partial summary judgment as to liability, including causation as to Defendant Stanley Alexander, Esq. Summary judgment is proper because Mr. Alexander's own sworn testimony and admissions establish liability and causation. Summary judgment is proper when there is no genuine issue of material fact. As Mr. Alexander concedes and admits the duties he owed were breached and other facts relevant to the motion, partial summary judgment in favor of Ms. Johnson as to Mr. Alexander's liability and causation is proper.

Alexander Represented Ms. Johnson at a Real Estate Closing

It is not disputed that Mr. Alexander represented Ms. Amber Johnson in a real estate closing. Depo. Alexander, p. 9. (See Ex. A attached – Stanley Alexander's Deposition.) Ms. Johnson purchased property at that closing. Shortly after the closing, it was realized that the property had been previously sold at a tax sale the year before and had been deeded to a new owner. Depo. Alexander, p. 12, 9-13. (Ex. A.)

Alexander Failed to Ensure Johnson Got Property Free and Clear.

Mr. Alexander concedes he had a duty to make sure Ms. Johnson got the purchased property free and clear with good and marketable title. He failed to

ensure that Ms. Johnson got the property free and clear with good and marketable title. As a result, Ms. Johnson has damages flowing from Mr. Alexander's breaches.

Johnson Suffered As A Result Thereof

As a result of Alexander's negligence, Johnson failed to get the property, and had resulting damage. For example, Ms. Johnson could not rent or resale the house and property. Depo. Alexander, p. 14. (Ex. A.)

ARGUMENT

The following is admitted by Mr. Alexander's sworn testimony:

Duty of Alexander

1. Alexander had a duty or responsibility to make sure Ms. Johnson got the property free and clear with good and marketable title. Alexander Depo. p. 102, lines 13-16; p. 16, lines 16-20. (Ex. A.)
2. As a result of the closing conducted by Alexander, Ms. Johnson was supposed to get good and marketable title. Alexander Depo. p. 16, lines 4-6 and lines 16-24. (Ex. A.)

Breach/Failure by Alexander

3. There was a failure in the title and Ms. Johnson did not get a marketable title to the property. Alexander Depo. p. 16, lines 7-12. (Ex. A.)
4. As a result of the failure of title, Ms. Johnson could not sell the house or convey clear title. Alexander Depo. pp. 14-15. (Ex. A.)

Proximate Cause Resulting in Damage to Johnson

5. Ms. Johnson suffered direct, incidental and consequential damage as a result of the subject property being transferred by virtue of the tax deed. Depo Alexander, p. 98, lines 9-15. (Ex. A.)
6. Because of this situation, Ms. Johnson could not rent or resale the house. Depo. Alexander, p. 14, 14-17 (Ex. A.) and letter. (Ex. B.)
7. Mr. Alexander testified that because of the tax deed, Ms. Johnson could not sell, rent or dispose of the property. Depo. Alexander, pp. 19-20. (Ex. A.)

Reliance by Johnson on Alexander

8. Ms. Johnson relied upon Alexander telling her she was getting good and marketable title. Depo. Alexander, p. 99. (Ex. A.)

Foreseeable

9. It is foreseeable that a purchaser would end up in litigation concerning the property problems, need to hire a lawyer and incur costs associated with that litigation. Depo. Alexander, pp. 17-18. (Ex. A.)
10. Mr. Alexander testified that it was foreseeable that the purchaser would be "in some litigation or negotiation to get the problem resolved." Depo. Alexander, p. 18, lines 22-24. (Ex. A.)

No Fault of Johnson

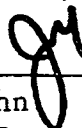
11. Ms. Johnson was put into the situation through no fault of her own and because of the litigation the property has been out of Ms. Johnson's control. Depo. Alexander, Ex. 2 thereto (Letter by Stanley E. Alexander Dated July 13, 2009 attached as Ex. B).

Additionally, Ms. Johnson's expert has not been refuted. Thus, liability and causation has been established.

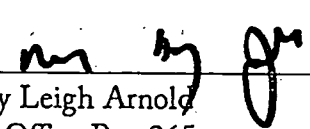
CONCLUSION

As the Defendant Alexander has admitted that he had certain duties that he breached and that resulted in damage, the Court should grant Ms. Johnson's motion for partial summary judgment as to liability. Following the grant of partial summary judgment, the court should set a hearing on damages.

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ATTORNEYS FOR PLAINTIFF
AMBER JOHNSON

Charleston, South Carolina
January 13, 2011

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing has been served upon all counsel by United States mail, with sufficient postage affixed thereto this 13th day of January 2011.

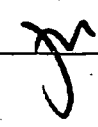
Signed: 

EXHIBIT A

1 STATE OF SOUTH CAROLINA)
2 : IN THE COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON) Case No. 2009-CP-10-6259
4 AMBER JOHNSON,)
5)
6 Plaintiff,) VIDEOTAPED DEPOSITION OF:
7 -vs-) STANLEY E. ALEXANDER, ESQ.
8)
9 STANLEY E. ALEXANDER,)
10 MARIO S. INGLESE AND)
11 MARIO S. INGLESE, PC,)
12)
13 Defendants.)
14 -----

COPY

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Given before Raymond E. Swartz, Notary
Public and Certified Court Reporter, in the Kahn Law
Firm, 562 Savannah Highway, Charleston, South Carolina on
Thursday, December the 16th, 2010, commencing at 10:25
o'clock, a. m.

RAYMOND E. SWARTZ, CSR
Professional Court Reporter
"A Timeless Standard of Excellence"

1 A Yes.

2 Q Alright, this is a letter you wrote?

3 A Yes.

4 Q And you recognize it as a accurate copy of a
5 letter you wrote?

6 A Yes.

7 Q In this letter you state that -- and this is a
8 letter you wrote to the Florida State Bar Association, or
9 for the Florida State Bar Association?

10 A Yes.

11 Q And it was concerning Amber Johnson, who is the
12 plaintiff in this matter?

13 A Yes.

14 Q And in the letter you state that you are
15 acquainted with and have done work for Mrs. Amber
16 Johnson? Is that right?

17 A Yes.

18 Q And the work you have done for Amber Johnson in
19 the past is as an attorney for her? Right?

20 A Yes.

21 Q And there is no dispute you were her attorney
22 in the closing that's at issue in this case? Right?

23 A Right.

24 Q And when you stated you had done work for Mrs.
25 Johnson in the past, was that before the closing that

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1 A Yes.

2 Q And you state that the loan was closed on
3 September 14th, 2006, which is the loan related to the
4 particular closing we are talking about? Right?

5 A Correct.

6 Q And that's the date of the closing that you
7 handled?

8 A Yes.

9 Q And you state in there "shortly thereafter we
10 were told that the property had been sold at a tax sale
11 the year before and had now been deeded to the new
12 owner." Do you see that?

13 A Yes.

14 Q When you say shortly thereafter you were told
15 that the property had been sold at a tax sale the year
16 before, at what point in time is that? When were you
17 informed that the property had been sold at a tax sale
18 the year before?

19 A I do not remember exactly.

20 Q And in terms of a frame of reference, it
21 appears that in October of 2006 Mrs. Johnson had a
22 contract to sell her property that she had purchased in
23 September. Were you aware of that? And I'll show you a
24 copy of it.

25 MR. GOINGS: Object to the form of the

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1 2006?

2 A I don't know.

3 Q Okay. How would you define the words shortly
4 thereafter, or what did that mean to you when you wrote
5 this letter? Sometime within a few weeks?

6 A Six months to a year.

7 Q Okay. So sometime under six months to a year
8 was what you mean by shortly thereafter?

9 A Correct.

10 Q If at some time during the deposition some
11 light bulb goes off or you remember what you meant by
12 shortly thereafter, would you stop and let us know?

13 A Yes.

14 Q Alright. And you said "unfortunately, because
15 of this situation Mrs. Johnson could not rent or resale
16 the house." Do you see that?

17 A Yes.

18 Q And that's why I was showing you this contract
19 to see if that refreshed your recollection that you had
20 some kind of awareness that she was unable to sell the
21 house or rent the house because of this. Does that ring
22 any bells?

23 A No. Just because of the situation, I mean, was
24 such she couldn't rent or sell the house.

25 Q And why was that?

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1 A Because there was a failure in the title.

2 Q And can you explain that to me, please?

3 A Well, if a third party had a deed to it, she
4 couldn't convey title at that time.

5 Q I'm sorry, say that again?

6 A If a third party had a deed to the property,
7 the people that bought it at the tax sale...

8 Q Okay.

9 A ...she could not convey a clear title?

10 Q Alright. Because the tax deed had been issued
11 to Westwood, Amber Johnson no longer had the ability to
12 deed or do anything with the property? Right?

13 A Well, that's actually really not true because
14 just like any liens, they could have paid them off and
15 got the title.

16 Q But at the time that Westwood had the deed to
17 the property Amber Johnson doesn't have any rights to the
18 property? Right?

19 A Well, I think she had as much rights as they
20 had to the property. She had a deed from the rightful
21 owner.

22 Q Okay.

23 A And the rightful owner gave her a deed saying
24 that there was no problem with the property.

25 Q Okay. So your understanding was that when Mrs.

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1 Johnson bought this property she was to get a fee simple
2 title from the seller?

3 A Certainly.

4 Q Right? And she was supposed to have good and
5 marketable title?

6 A Correct.

7 Q And she in fact did not get good and marketable
8 title? Correct?

9 A No.

10 Q I'm not correct, or no, she didn't get it?

11 A I'm saying she didn't get a marketable title to
12 it.

13 Q Alright. And you were hired, or you were her
14 attorney for this closing? Right?

15 A Correct.

16 Q And you had responsibility to make sure that
17 she got good and marketable title? Correct?

18 MR. GOINGS: Object to the form of the
19 question.

20 A Correct.

21 Q And that's one of the responsibilities of a
22 lawyer handling the closing, representing a purchaser?
23 Right?

24 A Correct.

25 Q And in 2006 a lawyer practicing good and

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1 prudently would, while representing a purchaser, would
2 make sure that the purchaser is getting good and
3 marketable title? Correct?

4 MR. GOINGS: Object to the form of the
5 question.

6 Q Is that correct?

7 A Well, that would be your job, sure.

8 Q The -- and if a purchaser doesn't get good and
9 marketable title to the property it can cause the
10 purchaser problems? Correct?

11 A Yes, it can.

12 Q And what are some of the kinds of problems it
13 can cause that purchaser?

14 A Well, I wouldn't -- well, it would depend, I
15 guess on the circumstances. I wouldn't begin to say
16 what.

17 Q Alright.

18 A You know, sometimes you can -- sometimes the
19 problems can be worked out.

20 Q Well, one of the problems that foreseeably
21 could be is that the purchaser could no longer sell or
22 rent the property? Right?

23 A Right.

24 Q And another foreseeable problem is that the
25 purchaser would end up in litigation concerning that?

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1 Right?

2 A Right.

3 Q And another foreseeable problem would be that
4 the purchaser would end up needing to hire a lawyer to
5 deal with that litigation? Right?

6 MR. GOINGS: Object to the form of the
7 question.

8 A Yes.

9 Q And another foreseeable problem that could
10 result from that is that the purchaser would have to
11 incur costs associated with that litigation?

12 MR. GOINGS: Objection.

13 A Yeah.

14 Q Another foreseeable problem is that the
15 purchaser's credit could be affected?

16 MR. GOINGS: The same objection.

17 A Well, I wouldn't necessarily say that's a
18 problem.

19 Q Okay. Well, what are the other kinds of
20 problems that are foreseeable as a result of a closing
21 lawyer not giving a purchaser good and marketable title?

22 A Well, the only ones I foresee could be involved
23 in some litigation or negotiation to get the problem
24 resolved.

25 Q Okay. Now, you state in your letter that

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1 "Likewise, because of the litigation with the title
2 insurance company the property has been out of Ms.
3 Johnson's control, and still is." Now, can you explain
4 what you meant by that, please?

5 A Well, when I say that, she could not -- well,
6 she could not completely -- she could not sell it to
7 convey title. She could have sold her interest in it but
8 she could not sell the property to a third party, is what
9 I meant.

10 Q Okay.

11 A And she couldn't rent it to a third party.

12 Q She what?

13 A She could not rent it to a third party.

14 Q Okay. She basically couldn't dispose of the
15 property or really make full use of it? Right?

16 A Right.

17 Q In terms of -- and you also put in here that
18 she was put into the situation she is in through no fault
19 of her own. Do you see that?

20 A I do.

21 Q Do you believe that's a true statement?

22 A Well, not completely now. I did not know some
23 of the facts at that time. I mean, I presume she was
24 paying them off and doing anything she could do -- what I
25 was saying was the tax deed was not her problem.

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1 Q Okay. Or not her fault?

2 A Right. Yeah, not her problem.

3 Q It was her problem?

4 A Yeah.

5 Q And how was this tax deed her problem?

6 A Well, she would still have the property. It
7 was a problem to be resolved.

8 Q The issuance of the tax deed made it such that
9 Mrs. Johnson was no longer able to sell the property?

10 Right?

11 A Correct.

12 Q And the issuance of the tax deed was such that
13 Mrs. Johnson was no longer able to rent the property?

14 A Correct.

15 Q The issuance of the tax deed put Mrs. Johnson
16 in a position where she was going to end up in litigation
17 over all of this?

18 A Well, not necessarily. The lender's title
19 insurance would have straightened it out, which it did,
20 and tried to put the title back in her hands, as I
21 understand it.

22 Q Alright. Well, have you reviewed all of the
23 documents associated with the title insurer's attempt to
24 quitclaim the property back to Mrs. Johnson?

25 A No, I have not.

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1 A Yes.

2 Q And paragraph 47 states as a result of this
3 breach, Alexander has suffered direct, incidental, and
4 consequential damages because, upon information and
5 belief, the subject property was transferred by virtue of
6 a tax deed for past taxes due and owing for the year of
7 2004. Is that a true statement?

8 A Yes.

9 Q And is it fair to say that if you have suffered
10 direct, incidental, and consequential damages because of
11 that, then Mrs. Johnson has suffered direct, incidental,
12 and consequential damages because of that?

13 MR. GOINGS: Object to the form of the
14 question.

15 Q Is that fair?

16 A Yeah.

17 Q Okay. On paragraph 52, on the next page? Do
18 you see that? Paragraph 52, you state Inglese owed
19 Alexander a duty of care to ensure that information
20 communicated to him was accurate, complete and truthful
21 and Alexander had a right to rely on the representations
22 of Inglese? Is that a true statement?

23 A Yes.

24 Q And is it a true statement that Mrs. Johnson
25 had a right to rely on the information you represented to

1 her at the time of closing?

2 A Yes.

3 Q including that -- and one of those
4 representations was that the title she was receiving to
5 the property was good and marketable title? Right?

6 MR. GOINGS: Object to the form of the
7 question.

8 A According to the information I had at the time,
9 yes.

10 Q Alright. And that's what you would have told
11 Mrs. Johnson? Right?

12 A Yes.

13 Q That what she was getting at the time of
14 closing was good and marketable title? Right?

15 A Yes.

16 Q I'm sorry?

17 A Yes.

18 Q And you agree that you had a duty of care to
19 ensure that the information communicated to Mrs. Johnson
20 was accurate, complete and truthful as concerning the
21 title to her property? Right?

22 A I had a duty to give her what I had as the best
23 of my knowledge at the time, yes.

24 Q Or what was capable of being within your
25 knowledge? Right?

1 Q Okay. And that was not true, was it?

2 A Well, apparently not.

3 Q Okay. The -- as part of -- you have already
4 told us that you agree that you were the attorney for
5 Mrs. Johnson and she was your client? Right?

6 A Right.

7 Q Can you tell me what responsibilities you had
8 to Mrs. Johnson at the time of this attorney/client
9 relationship?

10 A To close her loan transaction for her to the
11 best of my abilities and based on the information I had
12 at the time.

13 Q And you had a duty or responsibility to make
14 sure that she got the property free and clear with good
15 and marketable title? Right?

16 A Right.

17 Q And you -- let's go through this. We were
18 talking about Plaintiff's Exhibit Number 9. You agree
19 that as part of the relationship you had with Mrs.
20 Johnson it was a fiduciary relationship? Right?

21 A Yes.

22 Q And that's one of trust and confidence? Yes?

23 A Yes.

24 Q And a fiduciary relationship means that you
25 have to put the interests of your client above your own

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(843) 277-0899 - r_dswartz@homesc.com

EXHIBIT B

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July 13, 2009

Florida State Bar Association

Re: Amber Johnson

To Whom It May Concern:

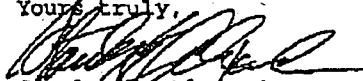
I am acquainted with and have done work for Ms. Amber Johnson and I am very impressed with her and I think she would make a fine lawyer.

I have been asked to address the property issue that I understand is causing a problem for Ms. Johnson in regards to taking the bar exam. I was asked by a mortgage broker, who I have known for some time, if I would close a loan for some friends of hers. She apparently was friends of Ms. Johnson's parents. She informed me that another law firm was supposed to close the loan, but for some reason had to back out. I was asked if I would buy the title work from the other law firm, and I did. The loan closed on September 14, 2006; shortly thereafter we were told that the property had been sold at a tax sale the year before and had now been deeded to the new owner. Unfortunately because of the situation Ms. Johnson could not rent or resale the house. Likewise because of the litigation with the title insurance company the property has been out of Ms. Johnson's control, and still is. She was put into the situation she is in through no fault of her own.



If you need any further information from me, or if you have any questions, please do not hesitate to call.

Yours truly,



Stanley E. Alexander

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Amber Johnson,

Plaintiff,

vs.

Stanley E. Alexander, Mario S. Inglese, and
Mario S. Inglese, PC,

Defendants,

Mario S. Inglese and Mario S. Inglese, PC,

Third-Party Plaintiff,

vs.

Charles Feeley,

Third-Party Defendant

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 09-CP-10-6529

DEFENDANT ALEXANDER
MEMORANDUM IN OPPOSITION
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

FILED
JUL 25 PM 3:12
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Stanley E. Alexander ("Alexander") submits this memorandum of law in opposition to Plaintiff's Motion for Partial Summary Judgment. Plaintiff moves for summary judgment as to liability.

FACTS

This is a legal malpractice action arising from a real estate closing that occurred in September 2006. Plaintiff Amber Johnson ("Johnson") purchased a single family house located at 2640 Ranger Drive in North Charleston, South Carolina for \$75,000.00. Johnson applied for and obtained 100% financing through a lender.¹ Defendant Mario S. Inglese ("Inglese") was

¹ As discussed below, Johnson submitted a false and fraudulent mortgage application for purposes of obtaining financing to purchase this property. Among other misrepresentations, the application falsely claimed she would be an owner-occupant of the property.

originally scheduled to close the transaction, but due to a conflict, Alexander was requested to serve as the closing attorney. Alexander understood a title search was performed through Inglese. Inglese had hired Attorney Charles Feeley ("Feeley"), who specializes in conducting title examinations in Charleston, South Carolina, to perform the title work. The title report delivered to Alexander showed no encumbrances or liens on the property. The examination report also reflected that all real estate taxes were current and up to date. Documentation from the Charleston County Online Tax System in August 2006 showed that all taxes were current, paid, and with no *nulla bona* amount outstanding. (Exhibit 1, Alexander Affidavit, ex. 2). The escrow ledger from the seller's mortgage company also showed the taxes were paid each year to the Charleston County Tax Assessor's Office. (Exhibit 1, ex. 4, Escrow Ledger).

Approximately four (4) months after the closing, on December 12, 2006, a tax deed was recorded conveying the property to Westwood Properties, LLC following a tax sale by the Delinquent Tax Collector for Charleston County. The sale was purportedly the result of nonpayment of 2004 Charleston County real property taxes. (Exhibit 2, Tax Deed). At the time of the title examination and closing, the prior tax sale would not have been revealed in the chain of title for this property or made publically available in the Charleston County Register Mesne Conveyance (RMC) Office. (Exhibit 3, Feeley Affidavit, ¶ 5). No notice of tax sale or *lis pendens* was filed as a matter of public record that would have given notice of this pending, unrecorded tax sale.

As to the standard of care employed in examining this title, Feeley testified he always performs title examinations with the very same strict routines of practice and habits. (Feeley Aff. ¶ 2). He followed these routine practices when conducting the title examination at issue. (Feeley, ¶ 2). As part of his routine practice, Feeley reviews the Charleston County Online Tax

System website. He performs a "Tax Records Search" query by "Parcel ID (TMS)". The first screen that appears is a 10-year history of the property's tax payments. On each line is a notation that the taxes were either current or delinquent. When he reviews the 10-year tax history screen, evidence of delinquent taxes or a tax sale is shown. If a notation is made, his customary practice is to conduct further inquiry. He would clearly note on the title abstract any evidence of delinquent taxes or a tax sale. Feeley testified he acted in conformity with his routine practice and custom when performing this title examination. Based on his review of the 10-year history of the property's tax records, no back taxes or tax sale was noted on the Charleston County Online Tax System. (Feeley, ¶ 2-3).

Further, Feeley testified title examiners practicing in Charleston County routinely rely upon information contained online from the Charleston County public records website. Physical documentation kept at the Charleston County Tax Collector's office is not readily assessable and is only available pursuant to a Freedom of Information Act request. Submitting a Freedom of Information Act request is generally outside the ordinary practice and standard of care of title examiners in Charleston County. *Id.* at ¶ 4.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to judgment as a matter of law." Bank of N.Y. v. Sumter County, 387 S.C. 147, 154-55, 691 S.E.2d 473, 477 (2010). "[I]n cases applying the preponderance of 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 Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In determining whether any triable issue of fact exists, the evidence and all factual inferences drawn from it must be

viewed in a light most favorable to the nonmoving party.” Donahue v. Multimedia, Inc., 362 S.C. 331, 337, 608 S.E.2d 162, 165 (Ct. App. 2005). To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture. McKnight v. S.C. Dep’t of Corrs., 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009). A grant of a motion for summary judgment based on liability is immediately appealable. Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972).

LAW/ANALYSIS

I. Legal Malpractice Standard

In order to prevail in a cause of action for legal malpractice, the plaintiff must prove: (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. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). “In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession,” Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000), and “[t]he standard to be applied in determining legal malpractice issues is statewide,” Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 437–38, 472 S.E.2d 612, 614 (1996). Finally, a plaintiff in a legal malpractice action must establish this standard of care by expert testimony. Id. at 435, 472 S.E.2d at 613.

Legal malpractice or professional negligence is the failure to do what an ordinarily reasonable lawyer would have done under the same or similar circumstances or the doing of something that an ordinary lawyer would not have done under the same or similar circumstances. Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985). Similarly, the defendant’s mistake or error in making a decision alone does not constitute negligence. Hook v. Rothstein, 281 S.C.

541, 316 S.E.2d 690 (Ct. App. 1984), cert. denied, 283 S.C. 64, 320 S.E.2d 35 (1984). The law does not require absolute accuracy either in practice or decision making or hold an attorney to the standard of perfection. Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993). A decision as to negligence must relate to the facts as they existed at the time, and not in light of what hindsight may reveal.

The Supreme Court of South Carolina has addressed the standard of care of a closing attorney related to the marketability of title to real property in Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993). The Supreme Court held the fact that an attorney was incorrect as to the ultimate marketability of title did *not* establish negligence. Id. at 404, 434 S.E.2d 274. In so holding, the Court relied on legal precedent reasoning that "liability arise[s] where the attorney *negligently* certifies title" and reminded that "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." Id.

II. The Failure to Plaintiff to obtain Marketable Title is not Legal Malpractice

Plaintiff's Motion for Partial Summary Judgment is premised upon a rejected legal theory. Plaintiff contends that since she did not receive the "property free and clear with good and marketable title" then Alexander is negligent. (Pls. MSJ, p. 2-3). This theory of liability is flawed. Plaintiff is attempting to confuse professional malpractice with a "strict liability" standard. Negligence cannot be proven based on the doctrine of *res ipsa loquitur*.² Eickhoff v. Beard-Laney, 199 S.C. 500, 20 S.E.2d 153 (1942); Crider v. Infinger Transportation Co., 248 S.C. 10, 16, 148 S.E.2d 732 (1966). Legal malpractice cannot be based on a failure to obtain a

² "*Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence." Watson v. Ford, 389 S.C. 434, 699 S.E.2d 169 (2010). This theory of liability is rejected in South Carolina.

specific result. Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000). Rather, the Plaintiff is required to show negligence with reasonable certainty, not through mere conjecture, and based on expert testimony. As stated above, Bass requires actual proof that an attorney performed a title examination and closing in a *negligent* matter. Plaintiff does not set forth any undisputed facts that Alexander was actually negligent in performing his duties as a closing attorney. Thus, summary judgment cannot be granted based on the grounds set forth in Plaintiff's Motion.

III. A Question of Fact Exists Whether Alexander Breached The Standard of Care

Viewing the evidence and all factual inferences in a light most favorable to Alexander, a material issue of fact exists as to whether Alexander's conduct fell below an accepted standard of care. Plaintiff boldly argues that Alexander "concedes and admits" that he is liable. Pl's MSJ p. 2. This is not accurate. Alexander's sworn testimony in his deposition does not concede liability.

Alexander testified that "after this came to light we looked back and it appears the county had made no notes anywhere that it had been sold at a tax sale. Plus, they were accepting current taxes and they don't do that when back taxes are due. So something was not right." (Exhibit 4, Alexander Depo. p. 86-87). He testified that the county "didn't make a note of it [and when] we go back and look at the back taxes and it says paid, period." (Id.) He testified the tax documentation "said paid...it didn't say sold, it said paid...all the tax records said paid." (Id. at 100-101). Alexander further testified his duty as a closing attorney was based on the information he reasonably had to rely upon. (Id. at 98-99). Alexander also stated he handled this closing within the generally accepted standard of care employed by attorneys performing real estate closings in Charleston County. Alexander believes he acted with the degree of knowledge, care,

and skill ordinarily possessed by other attorneys under the same or similar circumstances based on information readily known to him. (Alexander Aff. ¶ 13). Further, the title examination was conducted by an attorney who regularly conducts title examinations in Charleston County. Alexander had a right to rely upon this title examination. The title examination, and information obtained from the Charleston County Online Tax System, did not reveal any delinquent taxes or a prior tax sale.

Further, the existence of the tax sale would not have been disclosed in the chain of title for this property or made publically available in the RMC Office at the time of the title examination or closing because it was not recorded until December 12, 2006. There was no *lis pendens* or any other documentation recorded at the RMC or Clerk of Court's Office that would have placed Alexander, or any other person, on notice of this unrecorded tax sale.

Based on the title examination, the most recent tax notice posted prior to the closing showed that ownership was properly in the name of the seller (Carla Anderson), with the tax status listed as "Current (Paid)" with a "Nulla Bona Amount" of "0.00" and a "CURR Due" amount of "0.00". (Alexander Aff., ¶¶ 7-9). Documentation from the seller's mortgagee also revealed that both the 2004 and 2005 taxes were paid. (*Id.* at ¶ 10). The seller never disclosed to Alexander at any time prior to or during the closing that the property was subject to delinquent taxes and/or a tax sale. (*Id.* at ¶ 5).

The title examiner, Feeley, testified he followed his strict routine practice in examining the property title examination in question. This included reviewing the Charleston County Online Tax System website and performing a "Tax Records Search" query that revealed a 10-year history of the property's tax payments. Feeley testified he acted in conformity with his routine practice and custom when performing this title examination. Based on his review of the

10-year history of the property's tax records, neither back taxes nor the existence of a tax sale were noted on the Charleston County Online Tax System. (Feeley, ¶ 2-3). Feeley's testimony further establishes a genuine issue of material fact.

In addition, Alexander acted solely as the closing attorney. (Alexander Depo. p. 85). Plaintiff knew that Inglese had obtained the title examination and Plaintiff would not be paying for Alexander to perform another title examination. (Alexander Depo. p. 86-88; 120-121; 132-134). Thus, because of Alexander's limited role and the fact that Plaintiff knew the title examination was performed by a previous attorney, a genuine issue of fact exists.

IV. Plaintiff's Expert Testimony Is Insufficient to Establish Liability As a Matter of Law

Typically, a plaintiff in a legal malpractice case must establish the standard of care through admissible expert testimony. Sims v. Hall, 357 S.C. 288, 295-96, 592 S.E.2d 315, 319 (Ct. App. 2003). Plaintiff has not met this requirement.

Plaintiff has retained Attorney John Brown ("Brown") as a liability expert. His testimony fails to establish the standard of care or that a breach of that standard occurred in this case. His opinions are wholly insufficient to establish liability as a result of the alleged failure to conduct a proper title examination. For the following reasons his opinions should be excluded and summary judgment should be denied.

(a) Plaintiff's Expert Admits that If He Was the Closing Attorney that He Would Not have Discovered the Unrecorded Tax Deed

Brown admits that if he was the closing attorney or title examiner then he would not have discovered the encumbrance on the property. He testified as follows:

110

16 Q Mr. Brown, if you were closing this loan, and you had
17 also performed the title examination, how would you
18 have uncovered this issue?

19 A Well, I don't know that I would have.
20 Q So you could have been in the same position as Mr.
21 Alexander?
22 A Absolutely.
23 Q Okay.

111

14 Q So based on the scenario as it happened, as it relates
15 to 2640 Ranger Drive, you could, if you were the
16 closing attorney, be sitting in the same seat as Mr.
17 Alexander today, correct?
18 A I believe I could be.

(Exhibit 5, Jay Brown Depo. p. 110-111).

If Plaintiff's own expert testified that he would not have discovered the unrecorded tax sale, then certainly an issue of fact remains as to whether Alexander was negligent. The standard for liability is what a reasonable attorney would have done under the same or similar circumstances. This admission creates more than a genuine issue of material fact for a finder of fact to weigh the evidence as to whether Alexander's conduct fell below an acceptable standard of care. Simply put, Alexander cannot be found negligent if this title irregularity would have been unavoidable even to Plaintiff's own expert. Brown further admitted that marketable title cannot be guaranteed even with a proper title examination. (*Id.* p. 55-56). He also conceded that public records are not always accurate. (*Id.* p. 56). Thus, liability cannot be established as a matter of law.

**(b) Plaintiff's Expert Cannot Identify Any Negligent Act or Omission,
but Instead Testifies Liability Exists Based on Strict Liability
and/or *Res Ipsa Loquitur***

Plaintiff's expert does not identify a specific negligent act on the part of Alexander or the title examiner. Brown's opinion is based on his belief that a real estate closing attorney has the "absolute duty to ensure that clear and marketable title is conveyed to a purchaser." (Brown Depo. p. 69 -71). Based on his opinion, the mere failure to convey clear and marketable title is

per se legal malpractice. Proof of liability cannot be based on *res ipsa loquitur* and Brown's opinions are contrary to existing South Carolina law. See Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993). His erroneous legal conclusion based on nothing more than his personal opinions should be excluded. See Nelson v. Piggy Wiggly Central, Inc., No. 4754 (Ct. App. Oct. 20, 2010) (excluding expert testimony at summary judgment that was based on own preferences rather than to the requirements of any law, ordinance, or recognized standard); In re Bausch & Lomb, Inc. Contact Lens Solution Products Liability Litigation, 2009 WL 2750462, *9 (D.S.C., Aug. 26, 2009) (Norton, C.J) ("An expert's subjective, personal beliefs or speculation fail to satisfy the requirement of reliability.").

(c) Plaintiff's Expert lacks the Qualifications to Testify as to the Standards and Procedures of Examining Title to Real Property

The testimony of Plaintiff's expert witness fails to comport with the standards set forth in Watson v. Ford Motor Co., 699 S.E.2d 169, 175 (2010) and Rules 401, 403, and 702 of the South Carolina Rules of Evidence. As stated in Watson, in executing its gatekeeping duties, the trial court must make three key preliminary findings before expert testimony may be considered.

First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Id. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Id. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. Thus, expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Id. Expert opinions cannot be based on *ipse dixit* [a bare assertion resting on the authority of an individual] of the expert.

In this case, Brown's testimony should be entirely excluded because he fails to satisfy Rule 702, both in terms of expert qualifications and reliability as to how to properly conduct a title examination. Brown has no particular knowledge, skill, experience, training or education in conducting title examinations. Brown began conducting real estate closings in late 2003. (Brown Depo. p. 33). Unlike Alexander or Feeley, Attorney Brown does not perform title examinations. (Id. p. 43). In fact, Brown has never performed a full title examination. (Id. at 48). He concedes that he is "[un]qualified" to perform title examinations. Id. If Brown is unqualified to perform title examinations, he is equally unqualified to testify whether this examination was properly conducted. Thus, Brown lacks the qualifications to testify as to whether title examination performed for the subject closing fell below the standard of care.

Furthermore, his opinions lack any indicia of reliability. As discussed above, Brown attempts to create a "strict liability" standard for a real estate closing attorney which departs from South Carolina law. Brown conducted no independent investigation into how the title examination was conducted. He had no knowledge as to what types of information would be reasonably available to a title examiner to give sufficient notice of this encumbrance. Based on the facts here, Brown could not identify any particular measure that a reasonable attorney in a similar position could have undertaken to discover the unrecorded tax sale deed. Any opinion as to the existence of documentation that would put a reasonable attorney on notice is admittedly based on "speculation." (Brown Depo. p. 108-110). He is unfamiliar with the Charleston County Online Tax system and how public records are kept. (p. Id.). Significantly, he is unsure where any records would be kept--- the Auditor's Office or the Assessor's Office. (p. 110). Without sufficient proof of reliability, Brown's expert testimony should not be considered.

Accordingly, Plaintiff's expert should be excluded because his opinions fail to satisfy the requisite standard of proof for admissibility of expert testimony.

V. A Question of Fact Exists as to the Element of Causation based on Plaintiff's Fraudulent Conduct

In order to prove liability, plaintiff must show the defendant's negligence proximately caused the plaintiff's damages. As a threshold matter, Plaintiff would not have been allowed to purchase this property but for her own fraudulent conduct. Her own fraudulent conduct was the cause of any alleged damages. South Carolina law provides, "no person [should] be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act." Jackson v. Bi-Lo Stores, Inc., 437 S.E.2d 168, 170 (S.C. App. 1993) (citing 86 C.J.S. Torts § 12 (1954)).

Plaintiff could not have obtained financing to purchase this property without submitting a Residential Loan Application rife with admitted false statements and material misrepresentations. (Exhibit 6, Uniform Loan Application). First, Plaintiff certified that 2640 Ranger Drive was purchased to be her primary residence. This was patently false. The application states that she was moving into this home from her parent's home where she had lived for 7 years. This was also false. The loan application failed to disclose that she had, in fact, moved to Florida to attend law school. Third, in order to show gainful employment, the application stated Plaintiff was employed by a company named "Invisible Men Entertainment," listing a gross monthly income of \$3,500. This was false. Fourth, in Plaintiff's asset listing statement, she falsely included a life insurance policy in the face amount of \$100,000, two automobiles (2000 Dodge and 2003 Nissan), and personal property valued at \$65,000 in her asset listing. Her asset listing was completely baseless. Based on the language of the note and mortgage, this fraudulent conduct voided the real estate transaction. (Exhibit 7, Note and

Mortgage). Thus, Plaintiff cannot show the conduct of Alexander proximately caused her alleged damages based on her own fraudulent conduct.

VI. Plaintiff Cannot Show Any Damages as a Matter of Law

Finally, the Plaintiff must prove Alexander's alleged negligence proximately caused her damages. The damages set forth in Plaintiff's Motion relate to a being a party to a subsequent foreclosure action and the inability to rent or sell the subject property.

The existence of these damages is not supported by the evidence. Plaintiff's own failure to make payments was the proximate cause of the foreclosure action. (Exhibit 8, Letter from Korn Law Firm). Johnson admits that her failure to make mortgage payments resulted in the foreclosure action. (Johnson Depo. p. 98-99). The fact the property lacked marketable title cannot be the proximate cause of the foreclosure action as a matter of law. This exact issue has already been addressed by the South Carolina Supreme Court in Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 862 (1997). In Wilson, the Court held, "even if there were a cloud [based on tax deed], it was not the proximate cause of the foreclosure. The proximate cause of appellant's loss was her failure to make payments according to the note, which obligations were separate and independent of any alleged problem with the title." Id. at 147, 488 S.E.2d at 864.

Here, Plaintiff discontinued paying her note and mortgage on the subject property on April 2007. (Exhibit 9, Johnson Depo. p. 161-163). She admits that her failure to make her monthly payment resulted in a breach of the note and mortgage. (Id. at 98-99). She further conceded that if the mortgage payments had been made, then the foreclosure action would not have been commenced. (Id. at 177). The law, as illustrated in Wilson, obligates one to continue paying the note, irrespective of title concerns. During the time Plaintiff ceased making mortgage payments, she rented the property for \$700.00 per month from October 2006

until March 2009, thus profiting over \$20,000 in income. (Johnson Depo. p. 160; Exhibit 10, Melzetta Brown Depo. P. 35, 50-52 and 58). Johnson concedes that if she would have properly used the rental payments each month to pay the mortgage, then no foreclosure action would have been filed. (Johnson Depo. at p. 176). Not only did Johnson receive a windfall profit of over \$20,000 in rental income, but she received half of the overage resulting from the tax sale, approximately \$9000. Thus, Plaintiff fails to show proof of damages in order to establish liability.

VII. Alexander Objects to Plaintiff Submitting to the Court Documentation from the Charleston County Online Tax System printed after the date of the Closing

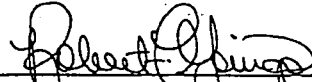
At the initial hearing on this Motion on Monday, May 9, 2011, Plaintiff attempted to submit to the Court a document printed from the Charleston County Online Tax System concerning the subject property dated May 9, 2011 at 8:53 am. Alexander objects to this document on the grounds that it does not accurately reflect the status of the tax records on or about the time of the title examination and the closing in 2006. This document was printed in 2011 and there is no evidence regarding what information could have been accessible through the Charleston County Online Tax System on or about the time of the closing. A decision as to negligence must relate to the facts as they existed at the time, and not in light of what hindsight may reveal. Since this document is not accompanied by any competent testimony and the actual screen shot from 2006, it should be deemed inadmissible as unauthenticated, irrelevant, unduly prejudicial pursuant to Rule 403, SCRE.

CONCLUSION

For these reasons, liability cannot be established as a matter of law Plaintiff's Motion for Partial Summary Judgment should be denied.

Respectfully submitted,
COLLINS & LACY, P.C.

By:



JOEL W. COLLINS, JR., ESQUIRE
ROBERT F. GOINGS, ESQUIRE
1330 Lady Street, Sixth Floor (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
(803) 771-4484 (f)

ATTORNEYS FOR STANLEY E.
ALEXANDER

Columbia, South Carolina
May 24, 2011

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
9th JUDICIAL CIRCUIT

Amber Johnson,

CIVIL ACTION NUMBER: 09-CP-10-6529

Plaintiff,

vs.

Stanley E. Alexander, Mario S. Inglese, and
Mario S. Inglese, PC,

Defendants.

vs.

Mario S. Inglese and Mario S. Inglese, PC,

Third-Party Plaintiff,

vs.

Charles Feeley,

Third-Party Defendant.

FILED
2011 MAY -5 PM 12:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

AFFIDAVIT OF STANLEY E.
ALEXANDER

PERSONALLY APPEARED BEFORE ME, STANLEY E. ALEXANDER, who
upon being duly sworn deposes and states as follows:

1. I am a citizen and resident of Charleston County, South Carolina. I am
over the age of eighteen and competent to testify to matters contained herein. I am a
licensed attorney in the State of South Carolina and one of the Defendants in this matter.
The statements contained herein are true and accurate based on my personal knowledge
and information which I believe to be true. This affidavit is made in opposition to
Plaintiff's Motion for Summary Judgment.

2. I was the closing attorney for a real estate transaction between Carla Anderson (seller) and Amber Johnson (purchaser) for the purchase of 2640 Ranger Drive in North Charleston, South Carolina on September 14, 2006.

3. The title examination for this transaction was conducted by Attorney Charles Feeley at the request of the first attorney that was retained to originally close this transaction, Mario S. Inglese.

5. Prior to or at the time of the closing, Ms. Anderson never disclosed that property taxes were delinquent or that a tax sale had occurred on the property.

6. Prior to or at the time of the closing, evidence of a prior tax sale or information that would place a person on inquiry notice of delinquent taxes was not filed with the Charleston County Register of Deeds Office.

7. The title examination revealed that no property tax lien existed and that all taxes were current and paid. Further, it showed the 2005 property taxes were paid on December 13, 2005 in the amount of \$928.43. A true and accurate copy of the title examination worksheet that I relied upon for purposes of closing this transaction is attached hereto as Exhibit 1.

8. Attached as Exhibit 2 is an official statement from the Charleston County Tax Assessors' Office generated on August 10, 2006, prior to the closing. This record indicates that property taxes were "Current(Paid)" as of this date and that no back taxes were owed or due. The current due amount states "0.00" and the nulla bona amount states "0.00".

9. Attached as Exhibit 3 is an official statement from the Charleston County Tax Assessors' Office generated on September 11, 2006, prior to the closing. This record

also indicates that property taxes were "Current(Paid)" as of this date and that no back taxes was owed or due. The current due amount states "0.00" and the nulla bona amount states "0.00".

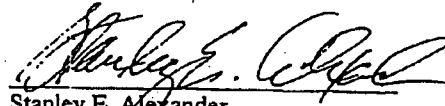
10. Further, based on documentation received from the Ms. Anderson's mortgage servicer, it appears that the 2005 property taxes were paid in the amount of \$928.43 and the 2004 property taxes were paid in the amount of \$441.19, attached hereto as Exhibit 4. A transaction history report from Ms. Anderson's mortgage servicer further reflects that the property taxes were paid in 2004 and 2005, attached as Exhibit 5.

11. No records were discovered at the time of the title examination or the closing that would have put me on notice that property taxes were delinquent or that a tax sale had occurred on the property.

12. 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 on 2640 Ranger Drive at the time of the closing. A real estate closing attorney routinely relies upon the result of a title examination and has a right to rely on information, such as Exhibits 1-3, kept as a matter of public record.

13. I believe I handled this closing with the generally accepted standard of care employed by attorneys performing real estate closings in Charleston County, South Carolina. I believe I acted with the degree of knowledge, care, and skill ordinarily possessed by lawyers in good standing under the same or similar circumstances and that I followed the generally accepted practices and procedures in the legal profession.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.


Stanley E. Alexander

SWORN to and SUBSCRIBED before me
This 5th day of May, 2011


NOTARY PUBLIC for South Carolina
My Commission Expires: 10-22-14

EXHIBIT 1

MORTGAGES:

1. BK/PQ: M444-174 TYPE _____
 FROM Andrew
 TO Argent City L.L.C.
 AMOUNT 53,500.00 @ _____ %
 DATE 4/18/03 REC 4/19/03

ASSIGNMENTS:

BK/PQ: _____ DATE _____ REC _____
 TO _____
 BK/PQ: _____ DATE _____ REC _____
 TO _____

MORTGAGES:

3. BK/PQ: _____ TYPE _____
 FROM _____
 TO _____
 AMOUNT _____ @ _____ %
 DATE _____ REC _____

ASSIGNMENTS:

BK/PQ: _____ DATE _____ REC _____
 TO _____
 BK/PQ: _____ DATE _____ REC _____
 TO _____

2. BK/PQ: 5457-429 TYPE _____
 FROM Andrew
 TO Thomas
 AMOUNT 51,500.00 @ _____ %
 DATE 4/18/03 REC 4/19/03

BK/PQ: _____ DATE _____ REC _____
 TO _____
 BK/PQ: _____ DATE _____ REC _____
 TO _____

4. BK/PQ: _____ TYPE _____
 FROM _____
 TO _____
 AMOUNT _____ @ _____ %
 DATE _____ REC _____

BK/PQ: _____ DATE _____ REC _____
 TO _____
 BK/PQ: _____ DATE _____ REC _____
 TO _____

UCC LIENS:

None
 \$ _____ FROM _____ TO _____ REC _____
 \$ _____ FROM _____ TO _____ REC _____
 \$ _____ FROM _____ TO _____ REC _____

YR. 2005 TMS# 411.12 00054 REC# _____ AMT\$ 928,413

VALUE _____ @ _____ % MILS DIST _____ DATE PAID 12/13/05

GROSS AMOUNT \$ _____ RES. EXEMPT\$ _____ CREDITS\$ _____ HMSTD\$ _____

PENALTIES \$ _____ COSTS/FEE\$ _____

BACK TAXES: PAID X NOT PAID _____

NOTES

None

ALEXANDER000049

EXHIBIT 2

CHARLESTON COUNTY

Online Tax System

MAIN MENU
CONTACT
EXIT

- Billing Information -		- Property Information -	
Account: 411-12-	Appraised: 82,700	Legal Description: 2840 RANGER DR - LT 121	
(PID): 00-054	(FMV):	Subdivision: WAYLYN	
Tax Year: 2005	Assessment: 3760	Deed: 04-15-2003 L444-803	
Prior Year: NA	Mills: x0.2551	Plot: F-117	
Status: Current		Land Use: RESIDENTIAL	
(Paid)		General Use: SFR	
2005-		Parcel: 10R	
Receipt: 002420	Base Tax: 859.18		
Previous Receipt: NA	Penalties: + 0.00	Buildings	Appraisal: 82,700
Next Receipt: NA	Interest: + 0.00	Others (6%)	Assessment: 3,760
Billed: 09-30-2005	Credits: -119.78		Totals: 82,700
Paid Date: 12-13-2005	User Fee: + 89.00	Acresage	Appraisal: 11700
Actual Date: 12-13-2005		High: 0.00	Improvements: 0
		Marsh: 0.00	Buildings: 81000
		Swamp: 0.00	
		Total: 0.00	Total: 82700
Mortgage Co: OCWEN FEDERAL BANK, FSB	Net Tax: 828.43		
MLOD Factor: No	Amount Paid: -928.43		
	Nulla Bona Amount: - 0.00		
	Refund Amount: - 0.00		
	Transfer Amount: - 0.00		
	CURR Due: 0.00		

N608/628

- Owner Information -

Current Owner: ANDERSON CARLA Tax Address: 2840 RANGER DR

Current Co-Owner: NA

Tax District: 43 Mail Address: 2840 RANGER DR

Jurisdiction: 01 City State Zip: NORTH CHARLESTON SC 29405

Selections Tax Record Credits Main Menu

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http://taxweb.charlestoncounty.org/surfer/form/PIDSearch/SelectRecord/6_Bya849673750... 8/10/2006

ALEXANDER000024

EXHIBIT 3

CHARLESTON COUNTY Online Tax System

- * MAIN MENU
- * CONTACTS
- * EXIT

N668/LZF

- Billing Information -		- Property Information -	
Account: 411-12-	Appraised: 62,700	Legal Description: 2840 RANGER DR - LT 121	
(PID): 00-054	(FMV):	Subdivision: WAYLYN	
Tax Year: 2005	Assessment: 3760	Deed: 04-16-2003 L444-803	
Prior Year: NA	Mills: x0.2531	Plot: F-117	
Status: Current (Paid)		Land Use: RESIDENTIAL	
Receipt: 2005-002420	Base Tax: 959.19	General Use: SFR	
Previous Receipt: NA	Penalties: + 0.00	Parcel: 10R	
Next Receipt: NA	Interest: + 0.00		
Billed: 08-30-2005	Credits: -119.76		
Paid Date: 12-18-2005	User Fee: + 89.00		
Actual Date: 12-13-2005			
	Net Tax: 928.43		
	Amount Paid: -928.43		
Mortgage Co: OCWEN FEDERAL BANK, FSB	Nulla Bona Amount: - 0.00		
MLOD Factor: No	Refund Amount: - 0.00		
	Transfer Amount: - 0.00		
	CURR Due: 0.00		

- Owner Information -	
Current Owner: ANDERSON CARLA	Tax Address: 2640 RANGER DR
Current Co-Owner: NA	
Tax District: 43	Mail Address: 2640 RANGER DR
Jurisdiction: 01	City State Zip: NORTH CHARLESTON SC 29405

Selections Tax Record Credits Main Menu

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http://taxweb.charlestoncounty.org/surfer/ferm/PIDSearch/SelectRecord/23_igh363082965... 9/11/2006

ALEXANDER000026

EXHIBIT 4

928.43

Refund of Interest Paid	\$0.00	Ferrell Payment Amount	\$0.00
Taxes Paid	\$928.43	Late Charges	\$0.00
Pre-Payment Penalties	\$0.00		
Interest Arrearage Amount	\$0.00		
Accident/Health Insurance	\$0.00	Accidental Death Insurance	\$0.00
Credit Life Insurance	\$0.00		

12/05

Year 2004

Beginning Principal Balance \$53,320.31

Ending Principal Balance	\$52,898.02	Principal Paid	\$421.29
Amount Paid to FHA	\$0.00	Beginning Escrow Balance	\$0.00
Ending Escrow Balance	(\$1,281.19)	Escrow Interest Paid	\$0.00
Interest Paid	\$4,542.63	Interest Reported to IRS	\$4,604.87
Interest Carried Over	\$0.00	Subsidy Interest Paid	\$0.00
Refund of Interest Paid	\$0.00	Ferrell Payment Amount	\$0.00
Taxes Paid	\$441.19	Late Charges	\$82.04
Pre-Payment Penalties	\$0.00		
Interest Arrearage Amount	\$0.00		
Accident/Health Insurance	\$0.00	Accidental Death Insurance	\$0.00

9/14/04

ALEXANDER000050

EXHIBIT 2

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

TAX DEED BK N 608PG628

WHEREAS, by the Acts of the General Assembly of the State of South Carolina and the Statutes of this State, it is provided that hereafter the County Treasurer of Charleston County shall and is hereby authorized and directed to issue in the name of the State a tax execution against each defaulting taxpayer in Charleston County directed to the Delinquent Tax Collector requiring and commanding either to levy the same by distress and sell so much of the defaulting taxpayer's estate, real or personal, or both, as may be sufficient to satisfy the delinquent taxes, assessments, penalties and costs for their collection; and

WHEREAS, it is further provided by said Acts of the General Assembly and Statutes of this State that under and by virtue of said tax execution the Delinquent Tax Collector shall seize and take exclusive possession of so much of the defaulting taxpayer's real property to collect delinquent taxes, assessments, penalties and costs for their collection as provided by law and after due advertisement sell the same at a public auction on a regular sales day and within the usual hours for public sales for legal tender and give to the purchaser (upon his complying with the terms of sale) a receipt for the purchase money but not make title to the purchaser until the expiration of twelve months from the date of sale, if the property sold be not redeemed as provided by law, and attach a copy of the receipt to the tax execution with the endorsement thereon of his action; and

WHEREAS, Andrew C. Smith, CPA, the County Treasurer of Charleston County, has issued a tax execution directed to the Delinquent Tax Collector, by authority of said Acts of the General Assembly of South Carolina and Statutes of this State, against defaulting taxpayer Carla Anderson, strictly charging the Delinquent Tax Collector of Charleston County to levy by distress and sell so much of the defaulting taxpayer's estate to satisfy the delinquent taxes, assessments, penalties and costs for their collection; and

WHEREAS, by virtue of said tax executions issued for tax year(s) 2004 the Delinquent Tax Collector of Charleston County sent on April 11, 2005, a copy of the tax execution to the aforementioned defaulting taxpayer(s) and further sent on May 23, 2005, via certified mail a notice of delinquent taxes, assessments, penalties and costs to Carla Anderson, 2640 Ranger Drive, North Charleston, SC 29405-7393, where notice was not received; and

WHEREAS, Dionne C. Brown and Edrian J. Trakas, deputy delinquent tax collectors, did post proper notice on July 22, 2005 on one or more conspicuous places on the property against which delinquent taxes were assessed and levied; and

WHEREAS, on October 3, 2005, during the usual hours of sale, the Delinquent Tax Collector, after due advertisement, did sell the same and gave receipt to Westwood Properties LLC, the highest bidder at such sale for the sum of \$20,000.00 dollars; and

WHEREAS, on September 11, 2006, the Delinquent Tax Collector did send via certified mail final notice before redemption to Carla Anderson and Carolyn Thomas, where such notice(s) were not received; and to Argent Mortgage Company LLC and Deutsche Bank National Trust Co, where such notice(s) were received; and

WHEREAS, the twelve month redemption period, provided by law, has expired.

NOW, therefore, know all men by these presents that I, Mary M. Scarborough, Interim Delinquent Tax Collector of Charleston County, in the State aforesaid, in consideration of the sum of Twenty Thousand (\$20,000.00) Dollars, to me in hand paid by Westwood Properties LLC, the receipt of which is hereby acknowledged, have remised, released and forever quitclaimed and by these presents do remise, release and forever quitclaim unto the said Westwood Properties LLC the property to wit:

ALL that certain piece, parcel or lot of land, together with the buildings and improvements thereon, situate, lying and being in Charleston County, State

BK N 608PG629

aforesaid plat; the said lot herein being conveyed having such actual size, shape and dimensions as an actual survey of the lot will show.

Being the same property conveyed to Carla Anderson by deed of Carolyn Thomas dated 4/8/2003, and recorded in the RMC Office for Charleston County 4/15/2003, in Book L444, Page 803.

TMS Number: 411-12-00-054

Grantee's Address: Westwood Properties LLC
PO BOX 30422
Charleston, SC 29417-0422

TO have and to hold, all and singular the premises unto said Westwood Properties LLC, its heirs and assigns, forever.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to said property belonging or in any wise incident or appertaining.

WITNESS my hand and seal this date 12-12-06.

Signed, Sealed and Delivered in the Presence of us:

Vicki Jenkins
First Witness

L. Greene
Second Witness

Mary M. Scarborough
Mary M. Scarborough
Interim Delinquent Tax Collector
Charleston County, South Carolina

THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PERSONALLY APPEARED BEFORE, the undersigned, and made oath that he/she saw, Mary M. Scarborough, Interim Delinquent Tax Collector of the County of Charleston sign, seal, and as her act, did deliver the above Deed of Conveyance; and that he/she, with the other witness above named, witnessed the execution thereof.

SWORN to before me this date Dec 12, 2006

L. Greene
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3-31-2014

Vicki Jenkins
First Witness

EXHIBIT 3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) 9th JUDICIAL CIRCUIT
) CIVIL ACTION NUMBER: 09-CP-10-6529

Amber Johnson,
Plaintiff,

vs.

) AFFIDAVIT OF CHARLES M. FEELEY

Stanley E. Alexander, Mario S. Inglese, and
Mario S. Inglese, PC,
Defendants.

vs.

Mario S. Inglese and Mario S. Inglese, PC,
Third-Party Plaintiff,

vs.

Charles Feeley,
Third-Party Defendant.

FILED
2011 MAY 17 PM 1:57
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PERSONALLY APPEARED BEFORE ME, CHARLES M. FEELEY, who upon being
duly sworn deposes and states as follows:

1. I am a citizen and resident of Charleston County, South Carolina. I am a member in good standing of the South Carolina Bar, having been admitted to practice in 2002. I maintain a law practice in Charleston, South Carolina. My practice has always been focused in the area of real estate law and the examination of real estate titles and records in Charleston, Berkeley and Dorchester Counties. I have been examining titles in Charleston County for approximately 20 years, and I personally conduct my own title research. Over the course of my career, I have examined approximately 2,800 titles in Charleston County, and aside from the present case, I have never had a claim or suggestion of error with regard to a delinquent tax issue. I frequently work with other attorneys who engage my services. I am a party in the above-referenced matter.

2. Other than my review of the title examination documentation produced in this case, I do not recall the details from this title examination (2640 Ranger Drive, Charleston South Carolina, TMS No. 411-12-00-054) since it was performed in 2006; however, the abstract summary sheet produced is my summary sheet and the handwriting on the summary sheet is mine. According to the summary sheet, the abstract was completed on August 9, 2006, for Mario S. Inglese, PC. I do, however, perform title examination with very strict routines of practice and habits. I always perform my work in the same manner.

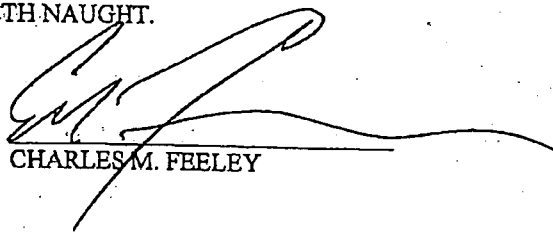
3. Although I cannot recall the specific details of this title examination, I do conduct my title examination with strict routines of practice and habits, and I always perform my title examinations in the same manner. Specifically, concerning the question of real property taxes, past and present, as part of my routine practice, I begin by reviewing the Charleston County Online Tax System website and I perform a "Tax Records Search" by "Parcel ID (TMS)" (Tax Map No.). The first screen that appears shows a ten-year history for the searched property's tax payments, beginning with the most recent tax year shown on the first line and each prior year on the successive lines; at the end of each line is a notation that the taxes were either current or delinquent. It is from this ten-year history screen that individual tax years can be further investigated. When I look at the ten-year history screen, I note any exceptions, problems, or notations that reflect unpaid taxes. If I see any evidence of unpaid taxes, I follow-up by reviewing the individual tax year screen for the tax year in question. If I see a delinquency or tax sale on the first screen, my custom and practice is to print the tax record for that year and to notate the issue on my abstract summary sheet. However, with this case, I noted on the abstract summary sheet that all of the taxes were paid and/or current, and that no back taxes were due or

owing for the property. I believe that I acted in conformity with my routine practice and custom when I performed the title examination for this property.

4. Title examiners in Charleston County, including myself, reasonably rely on information contained on the Charleston County Online Tax System. In order to obtain other information (including physical documentation) from the Charleston County Tax Collector not provided publicly on the Charleston County Online Tax System, a Freedom of Information Act request is required. I am not aware of any title examiner that submits a Freedom of Information Act request for purposes of performing a title examination.

5. The existence of the prior tax sale would not have been disclosed in the chain of title for this property or made publically available in the RMC Office at the time of the title examination and closing in 2006 because the tax sale deed was not recorded as a matter of public record with the Charleston County Register Mesne Conveyance (RMC) Office until December 12, 2006. Further, no *lis pendens* was recorded at the RMC Office or the Clerk of Court's Office at the time of the title examination and closing that would have placed the public on notice of an unrecorded tax sale.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.


CHARLES M. FEELEY

SWORN to and SUBSCRIBED before me
This 17th day of May, 2011


NOTARY PUBLIC for South Carolina
My Commission Expires: 12/27/17

EXHIBIT 4

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
Case No. 2009-CP-10-6259

AMBER JOHNSON,)
Plaintiff,)

-vs-

STANLEY E. ALEXANDER,)
MARIO S. INGLESSE AND)
MARIO S. INGLESSE, PC,)
Defendants.)

VIDEOTAPED DEPOSITION OF:

STANLEY E. ALEXANDER, ESQ.

Given before Raymond E. Swartz, Notary
Public and Certified Court Reporter, in the Kahn Law
Firm, 562 Savannah Highway, Charleston, South Carolina on
Thursday, December the 16th, 2010, commencing at 10:25
o'clock, a. m.

RAYMOND E. SWARTZ, CSR
Professional Court Reporter
"A Timeless Standard of Excellence"

1 A Well, if I had checked the title I may have
2 found it, but because the title had been checked...

3 Q Okay. So you were relying on the work of
4 someone else?

5 A Yes.

6 MR. GOINGS: Objection.

7 Q And you agree, though, that ultimately it's
8 your responsibility? Right?

9 A The closing is my responsibility but I think I
10 have a right to rely on a proper -- when somebody gives
11 me a title search and I pay for it, I have a right to
12 rely on it.

13 Q And the person who does the title search, in
14 your mind, is your agent?

15 MR. GOINGS: Object to the form of the
16 question.

17 Q That's somebody you hired?

18 A Well, normally, yes, but in this case, no. If
19 I understand it right, the Johnsons already engaged Mario
20 to do the closing. For some reason he didn't do the
21 closing and I was asked to do them and take over his
22 title work. They knew that I was using his title work.

23 Q So you...?

24 A They knew that I was using his title work. They
25 knew I was taking over for him and I was paying him so

1 that they wouldn't have to pay me and him both. I was
2 trying to do these folks a favor.

3 Q Alright. In the end the lawyer handling the
4 closing is ultimately responsible for making sure the
5 title work is done properly? Correct?

6 MR. GOINGS: Same objection.

7 A No, I can't see that he can be responsible. I
8 mean, you engage somebody that you feel comfortable with,
9 or that is supposed to be competent. If I went back and
10 oversaw the title work, I might as well do it myself,
11 which normally I do. But...

12 Q Alright. Should you have done that here?

13 A No.

14 Q Okay. The -- do you agree that the problem
15 here for Mrs. Johnson is the title work? Right?

16 A Yes.

17 Q The title work is defective?

18 A Apparently.

19 Q Well, isn't that what you are saying?

20 A Well...

21 Q That's it? That's the...?

22 A Well, after this came to light we looked back
23 and it appears the county had made no notes anywhere that
24 it had been sold at a tax sale. Plus, they were
25 accepting current taxes and they don't do that when back

1 taxes are due. So something was not right.

2 Q Well, in any case, the title work here is
3 defective? Right?

4 MR. GOINGS: Object to the form of the
5 question.

6 Q Because it didn't pick up on the fact there was
7 a tax sale?

8 MR. GOINGS: Same objection.

9 A It did not pick up the tax sale, correct.

10 Q And a proper title work would have picked up on
11 the tax sale?

12 A Unless the county records had had it -- had
13 entered things such that you wouldn't pick up on it.

14 Q Sitting here today you can't tell us that the
15 county improperly entered information concerning the tax
16 sale that would result in a lawyer not picking up on it,
17 can you?

18 A Not improperly, but -- I remember because they
19 didn't make a note of it. We go back and look at the
20 back taxes and it says paid, period.

21 Q For what year?

22 A For every year that we looked at since....

23 Q When did you look?

24 A Since this has all come to light. I don't have
25 the....

1 Q But before the closing you didn't look?

2 A No, because I had this sheet right here showing
3 that the back taxes were paid.

4 Q And that sheet right here is reflected on --
5 can I see the Plaintiff's Exhibit number, please? It's
6 Plaintiff's Exhibit Number 8 and you're pointing to the
7 third or fourth page? I can't...?

8 A Back taxes paid, the last page of it.

9 Q But in fact the back taxes were not paid, which
10 is why the property was sold at a tax sale? Right?

11 MR. GOINGS: Object to the form of the
12 question.

13 A Well, also from what I have found it appeared
14 that the taxes were paid.

15 Q You said what you have found. Have you
16 presented that argument to the county in an effort to
17 help Mrs. Johnson?

18 A Well, we did at the time when I got the lawyer,
19 I turned all that over. Like I said, since you were in
20 litigation, that you all would take care of that. I sent
21 you the documents where it appears that the mortgage
22 company paid those taxes.

23 Q Okay. But there has been no determination that
24 that in fact happened? Correct?

25 A No.

1 A Yes.

2 Q And paragraph 47 states as a result of this
3 breach, Alexander has suffered direct, incidental, and
4 consequential damages because, upon information and
5 belief, the subject property was transferred by virtue of
6 a tax deed for past taxes due and owing for the year of
7 2004. Is that a true statement?

8 A Yes.

9 Q And is it fair to say that if you have suffered
10 direct, incidental, and consequential damages because of
11 that, then Mrs. Johnson has suffered direct, incidental,
12 and consequential damages because of that?

13 MR. GOINGS: Object to the form of the
14 question.

15 Q Is that fair?

16 A Yeah.

17 Q Okay. On paragraph 52, on the next page? Do
18 you see that? Paragraph 52, you state Inglese owed
19 Alexander a duty of care to ensure that information
20 communicated to him was accurate, complete and truthful
21 and Alexander had a right to rely on the representations
22 of Inglese? Is that a true statement?

23 A Yes.

24 Q And is it a true statement that Mrs. Johnson
25 had a right to rely on the information you represented to

1 her at the time of closing?

2 A Yes.

3 Q including that -- and one of those
4 representations was that the title she was receiving to
5 the property was good and marketable title? Right?

6 MR. GOINGS: Object to the form of the
7 question.

8 A According to the information I had at the time,
9 yes.

10 Q Alright. And that's what you would have told
11 Mrs. Johnson? Right?

12 A Yes.

13 Q That what she was getting at the time of
14 closing was good and marketable title? Right?

15 A Yes.

16 Q I'm sorry?

17 A Yes.

18 Q And you agree that you had a duty of care to
19 ensure that the information communicated to Mrs. Johnson
20 was accurate, complete and truthful as concerning the
21 title to her property? Right?

22 A I had a duty to give her what I had as the best
23 of my knowledge at the time, yes.

24 Q Or what was capable of being within your
25 knowledge? Right?

1 A Yes.

2 MR. GOINGS: Object to the form of the
3 question.

4 A Was it within your power and abilities to
5 determine whether or not the property that she was buying
6 was free and clear of taxes, liens or encumbrances? Did
7 you have the ability to determine that?

8 A Yes, I could have gone back and rechecked
9 everything.

10 Q Okay.

11 A But there would be no sense in paying someone
12 to do it if I was going to do that.

13 Q You had the ability to determine those things?
14 Right? That is you had the ability to determine whether
15 or not the property she was buying was free of liens,
16 encumbrances, and taxes?

17 A Well, at that time I am not sure, because every
18 time we looked back at the tax year it said paid. It
19 didn't say sold, it said paid.

20 Q Did you have the ability to determine whether
21 or not the property had been sold at a tax sale?

22 MR. GOINGS: Object to the form. Asked
23 and answered.

24 A I do now.

25 Q Well, did you not have the ability in September

1 of 2006 to determine if the property had been sold at a
2 tax sale?

3 MR. GOINGS: Same objection.

4 A Well, when we looked back at the tax records
5 they said the taxes were paid and they accepted the
6 current taxes, which they would not do if there are prior
7 back taxes on the property.

8 Q My question was did you have the ability to
9 determine whether or not the property had been sold at a
10 tax sale in September of 2006?

11 MR. GOINGS: Objection. You have asked
12 the question five times and he's answered it.
13 I don't think you need to ask it again.

14 A No.

15 Q You did not have that ability?

16 A No.

17 Q Did you communicate to Mrs. Johnson that you
18 did not have the ability to determine whether or not the
19 property had been sold at a tax sale prior to having this
20 closing?

21 A No.

22 Q Would that be important information for Mrs.
23 Johnson to have before conducting a closing?

24 A It would have been, except all the taxes -- all
25 the tax records said paid and that's what we told her.

1 A Yes, I did.

2 Q How did you know her?

3 A The manager of the City Financial in
4 Summerville bought a house and I was working it for her
5 and her loan fell through, how she was buying it. If you
6 all have worked with mortgage brokers out of state,
7 things will go for months and months and all of a sudden
8 things fall through and you have to scramble around. And
9 Candy found her another mortgage very quickly with a bank
10 that I really liked working with, so I thought the lady
11 seemed pretty sharp. And that was the first I had ever
12 met her. And then she called me when this came up and
13 she said do you remember me?, and I said yes, I do, and
14 she said I've got three loans I want you to close, and I
15 said fine. And I believe after she gave me the loans she
16 then said well, would you mind paying for this title work
17 we have already had done, to keep the Johnsons from
18 having to pay twice? And I said, no. I'm used to that.
19 I would do that every now and then. And I try to be
20 accommodating to another lawyer, or somebody else, so I
21 told her no, I didn't mind paying for the title work.

22 Q Alright. So it was your understanding from
23 Candy Ryan that Mario Inglese's law firm had already done
24 the title work on these two parcels, or had someone
25 perform the title work?

1 A Yes.

2 Q And then you purchased the results of those
3 title abstracts?

4 A Right.

5 Q From his office?

6 A Right.

7 Q And you said earlier you don't recall who Mrs.
8 Johnson's realtor was for this closing?

9 A I don't. It was a black lady but I have no
10 idea what the name was.

11 Q Alright. And your previous testimony was that
12 the Johnsons engaged Mario initially to do this closing
13 and then apparently it got shifted over to you. What's
14 the basis for that testimony? What was your
15 understanding of...?

16 A That was my understanding from Ms. Ryan, that
17 Mario was supposed to do the closing but for some reason
18 he couldn't, or didn't. I didn't even know why not, but
19 I thought it was maybe a timing situation but I didn't
20 ask. I mean, you know, three closings at one time, I was
21 glad to get them.

22 Q And you also testified that the Johnsons knew
23 that you were using the title work. How did they know
24 that?

25 A Well, maybe it was an assumption that if they

1 Q. Alright. And he never told you that on the
2 phone?

3 A. No.

4 Q. And Mr. Feeley never told you that?

5 A. No.

6 Q. Alright. And do you know whether or not Mario
7 Inglese has ever even done a title search?

8 A. No, I don't.

9 Q. Alright. And are there -- I don't see any
10 communications in your file in terms of written
11 correspondence, but would there have been any exchange of
12 e-mails and correspondence with Amber Johnson?

13 A. No.

14 Q. Alright. How did you -- assuming that the
15 three pages on Exhibit 8, or the title abstract, and
16 there may or may not have been some more documents
17 attached, how did you take receipt of the title? Did it
18 come from Island, or did it come from Mario's office?

19 A. It came from Island in a file with whatever
20 other documents they had. It was stapled and clipped
21 together.

22 Q. Alright. So as far as you know, the title
23 abstract had been pulled, had been sent to Island and
24 then Island sent it to you in a package and Candy said
25 write a check back to Mario's law firm? Is that

1 accurate?

2 A Yes.

3 Q Okay.

4 A Well, I was asked will you pay for this -- you
5 know, will you pay this lawyer for the title work.

6 Q Alright. Did you receive an actual invoice
7 from Mario's firm?

8 A Yes.

9 Q Alright. From his firm or was it in the
10 Island package?

11 A It was in the package with his...

12 Q Alright. So Island Lending, or Island
13 Mortgage, whatever that entity is called, they had not
14 paid Mario's firm at that point in time?

15 A I assume not if they asked me to pay it.

16 Q But it's your testimony that there was an
17 actual invoice...?

18 A Yes.

19 Q ...to somebody from Mario's firm?

20 A Yes.

21 Q Who would that invoice have been to?

22 A I really don't think it was to anybody in
23 particular. It was just an invoice and it was hooked to
24 the front of the title book.

25 Q Alright. Just so I'm clear, your testimony is

1 that you had an invoice from somebody showing that
2 Mario's law firm was owed a hundred and some dollars?

3 A Well, it had kind of like his letterhead, so...

4 Q Alright. Well, that's not in your package, so
5 what happened to that invoice?

6 A I would say I probably sent it back to Mario.

7 Q Alright.

8 A With the check.

9 Q Okay. You mailed that check back to him?

10 A Yes.

11 Q Alright. Did you have an understanding one way
12 or another at that time as to whether Mario was making
13 any money off of the title search, or that was just a
14 pass through cost from where Charles Feeley...?

15 A I didn't know anything about Charles at the
16 time. I thought that was Mario's fee for the title work.

17 Q Alright. And do you know today whether or not
18 that was just a pass through cost to pay Charles Feeley
19 back for...?

20 A I don't know. Mario just told me later that
21 Charles did his title work for him.

22 Q Alright. Bear with me a second. You have
23 talked about some of the software glitches, for lack of
24 a better word, from the HUD-1. What kind of closing
25 software were you using back in 2006?

EXHIBIT 5

John Brown

C/A No: 09-CP-23-8523

Amber Johnson v. Stanley E. Alexander, Mario S. Inglese, and Mario Inglese PC

March 1, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	C/A NO: 09-CP-23-8523
AMBER JOHNSON,	)	
	)	
PLAINTIFF,	)	DEPOSITION
	)	
VS.	)	OF
	)	
STANLEY E. ALEXANDER, MARIO	)	JOHN G. BROWN, II, ESQUIRE
S. INGLESE, AND MARIO S.	)	
INGLESE, PC,	)	
	)	
DEFENDANTS.	)	

DEPOSITION OF JOHN G. BROWN, II, ESQUIRE, TAKEN BEFORE
WENDY SHANNON SULLIVAN, A NOTARY PUBLIC IN AND FOR THE STATE
OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 10:04 A.M.,
TUESDAY, THE 1ST OF MARCH, 2011, AT THE KAHN LAW FIRM, 562
SAVANNAH HIGHWAY, CHARLESTON, SOUTH CAROLINA 29412.

C O P Y

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- 1 Q No, I understand.
- 2 A -- totally honest with you. I mean, when I say I
- 3 haven't been --
- 4 Q So it's fair to say you've never handled a foreclosure
- 5 action?
- 6 A Not -- yeah. Not as far as the court-side of it and
- 7 all that. No.
- 8 Q Okay. And it's your testimony that the only
- 9 foreclosure-related matter you referred to Ms. Arnold,
- 10 correct?
- 11 A I referred that one to her. Right. And then, I think
- 12 I referred one to an attorney named Dan Bradley to
- 13 handle.
- 14 Q Okay. I think you kind of alluded a little bit
- 15 earlier. But has the economy affected the real estate
- 16 transactions in Charleston County?
- 17 A Certainly.
- 18 Q Okay. And has that, in turn, also affected your
- 19 practice as a real estate closing attorney?
- 20 A It has.
- 21 Q Okay. You started performing real estate closings in
- 22 late 2003, correct?
- 23 A Right.
- 24 Q What year would you say would be, like, the boom for
- 25 handling real estate closings?

1 Q Do you personally perform title examinations for every
2 closing?

3 A I do not.

4 Q Who conducts your title examinations?

5 A I use a company called F. Thomas Abstract.

6 Q Have you ever performed a title examination?

7 A I think I've done -- yeah. I've done a title
8 examination, probably once, I would say for sure.

9 Q Okay. When did you perform that one title examination?

10 A It has been years ago. I think, probably -- I would
11 probably say it was '04 or '05.

12 Q How many years have you utilized the services of F.T.
13 Abstractor?

14 A I've used F. Thomas for at least the last -- since '08.
15 I'm trying to remember if I used him at all at Buist
16 Byars. We have a couple of abstractors there that we
17 used. I don't remember -- I don't think I used F.
18 Thomas while I was there. Actually, the Charleston
19 abstractor for F. Thomas was one that I used when I was
20 on my own as well. His name is John Dounian.

21 Q So the title abstractor that you privately used is --
22 his first name is John, right?

23 A John. Right.

24 Q Last name is --

25 A Dounian, I think it's D-O-U-N-I-A-N.

1 of year it is, and whether the tax bill had been
2 issued. You do a lien search. Which, I think those
3 would typically be recorded in the RMC office.

4 Most, if not all counties, any liens directly
5 affecting the property -- I'm not sure how they do the
6 state and federal tax lien, because those can attach,
7 even if they're not actually filed in the county where
8 the property is located. So there may be a database
9 that they use to check those kind of things.

10 Q When you performed a title examination that one time,
11 did you actually go to the tax assessor's office and
12 pull tax records?

13 A That was an update. I think it was within 12 months.
14 So maybe new tax bills had come out. I'm trying to
15 remember, at that point. I think the stuff was
16 available on-line, so I may have just pulled -- and I
17 was trying to remember the time and the year. But I
18 think the closing was maybe even within the same
19 calendar year. So I was just basically updating and
20 doing the lien search at that point.

21 Q Okay. So you've never performed a full-size title
22 examination?

23 A No. I didn't feel qualified to do that.

24 Q And that's why you hired a title abstractor?

25 A That's why I use title abstractors. Yes, sir.

1 THE WITNESS: I mean, part of the purpose of
2 title insurance is there can be undiscovered
3 defects, you know, things like I mentioned, some
4 of the probate stuff. It depends on your
5 abstractor, you know, as to whether or not -- how
6 deep they delve into it, as to whether a probate
7 estate was properly handled, so to speak. But
8 then, there are issues like forgeries and that
9 kind of stuff. But you know, your abstractor is
10 not necessarily going to pick up on it.

11 BY MR. GOINGS:

12 Q Okay.

13 A And that's when you -- if someone else asserts title to
14 property as a result of, you know, a forged document,
15 for instance, then that would be something that a title
16 search wouldn't necessarily reflect, because I don't
17 know what your signature looks like, you know, from 20
18 years ago.

19 Q Right. So you would agree with me that it's fair to
20 say that even with a proper title examination on a
21 property, that property may still have encumbrances or
22 liens; is that correct?

23 MS. ARNOLD: Objection.

24 THE WITNESS: I mean, yeah. I could see a
25 situation in which there could be an encumbrance

1 or a lien.

2 BY MR. GOINGS:

3 Q And that's why you have title insurance, right?

4 A Yeah, title insurance. And you have affidavits from
5 your seller. But there's another thing that could be
6 there, for instance, would be an unreported mortgage,
7 if the seller had gone and borrowed money from Uncle
8 Bob, you know, to give an example. And then, Uncle Bob
9 took a mortgage back \$10,000, but they just never
10 recorded it. And technically, Bob has got a lien on
11 that property. See, I see what you're saying.

12 Q Okay.

13 A There's a chance that a lien on the property, or in
14 that sense, an encumbrance on the property could exist
15 that the title search isn't going to reveal.

16 Q Okay.

17 A Because it just was never recorded.

18 Q Do you believe that public records are always correct?

19 A No. I would say they're not always correct.

20 Q Had you, as a real estate closing attorney, found there
21 to be errors, or omissions, or mistakes in public
22 records, as it relates to real estate transactions?

23 A I have had situations where, for instance, the legal
24 description of a property was insufficient, or
25 something was left out that should have been brought

- 1 care, correct?
- 2 A Correct.
- 3 Q You know what a Dismissal Without Prejudice is?
- 4 A Generally, yes. I mean, from being a lawyer, yes. I'm
- 5 familiar with what it is.
- 6 Q What's a Dismissal Without Prejudice?
- 7 A They'd get some action to dismiss -- you said without
- 8 prejudice?
- 9 Q Without prejudice.
- 10 A Essentially, an action is dismissed with leave to re-
- 11 file at a later date. That's my sort of general -- you
- 12 might have just tapped all of my litigation experience.
- 13 I'll give you that.
- 14 Q I don't need your book.
- 15 A I should probably review it, then.
- 16 Q Mr. Brown, have you reached an opinion in this case?
- 17 A I have.
- 18 Q Okay. And how many opinions have you reached, if any?
- 19 I mean, I know you've reached an opinion.
- 20 A Right.
- 21 Q So how many opinions have you reached, other than at
- 22 least one opinion?
- 23 A Not really sure how to answer that.
- 24 Q Okay. You've reached an opinion?
- 25 A Right.

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1 Q Okay. What is that opinion?

2 A My opinion is that Mr. Alexander's conduct in
3 conducting this closing fell below the applicable
4 standard of care. And that that failure, for lack of a
5 better phrase, caused Ms. Johnson to lose title to the
6 property. And it was, you know, approximate cause to
7 any damages that may have resulted from her loss of
8 that property.

9 Q You said, approximate cause as to any damages. But you
10 don't know anything about the damages? That's what
11 you're testifying to?

12 A Not specifically, no. I don't know what damages would
13 be alleged. But I mean, obviously, there is foresee-
14 ability of litigation being which has happened now, at
15 least in a couple fronts. You know, I would be
16 reticent as to opine as to any and all damages, because
17 I just don't know. It's kind of outside of my scope of
18 my normal arena. But obviously, if you lose title to
19 property that you bought, there's going to be damages
20 associated with that.

21 Q And if you fail to pay on your note of mortgage,
22 there's also going to be foreseeable litigation
23 incurred, correct?

24 A Correct.

25 Q So, I'm trying to write down your opinion. And help me

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1 out. Mr. Alexander's conduct fell below the applicable
2 standard of care and this failure caused Ms. Johnson to
3 lose title on property, correct?

4 A Right. The property was sold at a tax sale.

5 Q Okay. What conduct fell below the applicable standard
6 of care?

7 A Ultimately, it was the failure to discover the tax
8 sale, and the failure to ensure that she was receiving
9 clear title to the property, was the major failure that
10 I noted.

11 Q So the ultimate failure to discover tax sale failed
12 below the applicable standard of care; is that correct?

13 A Well, that as it related to failing to ensure that she
14 received good title to the property, clear title to the
15 property. I mean, again, to me, that's one of the
16 paramount responsibilities of a closing attorney. And
17 it didn't happen in this case.

18 Q Okay. So is it your opinion that a real estate closing
19 attorney has the absolute duty to ensure that clear and
20 marketable title is conveyed to a purchaser at closing?

21 A Yes.

22 Q Okay.

23 A I think I could agree with that.

24 Q All right. And regardless of the circumstances or what
25 happened surrounding the title examination, is it your

1 certainty that this information would have been
2 contained at the tax assessor's office?

3 A No. I can't say that for sure. That's where I believe
4 it would be.

5 Q Okay. So is it fair to say it's your personal opinion,
6 today, that evidence of a pending tax sale would be
7 contained at the tax assessor's office?

8 A Yes.

9 Q Okay. Where would you look in order to determine
10 whether -- at the tax assessor's office, where would
11 you look to be able to determine whether or not there
12 was a pending tax sale?

13 A And honestly, it's getting a little bit into the
14 abstractor side of it. I don't know if they just go up
15 and ask for the tax history for the last three years or
16 if they have a file cabinet. I don't believe they have
17 a file cabinet that you can just walk up to in the tax
18 assessor's office.

19 Q So you would defer to the abstractor?

20 A To the abstractor to know exactly how they pull their
21 tax history on the property.

22 Q Okay. And are you expecting to testify, to a
23 reasonable degree of legal certainty, that a title
24 abstractor would have discovered this pending tax sale
25 on or before the closing of September of 2006?

1 A Or that they should have. Yes.

2 Q But you don't know if there is actually any information
3 there at the tax assessor's office that would show it,
4 right?

5 A I don't know without having been there.

6 Q Okay. So you're just speculating then, that it should
7 be there?

8 A I suppose it could be speculation that there has got to
9 be record of the tax sale in the tax office.

10 Q I mean, can you testify to a reasonable degree of
11 certainty that a title examination would have uncovered
12 the pending tax sale to 2640 Ranger Drive?

13 A Again, we're hanging up on would and should. I believe
14 a proper title exam should discover that tax sale had
15 occurred.

16 Q Do you believe a proper title examination could have
17 discovered this pending tax sale?

18 A Should and could have. Yes. I'll go with both of
19 those.

20 Q How could a proper title examination would have
21 revealed this pending tax sale?

22 MR. KAHN: Objection.

23 THE WITNESS: And maybe I don't understand
24 the question.

25 BY MR. GOINGS:

1 Q How would a title examiner, title abstractor, discover
2 that there was actually a pending tax deed for 2640
3 Ranger Drive prior to the recordation of this tax deed?

4 MR. KAHN: Objection.

5 THE WITNESS: Again, it goes back to my
6 belief that there is a record -- if a tax sale
7 occurs, I believe that there is a record in the
8 tax office that a tax sale has occurred.

9 BY MR. GOINGS:

10 Q What does that record look like?

11 A I don't know what it looks like.

12 Q Do you know who would have that record in their
13 possession?

14 A I'm not sure if it would be the auditor or the
15 assessor.

16 Q Mr. Brown, if you were closing this loan, and you had
17 also performed the title examination, how would you
18 have uncovered this issue?

19 A Well, I don't know that I would have.

20 Q So you could have been in the same position as Mr.
21 Alexander?

22 A Absolutely.

23 Q Okay.

24 A And I take no pleasure in being here in the role I am,
25 because in part, I recognize that this could happen to

1 any of us.

2 Q Okay.

3 A And it's part of the -- I don't want to step up on the
4 soap box. But I mean, it's part of the perils of what
5 we do. I mean, it's a tough way to make a living,
6 especially these days. But you know, it's truly
7 believed that it's of paramount importance of
8 transferring clear title, and that it falls at our
9 feet. And the errors of our abstractors, or the errors
10 of our support staff, if we're paralegals and that kind
11 of thing, I think it all falls at our feet. And it's
12 not a calming thought, but that's my believe, and
13 that's my opinion.

14 Q So based on the scenario as it happened, as it relates
15 to 2640 Ranger Drive, you could, if you were the
16 closing attorney, be sitting in the same seat as Mr.
17 Alexander today, correct?

18 A I believe I could be.

19 Q Why do you believe that?

20 A Well, given the information, you know, that we have.
21 And again, making an assumption that the abstract was a
22 quality abstract of title, then, you know, this
23 situation could occur. But you know, again, it doesn't
24 obviate the responsibility, or doesn't eliminate the
25 responsibility for delivering that clear title. And

EXHIBIT 6

Uniform Residential Loan Application

[illegible]

It is an agreement for job #1002, Denver and Co-Denver each agree that we intend to apply for job credit (see below)

Amber Johnson

[illegible]

Name & Address of Employer ☐ Self Employed UNIVERSITY MICRO INTERNATIONAL 3400 AIRPORT ROAD CHARLOTTE, NC 28408		And how paid ☒ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)		Name & Address of Employer ☐ Self Employed ☐ Not Self Employed Frederick's Inc. of Richmond		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)	
Position/Title/Type of Business CONTRACTOR/CONSTRUCTION		Monthly Payroll (incl. own contribution) \$400-749.99-0000		Position/Title/Type of Business CONTRACTOR/CONSTRUCTION		Monthly Payroll (incl. own contribution) \$400-749.99-0000	
If employed by several employers for whom there are two payrolls for 12 consecutive months, complete one form for each employer.							
Name & Address of Employer ☐ Self Employed ROCKWELL ELECTRONIC ASSOCIATES 3340 HARRISON ST. DRIVE CHARLOTTE, NC 28434		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)		Name & Address of Employer ☐ Self Employed ☐ Not Self Employed Rockwell Electronic Associates		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)	
Position/Title/Type of Business CONTRACTOR		Monthly Payroll (incl. own contribution) \$400-749.99-0000		Position/Title/Type of Business CONTRACTOR		Monthly Payroll (incl. own contribution) \$400-749.99-0000	
Name & Address of Employer ☐ Self Employed MAKINSON CONSTRUCTION 10000 VIRGINIA, VA		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)		Name & Address of Employer ☐ Self Employed ☐ Not Self Employed Makinson Construction		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)	
Position/Title/Type of Business STUDENT/STUDENT MAKING		Monthly Payroll (incl. own contribution) \$400-749.99-0000		Position/Title/Type of Business STUDENT/STUDENT MAKING		Monthly Payroll (incl. own contribution) \$400-749.99-0000	
Name & Address of Employer ☐ Self Employed MAKINSON CONSTRUCTION		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)		Name & Address of Employer ☐ Self Employed ☐ Not Self Employed Makinson Construction		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)	
Position/Title/Type of Business STUDENT/STUDENT MAKING		Monthly Payroll (incl. own contribution) \$400-749.99-0000		Position/Title/Type of Business STUDENT/STUDENT MAKING		Monthly Payroll (incl. own contribution) \$400-749.99-0000	
Name & Address of Employer ☐ Self Employed MAKINSON CONSTRUCTION		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)		Name & Address of Employer ☐ Self Employed ☐ Not Self Employed Makinson Construction		And how paid ☐ Payroll ☐ Other (Specify) _____ (See instructions for the correct classification)	
Position/Title/Type of Business STUDENT/STUDENT MAKING		Monthly Payroll (incl. own contribution) \$400-749.99-0000		Position/Title/Type of Business STUDENT/STUDENT MAKING		Monthly Payroll (incl. own contribution) \$400-749.99-0000	

Earnings	Deductions	Contributions	Taxes	Employment	Monthly	Fringe	Compensation
Basic Salary Income	\$ 2,600.00	\$	\$ 2,600.00	Part	\$	\$	\$ 2,600.00
Overtime				Part	\$	\$	\$
Commission				Part	\$	\$	\$
Contract Income				Part	\$	\$	\$
Dividend Income				Part	\$	\$	\$
Net Rental Income				Part	\$	\$	\$
Other Income				Part	\$	\$	\$
Total	\$ 2,600.00	\$	\$ 2,600.00	Part	\$	\$	\$ 2,600.00

Self Employed Income: may be reported by providing annual compensation only as net income and general expenses.

Medical: separate, self-insured, or any other insurance policy not reported on this form.

Disability: separate, self-insured, or any other insurance policy not reported on this form.

Monthly Amount	Monthly Amount
	\$

Page 2 of 2

Form 990-SS (12-31-12)



EXHIBIT 7

BK 0 598PG789

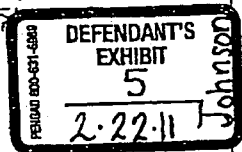
Return To:
CENTURY PACIFIC MORTGAGE CORPORATION
5655 PEACHTREE PARKWAY, SUITE 200
NORCROSS, GEORGIA 30092
Attn.: SHIPPING DEPT./DOC. CONTROL
Prepared By:

[Space Above This Line For Recording Date]

MORTGAGE

MIN 1000941-1100000802-9

MERS TELEPHONE: (888) 679-6377



DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated September 14, 2006, together with all Riders to this document.

(B) "Borrower" is AMBER JOHNSON an unmarried woman. Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) "Lender" is CENTURY PACIFIC MORTGAGE CORPORATION. Lender is a corporation organized and existing under the laws of the State of GEORGIA. Lender's address is 5655 PEACHTREE PARKWAY, SUITE 200, NORCROSS, GEORGIA 30092.

(E) "Note" means the promissory note signed by Borrower and dated September 14, 2006. The Note states that Borrower owes Lender Seventy Five Thousand And 00/100 Dollars (U.S. \$ 75,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than October 1, 2036.

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

Form 7041 1/01

Page 1 of 17

Initials:

scmerid

BK 0 598PG790

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☐ Other(s) [specify]

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

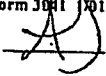
(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

Page 2 of 17

Form J001 701

Initials: 

BK 0 598PG791

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the County [Type of Recording Jurisdiction] of CHARLESTON (Name of Recording Jurisdiction):

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART
HEREOF.

Parcel ID Number:

which currently has the address of
[Street]

2640 RANGER DRIVE
NORTH CHARLESTON [City], South Carolina 29405 [Zip Code] ("Property Address"):

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns,) and to the successors and assigns of MERS, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

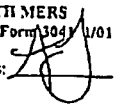
THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

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1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

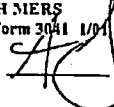
Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of

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amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the

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amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

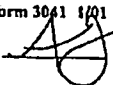
5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this

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Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

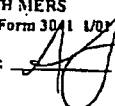
If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

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7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

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If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. **Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends, in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

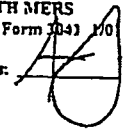
As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the

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amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowner's Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

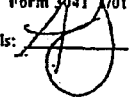
In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the

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Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. **Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. **Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

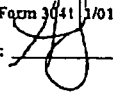
Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. **Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such

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Initials: 

fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. **Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed,

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

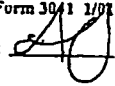
19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants, or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred

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Initials: 

to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. **Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

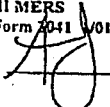
Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

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Form 2041 v01

Initials: 

22. **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. **Release.** Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. **Homestead Waiver.** Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. **Waiver of Appraisal Rights.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in Section 12-37-250 of the South Carolina Code of Laws.

26. **Future Advances.** The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to 150% of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

BK 0 598PG804

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

Mildred Candy Rye _____ (Seal)
AMBER JOHNSON _____ -Borrower

_____ (Seal)
_____ -Borrower

_____ (Seal)
_____ -Borrower

_____ (Seal)
_____ -Borrower

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

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BK 0 598PG805

STATE OF SOUTH CAROLINA,
County of CHARLESTON

Personally appeared before me THE UNDERSIGNED WITNESS and
made oath that he/she saw the within named Borrower sign, seal, and as his/her/their act and deed,
deliver the within written Mortgage; and that he/she with STANLEY E. ALEXANDER
witnessed the execution thereof.

Michael Conley

Sworn to before me this 14th day of SEPTEMBER, 2006

My Commission Expires: 10-18-14

Stanley E. Alexander
Notary Public for South Carolina

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

Form 3041 1/01

Page 17 of 17

Initials: *AX*

BK 0 598PG806

LEGAL DESCRIPTION

**2640 Ranger Drive
North Charleston, S.C. 29405**

All that certain piece, parcel or lot of land, together with the buildings and improvements thereon, situate, lying and being in Charleston County, State of South Carolina, known and designated as Lot 121, on a plat of the subdivision known as Waylyn, which plat is duly recorded in the Office of the Register of Deeds for Charleston County in Plat Book F, at Page 117; the said lot in general having such size, shape, and dimensions, more or less, as will by reference to the said plat more fully appear and being bounded as shown on aforesaid plat; the said lot herein being conveyed having such actual size, shape and dimensions as an actual survey of the lot will show.

TMS # 411-12-00-054

Being the same lands conveyed to mortgagor by deed of Carla Anderson dated September 13, 2006 and recorded in the Charleston County RMC Office simultaneously herewith.

AD

EXHIBIT 8

EXHIBIT 9

KORN LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW
1300 PICKENS STREET
COLUMBIA, SOUTH CAROLINA 29201

MAILING ADDRESS
POST OFFICE BOX 12369
COLUMBIA, SOUTH CAROLINA 29211-2369
(803) 252-5817
FACSIMILE (803) 252-5827

July 10, 2009

Amber Johnson
311 North Lake Blvd., Apt. # 1012
Altamonte Springs, FL 32701

Re: 2640 Ranger Drive, North Charleston, South Carolina

Dear Ms. Johnson:

As we discussed this morning, this office represents BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, L.P., which services a note and mortgage held by The Bank of New York. The mortgage is a lien on the above-referenced property. Although the loan has been referred to us for foreclosure, we have not yet begun the foreclosure action, as we must first resolve a title issue. As you know, prior to your purchase of the property, the property was sold at tax sale. This title defect was not the fault of my client or my client's predecessor in interest. Upon learning of the title defect, a title claim was filed, and the title company is in the final stages of obtaining the property from the tax sale purchaser.

As soon as the title issue is resolved, my client intends to bring a foreclosure action, unless, of course, you make arrangements to bring the loan current.

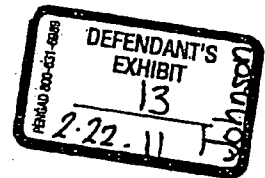
Please contact me at (803) 231-2022 if you have any questions.

Very truly yours,

Dean A. Hayes
Dean A. Hayes

DAH/tsg

THIS LETTER IS AN ATTEMPT TO COLLECT A DEBT, AND ANY
INFORMATION WILL BE USED FOR THAT PURPOSE. THIS LETTER IS FROM
A DEBT COLLECTOR.



Amber Johnson

C.A. No: 09-CP-10-6529

Amber Johnson v Stanley E. Alexander, Mario S. Inglese, and Mario Inglese PC

February 22, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NUMBER: 09-CP-10-6529
AMBER JOHNSON,	)	
	)	
PLAINTIFF,	)	DEPOSITION
	)	
VS.	)	OF
	)	
STANLEY E. ALEXANDER,	)	AMBER JOHNSON
MARIO S. INGLESE, AND	)	
MARIO INGLESE PC,	)	
	)	
DEFENDANTS.	)	

DEPOSITION OF AMBER JOHNSON, TAKEN BEFORE LORI
BOGGS REILLY, PROFESSIONAL VERBATIM REPORTER, AND NOTARY
PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT
THE HOUR OF 9:48 A.M., THE 22ND DAY OF FEBRUARY, 2011,
AT THE LAW OFFICES OF THE KAHN LAW FIRM, 562 SAVANNAH HIGHWAY,
CHARLESTON, SOUTH CAROLINA.

COPY

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803.787.7242

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1 Q Are these in fact your initials?

2 A Yes.

3 Q Does page 17 of 17 in the final document, entitled
4 Legal Description, also bear your initials?

5 A Yes.

6 Q These are in fact your initials?

7 A Yes.

8 Q Are you in breach of the terms of this mortgage?

9 MR. KAHN: Can you repeat the question?

10 Q Are you in breach of the terms of this mortgage?

11 MR. KAHN: Objection.

12 A I guess. I haven't paid the mortgage.

13 Q Do you believe that you're in breach of the terms of
14 the mortgage because you haven't paid the mortgage?

15 MR. KAHN: Objection.

16 A Yeah, I guess that's part of that issue, yes.

17 Q So the answer is yes?

18 MR. KAHN: Objection.

19 A Yes, I haven't paid the mortgage.

20 Q And are you aware that the Note and Mortgage for 2640
21 Ranger Driver required you to make certain payments
22 each month?

23 A Yes.

24 Q And without the assistance of a lender, you would not
25 have been able to purchase 2640 Ranger Drive; isn't

1 that correct.

2 A Yes.

3 Q Now, let's look at page 7 of 17?

4 A Seven.

5 Q Read out loud for me paragraph 6, at the bottom of page
6 7 of 17 of Defendant's Exhibit 5.

7 A Paragraph 6. "Borrower shall occupy, establish and use
8 the property as Borrower's principal residence within
9 60 days after the execution of this security instrument
10 and shall continue to occupy the property as Borrower's
11 principal residence for at least one year after the
12 date of occupancy unless lender otherwise agrees in
13 writing which -- in writing, which consent shall not be
14 reasonably withheld, or if extenuating circumstances
15 exist which are beyond borrower's control.

16 Q Did you comply with the terms and conditions as set
17 forth in this paragraph?

18 A No.

19 Q So you did not occupy, establish or use 2640 Ranger
20 Drive as your principal residence; is that correct?

21 A No.

22 Q Did you ever have any intention of using 2640 Ranger
23 Drive as your principal residence?

24 A No.

25 Q Now, let's go to the next page, page 8 of 17,

1 payments to 2640 Ranger Drive?

2 A No.

3 Q Did you learn at one time that your father ceased
4 making mortgage payments on 2640 Ranger Drive?

5 A Yes, sir.

6 Q What month?

7 A I'm not sure. I can guess. But I'm not sure.

8 Q Did you tell your father to continue making mortgage
9 payments for 2640 Ranger Drive?

10 A No.

11 Q Why not?

12 A Because he explained to me that because of the title
13 issue, I no longer owned the property.

14 Q Did your father explain to you that he was still making
15 or still obtaining rent payments each month from
16 Melzetta and Cleveland Brown?

17 MR. KAHN: Objection.

18 A No, we never talked about it.

19 Q Are you aware that Melzetta and Cleveland Brown made
20 monthly required mortgage -- excuse me, rental payments
21 to your father --

22 MR. KAHN: Objection.

23 Q -- from November of 2006 until March or April of 2009?

24 MR. KAHN: Objection.

25 A I'm not aware.

1 Q Did you know that your father was receiving rent
2 payments each month from Cleveland and Melzetta Brown.

3 A I know he was receiving rent.

4 Q How long did Cleveland and Melzetta Brown live in 2640
5 Ranger Drive?

6 A I don't know.

7 Q Did they live at that address during 2007?

8 A I believe so, but I don't know.

9 Q Did they live at that the address in 2008?

10 A I don't know.

11 Q Did Cleveland and Melzetta Brown live at 2640 Ranger
12 Drive during any months of 2009?

13 A I don't know.

14 Q How many payments were made pursuant to the Note and
15 Mortgage for 2640 Ranger Drive?

16 A I think five or six.

17 (MARKED AS DEFENDANT'S EXHIBIT NUMBER 12 FOR IDENTIFICATION
18 PURPOSES, BANK OF AMERICA PAYMENT HISTORY FOR 2640 RANGER
19 DRIVE)

20 BY MR. GOINGS:

21 Q I hand you a document that's marked as Defendant's
22 Exhibit 12. If you can identify this document for me?

23 A It's a loan history.

24 Q Does this document marked as Defendant's Exhibit 12
25 accurately reflect the payment history made for

1 property address 2640 Ranger Drive in North Charleston,
2 South Carolina.

3 MR. KAHN: Objection.

4 A I don't know.

5 Q Does this document show that mortgage payments were
6 made on or about November 30, 2006?

7 A Yes.

8 Q Does it show the mortgage payments were made on or
9 about January 5, 2007?

10 A Yes.

11 Q Does it show the mortgage payments were made on or
12 about February 9, 2007?

13 A Yes.

14 Q Does it show that mortgage payments were made on or
15 about March 1, 2007?

16 A Yes.

17 Q Does it show that mortgage payments were made on or
18 about April 4, 2007?

19 A Yes.

20 Q Does it show that mortgage payments were made on or
21 about May 24, 2007?

22 A Yes.

23 Q Is it your testimony that your father ceased making
24 mortgage payments as required under the Note and
25 Mortgage when he learned of a title irregularity on the

1 property?

2 A That's when I learned about it. That's when they
3 stopped making the payments.

4 Q So is it true that only five or six mortgage payments
5 were made for 2640 Ranger Drive?

6 A Yes.

7 Q Were any other payments made for 2640 Ranger Drive
8 other than as set forth on Defendant's Exhibit 12?

9 A These are all that I know of.

10 Q Where were you when you learned that there was a title
11 irregularity or problem as to the property at 2640
12 Ranger Drive?

13 A Where was I? I was in my parents' house.

14 Q In Charleston?

15 A Yes.

16 Q Who told you there was a problem with the title 2640
17 Ranger Drive?

18 A I think it might have been my mother.

19 Q What did you say when you heard this?

20 A I asked her what it meant, what was going on with it.

21 Q What response did you receive from your mother?

22 A Basically that it wasn't mine anymore.

23 Q Did you call anyone?

24 A No.

25 Q Did you call Stan Alexander?

1 Q Did your father ever tell you he received rental
2 payments from Cleveland and Melzetta Brown in the
3 amount of \$750 per month?

4 A No. I just knew -- I just know he received rental.

5 Q Are you aware that your father received rental payments
6 from Cleveland and Melzetta Brown for 2640 Ranger Drive
7 for months after the mortgage payments were ceased?

8 MR. KAHN: Objection.

9 A Am I aware that he received the rental payments?

10 Q Yes, ma'am.

11 A Yes.

12 Q What did your father do with the rental payments?

13 A I don't know.

14 Q Did your father give you that money?

15 A He didn't give me all the money directly, saying this
16 is the rental money.

17 Q Did you ask your father to continue making the mortgage
18 payments as he was receiving rent on this property?

19 A No, I didn't

20 Q Why not?

21 A Because I believe that there was a title issue.

22 Q Do you understand that your father profited off of 2640
23 Ranger Drive each month and never paid the mortgage
24 payment?

25 MR. KAHN: Objection.

1 A I understand that the mortgage wasn't paid.

2 Q And you also understand that he received mortgage
3 payments each month, too, correct?

4 A Mon- -- rental payments?

5 Q Rental payments each month.

6 A I guess so, yes.

7 Q So you know that your father received rental payments
8 at the same time he was not paying on the mortgage,
9 correct?

10 MR. KAHN: Objection.

11 A Yes.

12 Q Do you believe that if your father continued to pay the
13 mortgage payments as set forth in the Note and Mortgage
14 on 2640 Ranger Drive that you would not be involved in
15 the present foreclosure action?

16 MR. KAHN: Objection.

17 A In the present for- -- I guess the present, yes.

18 (MARKED AS DEFENDANT'S EXHIBIT NUMBER 14 FOR IDENTIFICATION
19 PURPOSES, RESIDENTIAL RENTAL AGREEMENT)

20 BY MR. GOINGS:

21 Q I'm going to hand you a document which I'm going to
22 represent was marked as Defendant's Exhibit 3 in the
23 deposition of Cleveland and Melzetta Brown, which for
24 the purposes of today's deposition is going to be
25 marked as Defendant's Exhibit 14. Have you ever seen

EXHIBIT 10

Melzetta Brown

Amber Johnson v Stanley E Alexander, Mario S Inglese, and Mario Inglese PC

Civil Action No.: 09-CP-10-6529

February 8, 2011

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) CIVIL ACTION NO.: 09-CP-10-6529
AMBER JOHNSON,)
PLAINTIFF,) DEPOSITION
VS.) OF
STANLEY E. ALEXANDER,) MELZETTA BROWN
MARIO S. INGLESE, AND)
MARIO INGLESE PC,)
DEFENDANTS.)

DEPOSITION OF MELZETTA BROWN, TAKEN BEFORE LORI
BOGGS REILLY, PROFESSIONAL VERBATIM REPORTER, AND NOTARY
PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT
THE HOUR OF 10:00 A.M., THE 8TH DAY OF FEBRUARY, 2011,
AT THE LAW OFFICES OF THE KAHN LAW FIRM, 562 SAVANNAH HIGHWAY,
CHARLESTON, SOUTH CAROLINA.

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1 them.

2 Q Okay. Do you recall -- tell me about when you took out
3 a bank loan. What was that for?

4 A That's my own personal savings, checking.

5 Q Okay, I got you. Did you go to South Carolina Federal
6 Credit Union to obtain financing to purchase 2640
7 Ranger Drive?

8 A Like I said before, my understanding, when I went to
9 the bank, it was like for -- I want to try to say it
10 was like promise to pay. They did some kind of share -
11 - a share thing, like borrow, to see if I would have
12 been able to pay the bank back, the money that I
13 borrowed from them, which I did.

14 Q Okay. Was that related to the purchase of 2640 Ranger
15 Drive?

16 A Uh-huh.

17 Q Is that a yes?

18 A Yes, sorry.

19 Q So my notes, you lived at 2640 Ranger Drive from
20 October of 2006 until March of 2009; is that correct?

21 A Exactly.

22 Q Other than with South Carolina Federal Credit Union, do
23 you recall if you applied for any other loan or
24 financing as it relates to --

25 A No.

1 Defendant's Exhibit 2 is the agreement to buy and sell
2 real estate residential, correct, and it was entered
3 into October 11, 2006; is that correct?

4 A Yeah, I think they were -- we were moving in the house
5 in October, we were moving in the house in October and
6 that's when he was trying to see if he could get us to
7 buy the house.

8 Q Why did you sign a month later an agreement called
9 Residential Rental Agreement, marked as Defendant's
10 Exhibit 4?

11 A She -- because she drew -- his wife drew up the papers,
12 I guess to make sure that we -- they would've gotten
13 their rent. And I told them that I wanted something in
14 writing to verify that, you know, who I'm paying my
15 rent to, and I wanted something drawn up, and his wife
16 drew up this rental thing here, so that way we could
17 have proof that we live in the house and that we were
18 renting from Mr. Alfred Johnson.

19 Q Okay. So, instead of purchasing the house, you chose
20 to rent the house, correct?

21 A Well, at the time it was basically rent, and then later
22 on rent-to-own. That's how that fell. But we would
23 have had -- I think he told me I would have to meet the
24 people who he was dealing with to rent the house, I
25 mean to finance the house or to sell us the house or

1 whatever. But in the process of them doing all of
2 that, I've told them if that wasn't a go, I wanted to
3 do the rent.

4 Q Okay.

5 A Do the rent, and if anything that comes back,
6 everything that I've put in the house, I would want to
7 try to get back from out of the house.

8 Q And then, that relates to paragraph 2 of Defendant's
9 Exhibit 4 when it states, "Renter will have the option
10 to buy said property," correct?

11 A Uh-huh.

12 Q So is it your understanding that Defendant's Exhibit 4
13 of the agreement set forth as Defendant's Exhibit 4
14 superceded Defendants Exhibit 2?

15 MR. KAHN: Objection.

16 A I don't know. All I know is that it sounds so good to
17 be true, and we just signed so we can either try to
18 either rent or buy the house.

19 Q Okay. But as set forth in Defendant's Exhibit 4 you
20 ended up renting the house, correct?

21 A Uh-huh.

22 Q Is that a yes?

23 A Yes.

24 (OFF THE RECORD)

25 BY MR. GOINGS:

1 Q Ms. Brown, did you have the electricity bills in your
2 name?

3 A My husband. I think it was in Cleveland Brown.

4 MR. BROWN: Yes.

5 A Yes.

6 Q Is that water bill in your name?

7 A Yep.

8 Q Did you ever receive at any time a notice on the door
9 from the Charleston Delinquent Tax Assessors office?

10 A Not to my knowledge. I never received nothing like
11 that. We went and put -- it ran in his name for a
12 while and then we went and turned it over and put it in
13 our name.

14 Q What ran in the name of the Johnsons?

15 A I can't recall if it was Amber's or Alfred, because
16 when we moved in there the water and stuff was on. The
17 water and the lights and stuff was on.

18 Q Okay. How long did it take for you to transfer the
19 utilities into you and your husband's name from the
20 Johnson's name?

21 A It didn't take us really that long. I mean when we
22 move in the house, I think our next step was to go and
23 get everything turned in and transferred into our name.

24 Q Okay. Would you say that within 15 days from moving
25 in --

1 A Oh yeah, yeah. He did tremendously with us. And even
2 the receipts can show you, because I got everything
3 dated every time I call him and let know that I'm \$200
4 or \$300 short, and he said, well, you know, just
5 whenever you get it. And then when he'd come and get
6 what I got, I make sure how much I paid him, when I
7 paid him, what date I paid him, and then when he comes
8 back on the same receipt, or I do it on another
9 receipt, to verify that I did pay them the other
10 portion of the money.

11 Q Sometimes making the \$750-a-month rent payment was
12 difficult during that time?

13 A Yeah, because I was working -- like a school bus driver
14 gets paid like nine months out of the year, and it was
15 sometimes hard.

16 MR. KAHN: Object. I think it was 700, and
17 you said 750.

18 Q And the lease says 750, and then the testimony says
19 700, so I'm a little confused as well.

20 A Yeah. He didn't charge us the 750 because he actually
21 really just took the 700 from us. Because like I said
22 before, he saw how we were taking care of the house and
23 he didn't want to put that down on us like that.

24 Q Were you were working for Durham during the time you
25 were living at Ranger Drive.

FILED

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON IN THE NINTH JUDICIAL
CIRCUIT
J. ARMSTRONG
CLERK OF COURT

AMBER JOHNSON,
PLAINTIFF,

V.

STANLEY E. ALEXANDER, MARIO
S. INGLESE AND MARIO S.
INGLESE, PC,
DEFENDANTS.

Case No. 09-CP-10-6529

AFFIDAVIT OF

Mary Scarborough
Delinquent Tax Collector
Charleston County, South Carolina

Deponent, Mary Scarborough, having been duly sworn, states as follows:

1. My name is Mary Scarborough. I am over the age of 18 and I am competent to make this affidavit.
2. I am the Delinquent Tax Collector for Charleston County, South Carolina and have worked in this capacity as collector or interim collector for over 5 years. In 2006, I was the Interim Delinquent Tax Collector for Charleston County. I have worked in the Charleston County Delinquent Tax Office for about 30 years.
3. I have no interest in the matter known as *Amber Johnson v. Stanley E. Alexander, et al*, Case No. 09-CP-10-6529, in the Court of Common Pleas of Charleston County.
4. I have first hand knowledge about this matter as I issued the tax deed recorded with the Charleston RMC Office at Book N 608, page 628 and signed an Affidavit recorded with the Charleston RMC Office at Book N 608, page 630 related to the property at issue, property identification number (PID) or TMS 411-012-00-054, at 2640 Ranger Drive, North Charleston, South Carolina.
5. In my professional capacity, I have direct and personal knowledge of the ways and means by which the Delinquent Tax Office informs the public about the status

of taxes regarding real property in Charleston County and how the office maintains information regarding delinquent real property taxes, and how abstractors, attorneys and members of the public access such public information, particularly for the purposes of conducting title searches.

6. I am aware that the tax deed from the October 3, 2005 tax sale of the property at issue was not recorded with the Charleston County Office of the Register Mesné Conveyance (RMC) until December 12, 2006. The tax deed merely reflects that the property sold at the tax sale in October of 2005 has been conveyed to the purchaser at the tax sale. Information regarding the status of the taxes, delinquent, paid, etc. is always available through the public records and means discussed herein. The facts and information regarding the property that had been sold at a Charleston County tax sale would have been readily and publicly available in ways that are routinely, regularly and as a matter of course accessed by abstractors, attorneys and members of the public conducting title examinations or inquiring about the tax status of real property.

7. I have direct and personal knowledge that information regarding delinquent taxes for real properties located in Charleston County, South Carolina, was readily and publicly available in July, August and September of 2006, in the Office of the RMC office for Charleston County via the Vista 3270, a computer database commonly known as the "mainframe." I have personal and direct knowledge that title abstractors and attorneys routinely and regularly used that public system in July, August and September of 2006 to conduct title examinations to make themselves aware of the status of taxes regarding property.

8. Based on my first-hand knowledge in working in the Office of the Delinquent Tax Collector for many years, I know that Delinquent Tax data for Charleston County real properties has been publicly available on the Vista 3270 mainframe system since 1997, when in my professional capacity I helped design the system.

9. I also know that the Delinquent Tax Office regularly and timely updates for itself and members of the public, Delinquent Tax data on the mainframe system (Vista 3270) regarding Charleston County real properties. Numerous machines for publicly accessing that system are readily available in the RMC office to abstractors, attorneys, or any member of the public interested in examining the title for real property in Charleston County and that system would have made known to anyone accessing it in July, August or September of 2006 that the property at issue had been sold at a tax sale in 2005 and that taxes were delinquent on the property for the years 2004 and 2003.

10. I know that an attorney or abstractor using the mainframe system in July, August or September of 2006 would have seen that the real property located at 2640 Ranger Drive, North Charleston, S.C., with the property identification number (PID) or TMS Number of 411-12-00-054, had been delinquent in tax payments for years 2003 and 2004 because the system is designed to provide that information to members of the public who access it. Further, one using that publicly available system would have seen that the property had been sold at a Charleston County tax sale on October 3, 2005 to pay the 2004 delinquent taxes.

11. I know that information about the sale of TMS No. 411-12-00-054 has been publicly and readily available on the mainframe system since October 14, 2005, which is the date that proceeds from the October 3, 2005, tax sale were applied to the Delinquent Tax account. Delinquent Tax Records in the Vista 3270 are updated to reflect a tax sale as soon as proceeds of the sale are applied to the account, even though a tax sale deed is not recorded for at least one year after the sale. The delay in posting and filing a tax deed is to take into account the "redemption period" to give a property owner or purchaser sufficient time to pay the delinquent taxes before the property that was sold at the tax sale to be conveyed and recorded in the name of the tax sale purchaser.

12. Attached are documents printed from my office relating to the real property identified by way of TMS No. 411-12-00-054. With the exception of information related to the dates after 2006, I know that the attached print-outs from the mainframe system (Vista 3270) accurately reflect and represent what an attorney, abstractor or any member of the public would have seen regarding this specific real property had he or she accessed the public records via the mainframe system at any time in 2006, including July, August and September of 2006. Exhibit 1 shows the real property taxes were delinquent in 2003 and 2004, as delineated by the "D" on the lines for those years. Exhibit 2 reflects that the subject real property was sold at a tax sale on October 3, 2005. Exhibit 3, the Delinquent List Screen, shows all the years for which taxes on the property were delinquent.

13. Further, I know that delinquent real property tax information in Charleston County, South Carolina, was publicly and readily available in 2006, including July, August and September 2006, on a Charleston County internet web-based system known as the Charleston County On-Line Tax System, available at <http://taxweb.charlestoncounty.org>. The system allows an abstractor, attorney or member of the public to check a real property's tax history simply by conducting Tax Records Search by entering the PID or TMS number into the search field.

14. I know that in July, August or September of 2006, any abstractor, attorney, or member of the public who conducted a "Tax Records Search" on the Charleston County On-Line Tax System by entering the PID or TMS number 411-12-00-054 would have seen a list of the property's payments or delinquencies by year, including the years 2003 and 2004. The fact that the property taxes were delinquent for the years 2003 and 2004 would have been visible to those conducting such a search. I know that had any abstractor, attorney or member of the public who used that system at that time could have then "clicked" on the delinquent tax years and would have seen a message instructing him or her to call the Charleston County Delinquent Tax Office for more information.

15. Further, I know in July, August or September 2006, had an abstractor, attorney or any member of the public called the Delinquent Tax Office for information about the property in question, would have been told about the tax sale that occurred on October 3, 2005 and the current status of whether the property had been redeemed. Obtaining a full Delinquent Tax file from the Delinquent Tax Office on a particular piece of real property requires filing a S.C. Freedom of Information Act (FOIA) request. However, it is not necessary to obtain the "full file" to determine that the taxes were delinquent or the property had been sold at a tax sale because the information regarding the tax status is publicly available as set forth above. In any case, as a matter of policy in July, August and September of 2006, as now, I know people call about delinquent property taxes are given basic information about the property's delinquent status, including how much tax is owed, whether the property has been sold at a tax sale, and whether the property has been redeemed.

16. In sum, as to the real property located at 2640 Ranger Drive, North Charleston, South Carolina with TMS or PID number 411-12-00-054, in July, August and September of 2006, the fact that the taxes were delinquent for the tax years 2003 and 2004 and that the property had been sold at a tax sale on October 3, 2005 was information in the public records and easily, publicly and readily available, including through information provided by this office; through the Vista 3270 mainframe system available in the Office of the RMC; and via the Charleston County On-Line Tax System available via the World Wide Web. The attached printouts are exemplarily of what the public records an abstractor, attorney or other member of the public would have seen when performing a search related to taxes concerning the property on one of the public systems.

FURTHER DEPONENT SAYETH NOT.

Mary Scarborough
Mary Scarborough
Delinquent Tax Collector

Sworn to before me

This 20 day of May, 2011

Notary Public for South Carolina

My commission expires: Nov. 7 2016

ju

U102

OPER ID: RMCP01

CHARLESTON COUNTY TAX SYSTEM
REAL PROPERTY - PID HISTORY

05-18-2011

12:59:11

PID NO: 411-12-00-054

TAX YEAR:

TAX YEAR	PRIOR YEAR	*----- OWNER NAME	-----*	RECEIPT NUMBER	STAT
2010		JOHNSON AMBER		2010-176632	C P
2010		JOHNSON AMBER		2010-079218	C N
2009		WESTWOOD PROPERTIES LLC		2009-163317	C P
2008		WESTWOOD PROPERTIES LLC		2008-161278	C P
2007		WESTWOOD PROPERTIES LLC		2007-157158	C P
2006		ANDERSON CARLA		2006-990000	C P
2006		ANDERSON CARLA		2006-160580	C N
2006		ANDERSON CARLA		2006-002560	C N
2005		ANDERSON CARLA		2005-002420	C P
2004		ANDERSON CARLA		2004-002394	D
2003		THOMAS CAROLYN		2003-130062	D

MORE RECORDS

NEXT SCREEN:

PF1-AUDIT PF2-TREAS

PF8=SCROLL FWRD

Exhibit 1

D102

OPER: RMCP01

CHARLESTON COUNTY TAX SYSTEM
DELINQUENT RECEIPT INQUIRY

05-18-2011

13:04:52

TAX YR: 2004 ACCT: 4111200054

PROP: 00 RCPT: 2004 - 002394 ACT: I

PY: REF:

TD: 43

JUR: 01 HE CD: STAT: S RC: 40

OWN1 1ST: ANDERSON CARLA

OWN2 1ST:

CARE OF:

TAX ADDR: 2640 RANGER DR

C,S,Z:

MAIL ADDR: 2640 RANGER DR

C,S,Z: NORTH CHARLESTON

DESC: LT 121

WAYLYN

TOT APPR: 34,000

TOT ASMT: 2,040

HME ASMT:

PTR ASMT:

CAP ASMT:

TAX SALE: 10-03-2005 S

REDEEMED:

CONVEYED:

INQUIRY COMPLETE

F1=ACCT F4=CRED F6=COLL F9=MEMO F11=ADMN F16=RFND F21=ABAT

MILLAGE: 294.7

LEGAL RES:

OTHER RES: OT

AGRI LAND:

CAP APPR:

ABT OP/DT:

UPD OP/DT: SHDPEL 10-14-2005

SOLD TO BIDDER

UNIT:

UNIT:

SC 29405 7393

MEMO: Y

REF CK/DT:

ORIG TAX:

CREDITS:

PENALTIES:

INTEREST:

USER FEE:

SW FEE:

NET AMT:

PAID DT: 10-14-2005

BD CHK DT:

NB DT:

REF AMT:

ABMT AMT:

RSEQ: 0

NSCN:

Exhibit 2

D103
OPER: RMCP01

CHARLESTON COUNTY TAX SYSTEM
DELINQUENT LIST SCREEN

05-18-2011
13:03:55

TAX YR: 2010 ACCT: 4111200054 PROP: 00

REF:

OWNER1: ANDERSON CARLA

TAX ADDR: 2640 RANGER DR

UNIT:

C,S,Z: SC

OWNER1 NAME	RECEIPT	NET AMOUNT
ANDERSON CARLA	2004-002394	601.83 S
THOMAS CAROLYN	2003-130062	326.19 P
THOMAS CAROLYN	2000-121046	240.40 P

INQUIRY COMPLETE

TAXYR DEFAULTS TO CURR YEAR

F1=ACCT F2=RCPT

NEXT SCREEN:

Exhibit 3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

**COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL
CIRCUIT**

AMBER JOHNSON,

Case No. 09-CP-10-6529

PLAINTIFF,

V.

AFFIDAVIT OF

STANLEY E. ALEXANDER, MARIO
S. INGLESE AND MARIO S.
INGLESE, PC,

TODD BALISH

DEFENDANTS.

2011 MAY 24 PM 3:40
FILED
BY JULIE J. ARMSTRONG
CLERK OF COURT

Deponent, Todd Balish, having been duly sworn, states as follows:

1. My name is Todd Balish. I am over the age of 18 and I am competent to make this affidavit.
2. I am a resident of Dorchester County engaged in the practice of conducting abstracts of title for residential closings, commercial transactions, foreclosure law suits as well as litigation matters. I am sole proprietor of Edisto Title Services, Inc., which has been in existence since 1994. I routinely conduct abstracts of title for properties located in Charleston, Colleton and Berkeley counties. I have been engaged in the business of abstracting title for 21 years.
3. I have no interest in the matter known as *Amber Johnson v. Stanley E. Alexander, et al*, Case No. 09-CP-10-6529, in the Court of Common Pleas of Charleston County.
4. On November 1, 2007, I was contacted by Jim Koutrakous, Esquire of Callison, Tighe & Robinson, LLC, who was handling a title claim on behalf of Chicago Title. Mr. Koutrakous contacted me and requested that with regard to real property located at 2640 Ranger Drive, North Charleston, South Carolina, TMS No. 411-12-00-054 (The Property) that I do the following: (1) conduct a title examination back to 2000; (2) review the delinquent collector's records to determine if someone doing the closing for Amber Johnson should have discovered that the property was

sold at a tax sale; and (3) procure a copy of the Assessor's/Delinquent Tax Office's files for the tax sale of this property.

5. On November 15, 2007, I completed a Title Examination Report with all relevant documentation. I conducted the title abstract of The Property in the same manner in which I generally conduct title abstract.

6. I am familiar with the standard for abstractors and attorneys as it relates to the normal, usual, and standard practice for abstractors and attorneys conducting title examinations in South Carolina to check tax records for 10 years.

7. By examining the public Charleston County Tax System, which is readily and publicly accessible in the Charleston County Register Mesné Conveyance (RMC) Office, I know that delinquent taxes were due on The Property in question in 2004, and that the property was sold in a tax sale on October 3, 2005. Further, anyone checking the title on the publicly available system in the RMC office in Charleston County in July, August or September of 2006 on the Charleston County Tax System would have seen that the taxes were delinquent in 2004 and that the property had been sold at a tax sale in October of 2005.

8. The printout of the publicly available Charleston County Tax System Delinquent Receipt inquiry, attached as Exhibit A (CT&R 000709), shows The Property was sold on October 3, 2005 for delinquent 2004 taxes. A computer screen reflecting the information available from the Charleston County Delinquent Tax Office that is the equivalent of the printout of this information would have been and was readily and publicly available to any abstractor, attorney or member of the public checking tax records for the subject property at the Charleston County RMC office.

9. Further, I know that in 2006, including July, August and September, records and information that the property taxes were delinquent in 2004 would have been publicly available via the Charleston County On-Line Tax System, an internet web-based system available on any computer with internet access. I know that further details about the delinquent taxes, including how much was owed and that The Property had been sold at a tax sale in October of 2005, would have been a public record publicly available on the Charleston County Tax System at the RMC Office or by calling the Delinquent Tax Office.

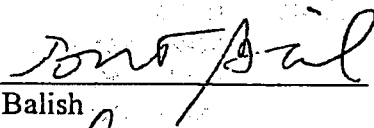
10. As a title abstractor engaged in the practice for 21 years, I am of the opinion and belief to a reasonable degree of title abstractor certainty that anyone

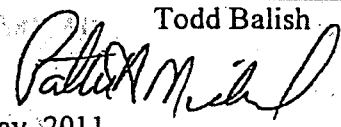
conducting a standard and proper title abstract in 2006, including July, August and September of 2006, would have and should have discovered that taxes were delinquent and the property was sold for past due taxes in 2005 prior to a closing conducted in September 2006 because the information was publicly available in the RMC office as well as online on the internet via the world wide web on the Charleston County Tax System.

11. In this matter, the abstractor and/or attorney involved in the performing a title search in August and September of 2006 departed from the applicable standard of care related to performing a proper title abstract by failing to discover the public information that the property was sold for delinquent taxes in October of 2005.

12. Each of my opinions are to a reasonable degree of certainty, most probably.

FURTHER DEPONENT SAYETH NOT.


Todd Balish

Sworn to before me 
This 23rd day of May, 2011
Notary Public for South Carolina
My commission expires: 1-21-21

D102

CHARLESTON COUNTY TAX SYSTEM

11-15-2007

OPER: RMCP01

DELINQUENT RECEIPT INQUIRY

11:07:00

TAX YR: 2004 ACCT: 4111200054

PROP: 00 RCPT: 2004 - 002394 ACT: I

PY: REF:

TD: 43

JUR: 01

HE CD:

STAT: S RC: 40

OWN1 1ST: ANDERSON CARLA

OWN2 1ST:

CARE OF:

TAX ADDR: 2640 RANGER DR

C,S,Z:

SC

MAIL ADDR: 2640 RANGER DR

C,S,Z: NORTH CHARLESTON

SC 29405 7393

DESC: LT 121

WAYLYN

TOT APPR: 34,000

MILLAGE: 294.7

TOT ASMT: 2,040

LEGAL RES:

HME ASMT:

OTHER RES: OT

MEMO: Y

NB DT:

PTR ASMT:

AGRI LAND:

REF AMT:

CAP ASMT:

CAP APPR:

REF CK/DT:

TAX SALE: 10-03-2005 S

REDEEMED:

ABT OP/DT:

ABMT AMT:

CONVEYED:

UPD OP/DT: SHDPEL 10-14-2005

RSEQ:

INQUIRY COMPLETE

SOLD TO BIDDER

F1=ACCT F4=CRED F6=COLL F9=MEMO F11=ADMN F16=RFND F21=ABAT

NSCN:

Exh. A

CT&R 000709

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
09-CP-10-00529

AMBER JOHNSON,)
PLAINTIFF,)
vs.)
STANLEY E. ALEXANDER,)
MARIO S. INGLESE and)
MARIO S. INGLESE, PC)
DEFENDANTS.)

TRANSCRIPT OF RECORD
(ORIGINAL)

MARIO S. INGLESE and)
MARIO S. INGLESE, PC)
THIRD-PARTY PLAINTIFF,)
vs.)
CHARLES FEELEY,)
THIRD-PARTY DEFENDANT.)

MAY 26, 2011
CHARLESTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JR., JUDGE.

A P P E A R A N C E S:

JUSTIN S. KAHN, ESQ.,
MARY LEIGH ARNOLD, ESQ.,
Attorney for the Plaintiff.

JOEL W. COLLINS, JR., ESQ.,
ROBERT F. GOINGS, ESQ.,
MARIO S. INGLESE, ESQ.,
Attorneys for Defendants.

VIVIAN H. CROSS
OFFICIAL COURT REPORTER

I-N-D-E-X
MAY 26, 2011
(AMBER JOHNSON

V.
STANLEY E. ALEXANDER, ET AL.)
(09-CP-10-6529)

PAGE

COLLOQUY

3

REPORTER'S CERTIFICATE

49

E X H I B I T S

IDENTIFICATION

ENTERED

COURT EXHIBITS:

1	COLLINS & LACY BINDER	19
2	MAY 25, 2011 FAX	47
3	TODD BALISH AFFIDAVIT	48
4	MARY SCARBOROUGH AFFIDAVIT	48

P R O C E E D I N G S

(CASE NO.: 09-CP-10-00529)

(MAY 26, 2011 - 9:40 A.M.)

THE COURT: Uh -- let me see. Mr. Collins, the Clerk just -- I -- I've been in trial all week and I see where both of you sent some emails. I haven't opened up the emails; I don't know what was in 'em.

And I see, Mr. Collins, you had requested -- I did look on the Blackberry at your email -- you're requesting a continuance today.

MR. COLLINS: Judge, this is the letter---

THE COURT: And then the Clerk just handed me a letter that's overnight that I haven't opened yet.

So I guess we'll let you -- you got a Motion for Continuance?

MR. COLLINS: Yes we do, Your Honor. This is the letter that we emailed to you and faxed to you and---

THE COURT: I haven't -- the Clerk just game me a copy of it.

MR. COLLINS: Yes, sir; all right, we'll -- you have a copy of our letter?

(WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A CONFERENCE, OFF THE RECORD.)

(WHEREUPON, COURT RESUMED.)

THE COURT: All right; well, first of all, do you --

1 does anybody have the order -- I know the file's here -- that
2 we issued from the last hearing that I can look at?

3 MR. KAHN: Your Honor, it wasn't an order, and The Court
4 may recall that---

5 THE COURT: It was all verbal---

6 MR. KAHN: ---correct; you---

7 THE COURT: ---there was no written order.

8 MR. KAHN: ---you had instructed us to get---

9 THE COURT: All right; my understand from the last
10 hearing, the reason I continued the hearing and scheduled the
11 hearing for this week was to give you a opportunity to bring
12 information into The Court by live testimony or affidavits as
13 to what -- the notice requirement, the tax liens in
14 Charleston County office, the Treasurer's Office, the R-M-C's
15 office. That was the purpose of this hearing.

16 So I don't understand -- I haven't read your material
17 and why you want the, uh, continuance, but the---

18 MR. COLLINS: All right---

19 THE COURT: ---in light of that, let me hear from you.

20 MR. COLLINS: ---let -- yeah, let -- please allow me to
21 explain, Your Honor.

22 THE COURT: Okay, because I thought it was very, very
23 specific. You -- you raised the issue that the -- the lawyer
24 didn't have notice, the abstracter didn't have notice because
25 it wasn't available. And I said I'll continue it to give you

1 an opportunity to bring live witnesses, affidavits, or
2 however you want to present it to The Court as to notice to
3 the public on the issue of tax liens.

4 But, I can't understand why we need a continuance.

5 MR. COLLINS: Judge, may I explain?

6 THE COURT: Yes, sir; I'll -- I'll listen to you.

7 MR. COLLINS: I hope you'll -- I hope you'll bear with
8 me, Your Honor.

9 THE COURT: I -- I'll listen. Let me hear him and I'll
10 listen to you, Mr. Kahn, okay?

11 MR. KAHN: All right.

12 THE COURT: But I just -- that was real simple---

13 MR. COLLINS: Judge---

14 THE COURT: ---a real simple reason we're having this
15 hearing today!

16 MR. COLLINS: ---Judge---

17 THE COURT: And I don't understand why we need a
18 continuance.

19 MR. COLLINS: ---may I be heard, Your Honor?

20 THE COURT: Yes, sir.

21 MR. COLLINS: Uh -- Judge, the big envelope that you
22 have in front of you, which you have not opened, is our
23 Memorandum of Law in opposition to this Motion for Summary
24 Judgment.

25 Attached to it are exerts of depositions and the

1 affidavit of the man who actually conducted the title
2 examination---

3 THE COURT: Okay.

4 MR. COLLINS: ---Mr. Charles Feeley. Mr. Feeley's
5 affidavit, we believe, Your Honor, abundantly proves that
6 there's a genuine issue of material fact about whether or not
7 that a title examiner in, uh -- in August of 2006 would have
8 before him such information as to create notice that there
9 was a defect in the title having to do with the unpaid taxes.

10 We believe that his dep- -- his affidavit abundantly
11 shows that that's the case.

12 We believe that the rest of what's before you also
13 corroborates that and clearly establishes a genuine issue of
14 material fact.

15 This is a professional liability case, Your Honor,
16 brought against not one, not two, but three lawyers. And,
17 they stand before you today, uh, with a -- a complicated but
18 factually intense, uh, record to show that you don't have
19 before you a -- a sufficient basis whatsoever to grant a
20 summary judgment to the Plaintiff.

21 First of all, their only expert that they identify,
22 Judge---

23 THE COURT: Well, I mean are we -- are you addressing
24 the continuance or what are we addressing?

25 MR. COLLINS: Judge---

1 THE COURT: The merits of the argument?

2 MR. COLLINS: ---I'm -- I'm addressing---

3 THE COURT: I thought you wanted a continuance.

4 MR. COLLINS: ---I'm addressing the continuance, but I'm
5 giving you some---

6 THE COURT: Okay.

7 MR. COLLINS: ---historical perspective---

8 THE COURT: Okay.

9 MR. COLLINS: ---for why we think that's important.

10 THE COURT: Okay.

11 MR. COLLINS: As I was saying, the only expert they
12 identify in this two-year-old case was Mr. John Brown.
13 Mr. Brown is a member of The Bar.

14 They have an affidavit from him, I believe, before they
15 filed this lawsuit, as is required by law. Mr. Goings
16 deposed him. At his deposition, Mr. Brown admitted he
17 doesn't check titles, is not familiar with the online system
18 here in Charleston County. And, went on to say that if he
19 had done this title work he would have had the same problem,
20 made the same omission or error -- whatever it is. But, he
21 said -- he went on to say essentially this. That when a
22 lawyer closes a loan, he's strictly liable for any problem
23 that comes up.

24 Well Judge, that's not the law. The law of South
25 Carolina is that a title attorney can only be guilty of

1 professional negligence if he fails to exercise due care and
2 fails to exercise, uh, a standard that is established by a
3 qualified expert. Mr. Brown doesn't establish a qualified
4 standard.

5 And, he goes on to say, uh, essentially, a -- a standard
6 that he applies is one that's not the law.

7 THE COURT: Mr. Collins, this is the same argument you
8 made at the previous hearing.

9 MR. COLLINS: If Your Honor will allow me to make my
10 record?

11 THE COURT: Okay.

12 MR. COLLINS: Now, after we filed our Memorandum of Law
13 and quote Mr. Brown's very deficient, uh, testimony, they
14 come up and the very next day---

15 THE COURT: That -- that was quoted at the last hearing.
16 The same argument you're making now was the same argument at
17 the last hearing.

18 MR. COLLINS: Judge, I believe I'm adding to that if
19 you'll allow me.

20 THE COURT: Okay -- all right.

21 MR. COLLINS: We then, after we make our filing, Your
22 Honor, receive on the -- on the day before yesterday---

23 THE COURT: You're talking about the memorandum that's
24 in the overnight package?

25 MR. COLLINS: No, Your Honor, I'm talking about what we

1 got from the Plaintiff.

2 Late on the afternoon of the 24th, we receive a letter
3 with two new affidavits in it.

4 THE COURT: All right.

5 MR. COLLINS: This was sent to you; this is the copy
6 that was sent to us. We got it late, uh, Tuesday afternoon;
7 all right?

8 In this submission, Your Honor, the Plaintiffs have
9 gotten them a new expert. He's not even a member of The Bar.
10 He's the owner of Edisto Title Service, Inc.

11 Because they realize the defect they have with their own
12 expert -- the fact that he doesn't measure up to any legal
13 standard recognized by the laws of South Carolina -- they
14 switch and now have a new expert.

15 Under Rule 56 and Rule 8, Your Honor, they are required
16 to have their supporting affidavits, uh, for Summary Judgment
17 filed with that motion. And their---

18 THE COURT: Mr. -- Mr. Collins, that was the purpose of
19 me continuing the case; to give both parties a opportunity to
20 come forward with additional information for this Court
21 'cause The Court felt like it didn't have enough information
22 as to notice on delinquent taxes.

23 I gave the Plaintiff that opportunity; I gave you that
24 opportunity.

25 MR. COLLINS: Judge, we---

1 THE COURT: And that was the purpose, and I was very
2 specific.

3 MR. COLLINS: ---Judge, we think we've met that
4 absolutely.

5 THE COURT: Well, that may be.

6 MR. COLLINS: All right.

7 THE COURT: But now they've done what I instructed them
8 to do by affidavits. So why should you have a continuance?

9 MR. COLLINS: Judge, please allow me to be heard.
10 They---

11 THE COURT: Well, I've been sitting here listening to
12 you and all you've done is regurgitate the same thing you
13 regurgitated at the first hearing.

14 MR. COLLINS: Judge---

15 THE COURT: Tell me something new.

16 MR. COLLINS: ---I can't be regurgitating what was in
17 the last hearing, because I'm giving you now the contents of
18 an affidavit of a brand new expert they didn't identify to us
19 until day before yesterday.

20 Okay, how can I be regurgitating to you at what was the
21 last hearing?

22 THE COURT: I haven't seen that affidavit, so I don't
23 know what you're talking about.

24 MR. COLLINS: All right.

25 THE COURT: The only thing you've told me is the same

1 thing you've argued at the last hearing.

2 MR. COLLINS: No, Your Honor.

3 THE COURT: Now, I assume you don't have any additional
4 testimony or affidavits to present to The Court today; is
5 that correct?

6 MR. COLLINS: We have what was submitted in that
7 envelope you haven't even opened---

8 THE COURT: Okay; all right, I understand.

9 MR. COLLINS: ---and that is the affidavit of Charles
10 Feeley.

11 THE COURT: Okay -- all right.

12 MR. COLLINS: And, Judge, we have, uh -- if you'll allow
13 me now -- Mr. Todd Balish is a new expert with a new cast
14 theory.

15 And the reason why we have asked you to continue this
16 hearing is because we don't believe it's fair in a
17 professional liability case against a lawyer for the
18 Plaintiff to rename a new -- a new expert, cast a new theory
19 of liability, presented it to you thirty-six hours before the
20 hearing, and have you make a ruling on Summary Judgment.

21 We believe that we are entitled to the opportunity of
22 deposing Mr. Balish.

23 THE COURT: Mr. who? What's his name?

24 MR. COLLINS: Balish -- Todd Balish.

25 THE COURT: Okay; Todd Balish.

1 MR. COLLINS: He's not even a lawyer. The first thing
2 we'd say, Your Honor, is you can't---

3 THE COURT: Well, most people that abstract titles
4 downstairs from the -- aren't lawyers, okay?

5 MR. COLLINS: But Judge, we don't think a non-lawyer can
6 carry the ball in a professional liability case against a
7 lawyer.

8 We believe that even though you may use a Title
9 Extractor, there has to be a qualified member of The Bar
10 identified as an expert who comes into this Court and, in
11 accordance with that new, uh, Supreme Court case, uh --
12 Wilson -- the case of -- it's cited in our brief. About the,
13 you know, the gate-keeping role you have, uh, by an expert.

14 We believe that they've got to have a qualified member
15 of The Bar opine and give opinion. Our client and those two
16 lawyers named as Defendants failed to meet their standard of
17 care---

18 COURT REPORTER: I'm sorry, the lawyers named as what,
19 Your Honor?

20 MR. COLLINS: ---recognized in South Carolina.

21 THE COURT: I'm sorry, what?

22 COURT REPORTER: Lawyers named as what?

23 MR. COLLINS: Mr.---

24 THE COURT: Hold on just a second. What?

25 COURT REPORTER: The lawyers named?

1 MR. KAHN: I think he said Defendants.

2 COURT REPORTER: Defendants.

3 THE COURT: Defendant; okay.

4 MR. COLLINS: The other named Defendants, uh, Madame
5 Court Reporter. Uh -- there are two other lawyers who are
6 named as Defendants. Uh -- Mr. Stan Alexander is our client.

7 By the way, Your Honor, Mr. Alexander couldn't be here
8 this morning. He had a Doctor's appointment that was very
9 important to him.

10 And Mr. Feeley had a -- a problem also. We do have, uh,
11 Mr. Inglese here; he's a---

12 THE COURT: Okay; all right.

13 MR. COLLINS: ---he's a named Defendant as well. But,
14 Your Honor, we believe that we're entitled to a continuance
15 because these two affidavits they have submitted to you go
16 far beyond a mere tweaking or a clarification of what's on
17 the record. It's a -- it's a recast theory of liability.

18 Now, with regard to the affidavit that I---

19 THE COURT: How does a recast ability -- a liability --
20 liability theory was that he missed a tax lien. That hasn't
21 changed.

22 MR. COLLINS: Judge, their theory---

23 THE COURT: How -- how has that changed, Mr. Collins?

24 MR. COLLINS: Because the theory of liability they
25 assert under Mr. Brown, their expert, is a theory of strict

1 liability. You close the loan, a problem arises later, you
2 buy the farm. That's their theory of liability as per their
3 first expert, Mr. Brown; okay?

4 Now their theory is different, and we believe we're
5 entitled, Judge, to defend our clients by deposing these two
6 witnesses.

7 For example, let me tell you about Ms. Scarborough. She
8 comes in with an affidavit and she talks about---

9 THE COURT: And who is Ms. Scarborough?

10 MR. COLLINS: She works with the tax -- delinquent tax
11 office, Your Honor.

12 THE COURT: Okay; all right.

13 MR. COLLINS: This is an affidavit we prepared -- also
14 that did not get read -- but which is -- was submitted to
15 you.

16 THE COURT: Well, I started the Motion saying I haven't
17 read any of it. I've been in trial all week. I did open
18 your email last night on my blackberry where you needed a
19 continuance.

20 Other than that, I haven't opened any -- I haven't
21 looked at anything else.

22 MR. COLLINS: Well, I think, Judge, another very strong
23 reason why we deserve a continuance is the fact that you
24 haven't even read our submission in support -- in opposition
25 to this Motion.

1 THE COURT: Well, I can read that after the hearing,
2 Mr. Collins, okay?

3 MR. COLLINS: Yes, sir; but, you won't have the same
4 understanding.

5 THE COURT: There's such a thing as taking things under
6 advisement and reading information that's been submitted by
7 The, uh, Court.

8 If you're insinuating I'm gonna make a decision without
9 reading your memorandum, sir---

10 MR. COLLINS: I -- I am insinuating that, Your Honor.

11 THE COURT: ---okay; wait---

12 MR. COLLINS: ---I am insinuating that based on the way
13 you handled the last hearing.

14 THE COURT: ---well, you are absolutely wrong, Mr.
15 Collins, okay?

16 MR. COLLINS: Well, I'm doing my best, Your Honor.

17 THE COURT: All right; do you have anything else to
18 say---

19 MR. COLLINS: Yes, sir; I do---

20 THE COURT: ---concerning a continuance?

21 MR. COLLINS: ---I do. Because, we need a continuance
22 in order to depose Mary Scarborough whose affidavit was
23 submitted to you about thirty-six hours ago and she, uh, goes
24 into some statements, uh, in her affidavit about the records-
25 keeping system here at the Charleston Courthouse.

1 But, Judge, she doesn't say that an entry made on the
2 screen of the computer is marked so as to be able to
3 reconstruct at a later time when that screen was changed.

4 She cannot say, Judge, that in August of 2006, when
5 Mr. Feeley went in there to check this title, she cannot say
6 here's the screen he was looking at; these are the records he
7 had in front of him. She does not say that because she
8 cannot say that.

9 Charleston County does not have a system that allows
10 anybody to go in and see when the screen was created, when it
11 was changed, when it was altered in any way. All you can do
12 is look at the screen that's there in front of you. And,
13 that's what Mr. Kahn had at the last hearing; he had a screen
14 that he printed off and gave to you. And, it showed what was
15 there in 2011; it didn't show what was there in 2006.

16 Mr. Feeley, in his affidavit -- which is in that
17 unopened package -- says this. He said, I have a strict,
18 very regimented process that I use every time. I used it in
19 this case. I looked at the screen; had there been anything
20 there that caused me any concern, I would have done the
21 following other things.

22 He goes into that in his affidavit. And in -- and in
23 Charleston County, if you want to see the source documents
24 about tax records, you have to file a Freedom of Information
25 Act Request. That's all in his affidavit.

1 So, Judge, what we have we think is abundantly clear to
2 create a genuine issue of fact applying to scintilla rule.

3 But, what we are concerned about is, Your Honor has, uh,
4 made statements on the record in this case indicting, uh, a
5 view that, uh, it's all a matter of what's on the screen.

6 And, we believe the screen is never going to be able to
7 tell you what was there in August of '06. What records of---

8 THE COURT: What's the -- what's the statute of
9 limitations on, uh, the County bringing, uh, a -- a -- a
10 sale -- a delinquent sale on unpaid taxes?

11 MR. COLLINS: I -- I don't know, Your Honor. I -- I---

12 THE COURT: Mr. Kahn, do you know?

13 MS. ARNOLD: Your Honor, I believe, if they're trying to
14 invalidate the tax sale, it's a two-year statute of
15 limitation.

16 THE COURT: It's a two-year statute of limitations to---

17 MS. ARNOLD: Yes, sir---

18 THE COURT: ---to validate the sale?

19 MS. ARNOLD: ---to invalidate tax liens.

20 THE COURT: How to -- to bring it once the taxes hasn't
21 been sold (sic) do they -- is -- is there a statute of
22 limitation period on that?

23 MR. KAHN: I know that they put the taxes -- when they
24 report 'em, they're there for ten years. But, I don't know
25 what period of time---

1 THE COURT: Right.

2 MR. KAHN: ---they have to report.

3 THE COURT: All right. Mr. Collins?

4 MR. COLLINS: Judge, uh, to -- following up on that, we
5 know that the mortgage company---

6 THE COURT: Well, before we get into that, I got to rule
7 on your Motion for Continuance first, Mr. Collins.

8 MR. COLLINS: All right.

9 THE COURT: Okay, is there anything else on your Motion
10 for Continuance?

11 MR. COLLINS: Let me confer one minute, Your Honor.

12 THE COURT: Yes, sir.

13 MR. COLLINS: With regard to the issue of a -- our
14 request for a continuance, Your Honor, I have nothing else to
15 add.

16 But, I do want to make sure that the wro- -- the letter
17 I wrote to you is made a part of the record in this case.
18 Uh -- may I have it marked as an Exhibit?

19 MR. KAHN: No objection.

20 THE COURT: I'll -- no, sir; no, you're not going to
21 mark it as an Exhibit. I'll mark it as a Court's Exhibit,
22 okay?

23 MR. COLLINS: Okay, very good.

24 THE COURT: And I received it this morning from The
25 Clerk's office.

1 (WHEREUPON, COURT'S EXHIBIT NUMBER 1 WAS ADMITTED INTO
2 EVIDENCE.)

3 THE COURT: Uh -- anything else, Mr. Collins, on your
4 Motion for Continuance?

5 MR. COLLINS: No, Your Honor.

6 THE COURT: All right, sir. Mr. Kahn, be glad to hear
7 you on the Motion of Continuance.

8 MR. KAHN: Yes, Your Honor. I would think the Motion
9 for Continuance should be denied. The Court gave us a simple
10 mission; obtain information from the County as to what was
11 available and what the records showed.

12 We obtained an affidavit from Mary Scarborough, who is
13 the delinquent tax collector for the County of Charleston.
14 I'll hand it to The Court; it's already been filed and, um,
15 they have it. So that affidavit, I'm handing it to you along
16 with an affidavit of Todd Balish who they mention who's an
17 abstractor.

18 We did exactly what The Court requested; find out what
19 the publicly available records were and what they showed.

20 Uh -- Mrs. Scarborough, whose affidavit you have before
21 you, uh, says unequivocally -- first of all, she was actually
22 the one who issued the tax deed, so she testified in her
23 affidavit that she's familiar -- personally familiar with
24 this matter. She's been in Court for the Charleston County
25 Delinquent Tax Office about thirty years. She is the

1 delinquent tax collector involved with this matter.

2 She says she has first-hand knowledge of this matter.

3 Uh -- she says that she has professional -- in her
4 professional capacity she has direct and personal knowledge
5 of the ways and means by which the Delinquent Tax Office
6 informs the status about taxes.

7 She says that she's aware that, uh, this tax deed issue,
8 that she realizes that the tax deed itself may not have been
9 recorded but it -- the tax deed merely reflects -- and I'm
10 looking at paragraph six, page two of her affidavit---

11 THE COURT: I'm sorry, which page now?

12 MR. KAHN: Page two, paragraph six.

13 THE COURT: Okay.

14 MR. KAHN: ---that the tax deed merely reflects that the
15 property sold at the tax sale in October of 2005 had been
16 conveyed to the purchaser of the tax sale.

17 Her next sentence is, information regarding the status
18 of the taxes -- delinquent, paid, and so on -- is always
19 available through the public records and means discussed
20 herein.

21 And in her affidavit, she specifically states --
22 paragraph seven and eight -- that she has direct and personal
23 knowledge that the information regarding the delinquent taxes
24 for real properties in Charleston County was readily and
25 publically available in July, August, and September of 2006

1 in the Office of the R-M-C Office for Charleston County,
2 vis-à-vis Vista thirty-two-seventy computer data base.

3 Um -- that she has personal and direct knowledge that
4 Title Abstracters and Attorneys routinely and regularly used
5 that system during that time to conduct title events and to
6 make themselves aware of the status of taxes.

7 And anyway, she goes on through -- and The Court can
8 read it since you already indicated that you would read it --
9 uh, this information. She makes abundantly clear that the
10 information regarding both the fact that the property was
11 delinquent for the year 2004 was a public record available in
12 the R-M-C's office through this computer system, and she
13 makes -- uh, she attaches exemplars of the kinds of screens
14 one could pull up at that time in the R-M-C's Office. And,
15 she also makes clear that because it was printed in 2011 that
16 the information from 2007 afterwards on that first Exhibit 1
17 would not have been there. But otherwise, if The Court
18 refers to Exhibit 1, which is attached, uh, towards the
19 bottom it says---

20 THE COURT: Is that on this particular property or
21 that's just a sample?

22 MR. KAHN: That -- that's this property, Your Honor.

23 THE COURT: Okay; all right.

24 MR. KAHN: Uh -- it---

25 THE COURT: What's the status out here to the side?

1 What do those symbols mean?

2 MR. KAHN: What those stand for is spouse. First of
3 all, looking at Exhibit 1, it's got the property I-D number
4 at the top -- 4-11-12-00054 -- which is the property at
5 issue.

6 The bottom right where it says 'D' for 2004/2003, that
7 'D' stands for delinquent. And that would have been known
8 and visible to anybody doing the, uh, record search.

9 If you look at Exhibit 2, which is the delinquent
10 receipt inquiry screen for the property, for the tax year
11 2004, the bottom left, you see where it says tax sale
12 10-03-2005-S. That lets everybody know that there was a tax
13 sale.

14 Now, she does state that the information regarding the
15 October 3rd tax sale that took place in 2005 would not have
16 been available until around October 14 of 2005. But, in all
17 of 2006 it would have been on the screen had anybody looked.

18 And, uh, that's so -- the whole point is that she makes
19 abundantly clear she is the person in the office -- The Court
20 says to us, tell us what's -- The Court kept saying, down
21 there in the office. We went to the lady who keeps those
22 records, and she says, this is what was there at the time.
23 She knows it 'cause she's been working there thirty years or
24 so. And, that the information was available in two different
25 ways.

1 One is through her -- that Vista System for the
2 Delinquent Tax Office, and also via the worldwide web. So,
3 not only can somebody look at it in the R-M-C's office but if
4 you'd come in from anywhere on the planet to log in in 2006
5 you would have seen the same information had you looked for
6 the 2004, um, tax information. And that's all in this
7 affidavit. The Court can read that after this hearing, um,
8 so I think that affidavit addresses it.

9 The second affidavit that they are raising concern about
10 is an affidavit from Mr. Balish.

11 Mr. Balish is a Title Examiner who's conducted a Title
12 Exam for the property in the year 2007 for another lawyer
13 related to all this litigation in which Mr. Alexander is
14 involved in. The reason why we used him is they've known
15 about him through discovery because they've had his Title
16 Exam Report.

17 He opines two things; one is, he agrees with Mary
18 Scarborough that the information was publicly available, and
19 separately he does render an opinion that somebody should
20 have -- that -- that -- that the proper standard of care
21 required a Title Abstracter to find it.

22 To the extent that they are upset about that opinion,
23 and to the extent that that does not coincide with what The
24 Court ordered us to do, Judge we have no problems with The
25 Court saying you won't consider that part of his opinion.

1 THE COURT: Okay; I -- I wasn't ask- -- looking for
2 opinion. I was looking for what records were available for
3 notice to the public what (sic) I was looking for, not an
4 opinion; I'm not gonna consider any opinion that he gave---

5 MR. KAHN: I understand.

6 THE COURT: ---'cause that's not the purpose of this
7 hearing, okay? I don't -- I haven't read it, but I'm not
8 going to consider any opinion he gave.

9 I will consider any information he gives in the
10 affidavit about what's available to the public as far as
11 notice of delinquent taxes. And that's what I was after;
12 it's a simple question.

13 MR. KAHN: I understand; you sent us on a simple
14 mission. We thought we went right to the source, got what
15 the records showed from the lady who keeps up with those
16 records, and have now presented that to The Court.

17 The only other issue I've raised in terms of addressing
18 the Motion for Continuance is that there is no need for a
19 continuance. They've fully argued this matter, The Court
20 gave us direct instructions -- get what information was
21 available.

22 We have brought that to you. The affidavit they have
23 brought -- we've brought that to you from a disinterested
24 county official. The affidavit they have brought is from a
25 party, who says -- when you read the affidavit and I know The

1 Court will -- that I don't remember what I did that day, but
2 my normal practice is da-da-da-da-da.

3 So that's like in a car wreck case somebody saying I
4 don't remember if I ran this red light, but I know I normally
5 don't run red lights.

6 So, I think there's nothing for The Court to consider in
7 terms of the affidavit that they have submitted. And
8 certainly they haven't created a question of fact.

9 And -- and The Court should grant our Motion for Summary
10 Judgment because the---

11 THE COURT: No, let's don't get into that---

12 MR. KAHN: All right, no problem at all.

13 THE COURT: ---okay? Okay.

14 MR. KAHN: I -- I---

15 THE COURT: I just wanted to address the -- the Motion
16 of Continuance and thank you very much.

17 MR. KAHN: All right; now, the only other thing I'd
18 add -- which has nothing to do with the matter -- I'm
19 supposed to be in front of Judge Early at one-fifteen
20 in Aiken. So, with The Court's permission, I'd like --
21 Sammy Arnold will continue. But I, with The Court's
22 permission, would like to go to Aiken now.

23 THE COURT: Have a -- have a safe trip.

24 MR. KAHN: Thank you; thank you, Your Honor -- unless
25 you have any other questions for me?

1 THE COURT: All right; no, I hear you.

2 Mr. Collins, I apologize that I offended you at the last
3 hearing. If I remember I had difficulty with Mr. -- getting
4 Mr. Goings to answer some of my questions and I stayed at him
5 pretty hard to get a answer.

6 To me, uh, this is not a -- a opinion case. I -- it's a
7 real simple thing I wanted to know; what was available on the
8 delinquent taxes in the Charleston County's office. That's
9 all I wanted to know, 'cause I think that's the crux of this
10 issue.

11 MR. COLLINS: And there is a genuine issue about that.

12 THE COURT: Okay? That -- and that's -- and that's what
13 I wanted to know, okay?

14 MR. COLLINS: Okay; yes, sir.

15 THE COURT: And I -- if I offended you, I apologize,
16 okay?

17 MR. COLLINS: And I apologize.

18 THE COURT: But I -- I -- I remembered getting after
19 Mr. Goings pretty hard trying to get him to answer my
20 questions 'cause he didn't answer my questions. And if it'd
21 been you, I would have done the same thing. When I ask a
22 lawyer a question, I want a answer, not talking about
23 something else.

24 Now, is there anything you want to say in rebuttal on
25 the continuance?

1 MR. COLLINS: Sure.

2 THE COURT: I am not going to consider any opinions that
3 Mr. Balish -- Bellish (phonetic/sic), uh, submitted. I will
4 consider the por- -- portions of his affidavit of what's
5 available as far as notice on taxes and whether they've been
6 paid or they haven't been paid -- okay?

7 MR. COLLINS: Yes, sir.

8 THE COURT: Anything else you want to say on the
9 continuance?

10 MR. COLLINS: Yes, sir; yes, sir. With regard to our
11 Motion for a Continuance, we respectfully submit that we are
12 entitled to depose Mrs. Scarborough and establish through
13 either her deposition or the deposition of others a principle
14 contention that we've made, and that is, nobody can come in
15 here right now and tell you what that screen showed in August
16 of 2006.

17 THE COURT: Well Mr. Collins, you're not mis- -- you
18 apparently don't understand the position that The Court
19 ask- -- took last time and what I'm asking.

20 It's immaterial what's on the screen in -- when was it,
21 August of '05?

22 MS. ARNOLD: It was '06, Your Honor.

23 THE COURT: '06. The point is, the only taxes that were
24 looked at was '05 I believe.

25 MR. COLLINS: No, Your Honor; no, Your Honor.

1 THE COURT: Is that correct?

2 MS. ARNOLD: Your Honor---

3 THE COURT: It was just '05, that was the only taxes
4 that were looked at.

5 MR. COLLINS: No, sir. If you read the deposition --
6 the affidavit testimony of Mr. Feeley---

7 THE COURT: But --- But --- for the purposes of your
8 Motion of Continuance, that's denied, okay?

9 Now, the point is I -- if I remember the affidavits and
10 the arguments, the abstractor or whoever -- the title
11 examiner or the whoever certified the title only saw the tax
12 records for one year. Is that correct?

13 MR. COLLINS: No, Your Honor.

14 THE COURT: Okay---

15 MR. COLLINS: No, Your Honor---

16 THE COURT: ---tell me otherwise---

17 MR. COLLINS: ---that is not correct.

18 THE COURT: ---tell me otherwise.

19 MR. COLLINS: The affidavit of Mr. Feeley clearly showed
20 that the screen shows a ten-year history for the search
21 property's tax payments and he looked at that. He looked at
22 all the ten years, Your Honor. That's what he said in his
23 affidavit he looked at.

24 THE COURT: Okay.

25 MR. COLLINS: All right? And, Judge, if -- if -- if I

1 could make my record -- make my record about your last
2 ruling---

3 THE COURT: Forget about your record. I'm gonna make a
4 decision, and I want to hear from you and quit worrying about
5 your record. I'll let you make your record.

6 Where is this information on Mr. Feeley about he looked
7 at the record for ten years?

8 MR. COLLINS: In his affidavit.

9 THE COURT: Have you submitted -- did you submit that
10 last time?

11 MR. COLLINS: Yes, sir, it's in that env- -- unopened
12 envelope.

13 THE COURT: Okay; it's in the envelope. Okay, I'll read
14 it. All right, what else did he say?

15 MR. COLLINS: Well, Your Honor, I'll read the whole
16 affidavit if you want me to do so, because I think it's all
17 important.

18 Um -- he, uh, talks about the---

19 THE COURT: I -- I'll read the affidavit; just make your
20 argument, please Mr. Collins.

21 MR. COLLINS: Well, Your Honor, the argument is his
22 affidavit -- condensing his affidavit. And what he says is,
23 that he has a very thorough---

24 THE COURT: Well, let -- let's back up. It's their
25 burden so let me listen to them first and then you can reply.

1 It's their burden on the Mo- -- Summary Judgment Motion.

2 I denied your Motion of Continuance. The reason I
3 denied it, it was a simple thing I asked to be done. That's
4 been done and you've submitted an affidavit. The Plaintiff
5 has submitted an affidavit. I will consider those, I will
6 listen to arguments, I'll read your Memorandum, I will make a
7 decision. But, I'll be happy to hear the information from
8 the Plaintiff and from the Defendant, before I make a
9 decision.

10 Yes, ma'am?

11 MS. ARNOLD: Your Honor, my name is Mary Arnold, on
12 behalf of the Plaintiff.

13 Um -- Judge, I won't go any further into
14 Mrs. Scarborough's affidavit; I think that's done enough.

15 What we have in, uh -- to create or attempt to create a
16 material issue of fact, is an affidavit submitted by the
17 Defendant, Mr. -- Mr. Feeley.

18 And so The Court understands, when we brought this
19 action, we brought the action against Stan Alexander and
20 Mario Inglese who had Stan obtain (balance inaudible).

21 COURT REPORTER: I'm sorry, I'm having trouble hearing
22 you; can you use the microphone?

23 MS. ARNOLD: Sure enough. Uh -- Mr. Inglese then
24 third-partied in Mr. Charles Feeley, um, and brought a
25 claim against him. Mr. Feeley is the individual that

1 did prepare the Title Abstract that the lawyers relied on.

2 So, the affidavit that we now have in opposition to
3 create a material issue of fact is that of Mr. Feeley, who is
4 a party.

5 When The Court looks at this affidavit submitted by
6 Mr. Feeley, you will see that he says, I don't recall doing
7 this particular title search, but this is the normal course
8 that I would follow.

9 In his normal course that he describes, he makes
10 reference to a ten-year screen. A screen that provides a
11 ten-year status of taxes. That is not attached to this
12 affidavit; he just says I merely normally look at that. And
13 I don't have anything that reflects that I did anything
14 because I looked at that ten-year.

15 But, if you look at Ms. Scarborough's affidavit, there
16 is the ten-year screen attached, and it shows in this
17 situation delinquent taxes for 2003 and 2004.

18 So, Your Honor, the mere fact that they have submitted
19 this affidavit by Mr. Feeley -- a party -- and you look at
20 what it actually says, it does not create a material issue of
21 fact.

22 And, that would be our argument. This, Your Honor, we
23 feel -- and I don't mean to minimize -- is a simple case.
24 Closing was conducted, closing was conducted in 2006. The
25 documents you saw at the last hearing all refer to taxes for

1 2005. The issue is the fact that the taxes for 2004 were
2 delinquent and the property was sold in 2005 and that a deed
3 was also another issue. The---

4 THE COURT: The deed was conveyed after this deed was
5 conveyed, right?

6 MS. ARNOLD: Correct; about two months, Your Honor.

7 THE COURT: Okay; all right.

8 MS. ARNOLD: So that redemption period was gone; there
9 was nothing that could be done in redemption period. After
10 that time period they could have had another two years I
11 believe it was to invalidate or from the tax sale invalidate
12 it, which was never done.

13 Um -- but, Your Honor, so again -- not, uh -- not to
14 make it too simple at this -- and our experts testified to
15 it. Not only has our expert testified to it, if you look at
16 this Motion for Summary Judgment, we attached deposition
17 testimony of Mr. Alexander where Mr. Alexander testified yes,
18 it was his duty at the time of the closing to get good,
19 marketable title to this property. And he also admits that
20 didn't happen. I don't think there's any question it didn't
21 happen here. The property had a tax de- -- deficiency on it,
22 the property was sold for delinquent taxes, and the property
23 was conveyed out to a third party by the Tax Delinquent
24 Office.

25 So it -- again, it's simple; we believe we're entitled

1 to Motion for Summary Judgment. We do not believe the
2 affidavit they submitted is a material issue of fact.

3 THE COURT: Okay. All right, Mr. Collins, be glad to
4 hear you.

5 MR. COLLINS: Thank you. Your Honor, the fact that
6 Mr. Feeley is a party does not change the fact that he is a
7 member of The Bar, he is a, uh, expert in title examination.
8 He has given you an affidavit in which he states that he
9 checked the ten-year records, uh -- that's available.

10 Mrs., uh, Arnold says he didn't attach that screen.
11 Your Honor, the only screen he could get right now is the
12 same thing they could get, and that's a screen that dates
13 today.

14 If you look at the screen -- the, uh -- uh, attachments
15 to Mrs. Scarborough's affidavit, one thing that's notable is
16 every one of them has at the top right-hand corner the date
17 5-18-2011. That's all you can get; all you can get is the
18 records now. Nobody has, and nobody can -- as far as I
19 know -- come in here and say, here's what that screen looked
20 like in August of 2006. Nobody has said that.

21 If you read Mrs. Scarborough's affidavit carefully, you
22 see almost in every paragraph -- and I went through that and
23 underscored it -- would have been readily public available,
24 would have been known. She's speculating, Your Honor, and
25 she speculates about what would have been known. That's not

1 testimony on what that screen showed.

2 Mr. Feeley's testimony is, in his affidavit, that he
3 checked it. And the only way he could have gone beyond
4 look -- that -- what was in the screen was to do a Freedom of
5 Information Act request and that is not a routine part of a
6 title examination.

7 He says that when he checked the record, there was
8 nothing on that screen to alert him to any unpaid taxes, and
9 nobody has come forward to refute that because nobody can
10 say.

11 THE COURT: Hold on just a second.

12 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
13 CONFERENCE, OFF THE RECORD.)

14 (WHEREUPON, COURT RESUMED.)

15 THE COURT: Go ahead.

16 MR. COLLINS: Nobody has -- nobody can say what that
17 screen showed in 2006.

18 So, Your Honor, there's a genuine issue of material fact
19 about whether or not there was any failure to exercise
20 reasonable care in the course of conducting this---

21 THE COURT: See, Mr. Collins, my problem with your
22 argument is this. I want you to understand my problem and I
23 want you to address it, okay?

24 This property had been referred to the delinquent tax
25 collector for sa- -- sale, okay?

1 MR. COLLINS: But we don't know when---

2 THE COURT: Listen to me for a minute.

3 MR. COLLINS: All right.

4 THE COURT: All you want to do is talk. You don't
5 listen very well, Mr. Collins, okay? Will you listen for a
6 minute? And I will listen to you. Can you do that?

7 MR. COLLINS: Yes, sir.

8 THE COURT: Can you calm down and listen for a few
9 minutes? Just calm down, okay? I'm gonna listen to you, I'm
10 gonna read all your documents before I make a decision, and
11 I'm gonna try to be fair to both parties. But if you'll just
12 calm down and listen.

13 Let me tell you my problem with your argument and then
14 I'll listen to you, okay? Can we do that or do we need to
15 take a break, give you a chance to calm down?

16 MR. COLLINS: No, sir.

17 THE COURT: All right. The problem I have with your
18 argument is this. Charleston County Treasurer had referred
19 this to the -- to the delinquent tax collector, okay? In
20 order for them to do that, the taxes were not paid. So if
21 the tax -- if whoever checked that title had looked at the
22 last ten years where the tax had been paid for the last ten
23 years, they would have found that the taxes had not been
24 paid. Then they would have been required to look further.

25 That -- irregardless of what was on that screen, the

1 property had been referred to the delinquent tax collector so
2 the Treasurer had put on the computer, taxes not paid.

3 Now, I -- and that's the problem I have with your
4 argument. I'll be glad to listen to you answer to that.

5 MR. COLLINS: Judge, uh, thank you. Nobody can tell us
6 when that record went onto that screen. Nobody has dated
7 precisely when any of the events you just referred to
8 occurred. Nobody can quantify exactly what there was there
9 for Mr. Feeley to see in, uh, August of 2006. Mr. Feeley---

10 THE COURT: But it would have had to show it delinquent
11 in order to be referred to the delinquent tax collector is my
12 point, Mr. Collins.

13 MR. COLLINS: Judge, I believe that that statement you
14 just made is an inference. But, it is not an inference
15 taking the evidence in the light most favorable to the
16 non-moving party. And, at this stage in this proceeding you
17 are required to give those inferences to the Defense, not to
18 the Plaintiff.

19 THE COURT: But I mean, your argument is that there's
20 just nothing and it's mysteriously -- the Treasure
21 mysteriously referred this to the delinquent tax collector.
22 That's basically your argument.

23 MR. COLLINS: Judge, what I'm telling you is Mr. Feeley
24 creates a genuine issue of material fact about what was there
25 in August of 2006 when he checked this title. And nobody

1 that they called, uh, can clear that up sufficiently for you
2 to conclude that there's no genuine issue of material fact to
3 find now.

4 Judge, there are other problems that the Plaintiff has
5 with regard to a Summary Judgment if I may be heard on those?

6 THE COURT: Yes, sir; I'll be glad to hear anything you
7 want to tell me.

8 MR. COLLINS: As -- as Your Honor well knows, in order
9 for there to be liability in -- in nature, there must be a
10 duty -- a breach of a duty, proximate causation, and damages.

11 The Plaintiffs here, Your Honor, have a huge problem
12 with re- -- with regard to causation. They lost this
13 property on a mortgage foreclosure proceeding. The mortgage
14 foreclosure, Your Honor, was brought about by the fact they
15 didn't make their -- their payments.

16 There's a South Carolina case, *Wilson versus Mosley*,
17 recorded on page, uh, thirteen of our brief, which stands for
18 the proposition that a defect in the title -- let me read it
19 to you.

20 Quote -- the fact the property lacked marketable title
21 cannot be the proximate cause of a foreclosure action as a
22 matter of law. Even -- quote -- even if there was a cloud
23 based on the tax deeds, it was not the proximate cause of
24 foreclosure. The proximate cause of Appellant's loss of
25 her -- was her failure to make payments according to the Note

1 which obligations were separate and independent of any
2 alleged problems with the title -- close quote. *Wilson v.*
3 *Mosley*, 488 S.C.(2d) 864.

4 And, Judge, we say that Mrs. Amber Johnson bought this
5 property representing it to be her, uh, her residence --
6 which was untrue -- falsified her income, falsified her
7 assets, made about four or five material, factual, deliberate
8 misrepresentations.

9 She acquired the property; she collects rent on it for
10 years. She quit making her payments after just a few months,
11 continued to collect rent, made over twenty thousand dollars
12 in rent, and then when the title insurance company stepped
13 in -- and that's an important consideration, Your Honor, from
14 the standpoint of causation because later, when the defect,
15 uh, was made known, the title insurance company came in, they
16 cleared up the problem.

17 They went out and bought the property, they paid off
18 the, uh, the party that had bought it at the tax sale. And
19 in fact, Mrs. Amber Johnson received half of the overage, uh,
20 that existed. And so, she made another nine thousand dollars
21 there. So she has, uh, made, uh, according to our
22 calculation, at least twenty-nine thousand dollars net profit
23 off this.

24 THE COURT: Well, and -- and---

25 MR. COLLINS: And so, therefore, Your Honor, there's no

1 proximate---

2 THE COURT: ---can I interrupt -- interrupt you and ask
3 you a question real quick before I -- I forget it?

4 MR. COLLINS: Yes, sir.

5 THE COURT: I understand it's a Partial Summary Judgment
6 for liability and the damage issue is not even before The
7 Court.

8 MR. COLLINS: Well, Your Honor, we believe the proximate
9 causation is---

10 THE COURT: Ms. Arnold, is that correct?

11 MS. ARNOLD: That's absolutely correct, Your Honor.

12 THE COURT: Okay, all right.

13 MR. COLLINS: I agree about the damages point but
14 fully -- Judge, Your Honor, you have to find that there's a
15 proximate causation of some damage before you can---

16 THE COURT: Well, but what -- what -- let me just ask
17 you the second question. If -- if -- I'm not -- I don't know
18 what I'm gonna do, Mr. Collins, I have not made up my mind.
19 I just wanted more information you-all have provided for me;
20 I want to thank both parties.

21 But let's assume that I grant Summary Judgment Motion on
22 their partial liability. All that's gonna do is address the
23 duty and the breach of the duty, then you're gonna have a
24 hearing on the causation and the damages. Is that correct or
25 is that incorrect?

1 MR. COLLINS: I think that's incorrect because the next
2 thing that happens is we -- we -- we appeal Your Honor's
3 ruling.

4 THE COURT: Oh, you think that's incorrect? You think
5 it -- you-all think causation would enter into your damage
6 hearing?

7 MR. COLLINS: Uh -- well, Your Honor, we think the next
8 step would be our appeal to this ruling. Because, according
9 to our research---

10 THE COURT: Well, that's -- that's fine. You're en- --
11 you -- but see, you're avoiding my question. That's fine if
12 you want to appeal it -- my ruling. I don't -- that's fine;
13 that's what you're entitled to do and that's great.

14 But, that's not the question I asked you. I asked you
15 the question -- irrespective of a appeal -- if I rule for
16 their partial Summary Judgment Motion, aren't you then
17 entitled to a damage hearing and causation would enter into
18 the award of any damages? Is that correct or incorrect?

19 MR. COLLINS: I believe that is correct, Your Honor.

20 THE COURT: Okay; thank you for answering my question,
21 okay? I appreciate it very much.

22 MR. COLLINS: May I add to my---

23 THE COURT: Please -- please continue your argument.

24 MR. COLLINS: All right. Judge, in -- in addition
25 to -- to the submission I made just now, we believe that Your

1 Honor must find, at this stage, that there is causation of
2 some damage. As to the amount of the damages, that could be
3 a later day, a later hearing. But, we believe that this
4 hearing, uh, today, before you can, uh, enter a Partial
5 Summary Judgment, you have to find some causation. And we
6 believe that if you read and -- and carefully apply the
7 principle of *Wilson versus Mosley* and take into consideration
8 those items which we have excerpted from Plaintiff's
9 deposition at, uh -- and which are attached as exhibits to
10 our Summary Judgment Memo, you will conclude that there is no
11 proximate cause of any damages.

12 Uh -- lastly, Your Honor, with regards to the issue of
13 liability, we believe that under South Carolina law, uh, the
14 *Simms* case -- *Simms against Hall* -- the Plaintiff has a duty
15 to establish a standard of care through admissible expert
16 testimony. They haven't done that.

17 The only expert they identified was John Brown.
18 Essentially came in and said if a defect in the title later
19 surfaces, the closing attorney is liable -- period.

20 The -- the standard that he would apply is a standard of
21 strict liability. That is not the law of professional
22 liability in South Carolina.

23 So we believe, Your Honor, the Plaintiffs have not come
24 forward and met the requirement of *Simms against Hall* by
25 showing legal malpractice, uh, occurred in this case because

1 a standard of care, uh, as established by a competent and
2 qualified expert -- who has to be a member of The Bar -- has
3 found in his opinion that that occurred. They don't have
4 that in this case, Your Honor. And we believe without that
5 they sure can't get a Summary Judgment.

6 May I confer?

7 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
8 CONFERENCE, OFF THE RECORD.)

9 (WHEREUPON, COURT RESUMED.)

10 Thank you, Your Honor.

11 THE COURT: The -- the Court Reporter needs that cite --
12 the case.

13 MR. COLLINS: Yes, sir. The *Simms* case?

14 THE COURT: She didn't get that cite.

15 MR. COLLINS: Very well. *Simms against Hall* is found
16 at, uh, 357 S.C. 288; pages 295 and 96 were, uh, the relevant
17 parts. That's also found at 592 S.E. (2d) 315. It was a
18 Court of Appeals case in 2003, Your Honor.

19 THE COURT: Thank you very much, Mr. Collins.
20 Yes, ma'am?

21 MS. ARNOLD: Just a few things, Your Honor. Again,
22 Mary Arnold.

23 Your Honor, I'll draw to this Court's attention -- I
24 think you can take, um, notice of what is also the public
25 record in Charleston County, um, Clerk's Office.

1 There is a related case, um, brought by the, um, lender
2 against Mr. Alexander with this particular closing. And in
3 that case Mr. Alexander submitted an answer and he submitted
4 in that case a cross-claim against Mr. Inglese.

5 In that case he claims there was a breach of contract.
6 The breach of contract was the tax issue was missed, the tax
7 sale was missed, and it shouldn't have been. So, exactly
8 what we are arguing, Mr. Alexander is arguing in another
9 related case about this same transaction.

10 Additionally -- and, Your Honor, I have -- I can hand it
11 up. It's -- it's a filed, um -- their copy, um---

12 THE COURT: Okay. But, what other -- anything else on
13 arguments -- oral?

14 MS. ARNOLD: Just one last thing, Your Honor. When you
15 look at our Motion for Summary Judgment we have cited the
16 testimony of Mr. Alexander that says, I had a duty, I had a
17 duty to give good, clear title. I didn't do that in this
18 instance because there was a tax deficiency and tax sale.

19 He also says in the citations that we have that that
20 failure of duty proximately caused damages to Mrs. Johnson.

21 As to the foreclosure, so The Court understands, um, the
22 foreclosure action -- you may recall this, Your Honor -- this
23 was a case that we argued in front of you. The first
24 foreclosure was dismissed because when the foreclosure action
25 was brought, it was brought in the wrong name of the lender.

1 It was the Bank of New York case.

2 THE COURT: Okay; yeah, I remember that case---

3 MS. ARNOLD: Okay---

4 THE COURT: ---I sure to. Okay, I remember that case.

5 MS. ARNOLD: ---that case came and went dismissed. We
6 then had a subsequent case---

7 THE COURT: That was the -- it was the Bank of New York
8 rather than Bank of New York Melon (phonetic).

9 MS. ARNOLD: Absolutely, Your Honor. After that case
10 was dismissed, a second case was brought for a foreclosure.
11 That case is not pending -- that's not correct; it is
12 pending, it has been resolved. Mrs. Johnson will not be a
13 party to that foreclosure action any longer. So there has
14 been no foreclosure of Mrs. Johnson's interest in this
15 property.

16 Mrs. Johnson lost the property when the tax sale
17 occurred. It was deeded out of her. But the second
18 foreclosure now is now being resolved and she will not be a
19 party to that action.

20 THE COURT: Okay, thanks very much.

21 MS. ARNOLD: Thank you, Your Honor.

22 THE COURT: Could I ask both parties, have you-all
23 submitted excerpts from depositions and everything that you
24 want The Court to consider? I want to give you a opportunity
25 to submit whatever excerpts of depositions you-all have been

1 talking about. I want to make sure everything's been
2 submitted to The Court to substantiate what you-all's
3 arguments are today so I can read it and make a decision.

4 Has the Plaintiff -- has the Defense done everything?
5 'Cause you-all been talking about depositions; I don't know
6 if you've submitted excerpts or not.

7 MR. GOINGS: Yes, Your Honor; um, Robert Goings for
8 the---

9 THE COURT: Are they attached to your memo?

10 MR. GOINGS: They are, Your Honor.

11 THE COURT: Okay.

12 MR. GOINGS: Uh -- one through ten---

13 THE COURT: Okay; all right.

14 MR. GOINGS: ---Exhibits one through ten.

15 THE COURT: Is there any other excerpts you would like
16 to submit? I will give you the opportunity to do that.

17 MR. COLLINS: Judge, we have no other excerpts that I
18 know of, but, uh, given the fact that we saw this, uh,
19 testimony from, uh, a representative of the County, uh,
20 we, uh, we wonder if there's not someone who is more
21 knowledgeable. Uh -- we -- we did not get this until, uh---

22 THE COURT: All right, well what are you asking me to --
23 what are you asking me to do?

24 MR. COLLINS: Well, Your Honor, I guess I'm going back
25 to the Motion to Continue. We wanted the opportunity to

1 address these, uh, representations and---

2 THE COURT: Well---

3 MR. COLLINS: ---and -- and find out the rest of the
4 story about the, uh, the records that were kept and -- and
5 how they are -- how they are modified. How those screens are
6 updated and that---

7 THE COURT: ---Mr. Collins, if you want to submit a
8 counter-affidavit, I'll give you ten days, okay?

9 MR. COLLINS: Well, uh, thank you.

10 THE COURT: If you want to. If you don't, that's fine.

11 MR. COLLINS: Fine; uh, I -- I'd like to confer, but I
12 appreciate that opportunity. Thank you, Your Honor.

13 THE COURT: Now, is there anything else you want to
14 submit for The Court to consider before I start reading all
15 this and trying -- and making up my mind?

16 MR. COLLINS: Uh -- not at this time, Your Honor.

17 THE COURT: All right. Well, this is the last
18 opportunity you're gonna have to submit anything. I've given
19 you ten days for affidavits. If you want to submit any more
20 excerpts from depositions, I'll give you the same ten days.

21 MR. GOINGS: Your Honor, Robert Goings; we'll go back to
22 the office and -- and keep you---

23 THE COURT: Okay, that's fine. Just submit whatever
24 you're going to submit within ten days. I'll give you the
25 same opportunity.

1 MS. ARNOLD: Thank you, Your Honor.

2 THE COURT: If you-all want to submit any new affidavits
3 along for the -- this purpose that's fine. If you want to
4 submit any excerpts I give you the same ten days; okay?

5 MS. ARNOLD: Thank you, Your Honor.

6 THE COURT: All right, is there anything else?

7 MS. ARNOLD: Nothing from the Plaintiff, Your Honor.

8 THE COURT: All right; I'm going to take it under
9 advisement. I will not read anything for ten days until I
10 receive any additional information by either party either by
11 way of affidavit or by excerpts of depositions.

12 MR. GOINGS: Thank you, Your Honor.

13 THE COURT: I -- and I don't know what else I can do to
14 try to get you-all to give me what information you want.
15 Anything else?

16 (NO RESPONSE.)

17 THE COURT: You know, other than continuing and going
18 into deposition and discovery, and I'm not going to do that.

19 All right, thank you-all so very much; I appreciate it.

20 MS. ARNOLD: Thank you, Your Honor.

21 MR. GOING: Thank you, Your Honor.

22 THE COURT: And your letter and all the affidavits and
23 the, uh, memorandum I will submit as a Court's Exhibit to
24 the, uh -- your request for Summary Judgment.

25 (WHEREUPON, COURT EXHIBIT NUMBER 2 WAS ADMITTED INTO

1 EVIDENCE.)

2 (WHEREUPON, COURT EXHIBIT NUMBER 3 WAS ADMITTED INTO
3 EVIDENCE.)

4 (WHEREUPON, COURT EXHIBIT NUMBER 4 WAS ADMITTED INTO
5 EVIDENCE.)

6 MR. INGLESE: Your Honor, I would just like to note --
7 Mario Inglese, one of the Defendants.

8 THE COURT: Yes, sir?

9 MR. INGLESE: The Summary Judgment action is -- is
10 against Stan Alexander and not the remaining Defendants.

11 THE COURT: I understand; it's just against that one.

12 MR. INGLESE: I just wanted you to know, sir.

13 THE COURT: I understand that.

14 MR. INGLESE: Thank you, Your Honor.

15 THE COURT: Thank you very much.

16 (WHEREUPON, HEARING ENDED AT 10:40 A.M.)

17 *****END OF REQUESTED TRANSCRIPT*****
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED VIVIAN H. CROSS, OFFICIAL COURT REPORTER FOR THE NINTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THOSE PROCEEDINGS REQUESTED AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR CHARLESTON COUNTY, SOUTH CAROLINA, ON THE 26th DAY OF MAY 2011.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

FEBRUARY 5, 2012

Vivian H. Cross
VIVIAN H. CROSS
CIRCUIT COURT REPORTER

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May 24, 2011

VIA EMAIL AND U.S. MAIL

Robert F. Goings, Esq.
Collins & Lacey, P.C.
PO Box 12487
Columbia, SC 29211
Email: rgoings@collinsandlacy.com

Re: Johnson v. Alexander

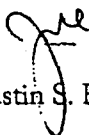
Dear Robert:

Enclosed are two affidavits we have obtained pursuant to Judge Nicholson's request.

Further, to the extent necessary, we hereby supplement our prior discovery responses with this information and identify Mary Scarborough and Todd Balish as witnesses who are expected to testify consistently with the information obtained within the attached affidavits.

Thank you very much.

Sincerely,


Justin S. Kahn

JSK/pm
Encl.

cc: Mario S. Inglese, Esq. (via fax and email, w/encl.)
Charles Feeley, Esq. (via fax, w/encl.)
Mary Leigh Arnold, Esq. (via email, w/encl.)

FILE NO. 1409-101

MAY 25 2011

REC'D JWC/RFG/CCR
COLLINS & LACEY



Joel W. Collins, Jr. |
jcollins@collinsandlacy.com

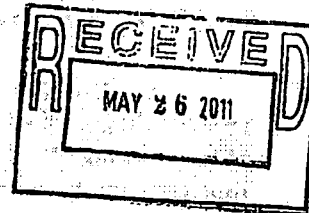
Office: 803.256.2660

E-Mail:

May 25, 2011

VIA U.S. MAIL, EMAIL (JNicholsonJ@sccourts.org) and FACSIMILE

The Honorable J.C. Nicholson, Jr.
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258



Re: Amber Johnson v. Stanley E. Alexander, Mario S. Inglese and Mario S. Inglese, PC
C/A No.: 2009-CP-10-6529
C&L File No.: 1409-101

Dear Judge Nicholson:

As you will recall, our firm represents the Defendant, Attorney Stan Alexander in the above styled case. Yesterday afternoon, on May 24, 2011, my partner, Robert Goings, received an email from Attorney Justin Kahn to which he attached two affidavits. One is from Mary Scarborough, the Delinquent Tax Collector of Charleston County, which she signed on May 20, 2011. The other affidavit is from a new expert, Todd Balish, owner of Edisto Title Services, Inc. The Plaintiffs have not previously identified these witnesses in discovery. The only expert Plaintiff has identified and retained was Attorney John Brown.

Prior to our receiving Mr. Kahn's letter and these two affidavits yesterday afternoon, we filed and submitted our Memorandum of Law Opposing Plaintiff's Motion for Summary Judgment. As we argued in our Memorandum, we believe Plaintiff previously designated expert, Attorney Jay Brown, lacks the qualifications to be recognized as an expert. Even if he is allowed to testify, we argue his opinion does not comport with the well established law of South Carolina regarding professional negligence of a real estate attorney. Essentially Mr. Brown's position, as he stated during his deposition, is a closing attorney is strictly liable if any defect of title later is found. In addition, he stated that he would not have discovered this title irregularity if he served as the title examiner or closing attorney.

Because the Plaintiffs have recast their theory of liability and named a new expert at this late stage, we respectfully submit we are entitled to respond appropriately before Your Honor resumes the hearing on Plaintiff's Motion for Summary Judgment. Rules 56 and 6(d), SCRCP require these affidavits to have been submitted contemporaneous with the filing of the motion itself.

We respectfully submit it would be manifestly unfair if the Court considers these last minute affidavits and to proceed with the hearing tomorrow morning on this motion. We

The Honorable J.C. Nicholson, Jr.
May 25, 2011
Page 2

request, on behalf of our client, the opportunity to respond to these new affidavits, especially the speculative conclusion regarding what information was "readily and publicly available in July, August and September of 2006 in the Office of the RMC office for Charleston County via the Vista 3270". These affidavits do not state what the online records actually showed in 2006 when the title was check by Mr. Feeley..

Accordingly, we hereby request that Your Honor continue tomorrow's hearing for a reasonable period of time to allow the opportunity to depose these witnesses, and if necessary, to obtain counter affidavits. We appreciate Your Honor's consideration of this request. By copy of this letter we are advising opposing counsel of this communication with the Court.

Sincerely,



Joel W. Collins, Jr.

JWCjr:bre

cc: Mary Leigh Arnold, Esquire
Justin S. Kahn, Esquire
Mario S. Inglese, Esquire
Charles Feeley, Esquire
Stanley E. Alexander, Esquire
Mr. Barry Reiber
Honorable Julie J. Armstrong (for filing)

STATE OF SOUTH CAROLINA) : IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) Case No. 2009-CP-10-6259

6529

AMBER JOHNSON,)

Plaintiff,)

-vs-)

STANLEY E. ALEXANDER,)

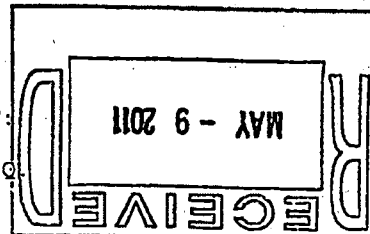
MARIO S. INGLESE AND)

MARIO S. INGLESE, PC,)

Defendants.)

VIDEOTAPED DEPOSITION OF:

STANLEY E. ALEXANDER, ESQ.



Given before Raymond E. Swartz, Notary
Public and Certified Court Reporter, in the Kahn Law
Firm, 562 Savannah Highway, Charleston, South Carolina on
Thursday, December the 16th, 2010, commencing at 10:25
o'clock, a.m.

RAYMOND E. SWARTZ, CSR
Professional Court Reporter
"A Timeless Standard of Excellence"

1 Q And at the time of the closing you handled in
2 September of 2006, you were not aware of the fact that
3 the property had been sold at a tax sale? Correct?

4 A Correct.

5 Q And you agree that a closing lawyer handling a
6 closing is required to determine something like whether
7 or not the property had been sold at a tax sale...?

8 A Well....

9 MR. GOINGS: Object.

10 Q ...before going forward with the closing?

11 MR. GOINGS: Object to the form of the
12 question.

13 A To the best of his ability.

14 Q Okay. And the best of his ability requires
15 that that lawyer exercise good and prudent judgment and
16 use the tools available to him to determine that? Right?

17 MR. GOINGS: Same objection.

18 A Correct.

19 Q The...?

20 MR. KAHN: Let's take a break. Before we
21 started you said I may need to take a quick
22 break, so let's take a break real quick.

23 (The deposition went off the record for a brief
24 period.)

25 Q Alright, we're back from our break. A little

1 MR. GOINGS: Object to the form of the
2 question.

3 A No.

4 Q And why do you say "no?"

5 A Because I relied on the title work of a
6 perfectly capable attorney.

7 Q Alright. You agree that ultimately it's the
8 responsibility of the lawyer handling the closing to
9 ensure that the papers, including the title work, is
10 proper?

11 MR. GOINGS: Object to the form of the
12 question.

13 A Well, unless you are going to do the title
14 again, I don't know how you would do that. And I don't
15 know any lawyer who is going to check the title again
16 after he paid for someone else to check the title.

17 Q Well, is it fair to say, though, in the context
18 of this case that it was your responsibility to make sure
19 that Mrs. Johnson was receiving good and marketable
20 title?

21 MR. GOINGS: Object to the form of the
22 question.

23 A Yes.

24 Q Alright. Is it fair to say that as a result of
25 the tax sale that had taken place in 2005 that Mrs.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NUMBER: 09-CP-10-6529
AMBER JOHNSON,	)	
	)	
PLAINTIFF,	)	DEPOSITION
	)	
VS.	)	OF
	)	
STANLEY E. ALEXANDER,	)	AMBER JOHNSON
MARIO S. INGLESE, AND	)	
MARIO INGLESE PC,	)	
	)	
DEFENDANTS.	)	

DEPOSITION OF AMBER JOHNSON, TAKEN BEFORE LORI BOGGS REILLY, PROFESSIONAL VERBATIM REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 9:48 A.M., THE 22ND DAY OF FEBRUARY, 2011, AT THE LAW OFFICES OF THE KAHN LAW FIRM, 562 SAVANNAH HIGHWAY, CHARLESTON, SOUTH CAROLINA.

COPY

1 A August 2006. I mean it was my parents' address. That
2 was when I started law school, so.

3 Q Well, let's say September 11, 2006. You did not live
4 at 1788 Banbury Road, Charleston, South Carolina 29404,
5 did you?

6 A No. I may have still been in a hotel.

7 Q You were living in Florida at the time, correct?

8 A I probably was in a hotel.

9 Q And let's go to page 2 of this document.

10 Q It shows that you worked for Invisible Men
11 Entertainment for seven months; is that correct?

12 A No. I've never worked for Invisible Men Entertainment.

13 Q Isn't it true that Invisible Men Entertainment, listed
14 on your Uniform Loan Application, is false?

15 MR. KAHN: Objection.

16 A I'm saying I never worked there.

17 Q Ms. Johnson, did someone on your behalf pay money to
18 Invisible Men Entertainment in order to put Invisible
19 Men Entertainment down as a name and address of your
20 employer in the Uniform Residential Loan Application
21 completed for 2640 Ranger Drive?

22 MR. KAHN: Objection.

23 A Not that I know of.

24 Q Isn't it true, Ms. Johnson, that in order to apply for
25 this loan, you needed to show at least two years of

1 Defendant's Exhibit 3.

2 MR. KAHN: Objection.

3 A No.

4 Q When was the first time you discovered that your
5 initials were forged on an Uniform Residential Loan
6 Application marked as Defendant's Exhibit 3?

7 MR. KAHN: Objection.

8 A I saw these forms on Sunday.

9 Q Who do you believe forged your initials?

10 MR. KAHN: Objection.

11 A I don't know whose initials they are.

12 Q Do these initials purport to be your initials, though?

13 MR. KAHN: Objection.

14 A I don't know what it is.

15 Q Now, let's look at page 2 of Defendant's Exhibit 3.
16 This also shows that Invisible Men Entertainment was
17 your employer, correct?

18 MR. KAHN: Objection.

19 A That's what it says.

20 Q Isn't it true that this is a false statement about
21 Invisible Men being your employer?

22 A They weren't my employer.

23 Q Why is Invisible Men Entertainment listed as one of
24 your employers on Page 2 of Defendant's Exhibit 3?

25 A I don't know.

1 A I don't personally have a life insurance policy that
2 I've paid for.

3 Q Has your parents into a life insurance policy on your
4 behalf?

5 A I think, I believe my mom has life insurance on me, but
6 I don't know how much it's worth or --

7 Q Well, how did this information related to life
8 insurance get placed in this Uniform Residential Loan
9 Application?

10 A I don't know.

11 Q Now, let's go down to "Automobiles name, make and
12 model." On or about August or September of 2006, did
13 you own a 2000 Dodge?

14 A No.

15 Q Has anyone in your family owned a 2000 Dodge?

16 A My dad.

17 Q So your dad's vehicle is listed --

18 MR. KAHN: Objection.

19 Q -- in this loan application?

20 MR. KAHN: Objection.

21 A Yes, it's listed.

22 Q What kind of Dodge did your dad own on or about August
23 or September of 2006?

24 A A Dodge -- it was an SUV. I can't think of the --

25 Q Was it a Dodge Durango?

- 1 A Yes.
- 2 Q Does he still drive that Dodge Durango today?
- 3 A No.
- 4 Q Did you own a 2003 Nissan?
- 5 A Yes.
- 6 Q In 2006, was this 2003 Nissan valued at 28,000?
- 7 A I'm not sure how much it was valued for?
- 8 A How much did you pay for this 2003 Nissan.
- 9 A I'm not even sure of an exact -- it was twenty-
- 10 something I believe.
- 11 Q When did you purchase the 2003 Nissan?
- 12 A 2005.
- 13 Q So you bought a 2003 Nissan used; is that correct?
- 14 A Yes.
- 15 Q Where did you buy this Nissan from?
- 16 A You need the name of the dealership?
- 17 Q Yes, ma'am.
- 18 A Marchant Chevrolet or something.
- 19 Q Do you still drive this 2003 Nissan today?
- 20 A No.
- 21 Q When did you sell the 2003 Nissan?
- 22 A August -- no, July 2010.
- 23 Q Why did you sell the 2003 Nissan?
- 24 A I just traded it in. It had a lot of miles on it.
- 25 Q What car do you currently drive?

1 **A A Toyota Camry.**

2 **Q What year?**

3 **A 2009.**

4 **Q You also list personal property in the amount of**
5 **\$65,000 on this, correct?**

6 **MR. KAHN: Objection.**

7 **A It's listed here.**

8 **Q Did you own personal property in the amount of \$65,000**
9 **on or about August or September of 2006?**

10 **A Not that I can think of.**

11 **Q On or about August or September of 2006, did you own**
12 **assets in the amount of \$106,593.**

13 **A No, not to my knowledge.**

14 **Q Do you believe your listing of assets as shown on page**
15 **3 of your Residential Loan Application is correct?**

16 **MR. KAHN: Objection.**

17 **A You mean the whole listing or the total?**

18 **Q The whole listing, and the total?**

19 **MR. KAHN: Objection.**

20 **A I mean I did have -- the only thing I can see is the**
21 **Nissan.**

22 **Q Okay. So as of August or September 2006, the only**
23 **asset that you had in your name was a 2003 Nissan; is**
24 **that correct?**

25 **MR. KAHN: Objection.**

John Brown

Amber Johnson v. Stanley E. Alexander, Mario S. Inglese, and Mario Inglese PC

C/A No: 09-CP-23-8523

March 1, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	C/A NO: 09-CP-23-8523
AMBER JOHNSON,	)	
	)	
PLAINTIFF,	)	DEPOSITION
	)	
VS.	)	OF
	)	
STANLEY E. ALEXANDER, MARIO	)	JOHN G. BROWN, II, ESQUIRE
S. INGLESE, AND MARIO S.	)	
INGLESE, PC,	)	
	)	
DEFENDANTS.	)	

DEPOSITION OF JOHN G. BROWN, II, ESQUIRE, TAKEN BEFORE
WENDY SHANNON SULLIVAN, A NOTARY PUBLIC IN AND FOR THE STATE
OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 10:04 A.M.,
TUESDAY, THE 1ST OF MARCH, 2011, AT THE KAHN LAW FIRM, 562
SAVANNAH HIGHWAY, CHARLESTON, SOUTH CAROLINA 29412.

C O P Y

Verbatim, Inc. Court Reporting
803.787.7242

1 opinion that the mere failure to convey clear and
2 marketable title is conduct that falls below the
3 applicable standard of care?

4 A I believe so. I believe, ultimately, it falls -- as I
5 mentioned earlier, it falls at the feet of the closing
6 attorney.

7 Q So it's your testimony that because she did not receive
8 clear and marketable title, then Mr. Alexander is
9 therefore negligible, correct?

10 A Correct.

11 Q Okay. And this opinion that you have reached, what is
12 the factual basis for this opinion?

13 A Well, the fact that the property was sold at a tax sale
14 in 2004, that the deed was recorded subsequent -- or
15 not long after, it doesn't appear. I'm thinking it was
16 about a month or so. I can't remember the exact
17 timeframe, after closing.

18 (OFF THE RECORD)

19 THE WITNESS: Can you read that last part
20 back? I sort of lost track.

21 THE COURT REPORTER: Sure.

22 (WHEREUPON, THE COURT REPORTER READ BACK THE LAST QUESTION.)

23 THE WITNESS: Okay. So I think, essentially
24 where we were, was I said that the standard of
25 care for a closing attorney is such that the

STATE OF SOUTH CAROLINA)

:

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Case No. 2009-CP-10-6259

AMBER JOHNSON,

)

)

Plaintiff,)

)

-vs-

)

VIDEOTAPED DEPOSITION OF:

)

STANLEY E. ALEXANDER, ESQ.

STANLEY E. ALEXANDER,

)

MARIO S. INGLESE AND

)

MARIO S. INGLESE, PC,

)

Defendants.)

Given before Raymond E. Swartz, Notary
Public and Certified Court Reporter, in the Kahn Law
Firm, 562 Savannah Highway, Charleston, South Carolina on
Thursday, December the 16th, 2010, commencing at 10:25
o'clock, a. m.

RAYMOND E. SWARTZ, CSR
Professional Court Reporter
"A Timeless Standard of Excellence"

1 Because if they fix the problem, the problem is fixed in
2 your favor.

3 Q What if they don't fix the problem?

4 A I have never known them not to fix the problem.
5 Technically if the Indians took back that property in a
6 lawsuit, she would lose her money. But I would not think
7 that was -- normally any kind of problem with a title is
8 small, or a defect, I mean, it can be resolved.

9 Q What was the problem with the title in her
10 case?

11 A Well, the lady that she bought it from
12 apparently had not paid the taxes.

13 Q Okay.

14 A And I say apparently because I don't know
15 that's the case. And the county had sold it at a tax
16 sale.

17 Q Alright. The county had sold Mrs. Anderson's
18 property at a tax sale sometime in 2008? I'm sorry,
19 sometime in 2005?

20 A Right. Some was for 2004 taxes.

21 Q Okay. The county sold Mrs. Anderson's property
22 at a tax sale in 2005?

23 A Yes.

24 Q And there is a one year period of redemption?

25 A Correct.

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

RECEIVED

MAR 13 2013

Case No. 2009-CP-10-06529

SC Court of Appeals

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.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the *Corrected* Record on Appeal complies with Rule 211(b) SCACR, and the August 31, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

By:



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Columbia, South Carolina
March 13, 2013

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

RECEIVED

MAR 13 2013

SC Court of Appeals

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,

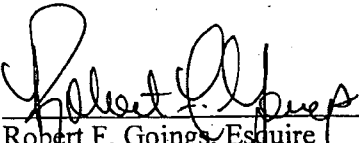
v.

Charles Feeley.....Third Party Defendant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210 (g), SCACR, the undersigned hereby certifies the *Corrected* Record on Appeal in the above-captioned matter contains all material proposed to be included by any of the parties and not any other material.

By:


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Columbia, South Carolina
March 13, 2013

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.

BRIEF OF APPELLANT STANLEY E. ALEXANDER

RECEIVED

MAY 19 2013

SC Court of Appeals

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STATEMENT OF THE CASE

This appeal follows a grant of summary judgment against Appellant Stanley Alexander ("Alexander") for legal malpractice.

On October 15, 2009, Respondent Amber Johnson ("Johnson") filed suit against Alexander and Mario S. Inglese and Mario S. Inglese, PC (collectively "Inglese") stemming from a real estate closing that occurred in September 2006. Johnson alleged that Alexander failed to discover or disclose that the subject property was subject to a tax sale on October 5, 2005, for delinquent taxes. Alexander answered the complaint denying the allegations, and in the alternative pursuant to Rule 8, SCRCp, asserted cross claims against Inglese. Inglese answered the complaint and joined a third-party defendant, Charles Feeley ("Feeley").

On January 14, 2011, Johnson filed a motion for partial summary judgment as to liability of Alexander. In moving for partial summary judgment, Johnson only attached excerpts of deposition testimony of Alexander and did reference the testimony of Johnson's retained expert witness, Attorney John Brown ("Brown"). In opposition to the motion, Alexander submitted an affidavit, excerpts of deposition testimony, and documentation produced in discovery in opposition to this motion.

On May 9, 2011, the motion was heard by Judge J.C. Nicholson, Jr.¹ After hearing arguments, Judge Nicholson recessed the hearing and requested the parties submit additional information concerning notice to the public of the tax sale. (R. pp. 215-216). The hearing was scheduled to resume May 26, 2011. Approximately thirty-six (36) hours before the hearing was reconvened, Johnson submitted affidavits of (a) Mary Scarborough, Delinquent Tax Collector of Charleston County; and (b) Todd Balish, a title examiner in Charleston County. Ms.

¹ A transcript from this hearing could not be generated because South Carolina Court Administration and the court reporter could not locate the records and tape from this proceeding. (R. p. 19-21).

Scarborough and Mr. Balish were not previously named as witnesses in this case. In Mr. Balish's Affidavit, he provided expert opinions, although he was never previously identified as an expert. Prior to the rescheduled hearing, Alexander presented the court with a Memorandum in Opposition to Motion for Partial Summary Judgment. It included the affidavit of Third Party Defendant Feeley along with deposition testimony of witnesses. (R. pp. 93-199).

At the second hearing, Alexander objected to Johnson submitting the new affidavits of Ms. Scarborough and Mr. Balish, because pursuant to Rules 56 and 6, SCRC, Johnson, as the moving party, was required to submit this evidence at the time she filed for summary judgment. (R. pp. 221- 51; 259; 262-263). Alexander also moved for a continuance to allow him the opportunity to depose Ms. Scarborough and Mr. Balish. Judge Nicholson denied Alexander's motion for a continuance, but held that he would not consider any "opinions" offered by Mr. Balish. (R. pp. 234-235; 241). Judge Nicholson afforded the parties ten (10) days following the hearing to submit "counter-affidavit[s]," but he denied Alexander's motion for a continuance for the purpose of conducting "deposition[s] and discovery" related to these two new witnesses. (R. p. 258).

On July 6, 2011, Judge Nicholson issued a written order denying Alexander's request for a continuance and granting Johnson's Motion for Partial Summary Judgment. As this case appeared on the trial roster on or about the same time Judge Nicholson's order was issued, Alexander did not have the opportunity to submit a Rule 59(e) motion. This appeal was filed.

STATEMENT OF FACTS

This is a legal malpractice action arising from a real estate closing. On September 14, 2006, Johnson purchased a single-family home located at 2640 Ranger Drive in North Charleston, South Carolina. Alexander served as the closing attorney. Johnson alleges that Alexander failed to ensure that Johnson purchased the property free and clear with good and marketable title. (R. pp. 24-25; 71-72). Johnson alleged her damages were her inability to "rent or resale the house and property." She also sought to recover the costs and expenses in defending a foreclosure of the property. (R. pp. 72-73).

(a) Factual Dispute Concerning the Title Examination and Closing

Inglese was originally scheduled as the closing attorney, but due to a scheduling conflict, Johnson requested Alexander perform the closing. (R. p. 110). Alexander was told that a title examination had been performed by Feeley, an attorney in Charleston who limits his practice to title work. Feeley had prepared a title report showing no encumbrances or liens existed on the property. (R. pp. 110; 114). The examination report also reflected all real estate taxes were current and up to date. (Id.). Documentation from the Charleston County Online Tax System in August 2006 showed all taxes were current, paid, and there was no taxes outstanding. (R. pp. 110-111; 116; 118). The escrow ledger from the seller's mortgage company also showed that property taxes were paid each year to the Charleston County Tax Assessor's Office. (R. p. 111; 120).

Approximately four (4) months *after* the closing, a tax deed was recorded on December 12, 2006, conveying the property to Westwood Properties, LLC, following a tax sale by the Delinquent Tax Collector for Charleston County. (R. p. 122). The sale was purportedly the result of nonpayment of 2004 Charleston County real property taxes. At the time of the title examination and closing, the prior tax sale would not have been revealed in the chain of title for

this property or made publicly available in the Charleston County Register of Mesne Conveyances (RMC) Office. (R. p. 127). No notice of tax sale or *lis pendens* was filed as a matter of public record that would have put Alexander or anyone performing a title search notice of this pending, unrecorded tax sale. (Id.)

As to the standard of care employed in examining this title, Feeley testified he acted in conformity with the same routine practice and custom he always followed when performing title examinations. (R. p. 126). As part of his routine practice, Feeley reviewed the Charleston County Online Tax System website. He performed a "Tax Records Search" query by "Parcel ID (TMS)." The first screen that appeared was a ten (10) year history of the property's tax payments. Each line in the history contains a notation that the taxes are either current or delinquent. If a notation was made indicating that the taxes are delinquent, Feeley's customary practice was to conduct further inquiry. Feeley would clearly note on the title abstract any evidence of delinquent taxes or a tax sale. For the subject property, Feeley's review of 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. (R. pp. 126-127).

Alexander testified that one of the duties of a closing attorney is to attempt to convey good and marketable title "according to the information [he] had at the time [of the closing]." (R. pp. 82-83; 88). He explained, as to information concerning the title to Johnson's property, Alexander "had a duty to give [Johnson] what [he] had as to the best of [his] knowledge at the time." (R. pp. 89; 135-137). Alexander testified he did not have the ability to determine in September 2006 that the property was subject to a pending tax sale. (R. p. 137). In his affidavit, Alexander set forth in detail the documentation and information he relied upon in reviewing the title. He testified the seller never disclosed to him that property taxes were delinquent or that a tax sale had occurred on the property. (R. p. 110). He further testified that prior to the closing

"evidence of a tax sale or information that would place a person on inquiry notice of delinquent taxes was *not* filed with the Charleston Register of Deeds Office." (R. p. 110). "The title examination revealed no property tax lien existed and that all taxes were current and paid," showing that the 2005 property taxes were paid on December 13, 2005, and all back taxes were paid. (R. pp. 110; 114). Statements from the Charleston County Tax Assessors' Office on August 10, 2006, and September 11, 2006, confirmed that property taxes were "Current(Paid)" and that no back taxes were owed or due, with a past due amount of "0.00." (R. pp. 110-111; 116; 118). Furthermore, based on documentation from the seller's mortgage servicer, the 2004 and 2005 property taxes were paid from the escrow account. (R. p. 111; 120).

Alexander attested that "based on the results of the title examination and in particular, the office of public records of the Charleston County Tax Assessor's Office, [he] understood that no back taxes were due or owing on 2640 Ranger Driver at the time of the closing." (R. p. 111). In his professional opinion, Alexander testified he "handled this closing with the generally accepted standard of care employed by attorneys performing real estate closings in Charleston County, South Carolina." (R. p. 111). He further opined that he "acted with the degree of knowledge, care, and skill ordinarily possessed by lawyers in good standing under the same or similar circumstances and that [he] followed the generally accepted practices and procedures in the legal profession." (Id.).

Johnson employed John Brown ("Brown"), an attorney in Charleston, South Carolina, to serve as her liability expert.² Brown began conducting real estate closings in late 2003. (R. p. 145). Brown does not perform title examinations, and conceded that he is "[un]qualified" to

² Johnson did not rely on Brown's testimony in support of her summary judgment motion. This is because Brown's testimony is *more favorable* to Alexander than Johnson. Brown's testimony supports that Alexander acted reasonably, or at the very least, that a genuine issue of fact remains for a trier of fact.

perform them. (R. p. 146). He is unfamiliar with how public records for real property are kept. (R. p. 155). In this case, Brown could not identify any particular measure that a reasonable attorney in a similar position could have undertaken to discover the title irregularity for this property. He testified any opinion as to the existence of documentation that would place a reasonable attorney on notice of this title irregularity would be speculation. (R. pp. 153-155). Brown failed to identify the correct standard of care, or any specific act or omission of Alexander. Rather, in Brown's opinion, a closing attorney has the "absolute duty to ensure that clear and marketable title is conveyed to the purchaser," and the "mere failure to convey clear and marketable title is conduct that falls below the applicable standard of care."³ (R. pp. 150-152; 274). He believes the responsibility for conveying perfect title "ultimately...falls at the feet of the closing attorney." (Id.). Brown admitted if he had served as the closing attorney for this transaction, he would not have discovered the unrecorded tax sale or the issue of delinquent taxes on the property. (R. pp. 155-156).

Johnson submitted surprise affidavits of Ms. Scarborough and Mr. Balish without affording Alexander the opportunity to depose these new witnesses. Ms. Scarborough testified generally about how the Delinquent Tax Office informs the public about the status of taxes regarding real property in Charleston. In her opinion, she believed that information related to the tax sale could have been publicly available prior to the closing. Ms. Scarborough rendered her opinion based on documentation that she accessed on May 18, 2011, and attached to her affidavit. (R. pp. 200-207). She presented no documentation which was publicly available in 2006, and she could not testify as to what Feeley actually saw when he conducted the title examination on the property. In Mr. Balish's affidavit, he testified that he conducted a title examination on November 15, 2007, over a year after the closing. (R. pp. 208-210). Mr. Balish

³ As discussed below, Brown's opinion is an incorrect statement of the law.

testified about what the tax records showed on November 15, 2007, but since he did not conduct the title examination in 2006, he could not testify as to what the online system showed when Feeley conducted the title examination.

(b) Factual Dispute of Whether Johnson Has Suffered Damages.

Johnson alleged her damages were the inability to "rent or resell the house and property" and the costs and expenses incurred in defending a foreclosure action on the property. (R. pp. 72-73). Johnson provided no evidence that she was unable to rent or resell her property, and further, she presented no evidence she incurred any costs or expenses in defending the foreclosure action. Johnson, instead, relied on hypothetical questions and answers posed to Alexander at his deposition. Those hypothetical questions lacked any basis in fact. (R. pp. 72-73).

Johnson purchased the subject property for \$75,000 with no down payment and 100% lender financing. (R. pp. 93; 185-186). In order to purchase the property, Johnson submitted a mortgage application that contained material inaccuracies. Among other misrepresentations, the application falsely stated she would be an owner-occupant of the property. Owner-occupants are preferred borrowers. Under the terms of the note and mortgage, these misrepresentations operate as a default under the loan. The Mortgage states:

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent give materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

(R. p. 170). Johnson testified she was living in Florida, and had no intention of occupying, establishing, or using the property as her residence. (R. p. 186). Alexander argues that, but for

Johnson's own conduct, she would not have been a party to this real estate transaction in the first place. (R. pp. 104-106).

Further, Alexander presented evidence that Johnson has not actually suffered the damages she alleged in this case. Johnson testified she *actually rented* the property for \$700 per month from October 2006 until March 2009, receiving over \$20,000 in rental payments from the tenant. (R. pp. 187-188; 191; 195-196). Moreover, Johnson received an additional payment of \$9,608.08, representing half of the overage from the tax sale, by merely having an interest in the property.⁴ Alexander presented evidence that his alleged actions were not the cause of the foreclosure action. Johnson testified that she discontinued paying on her note and mortgage until April 2007. (R. pp. 188-190). She *admits* that her failure to make the monthly payment resulted in a breach of the terms of the note and mortgage, giving rise to the foreclosure action. (R. pp. 185-186). Johnson received a letter from the mortgagor warning that the foreclosure action was imminent if she did not "bring the loan current." (Id.) Her failure to make mortgage payments is inexplicable because during the time she ceased making mortgage payments, she continued to rent the property for \$700.00 per month, until March 2009. (R. pp. 190-192; 195-196).

⁴ This Court can take judicial notice of this fact as set forth in the Order dated May 26, 2010, and Amended Order entered June 7, 2010, in *The Bank of New York Mellon as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2006- 23 v. Amber Johnson, et. al.*, 2009-CP-10-4588, as followed by a Consent Order entered January 25, 2012, in the matter of *The Bank of New York Mellon as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2006- 23 v. Amber Johnson, et. al.*, 2010-CP-10-4973. See Charleston County, Public Index, <http://jcmsweb.charlestoncounty.org/PublicIndex/PISearch.aspx> (last accessed Feb. 22, 2013). See *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (holding that courts "may properly take judicial notice of matters of public record").

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRCP. Edwards v. Lexington Cnty. Sheriff's Dep't, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010). "Rule 56(c), SCRCP, provides that summary judgment may be granted if a review of all documents submitted to the court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Bass v. Gopal, Inc., 395 S.C. 129, 133, 716 S.E.2d 910, 913 (2011).

"Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." Id. Summary judgment should only be granted "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 654, 661 S.E.2d 791, 796 (2008). "Since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002).

LAW/ANALYSIS

I. THE CIRCUIT COURT ERRED IN FINDING THAT JOHNSON HAD PROVEN THE ELEMENTS OF LEGAL MALPRACTICE AS A MATTER OF LAW AND THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED.

The circuit court erred in granting summary judgment in favor of Johnson because a genuine issue of material fact existed on the issue of whether Alexander committed legal malpractice. To prevail in a claim for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. Smith v. Haynesworth, Marion, McCay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996). "A plaintiff in a legal malpractice action must generally establish the standard of care by expert testimony." Id. "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). In a legal malpractice action, "a court should never measure a professional's performance through the lens of hindsight. Although an attorney may be liable for damages to a client for failure to act with a reasonable degree of skill and care, this does not mean, however, that an attorney acts as an insurer of the outcome." Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 291, 701 S.E.2d 742, 750 (2010) (citations omitted).

A. A Genuine Issue of Material Fact Exists Whether Alexander Breached the Standard of Care.

The trial court erred in finding that Alexander breached the standard of care as a matter of law. The question of breach of duty is a jury question. "Breach of duty is a fact question to be decided by the jury on the evidence presented in each case." Hatfield v. Van Epps, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004) (citations omitted); Singletary v. S.C. Dep't of Education, 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994) ("The breach of a duty of

due care is ordinarily a question of fact.”). To overcome summary judgment, Alexander was only required to show a mere scintilla of evidence that there was a dispute. Summary judgment must be denied when facts are in conflict or the inferences to be drawn can be disputed. Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294, 417 S.E.2d 631, 632 (Ct. App. 1992). “When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury.” Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006). The record before the court presents a genuine issue of material fact and precludes summary judgment.

In this case, Johnson alleges Alexander breached his duty because she did not receive the “property free and clear with good and marketable title.” (R. pp. 25-26; 71-72). The circuit court found that “Johnson established Alexander was negligent with more than reasonable certainty” based on the evidence before the court. (R. p. 12). The circuit court disregarded the summary judgment standard by attempting to weigh the competing evidence. The circuit court incorrectly accepted Johnson’s version of the facts and did not construe all inferences in favor of Alexander as the non-moving party.

The Order found that Alexander “admits he breached duties owed to Johnson.” (R. pp. 11-13). This is flatly erroneous. Alexander has never admitted that he was negligent. Rather, he explained, “after this came to light we looked back and it appears the county had made no notes anywhere that [the property] had been sold at a tax sale. Plus, they were accepting current taxes and they don’t [accept current taxes] when back taxes are due. So something was not right [with the public records].” (R. pp. 131-132). He explained that the county “didn’t make a note of it [and when] we go back and look at the back taxes and it says paid, period.” He testified the tax documentation in his possession at the closing “said paid...it didn’t say sold, it said paid...all the tax records said paid.” (R. pp. 136-137). Alexander testified he did not have the ability to

determine in September 2006 that the property was subject to a pending tax sale. (R. p. 137).

Further, Alexander was asked in his deposition:

Q: Is it fair to say that as a result of your failure to determine anything to do with the tax sale that took place in 2005 that Mrs. Johnson had a cloud on her title?

[Mr. Goings: Object to the form of the question.]

A: No.

Q: And why do you say "no?"

A. Because I relied on the title work of a perfectly capable attorney.

Q: Alright. You agree that ultimately it's the responsibility of the lawyer handling the closing to ensure that the papers, including the title work, is proper?

[Mr. Goings: Object to the form of the question.]

A. Well, unless you are doing to do the title again, I don't know how you would do that. And I don't know any lawyer who is going to check the title again after he paid for someone else to check the title.

(R. p. 266)

In his affidavit, Alexander testified "prior to or at the time of the closing, evidence of a prior tax sale or information that would place a person on inquiry notice of delinquent taxes was not filed with the Charleston County Register of Deeds Office." (R. p. 110) (emphasis added). He explained, "the title examination revealed that no property tax lien existed and that all taxes were current and paid," and provided written documentation in his file that substantiated that all past property taxes were paid. (R. pp. 110-111). Based on this evidence, Alexander testified that he "handled this closing with the generally accepted standard of care employed by attorneys performing real estate closings in Charleston County, South Carolina," and that he "acted with a degree of knowledge, care, and skill ordinarily possessed by lawyers in good standing under the same or similar circumstances, and that [he] followed the generally accepted practices and procedures in the legal profession." (R. p. 111). At summary judgment, the circuit court was

required to review the testimony and draw all inferences of the evidence in the light most favorable to Alexander. The circuit court should not have weighed the evidence or determined the credibility of conflicting testimony. S.C. Nat'l Bank v. Silks, 295 S.C. 107, 110, 367 S.E.2d 421, 422 (Ct. App. 1988) (holding "the trial judge is not to weigh the evidence and determine the credibility of witnesses and of documents"). As a result, the circuit court erred in granting summary judgment.

Further, public records from Charleston County in Alexander's possession showed that all property taxes were noted as "Current (Paid)" with a current due amount of "(0.00)" and a *nulla bona* amount of "(0.00)." (R. pp. 116; 118). As further evidence that no back taxes were due and owing, documentation from the seller's mortgage servicer showed that tax payments for 2004 and 2005 were paid from escrow. (R. p. 120). Based on these records, a jury could reasonably conclude that Alexander was not put on notice of a tax sale on the property. These records alone demonstrate that a genuine issue of fact exists as to whether Alexander breached the duty of care.

The affidavit of the title examiner, Attorney Charles M. Feeley, further creates a genuine issue of material fact. (R. pp. 125-127). While Mr. Feeley admittedly cannot recall every detail of this particular title examination from 2006, he testified about this examination based on his routine practice pursuant to Rule 406, SCRE. Mr. Feeley testified he conducts his title examinations "with strict routines of practice and habits" and "always perform[s] his title examinations in the same manner." (R. pp. 126-127). Mr. Feeley testified that after he conducted his tax payment history search on this property, he "noted on the abstract summary sheet that all of the taxes were paid and/or current, and that no back taxes were due or owing for the property." He testified that he "acted in conformity with [his] routine practice and custom when [he] performed the title examination for this property." (*Id.*) Mr. Feeley further explained

that the existence of the prior tax sale would not have been disclosed in the chain of title for this property or made publicly available prior to the closing because the tax sale deed was not recorded in the Charleston County Register Mesne Conveyance (RMC) Office until after the closing, on December 12, 2006. (R. p. 127). Additionally, no *lis pendens* was filed or recorded as a matter of public record to place the public on notice of an unrecorded tax sale. Feeley's testimony makes clear that evidence of this tax sale was not recorded as a matter of public record prior to the closing. His testimony and the inferences to be drawn from it clearly created a question of fact.

The testimony of Johnson's own liability expert, Attorney John Brown, further proves that Alexander's conduct was reasonable and prudent under the circumstances. Brown admitted that had he been the closing attorney, he would not have discovered the encumbrance on the property. Brown testified as follows:

Q: Mr. Brown, if you were closing this loan, and you had also performed the title examination, how would you have uncovered this issue?

A: Well, I don't know that I would have.

Q: So you could have been in the same position as Mr. Alexander?

A: Absolutely.

.....

Q: So based on the scenario as it happened, as it relates to 2640 Ranger Drive, you could, if you were the closing attorney, be sitting in the same seat as Mr. Alexander today, correct?

A: I believe I could be.

(R. pp. 155-156).

Given these circumstances, Johnson's own expert witness, John Brown, would not have discovered the unrecorded tax sale. Simply put, Alexander cannot be found negligent as a matter of law if this title irregularity would have been unavoidable even to Johnson's own expert. If the title irregularity was not reasonably apparent to Brown, then a fact finder can reasonably

conclude Alexander's conduct was not negligent under the circumstances. See Harris Teeter, Inc., at 281, 701 S.E.2d at 745 (2000) ("In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession.")

Based on the totality of the evidence, Alexander demonstrated a genuine issue of fact as to whether he breached the standard of care. A genuine issue of fact clearly exists as to what the public records for this property showed at the time of the title examination and whether Alexander acted reasonably under the circumstances. The issue of professional negligence was far from being "admitted" and "undisputed" as the circuit court erroneously found.

B. The Circuit Court Erred in Concluding that Alexander Had an Affirmative Duty to Convey Clear and Marketable Title to the Property.

The circuit court erred in holding Alexander had a duty to ensure the property was transferred to Johnson free and clear with good and marketable title. Johnson's theory of liability, as adopted in this Order, is fundamentally flawed and disregards the South Carolina Supreme Court's opinion of Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993).

"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." 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.").

The Supreme Court in Bass v. Farr addressed the exact issue confronted by this Court. In Bass, the plaintiff hired an attorney to close a real estate transaction. The closing attorney represented that the title was marketable; however, a year later it was determined that the title was unmarketable. The Supreme Court 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.” Id. at 404, 434 S.E.2d at 277 (emphasis added). The Supreme Court relied upon Jennings v. Lake, 267 S.C. 677, 230 S.E.2d 903 (1976), for the proposition that legal malpractice only arises when the “attorney negligently certifies title.” Id. The Supreme Court, in deciding Bass v. Farr, once again reaffirmed that the law does not require an attorney to be “infallible” or mistake-free.

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 ipsa loquitur*⁵ or create strict liability for real estate closing attorneys. Rather, 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. By failing to require proof there was no genuine issue of material fact that Alexander certified title in a negligent manner, the circuit court erred. Summary judgment should have been denied.

C. The Circuit Court Erred in Granting Summary Judgment Without Sufficient Expert Testimony to Establish Duty and Breach.

The circuit court erred in ruling Alexander committed legal malpractice because there was not sufficient testimony from an expert witness to establish a duty and a breach of that duty. Johnson moved for summary judgment *without* relying on the testimony of her retained expert witness. (R. pp. 70-74). Further, her expert witness (a) lacked the qualifications to testify as to the standard and procedures of examining title to real property because he does not do that type

⁵Crider v. Infinger Trans., Co., 248 S.C. 10, 16, 148 S.E.2d 732, 735 (1966) (rejecting the doctrine of *res ipsa loquitur*).

of work; (b) failed to identify any undisputed negligent act or omission that Alexander allegedly committed; and (c) and admitted that if he had been the closing attorney, he would not have discovered the unrecorded tax deed either.

In spite of this, the circuit court found Brown's opinion of professional negligence was "not necessary." The circuit court based its entry of partial summary judgment on the erroneous conclusion that Alexander admitted he breached the standard of care (R. pp. 13-14), and that, regardless, "Johnson's expert is competent to testify about the standard of care of a closing attorney." (R. p. 14). These rulings were erroneous.

(i) Johnson failed to present sufficient expert testimony to establish Alexander breached a duty of care.

The circuit court erred in finding that expert testimony was not required to prove liability in this case. (R. pp. 13-14).

"Generally, a plaintiff in a legal malpractice action must establish th[e] standard of care by expert testimony." Harris Teeter, Inc., at 282, 701 S.E.2d at 745. The recognized exceptions to this rule are if the subject matter is of common knowledge to lay persons or if the defendant admits the standard of care was owed to the plaintiff. Sims v. Hall, 357 S.C. 288, 295, 592 S.E.2d 315, 319 (Ct. App. 2003). Neither of these exceptions applies in this case. First, questions of reasonable conduct related to a title examination and real estate closings are not subject matters within the common knowledge of laypersons. Second, and most germane to this case, Alexander did not admit that he breached a standard of care.

As more fully described above, Alexander testified in his deposition and in an affidavit that he acted reasonably and properly under the circumstances. (R. pp. 109-111; 130-133; 265-266). He relied on a title examination that verified back taxes were paid, as well as additional documentation that was available to him as a matter of public record. As Alexander testified, a reasonable attorney had no reason to know this property had been sold at a tax sale. (Id.). It

cannot be overstressed that evidence of the tax sale did not appear as a matter of public record at the RMC office until four (4) months *after* the closing, on December 12, 2006. (R. p. 127). Chain of title issues to real property cannot always be prevented with reasonable diligence, regardless of the carefulness or exactness of the closing attorney. This is why Johnson, like most other purchasers of real property, obtained title insurance as an added measure of security.⁶ (R. pp. 148-149).

Moreover, expert testimony is necessary because Johnson bears the burden of proving that Alexander “*negligently* certifie[d] title.” *Id.* Despite the circuit court’s erroneous conclusion, Alexander did not admit that he was negligent in certifying title. The title examiner, Mr. Feeley, did not admit that he was negligent in conducting the title examination. Johnson’s expert witness failed to identify any specific negligent act or omission on the part of Alexander or the title examiner. 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). At the very least, an issue of fact exists regarding whether Alexander’s alleged breach would rise to the “most probable” standard for expert testimony. *See Pearson v. Bridges*, 337 S.C. 524, 533, 524 S.E.2d 108, 113 (Ct. App. 1999) (recognizing “the most probable standard to prove proximate cause” if expert testimony is required).

Thus, the circuit court erred in finding that expert testimony was not necessary in this case.

- (ii) **The circuit court erred in finding that Brown was competent to testify as an expert that Alexander breached a duty of care as matter of law.**

⁶ The title insurance company cured the title irregularity on the property.

The circuit court erred in holding that Brown was competent to testify as an expert regarding the standard of care to establish liability. (R. p. 14). This finding is erroneous for two reasons: (1) Brown's expert opinion runs afoul of the holding of Bass v. Farr; and (2) Brown lacks the qualifications to testify as to the standards and procedures of examining title to real property in South Carolina.

First, Brown's opinion is based on his incorrect personal belief that a real estate closing attorney has the "absolute duty to ensure that clear and marketable title is conveyed to a purchaser." (R. pp. 150-152). Brown opined that the mere failure to convey clear and marketable title is *per se* legal malpractice.

Without identifying the standard of care or identifying what Alexander should have done differently, Brown simply opined, "it was the failure to discover the tax sale, and the failure to ensure that she was receiving clear title to the property" which constituted a breach of the standard of care. (R. p. 152). In Brown's opinion, a closing attorney has the "absolute duty to ensure that clear and marketable title is conveyed to the purchaser" and the "mere failure to convey clear and marketable title is conduct that falls below the applicable standard of care." He claimed this "ultimately...falls at the feet of the closing attorney." (R. p. 274). Brown wrongfully concluded that failure to convey clear title is, in and of itself, *per se* legal malpractice.

Brown's legal theories are directly contradicted by the holding of Bass v. Farr. In that case, the Supreme Court held, "the fact that an attorney is incorrect as to the ultimate marketability of a title to real estate does not establish that he was negligent." Bass, at 404, 434 S.E.2d at 277. The circuit court erred in relying upon these personal opinions and erroneous legal conclusions. See Shields v. S.C. Dep't of Highways and Pub. Transp., 303 S.C. 439, 444, 401 S.E.2d 185, 188 (1991) (holding an expert witness cannot express an opinion as to the law

because this is the province of the court); Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 383, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (excluding expert testimony at summary judgment phase that was based on witness's personal beliefs rather than any law). Thus, without Brown testifying as to the standard of care and identifying a negligent act or omission committed by Alexander, his testimony cannot serve as the basis for a finding that Alexander committed legal malpractice.

Additionally, Brown is not competent to testify as an expert witness, pursuant to Rule 702, SCRE, as interpreted in Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Watson found that "expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability." Id. The Supreme Court has explained:

Expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gate keeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. The circuit court held that Brown was competent to testify, and relied upon his erroneous conclusions and unsupported opinions, without making these preliminary findings.

Attorney Brown did not satisfy Rule 702, both in terms of expert qualifications and reliability. Brown has no particular knowledge, skill, experience, training, or education in conducting title examinations. Brown began conducting real estate closings in late 2003. (R. p. 145). Brown does not perform title examinations. (R. p. 146). In fact, Brown has never performed a full title examination. These admissions alone should render him unqualified as an

expert under Rule 702. (R. p. 147). Brown concedes that he is “[un]qualified” to perform title examinations. (Id.) If Brown is unqualified to perform title examinations, he is equally unqualified to testify whether the title examination for the subject property was properly conducted. Brown admitted he could not and would not have discovered the title irregularity. Thus, Brown lacks the qualifications to testify as to the standard of care and Alexander’s alleged breach of that standard.

Furthermore, Brown’s opinion lacks reliability. His opinion contradicts South Carolina law. Brown conducted no investigation into how the title examination was conducted. Based on the facts here, Brown could not identify any particular measure that a reasonable attorney in a similar position could have undertaken to discover the unrecorded tax sale deed. He had no knowledge as to what types of information would be reasonably available to a title examiner to give sufficient notice of this encumbrance. Any opinion as to the existence of documentation that would put a reasonable attorney on notice was admittedly based on “speculation.” (R. pp. 153-155). He is unfamiliar with the Charleston County Online Tax system and how public records are kept. He admitted he does not know where to search for the applicable records. (Id.) Without sufficient proof of reliability, the circuit court erred in using Brown’s opinions to find there was no genuine issue of material fact and that summary judgment should be entered against Alexander.

D. A Genuine Issue of Material Fact Exists As to Damages.

The circuit court erred in finding there was no genuine issue of material fact that Johnson has suffered damages as a matter of law. The Order found that Johnson has sustained damages, leaving the amount of damages for a jury to determine. (R. p. 15-16). The circuit court incorrectly found that Johnson suffered damages, without any supporting evidence presented by

Johnson. The circuit court only relied on hypothetical questions posed to Alexander in his deposition, which lacked any factual basis.

"[D]amage to the client" is a necessary element of a legal malpractice claim. Smith v. Haynesworth, Marion, McCay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996). The finding of damages is a question of fact for a jury. Scott ex. rel. Scott v. Porter, 340 S.C. 158, 169, 530 S.E.2d 389, 394 (Ct. App. 2000). The circuit court found that damages existed as a matter of law, despite the fact, as previously explained, the Plaintiff may not be able at trial to prove any damages were sustained. See Steven v. Allen, 342 S.C. 47, 53, 536 S.E.2d 663, 666 (2000) (holding that "a verdict assessing liability against the defendant but awarding the plaintiff zero damages is inconsistent and contrary to South Carolina law"). The law is clear that "neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991).

In this case, Alexander strongly submits Johnson suffered no damages proximately caused by any act or omission of Alexander. Alexander presented significant evidence to the circuit court that Johnson had not incurred damages from the alleged inability to rent the property or from the foreclosure action. The evidence offered to the circuit court proved that Johnson actually profited from this transaction, receiving \$700.00 per month in rent from October 2006 until March 2009 while not making any mortgage payment. She also received a windfall of an additional \$9,608.08 for half of the overage paid by the purchaser at the tax sale. (R. pp. 106; 195-199). Further, any evidence of alleged damages stemming from the foreclosure action were never presented to the court. The evidence proves the foreclosure action was caused by Johnson not paying her mortgage, not from the title irregularity.

Accordingly, the circuit court erred. It should have found, at the very least, a genuine issue of material fact existed as to whether Johnson suffered damages.

E. A Genuine Issue of Material Fact Exists As to Causation.

The circuit court erred in concluding that the alleged breach of care was the proximate cause of Johnson's alleged damages. "The question of proximate cause ordinarily is one of fact for the jury." Madison v. Babcock Ctr., Inc., 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006). "Only on the rarest occasion should the trial court determine the issue of proximate cause as a matter of law." Burnett v. Family Kingdom, 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010); Newton v. S.C. Pub. Rys. Comm'n, 312 S.C. 107, 110, 439 S.E.2d 285, 287 (Ct. App. 1993). "[W]hen the evidence is susceptible to only one inference it becomes a matter of law for the court." Small v. Pioneer Mach., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). At this stage, only a mere scintilla of evidence with all inferences drawn in favor of Alexander is required to defeat Johnson's motion.

Alexander does not admit causation. In his Answer, Alexander alleges that Johnson's own conduct and the conduct of others were the cause of her alleged damages. Alexander also pled the defense of comparative fault. (Answer ¶ 45-49).⁷ See Berberich v. Jack, 392 S.C. 278,

⁷ The Answer pleads in relevant part:

For A Ninth Defense:

Any injuries or damages sustained by the Plaintiff are due to and caused and occasioned by Plaintiff's own negligence, gross negligence, recklessness, willfulness, and wantonness to which the direct and proximate cause of Plaintiff's alleged injuries or damages, if any and without which the same would not have occurred, and therefore, due to the Plaintiff's sole negligence, gross negligence, recklessness, willfulness and wantonness, Plaintiff's claims are barred.

For An Eleventh Defense:

Such injuries or losses as Plaintiff sustained, if any, were caused by the contributory negligence, carelessness, recklessness, willfulness, and wantonness of the Plaintiff, and this Defendant pleads the Plaintiff's contributory negligence as a complete defense to this action.

For a Twelfth Defense:

Even if this Defendant was negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiff's injuries, if any, which is expressly denied, this Defendant alleges Plaintiff's negligence, gross negligence, recklessness, willfulness and wanton conduct contributed to more than fifty percent (50%) to the cause of the accident and, therefore, Plaintiff's claims are barred.

709 S.E.2d 607 (2011) ("Under South Carolina's comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage."). This is especially true because South Carolina law provides, "no person [is to] be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This doctrine applies at both law and in equity and whether the cause of action is in contract or in tort." Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993). The determination of comparative fault, and apportionment of liability, is an issue for the jury. Trivelas v. S.C. Dep't of Transp., 348 S.C. 125, 138-39, 558 S.E.2d 271, 277-78 (Ct. App. 2001) (reminding that comparative fault is a jury question and reversing a grant of summary judgment on causation).

In this case, the circuit court erred in granting summary judgment because a genuine issue of material fact exists as to whether the alleged breach of care was the proximate cause of Johnson's alleged damages. Alexander presented evidence of Johnson's own misconduct that should have precluded any finding of summary judgment against him. But for Johnson's own conduct, her alleged damages would not have occurred. First, Johnson obtained financing to purchase this property by submitting a Residential Loan Application that contained admitted false statements and material misrepresentations. In the application, she certified that this property would only be used as her primary residence. (R. pp. 158-161; 186). However, she

For a Thirteenth Defense:

Even if this Defendant was negligent in any respect, which is expressly denied, and even if such conduct on the part of the Defendant operated as a greater than fifty percent (50%) cause of Plaintiff's injuries, if any, which is also denied, this Defendant is entitled to a determination as to the percentage which Plaintiff's negligence, gross negligence, reckless, willful, and wanton conduct contributed to Plaintiff's resulting injuries, if any, and the reduction of any amount awarded to the Plaintiff by an equal amount to the percentage of Plaintiff's own negligence.

admitted in her deposition that she did not occupy, establish, or use the property as her principal residence; nor had *any intention* to use this property as her primary residence. (Id.) The application states that she was moving into this house from her parents' home in Charleston; however, she was living in Florida at the time. She also made other material misrepresentations, such as falsifying her employment and personal assets. (R. pp. 268-272). Based on the language of the note and mortgage, Johnson's conduct operated to void the real estate transaction, the mortgage and her ownership of the property.

Furthermore, Johnson's failure to make required monthly mortgage payments was the proximate cause of any damages she incurred. This is why there was a foreclosure. Johnson's alleged failure to obtain marketable title did not result in the foreclosure. Johnson *admits* she breached the terms of the mortgage and failed to make the required mortgage payments. (R. pp. 185-186). Johnson *admits* that she discontinued paying on her note and mortgage in April 2007. (R. pp. 188-190). Johnson even received a letter from the mortgagor stating that the foreclosure action resulted from Johnson's refusal "to bring the loan current." (R. p. 183). Alexander cannot be held liable for causing a foreclosure action that was instituted because Johnson failed to pay the mortgage. In fact, Johnson failed to make the mortgage payments *even though she continued to profit and receive rent payments from the tenant*. (R. pp. 187; 191-192). Johnson's testimony confirms that if she had applied the rental payments each month to pay the mortgage, then no foreclosure action would have been brought. (R. p. 191).

The title irregularity did not negate Johnson's legal duty to make mortgage payments, thus, Alexander cannot be the proximate cause of the mortgage foreclosure. Pursuant to South Carolina law, Johnson had a duty to make the mortgage payments on the property irrespective of the claim of lack of marketable title. In addressing this issue, the South Carolina Supreme Court held in Wilson v. Moseley, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997): "[E]ven if there

were a cloud [based on tax deed], it was not the proximate cause of the foreclosure. The proximate cause of appellant's loss was her failure to make payments according to the note, which obligations were *separate and independent of any alleged problem with the title.*" (emphasis added). Therefore, the circuit court erred in finding no genuine issue of material fact and that Alexander's alleged conduct was the proximate cause of Johnson's alleged damages.

The circuit court also found that proximate cause was established by misconstruing Alexander's Answer and Crossclaim. The circuit court's Order excused Johnson's own conduct claiming that Alexander did not assert the defense of fraud. The circuit court ignored the fact Alexander pled Johnson's misconduct through the assertion of various comparative fault defenses. "In construing a [pleading]... the court must review the entire pleading." Doe ex rel. Legal Guardian v. Barnwell Sch. Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006). This finding is clearly erroneous, and the circuit court should have considered the evidence of Johnson's own conduct, much of it admitted by her, for purposes of making a ruling on causation.

Also, the Order relies on paragraphs 73 and 78 of the Crossclaim to erroneously find that "Alexander himself admits" that the title irregularities were "the proximate cause of the damages sustained by....Johnson." (R. p. 15). In his Answer, Alexander specifically denied the allegations of the Complaint as to causation. (R. pp. 36-37). In accordance with Rule 8(e), SCRCP, Alexander asserted in the alternative as a Twenty-Fourth Defense a crossclaim against Inglese to the extent that Johnson prevailed on the merits. (R. p. 42). Parties are allowed to set forth defenses in the alternative or hypothetically. See Rule 8, SCRCP; Harper v. Ethridge, 290 S.C. 112, 118, 348 S.E.2d 374, 377 (Ct. App. 1986) (holding that a party "may join as alternative claims as many claims, legal or equitable, as he has against the opposing party, even if the claims

are inconsistent"). Alexander did not admit in his Answer and Crossclaim that his conduct was the proximate cause of Johnson's alleged damage.

For these reasons, the circuit court erred in determining causation as a matter of law at the summary judgment stage.

II. THE CIRCUIT COURT ERRED IN DENYING ALEXANDER'S MOTION FOR CONTINUANCE.

The circuit court erred in denying Alexander's request for a continuance and in considering affidavits submitted by Johnson less than thirty-six (36) hours prior to the hearing on this motion. (R. pp. 212-258; 259; 261-263).

Rules 56 and 6(d), SCRCP require that all affidavits submitted *in support* of summary judgment must be filed with the motion. See also Smith v. Hastie, 367 S.C. 410, 418, 626 S.E.2d 13, 17 n. 10 (Ct. App. 2005) (holding the circuit court may abuse its discretion in considering an untimely affidavit if opposing party is prejudiced).

Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 654, 661 S.E.2d 791, 796 (2008). Furthermore, "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Here, Alexander was blindsided⁸ by affidavits of two witnesses not previously identified, including a new purported expert witness. Johnson did not rely on these witnesses in her original motion for summary judgment. Alexander was not given the opportunity to depose and cross-examine these witnesses on their affidavits. The circuit court then prevented Alexander from attempting to depose these witnesses. (R. p. 258). This was clearly prejudicial to Alexander.

⁸ It should be noted that Ms. Scarborough signed her affidavit on May 20, 2011, but Johnson's counsel did not send it to Alexander's counsel until the afternoon of May 24, 2011.

Based on the circuit court's ruling, Alexander was unable to test the basis, the accuracy, or credibility of this testimony. He was unable to develop grounds to challenge the expert qualifications. He was unable to develop counter testimony to refute some of the assertions contained in the affidavits. If the circuit court had granted a continuance, thereby enabling Alexander to depose these witnesses, Alexander could likely have obtained admissions from these witnesses that they lacked actual knowledge of what the online records *actually* showed in 2006 when the title was examined. He likely would have obtained admissions that the 2006 screen cannot now be replicated. Also, Alexander could have presented these witnesses with documentation in his possession at the time of the closing, which indicate that all past taxes were paid and that no tax sale deed or lis pendens had been filed.

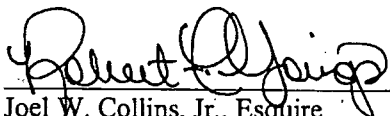
"Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses." Graham Law Firm, P.A., v. Makawi, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012) (multiple citations omitted). Alexander was prejudiced and should have been allowed the opportunity to fully explore the factual issues involved through further discovery and cross-examination of witnesses. On the other hand, Johnson would have suffered no prejudice. The circuit court should have granted Alexander's request for a continuance to allow him the opportunity to confront these new witnesses through cross-examination. Because Alexander needed to show there was genuine issue of material fact as to causation, the prejudice to him is clear.

CONCLUSION

For the reasons set forth herein, Alexander respectfully requests this Honorable Court reverse the entry of summary judgment against him and remand this case for a jury trial on the merits.

Respectfully submitted,

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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.

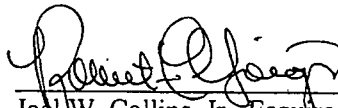
CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant Stanley E. Alexander and the Reply Brief of Appellant Stanley E. Alexander comply with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

[Signature Page to Follow]

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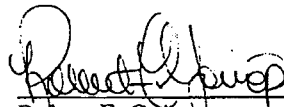
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I certify that I have served the Brief of Appellant Stanley E. Alexander and the Reply Brief of Appellant Stanley E. Alexander by mailing a copy of same, via United States Mail, on March 19, 2013, to the following:

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SC Court of Appeals

STATE OF SOUTH CAROLINA
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Appeal from Charleston County
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of whom Stanley E. Alexander is the Appellant

v.

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

v.

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II. STATEMENT OF THE ISSUES

- I. Did the trial court err in finding that no material question of fact exists as to whether Charleston County delinquent tax and tax sale records regarding the home Ms. Johnson purchased were publicly available at the time Mr. Alexander conducted the closing?
- II. Did the trial court err in finding that Mr. Alexander breached the standard of care of a closing attorney by failing to discover the delinquent tax and tax sale records, resulting in Ms. Johnson's loss of title?
- III. Did the trial court abuse its discretion by denying Mr. Alexander's motion for a continuance before ruling on Ms. Johnson's motion for partial summary judgment?
- IV. Did Mr. Alexander fail to preserve for appeal the lower court's findings that a variety of Mr. Alexander's arguments were based on irrelevant and inadmissible evidence?
- V. Did the trial court err in determining Ms. Johnson's expert closing attorney was qualified to testify as to the standard of care for a closing attorney?

III. STATEMENT OF THE CASE

On October 15, 2009, Ms. Amber Johnson (Johnson) filed this legal malpractice claim against her closing attorney Stanley E. Alexander, Esq. (Alexander). She claimed he was negligent for failing to discover the property she was buying had been sold for delinquent taxes approximately one year earlier and failing to take action with that knowledge. Alexander answered on April 20, 2010.

On October 5, 2010, Alexander filed a motion to stay alleging the damages Johnson sought against him were "wholly contingent on and directly related to the outcome of the Foreclosure Action" initiated by an entity claiming to be the holder of the note. (R. p. 52 - Alexander Motion to Stay, p. 2). On October 13, 2010, he filed a motion for protection to stop discovery. On November 8, 2010, an order was issued denying Alexander's motions and directing Alexander to make himself available for deposition.

On December 2, 2010, Alexander filed an Answer to a cross-claim and third-party complaint filed by Mario Inglese, Esq., a co-defendant. After discovery was conducted, on January 14, 2011, Johnson filed a Motion for Partial Summary Judgment as to liability and attached supporting materials. Five months later, on May 5, 2011 Alexander filed his affidavit in opposition.

On May 9, 2011, a hearing was held before Judge Nicholson. Because Alexander claimed tax records and documents concerning the tax sale were not publicly available, the lower court continued the hearing and ordered the parties to obtain and submit additional information as to what the public records of Charleston County reflected

concerning the tax sale and delinquent taxes. By agreement, the matter was rescheduled for May 26, 2011.

On May 17, 2011, Alexander filed an affidavit of Charles M. Feeley, Esq. in opposition to the Motion for Summary Judgment. On May 24, 2011, Johnson filed and served affidavits of Todd Balish, a title examiner, and Mary Scarborough, the Charleston County Delinquent Tax Collector. On May 25, 2011, Alexander filed a memorandum in opposition to Johnson's Motion for Summary Judgment. On the same day, via email Alexander requested a continuance.

On May 26, 2011, the hearing resumed. Alexander argued for a continuance, which was denied. The lower court heard further argument concerning all materials submitted, including requested information about public records. On May 27, an order was issued that partial summary judgment was taken under advisement. The lower court gave Alexander 10 additional days to submit any additional materials to consider. Despite the offer of additional time, Alexander chose to submit nothing. On June 6, the Court issued an order protecting the case from trial until it ruled.

On July 6, 2011, the Court entered an order granting partial summary judgment as to liability. Alexander did not file a Rule 59(e) motion to reconsider. On July 22, 2011, Alexander filed a notice of appeal.

On April 2, 2012, an order was issued to reconstruct the record of the hearing conducted on May 9, 2011 due to the court reporter losing the hearing tapes.

On June 18, 2012, the lower court issued a consent order reconstructing the record. The parties agreed arguments presented to the lower court on May 9, 2011 were

contained within the filings made in the court as of May 9, 2011 along with the materials contained in Alexander's Memo filed May 25, 2011.

IV. STANDARD OF REVIEW

Two standards of review govern this appeal: abuse of discretion as to the lower court's evidentiary rulings and the denial of the request for a continuance, and *de novo* as to the granting of partial summary judgment.

A. ABUSE OF DISCRETION

1. *Evidentiary Issues Are Controlled by an Abuse of Discretion Standard.*

Much of Alexander's argument is based on documents and materials the lower court ruled inadmissible. The excluded material Alexander relies upon is not available to consider for *de novo* review because he has not challenged the evidentiary determinations.

Among other things, the lower court excluded or determined inadmissible:

- The affidavit of Alexander's purported agent, Charles M. Feeléy, Esq., who conducted the title examination, because he lacked personal knowledge as he did not recall the details of the title exam. (R. p. 9 - Order, p. 5, fn. 1);
- Alexander's assumption that payment of the property taxes in 2005 meant they must have been paid on-time in previous years was inadmissible for lack of support (R. p. 9 - Order, p. 5, fn. 1);
- An unauthenticated copy of a non-party, non-government printout claiming taxes had been paid on property was inadmissible hearsay (R. p. 12 - Order, p. 8, fn. 3);
- Allegations Johnson engaged in fraudulent conduct involving her loan application with a non-party bank were unsupported, irrelevant and not properly plead (R. pp. 14-15 - Order at p. 10-11);
- Whether Johnson stopped paying the note months *after* she lost title to the property was irrelevant as to whether Alexander's negligence caused damage, and thus was inadmissible. (R. pp. 15-16 - Order at pp. 11-12; *see also* R. p. 15, Order at p. 11, fn. 5); and that

- An expert is not required to establish the standard of care if the professional defendant himself admits the standard of care owed to a client. (R. p. 13 - Order, p. 9).

A decision about the “admissibility or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion.” *Allegro Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012), *quoting State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” *Id.* Further, to warrant reversal, appellant must show prejudice in addition to the error of the ruling. *Id.* Alexander has not shown or argued such rulings were erroneous.

2. *Lower Court did not abuse its discretion by denying a request for a continuance.*

A motion for continuance is within the sound discretion of the trial court, and the ruling will not be reversed without a clear showing of abuse. *First Sav. Bank v. McLean*, 314 S.C. 361, 362, 444 S.E.2d 513, 514 (1994). Alexander did not state any viable reason why he needed additional time or what additional time would allow him to present. Following his request, he was given an additional 10 days to submit materials and did not. Further, Alexander fails to argue the lower court abused its discretion in denying the request for a continuance for a hearing.

B. SUMMARY JUDGMENT IS SUBJECT TO A DE NOVO REVIEW

An appellate court reviews a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRCP. *Edwards v. Lexington Co. Sheriff's Dep't.*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2012). The *de novo* review applies to matters properly preserved and admitted into evidence.” *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *clarified by*

319 S.C. 79, 459 S.E.2d 850 (1995). Summary judgment is available when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. Admitted evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991). However, this initial burden "may be discharged by 'showing' — that is, pointing out to the court — the absence of evidence to support the nonmoving party's case." *Baughman*, 306 S.C. at 115, 410 S.E.2d at 165, *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A genuine issue of fact "can be created only by evidence which would be admissible at trial." *Hansen*, 316 S.C. at 510, 450 S.E.2d at 627.

In order for this Court to consider materials and affidavits in opposition to summary judgment, they must be admissible and "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993).

V. TAX SALE PROCEDURAL BACKGROUND

A landowner is liable for the payment of taxes assessed by counties and municipalities. S.C. Code Ann. § 12-37-610 (1976). A statutory lien attaches to all real property owned by a taxpayer on December 31 for all taxes that are assessed during the following year. S.C. Code Ann. § 12-49-20 (1976). If the taxes are not timely paid, state law prescribes a procedure by which the County may sell the property to pay the taxes.

After providing notice to the record title holder and the public, including running newspaper advertisements, the County publicly sells the property to the highest bidder and uses the proceeds to pay the past due taxes within 30 days after the sale. S.C. Code Ann. § 12-51-80 (1976). The delinquent owner still has 12 months to redeem the property by paying the delinquent taxes and fees. Timely redemption prevents a tax deed from being issued to the tax sale purchaser. S.C. Code Ann. § 12-51-90(A) (1976). If the property is not redeemed, a tax deed for the property is issued to the tax sale purchaser and the balance of the proceeds after paying the taxes is paid to the titleholder of record. S.C. Code Ann. § 12-51-60. The tax sale becomes incontestable 12 months after the tax deed is issued. S.C. Code Ann. § 12-51-90 (C).

VI. STATEMENT OF FACTS

A. DELINQUENT TAXES AND TAX SALE ARE PUBLIC RECORDS

On Oct. 3, 2005, almost one year before Johnson purchased the property and house at 2640 Ranger Dr., North Charleston (the Property), the County of Charleston sold it to pay delinquent 2004 taxes. The property sold to a third-party bidder. The County applied a portion of the proceeds to the tax bill on October 14, 2005. (R. p. 202 - Affidavit of Mary Scarborough, Charleston County delinquent tax collector, p. 3, ¶ 11; R. pp. 122-123 - Tax Deed). Alexander agrees and offered no contrary evidence that: 1) the County sold the property at a public tax sale in 2005 (R. p. 276, lines 21-23 - Alexander Dep. p. 34); 2) delinquent tax records are public as a matter of law (*See, e.g., Taylor v. Mill*, 310 S.C. 526, 528, 426 S.E.2d 311, 312 (1992)); 3) the title work was defective because it did not pick up the tax sale (R. p. 132, lines 2-9 - Alexander Dep. p. 87,); 4) the tax sale was a matter of public record (R. p. 13, fn. 4 - Order citing R. p. 35).

Further, Alexander agrees there is no evidence the County improperly entered the tax sale information into the public record in a way that would result in a lawyer not finding it. (R. p. 132, lines 14-18 - Alexander Dep. p. 87).

There is no dispute Charleston County is a public body and the records it maintains are public, including delinquent tax records and notice of tax sales. Delinquent tax records are public as a matter of law. A "public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. S.C. Code Ann. § 30-4-20(c) (1976).

B. ALEXANDER ADMITS ATTORNEY-CLIENT RELATIONSHIP, PERFORMING THE TITLE WORK AND DUTIES OF A CLOSING ATTORNEY

On September 14, 2006, just shy of one year after the public tax sale, Alexander conducted the closing for Johnson for the Property. It is undisputed Alexander represented Johnson in the closing. (R. p. 82, lines 13-15 - Alexander Dep. p. 16, and R. p. 89, lines 7-16 - Alexander Dep. p. 102). Alexander had a duty to convey good and marketable title to Johnson. (R. p. 266 - lines 17-23 - *Id.* at p. 67). Alexander admits a closing lawyer is required to exercise good and prudent judgment and use the tools available. (R. p. 265 - lines 14-18 - *Id.* at p. 35). Alexander admits that the title work was defective (R. p. 131, lines 14-18 - *Id.* at 86) because it did not reveal the delinquent taxes and the tax sale. (R. p. 132, lines 2-9- *Id.* at 87, lines 2-9).

Alexander failed to look at the public tax records before the closing. (R. p. 133, lines 1-3 - Alexander Dep. p. 87, lines 1-3). Based on the above, it is irrelevant that

Alexander claims he relied on the work of his agent, Charles M. Feeley, Esq., a title examiner. (App. Br. p. 12).

C. ALEXANDER ADMITS JOHNSON WAS NOT AT FAULT

On appeal, counsel for Alexander repeatedly attempts to cast blame on Johnson. However, Alexander admitted that Johnson "was put into the situation she is in through no fault of her own." (R. pp. 67-68 - Alexander Dep. Ex. 2, letter July 13, 2009). He cannot now claim through *innuendo* and speculation that she contributed to *his* failure to determine the property had been sold at a tax sale or that her actions minimize any damages she suffered.

Eventually, the bank holding Johnson's mortgage sued Alexander for professional negligence. It is believed he or his insurer paid for his failure to provide good and marketable title. As to Johnson, there were two foreclosure actions brought against her by entities claiming to own or have an interest in the note. Both cases were dismissed with prejudice without any finding that she did anything improper or failed to do something she was required to do. Alexander seeks to impugn Johnson. However, there has never been any evidence, allegation by any lender or finding in any court that Johnson engaged in improper conduct associated with the purchase of the Property. Indeed, the lower court found Alexander's assertions "lack proof and are irrelevant." (R. p. 14 - Order Granting Partial S.J., p. 10 (hereafter, Order)). These evidentiary findings have not been appealed.

D. ALEXANDER COULD HAVE REDEEMED PROPERTY AT TIME OF CLOSING.

It is also undisputed that at the time of closing, the 12-month redemption period had not expired. The Charleston County Delinquent Tax Collector, Mary Scarborough,

issued and recorded the tax deed on December 12, 2006, almost two months after Johnson closed. (R. p. 201 - Scarborough Aff., p. 2, ¶ 6; R. pp. 122-123 - Tax Deed). Thus, Johnson would not have lost title as a result of the tax sale and would have suffered no other damages had Alexander acted properly and redeemed the property at the time of closing.

Instead, by operation of law, title was transferred from Johnson to Westwood LLC, the tax sale purchaser, on Dec. 12, 2006. (R. pp. 122-123 - Tax Deed and R. pp. 67-68 - Alexander Letter stating property sold at a tax sale had "been deeded to the new owner.").

As a direct result of the tax sale and the failure of Alexander to redeem the property at the closing, Johnson immediately lost title to the property and incurred direct, consequential and incidental damages. (R. p. 67 - *See, e.g.* Alexander Dep., Ex. 2 where Alexander states "Johnson could not rent or resale the house...the property has been out of Ms. Johnson's control, and still is. She was put into the situation she is in through no fault of her own.").

VII. SUMMARY OF THE ARGUMENT

Johnson seeks damages from Alexander as her closing attorney on grounds that Alexander negligently failed to discover the property Johnson was buying had been sold at a county tax sale 11 months earlier. Further, Alexander failed to redeem the property at the closing or thereafter. Alexander's failures directly caused Johnson to lose title to the property shortly after the closing, when a tax deed was issued to the tax sale purchaser.

To prove liability for professional negligence, one must show 1) the existence of an attorney-client relationship; 2) a breach of the attorney's duty; 3) damage resulting

from the negligence; and 4) proximate cause of the client's damages by that breach of duty. *Harris Teeter Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). Attorneys must render services with the degree of skill, care, knowledge and judgment usually possessed and exercised by members of the profession. *Id.*

Alexander admitted he failed to discover the tax sale. Alexander admits Johnson lost the property through no fault of her own. Alexander failed to offer any material and admissible facts showing that the tax sale records and delinquent status were not public records available to him. Nothing further need be considered. Alexander's arguments are nothing more than distractions, which have no bearing on the Court's decision to grant summary judgment as to liability.

Although Alexander claims Johnson suffered no damage, she lost title to the property; she incurred expenses to repair the property prior to losing title; she was unable to realize a profit from selling the property after improving it; and she continued to make payments on the mortgage note for several months after she lost title. These are damages.

The lower court properly determined Johnson presented evidence of each element sufficient to establish liability for professional negligence. The existence of an attorney-client relationship is not in dispute. As to the other elements, Alexander argues the lower court erred in finding no material question of fact existed as to the disputed elements and that summary judgment was inappropriate.

Alexander anchors his appeal in two key arguments: First, because Alexander or his agent failed to see the public records regarding the tax sale, a question of fact exists as to whether the public tax records were there to be seen. Second, he claims that Johnson's alleged tortious or improper conduct caused the damages she blames on Alexander.

As to the first argument, Alexander offers no admissible evidence to create a question of fact as to whether the Charleston County delinquent tax or tax sale records were publicly available and should have been discovered by Alexander or his agent.

As to the second, Alexander fails to challenge on appeal the lower court's findings that his allegations of Johnson's wrongdoing were irrelevant as to his liability and inadmissible. Those findings, therefore, are the law of the case, and the Court of Appeals may not, and should not, consider Alexander's allegations in conducting its *de novo* review of summary judgment. To the extent this Court does consider Alexander's allegations of comparative fault, Alexander does not challenge the lower court's finding that his negligence was the proximate cause of many other losses, discussed below.

Finally, regarding the lone procedural matter before this Court, Alexander fails to show how the lower court abused its discretion in denying Alexander's motion to continue the May 26, 2011 hearing on summary judgment, or to show prejudice stemming from the ruling. Specifically, Alexander ignored the lower court's extension of 10 more days to produce additional support for his opposition to summary judgment.

VIII. ARGUMENT

A. ALEXANDER ADMITS TO NEGLIGENCE AND CAUSATION; THUS, THE COURT PROPERLY DETERMINED LIABILITY.

Alexander fails to appeal the court's finding that an expert is not needed in a professional negligence case if the professional defendant establishes the standard of care owed to a client. (R. p. 13 - Order, p. 9). *See Sims v. Hall*, 357 S.C. 288, 296, 592 S.E.2d 315, 319 (Ct. App. 2003). Alexander admits that as a closing attorney, he is responsible for ensuring his client obtains good and marketable title to her property. (R. pp. 82, lines

4-p. 83, line 7; and R. p. 89, lines 3-16 - *E.g.*, Alexander Dep., pp. 16, 17 and 102).

Alexander admits she did not obtain such title. (R. p. 9 - Order p. 5).

The court properly determined that "Alexander himself admits the failure to properly and fully examine 'the title and all matter of public record available on the subject property' was 'the proximate cause of the damages sustained by...Johnson.'" (R. p. 15 - Order p. 11). The court properly relied upon many of Alexander's admissions conceding his duties, the breaches and resulting damage. Those findings are contained on pages 5 and 6 of the Order. (R. pp. 9-10.) They include:

- A lawyer handling a closing has the responsibility to make sure the purchaser gets good and marketable title to the property.
- Alexander had a duty to make sure Johnson got the property free and clear with good and marketable title.
- Alexander conducted a closing precisely to ensure that Johnson had good and marketable title.
- Johnson relied upon Alexander telling her she was getting good and marketable title to the property.
- The issuance of the tax deed made Johnson unable to rent or sell the property.
- Johnson suffered direct, incidental and consequential damage as result of the subject property being transferred by virtue of the tax deed.
- Johnson suffered damage as result of not obtaining clear marketable title to the property.

Even if the duty to transfer property free and clear is not absolute, Johnson's expert properly testified that Alexander fell below the standard of care for failing to find the public records showing the delinquent taxes and tax sale. (R. p. 34 - Brown Aff., p. 2, ¶¶ 11-13).

In any case, given Alexander's own admission and lack of opposing expert opinion, the court properly determined there was no material issue of fact as to Alexander's liability.

B. THE LOWER COURT CORRECTLY HELD TAX RECORDS WERE PUBLIC RECORDS

The lower court properly determined that as of October 14, 2005, almost one year before the Johnson closing, information about the delinquent taxes and tax sale of the Property was "publicly and readily available for abstractors, closing attorneys and the general public in the county's Register Mesné Conveyance Office." (R. p. 10 - Order p. 4, ¶¶ 5-6). Given the availability of these records and Alexander's admissions, the lower court properly found Alexander breached his duty as a closing attorney by failing to discover them. (R. pp. 11-12 - Order, pp. 7-8). Alexander fails to submit admissible evidence to create a material question of fact that these records were not public and available.

1. Non-Moving Party Must Come Forward with Admissible Facts to Create A Genuine Issue of Material Fact.

In response to a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SCRCP, Rule 56(e). Once the moving party carries its initial burden of showing no material question of fact exists, the opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts," and "must come forward with 'specific facts showing that there is a genuine issue for trial.'"

Baughman, 306 S.C. at 115, 410 S.E.2d at 545, quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). No court “is required to single out some morsel of evidence to create an issue of fact that is not genuine.” *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993), citing *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). The court is not required to attach great significance to [admissible] evidence introduced solely to create an issue of fact that is not genuine. See James F. Flanagan, *South Carolina Civil Procedure 3d*, 463-64 (S.C. Bar 2010). Unsupported and conclusory statements contesting the critical issues are not genuine disputes of material facts. *Id.*

In attempting to explain how he or his agent missed the public records, delinquent taxes and tax sale, Alexander offers only the unsupported speculation or conjecture that “something was not right.” (App. Br. p. 11). Raising a material question of fact requires more than asking an unanswered question.

2. Tax Records Are Public Records

As a matter of law, delinquent property taxes are public records. *Taylor*, 310 S.C. at 528, 426 S.E.2d at 312. This basic fact forms the gravamen of Johnson’s negligence claim against Alexander. No one disputes that checking those records is a core function of title examiners, or that a title examiner is supposed to check back property taxes for a period of 10 years. See Charles T. Manning, *Handbook for South Carolina Dirt Lawyers* 2d, 22-23 (2008). In support of summary judgment, Johnson submitted the affidavit of Mary Scarborough, the Charleston County delinquent tax collector, who stated the delinquent tax records and record of the tax sale specifically regarding the Property were publicly available as early as Oct. 14, 2005 — almost a year before the closing — on the

mainframe computer system, called the Vista 3270, in the RMC office. (R. pp. 202-203 - Scarborough Aff., p. 3-4, ¶¶11-14). The delinquent taxes also were publicly available over Internet via the County's Web site. (R. p. 202 - *Id.* at p. 3, ¶13). The fact that Alexander or his agent Feeley, failed to look for or to see these records does not create a question of fact as to their existence. Thus, the trial court did not err in finding Alexander was negligent in discovering them and he did not create a question of fact by claiming not to see them.

3. Alexander Offers No Admissible Evidence That The Public Records Showing the Tax Sale Were Not Public and Available

Alexander does not dispute that delinquent tax records by law are a matter of public record. He offers no evidence to support the idea that public records regarding the Property were somehow not public when his agent allegedly conducted the title search. Alexander agreed he could not say Charleston County improperly entered information regarding the tax sale in a way that prevents a lawyer from finding it. (R. p. 132, lines 13-18 - Alexander Dep. p. 87, lines 13-18). He points to no fire, flood or system error, or any reason whatsoever as to why the day he or his agent looked, the records were not where they always are.

Instead, Alexander seeks to create a *non-material* question of fact by claiming no "records were discovered" so as to put him "on notice that property taxes were delinquent or that a tax sale had occurred on the property." (R. p. 111 - Alexander Aff. p. 3, ¶ 11). Alexander attempts to rely upon Feeley's affidavit to create a material question of fact as to whether the delinquent tax or tax sale records existed at the time of Johnson's closing. (App. Br. p. 12). Such reliance is misplaced. First, the fact that Feeley did not see the

records does not create a question of fact as to the records' existence. Second, Feeley's affidavit is *not* based on personal knowledge, as required per Rule 602, SCRE. Feeley admits he does "not recall the details from this title examination." (R. p. 126 - Feeley Aff., p. 2., ¶ 2). He states only that he *usually* looks at a County web site on the Internet and contends he did not see that the taxes on the subject property had been delinquent or that the property had been sold at a county tax sale. (R. p. 126 - Feeley Aff., p. 2, ¶ 3).

Third, neither Alexander nor Feeley ever demonstrates or even states that delinquent tax records did not exist or were not publicly available in the RMC office. Rather, Alexander suggests that Feeley's failure to find the records creates a material question of fact as to whether they were there to be found. (App. Br. pp. 13-14). To bolster his case, Alexander cites Feeley's statement that "if I see a delinquency or tax sale on the first screen...I notate it on my abstract summary sheet" (*Id.*) Here, the "abstract summary sheet" he completed for the property shows no taxes were due (R. p. 126 - Feeley Aff., p. 2, ¶ 3). Alexander never establishes its admissibility into evidence; if it is offered merely for the truth of the matter asserted within the document, it is properly excluded hearsay. Even if the summary sheet was properly admitted, it is known Feeley did not find the records — his hand-written "abstract summary sheet" does not somehow provide verification the records were missing or create a material question of fact as to whether they existed.

As the lower court properly recognized, Alexander must come forward with admissible facts and Alexander failed "to meet his burden." (R. p. 17 - Order p. 13).

Fourth, the lower court properly disregarded the statements in Feeley's affidavit as evidence because Feeley admitted, "I do not recall the details from this title examination,"

and so his statement was not based on his personal knowledge (R. p. 9 - Order p. 5, fn.

1) As required by SCRCPP, Rule 56(e), Alexander never challenges this evidentiary finding, and thus it is the law of the case.

In contrast to Alexander's ambiguity about what was or was not available, Johnson offered the affidavit of Ms. Scarborough, who set forth detailed, admissible facts proving the records were public and available as well as a method for obtaining them on-line or at the RMC office via computers. Alexander never disputes her statements.

Therefore, given that Alexander fails to come forth with admissible evidence sufficient to create a material question of fact as to the availability of the public records, this Court should affirm the lower court's finding that Alexander breached his duty as a closing attorney by negligently failing to discover the delinquent tax records and the tax sale prior to Johnson's closing.

4. No Unfair Surprise from Scarborough's Affidavit

Alexander claims Scarborough's affidavit was a surprise (App. Br. p. 6) and that the lower court erred in considering it "less than 36 hours before the hearing." (*Id.* at 27). His contention is baseless. The trial court specifically ordered Alexander to bring evidence to support his contention that the records were not public. Alexander chose not to do so. The court also allowed Johnson to supply additional information, which she did.

As a threshold matter, one filing a motion for summary judgment is not required to provide any materials or affidavits. Rather, if affidavits are used to support a motion, they may be served with the motion. SCRCPP, Rule 6(d). Additional or opposing affidavits may be served not later than two days before the hearing, *unless the court permits them to be served at some other time. Id.* (Emphasis added). The moving party may serve

reply affidavits any time before the hearing. *Id.* Further, prior to ruling on a summary judgment motion, the Court may “order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.” SCRCF, Rule 56(f).

At the hearing on May 9, 2011, Alexander failed to come forward with any evidence showing the delinquent tax records were not public or unavailable at the time of Johnson’s closing. The lower court *allowed Alexander* an opportunity to continue the hearing. The parties were ordered to return with additional information about delinquent tax records and what was or was not public when the title examination was conducted in August and September of 2006. (R. p. 215, line 9-p. 216, line 4 - Hearing Trans. May 26, 2011, pp. 4-5).

5. *Alexander did not object and did not comply with order.*

Before the hearing resumed May 26, 2011, Johnson produced the affidavit of Ms. Scarborough, a disinterested public official, which detailed how delinquent tax and tax sale records are kept. She explained how and why those regarding the Property were publicly available at the time of the closing. (R. pp. 201-202 - Scarborough Aff. pp. 2-3). She clearly stated the records reflected the Property had been sold for delinquent taxes. (*Id.*)

Alexander, on the other hand, produced the affidavit of Feeley, who “cannot recall the specifics” but concludes based on reviewing his handwritten summary sheet that all taxes were paid and current. (R. pp. 126-127 - Feeley Aff., pp. 2-3, ¶ 3). This does not create a relevant or material issue of fact. His assumptions based on his notes do not change the fact that the Property was sold for delinquent taxes.

Alexander argues the court erred in considering Scarborough's "surprise" affidavit, because it was not filed with the motion for summary judgment. (App. Br. p. 6). The affidavit was no surprise as it was submitted at the request of the court and timely provided to Alexander before the hearing. Alexander cannot fairly claim prejudice due to his failure to depose Ms. Scarborough before the court considered her affidavit when he made no attempt to depose her or proffer what her purported testimony would be. (App. Br. p. 27).

When Alexander sought to claim prejudice to the trial judge, the court responded as follows:

Okay, because I thought it was very, very specific. You — *you raised the issue that* [Alexander] didn't have notice [of the delinquent taxes and tax sale], the abstracter didn't have notice because it wasn't available. And I said I'll continue it *to give you an opportunity* to bring live witnesses, affidavits, or however you want to present it to the Court as to notice to the public on the issue of tax liens. (R. p. 215, line 22 - p. 216, line 3 - May 26, 2011, Trans. pp. 4, lines 22-25 - 5, lines 1-3).

Now, as then, Alexander cannot legitimately claim he was "blindsided" by Scarborough's affidavit when the lower court ordered the parties to produce additional materials; nor can he reasonably claim the court abused its discretion by considering "untimely" affidavits when both sides were given equal opportunities to supplement information. Given the nature of this lawsuit, the director of the delinquent tax office was a natural source for information, yet Alexander took no steps to seek her affidavit before the hearing, to subpoena her for the hearing, to subpoena records from Charleston County, or to obtain a counter-affidavit from anyone else. Surprise is a claim he cannot legitimately make and is unsupported by the facts.

C. THERE WAS NO ERROR IN DENYING A CONTINUANCE

Alexander argues the court erred by denying his May 26, 2011 motion for a continuance. (App. Br. p. 27). He claims he was prejudiced because he lacked time to depose Scarborough or counter Plaintiff's other evidence that records regarding the delinquent taxes and tax sale were public and available. (*Id.*)

First, Alexander never asserts the court abused its discretion in denying the continuance. "Abuse of discretion" is the proper scope of review. Therefore, this issue is not properly before this Court and should be deemed abandoned.

Should this Court find Alexander infers the lower court abused its discretion, the facts and record do not support this position. Plaintiff's motion for summary judgment was filed nearly five months before the first hearing. The hearing was continued to allow each side to produce affidavits, live testimony, or other evidence to show the tax records for the Property had been publicly available at the time of the closing; Alexander provided nothing substantive when the hearing resumed; and the lower court then gave him another 10 days to provide more. (R. p. 215, line 9-p. 216, line 3; and R. p. 257, lines 7-12 - May 26, 2011, Trans. pp. 4, lines 9-25, p. 5, lines 1-3, p. 46, lines 7-12). He simply failed to accept the court's overly indulgent offers and chose to produce inadmissible affidavits.

On appeal, Alexander argues he should have been allowed to depose Scarborough to show she "could not testify as to what Feeley actually saw when he conducted the title examination on the property" (App. Br. p. 6); that he could have obtained "admissions ...that [she] lacked actual knowledge of what the online records actually showed in 2006 when the title was examined" (*Id.* at 28); and that he could have confronted her with

“documentation in his possession at the time of the closing which indicate that all past taxes were paid and no tax sale deed or *lis pendens* had been filed.” (*Id.*)

First, these arguments were not presented to nor ruled upon by the lower court; thus, Alexander failed to preserve them for appeal. Regardless, he fails to show how these points would have created a question of material fact as to what records were public and available when Alexander closed on the Property. Scarborough’s testimony was offered only to show what public records were available to one who looked—whether Feeley actually saw them is immaterial to her testimony. Thus, not only did Alexander fail to preserve the issue, but he fails to show how the lower court abused its discretion in denying his motion for a continuance or how he was prejudiced.

D. CERTAIN “FACTS” NOT MATERIAL

Alexander attempts to create a material question of fact as to whether the records were public and available by raising several immaterial and irrelevant facts, including that 1) the tax deed was not recorded when Alexander closed on the property; 2) certain screen shots for a current year signify that no prior taxes were delinquent and fully paid; and 3) no *lis pendens* was filed against the property. Aside from failing to preserve the lower court’s finding that these “facts” are irrelevant and inadmissible to the question of his liability, these distractions are presented merely in an attempt to confuse the Court.

1. *Red Herring No. 1: The Tax Deed Was Not Recorded at the Time of Ms. Johnson’s Closing.*

Alexander’s “proof” the public records were unavailable is that the tax deed was not recorded until Dec. 12, 2006, nearly two months after the closing. (App. Br. p. 14). So what? By statute, a tax deed is *never* recorded until after the 12-month redemption

period has expired. (R. pp. 122-123 - Alexander Dep., Ex. 6, Tax Deed for 2640 Ranger Dr.). It is misleading for Alexander to state that the lack of a recorded tax deed relieves him of his duty to discover the tax delinquency, liens or subsequent sale.

In *Taylor*, a tax deed from the county property tax sale had not been recorded before the plaintiff recorded his deed. *Taylor*, 310 S.C. at 528, 426 S.E.2d at 312. The Supreme Court did not relieve Taylor of the responsibility of discovering the delinquent taxes, since tax records are public. *Id.* The same applies here, and the fact the tax deed for the Property had not been recorded at the time of Johnson's closing does not create a question of fact as to whether the delinquent taxes records were public and available, or whether Alexander, as Johnson's closing attorney, is negligent for missing them.

2. *Red Herring No. 2: Appellant's "Documentation" shows All Taxes Paid*

Alexander argues that "documentation in [his] possession at the time of the closing" showed all past taxes were paid so a question of fact exists as to what the public record showed regarding delinquent taxes and the tax sale. (App. Br., p. 28). Alexander claims "after this came to light we looked back and it appears the county had made no notes anywhere that [the property] had been sold. Plus, they were accepting current taxes and they don't [accept current taxes] when back taxes are due." (R. p. 131, line 24-p. 132, line 1 - Alexander Dep., pp. 86, lines 24-25, p. 87, line 1).

First, Alexander does not appeal the trial court's finding that he offered no admissible evidence to support the claim the county will not accept money for current taxes owed if past taxes have not been paid. (R. p. 9 - Order, p. 5, fn. 1). Thus, this argument is not properly before this Court.

Second, screen shots from Aug. 10, 2006 and Sep. 11, 2006 showing taxes on the property were paid for the year 2005 attached to Alexander's affidavit are irrelevant as to whether taxes were delinquent in 2004, which prompted the tax sale. (R. p. 202 - Scarborough Aff., p. 3, ¶10). If the taxes showed paid, it was because the Property was sold at a tax sale. The proceeds received from the third party bidder paid those taxes to purchase the Property if the Property was not timely redeemed.

Thus, whether Alexander's "documents" show taxes were paid for the current year does not create a material question of fact as to whether the prior property taxes had been delinquent, or whether public records showed Johnson's property had been sold in a delinquent tax sale and that the redemption period was about to expire.

3. *Red Herring No. 3: No Lis Pendens*

Alexander seeks to create a question of fact as to whether the public record showed the delinquent taxes and tax sales by claiming no *lis pendens* had been filed against the property. (App. Br., p. 4). This statement is also designed merely to distract and confuse, as it is wholly unrelated. Filing a *lis pendens* is not part of the statutory process for selling property at a delinquent tax sale. S.C. Code Ann. § 12-51-40, *et seq.*

Alexander also fails to challenge the lower court's finding that his *lis pendens* claim is irrelevant and inadmissible (R. p. 9 - Order, p. 5, fn. 1.). Thus, even if it were relevant, it is not properly before this Court whether the lack of a *lis pendens* creates a material question of fact as to what records were publicly available regarding the delinquent taxes or tax sale.

E. APPELLANT RELIES ON INADMISSIBLE AND UNPRESERVED FACTS

The lower court correctly held “Alexander fails to meet his burden” of coming “forward with *admissible* facts that dispute the moving party’s contention....” (R. p. 17 - Order p. 13) (emphasis added). On appeal, Alexander does not challenge multiple findings by the lower court that his submissions were inadmissible. As much of his argument is based on unappealed evidentiary rulings determining his documents were not admissible, those materials underpinning Alexander’s arguments are not properly before this Court.

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Even if an issue has been preserved before the lower court, the appellant must raise the error to the appellate court or else lose it forever. “Unappealed rulings become the law of the case and should not be considered by this court.” *Sims v. Hall*, 357 S.C. 288, 293, 592 S.E.2d 315, 318, fn. 2 (Ct. App. 2003).

In its order granting summary judgment, the lower court found Alexander “fails to meet his burden” of producing any admissible evidence to dispute Johnson’s contention that she was entitled to judgment as a matter of law. (R. p. 17 - Order, p. 13). The lower court excluded or did not provide weight to:

- The affidavit of Alexander’s purported agent, Charles M. Feeley, Esq., who conducted the title examination, because he could not recall the details of the title exam. (R. p. 9 - Order, p. 5, fn. 1);
- Alexander’s assumption that payment of the property taxes in 2005 meant they must have been paid on-time in previous years was inadmissible for lack of support (R. p. 9 - Order, p. 5, fn. 1);

- An unauthenticated copy of a non-party, non-government printout claiming taxes had been paid on property was inadmissible hearsay (R. p. 12 - Order, p. 8, fn. 3);
- Allegations Johnson engaged in fraudulent conduct involving her loan application with a non-party bank were unsupported, irrelevant and not properly plead (R. pp. 14-15 - Order at p. 10-11);
- Whether Johnson stopped paying the note months *after* she lost title to the property was irrelevant as to whether Alexander's negligence caused damage, and thus was inadmissible. (R. pp. 15-16 - Order at pp. 11-12; *see also* R. p. 15 - Order p. 11, fn. 5); and that
- An expert is not required to establish the standard of care if the professional defendant himself admits the standard of care owed to a client. (R. p. 13 - Order, p. 9).

Although the standard of review of an order for summary judgment is *de novo*, a genuine issue of fact "can be created only by evidence which would be admissible at trial." *Hansen*, 316 S.C. at 510, 450 S.E.2d at 627. It is well-established that "the admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *Allegro Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* Further, to warrant reversal, the appellant must show prejudice in addition to judicial error. *Id.* Prejudice is a "reasonable probability" that the outcome would have been different had the court ruled the other way. *Id.*

The record below shows Alexander never argued the basis for the admissibility of these submissions to the lower court before the court issued its order granting partial summary judgment on July 6, 2011. After the order was issued, he neglected to file a

Rule 59(e), motion asking the court to reconsider these evidentiary findings.

Finally, he failed to appeal the lower court's rulings by arguing to this Court that the lower court erred in its evidentiary rulings or even listing them in his Statement of the Issues. "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues." Rule 208(b)(1)(B), SCACR. An appellate court *may* consider the appeal of a point that is not included in the Statement of the Issues, but only if the ruling being challenged is reasonably clear from the appellant's arguments. *Eubank v. Eubank*, 347 S.C. 367, 374, 555 S.E.2d 413, 417, fn. 2 (Ct. App. 2001); *see also* Jean Hoefer Toal, *Appellate Practice in South Carolina* 2d at 75 (SC Bar 2002). Here, that clarity is absent. Appellant's brief cites no rules of evidence, law, or even argument explaining why the trial judge abused his discretion (or otherwise erred) in excluding Alexander's purported evidence. Alexander never even uses the term "abuse of discretion" to describe these evidentiary findings. Alexander abandoned issues concerning materials deemed inadmissible and the lower court's evidentiary findings are the law of the case.

1. Appellant Abandons Argument that Feeley's Affidavit is Irrelevant to Show a Question of Material Fact

On appeal, Alexander argues Feeley's affidavit creates a material question of fact as to what records regarding the delinquent taxes and tax sale of the Property were publicly available. However, Alexander failed to file a Rule 59(e) motion to challenge the lower court's finding that Feeley's affidavit was inadmissible and did not create a material question of fact for lack of personal knowledge. (R. p. 9 - Order, p. 5, fn. 1). Alexander also fails to appeal the lower court's finding of inadmissibility to this Court.

Without arguing any error, Alexander asserts Feeley's affidavit creates a question of fact because his habit or routine practice may be offered as evidence to prove conformity therewith, per Rule 406, SCRE. (App. Br., p. 13). However, the fact Mr. Feeley routinely conducts title examinations by looking at a County web site is not evidence that his method complies with the standard of care, is effective, or even not negligent. This does not create a material question of fact as to whether the records were public and available, especially since delinquent tax records are public as a matter of law.¹

Thus, Alexander's failure to challenge the lower court's finding that Mr. Feeley's affidavit does not create a question of fact, either by filing a Rule 59(e) motion below or by arguing an error on appeal, means the issue is abandoned, and the contents of his affidavit are not properly before the Court for consideration.

2. *Additional Ground for Inadmissibility: Reliance on Feeley Immaterial*

In its *de novo* review of the facts, this Court can consider an additional ground for excluding Feeley's affidavit as irrelevant: Alexander admits he was ultimately responsible for the title work. (R. p. 89, lines 7-16 - Alexander Dep., p. 102, lines 7-16). Alexander contends he reasonably relied on Feeley's work (App. Br. p. 12). Whether he relied on Feeley's title exam does not obviate his duties as the closing attorney. Alexander admitted to the duties of fully and properly examining the title and the resulting damage for his failure to properly do so. (R. pp. 42-46 and R. p. 15 - Alexander's Answer and Cross-Claim, March 4, 2010, ¶¶ 60-86 and Order p. 11).

¹ In his affidavit, Feeley references a title examination summary sheet he completed showing his findings regarding the property. However, this sheet is not attached to the affidavit Appellant offers to this Court. (R. pp. 125-127).

Therefore, for purposes of determining whether a question of fact existed, Feeley's affidavit is inadmissible, irrelevant and does not create a material issue of fact.

3. Alexander Failed to Preserve Argument that Non-party's bank records creates a question of fact

Appellant argues on appeal that "[a]s further evidence that no back taxes were due and owing, documentation from the seller's mortgage servicer showed that tax payments for 2004 and 2005 were paid from escrow." (App. Br., p. 13). However, the circuit court determined that this "documentation from the seller's mortgagee" concerning the status of tax payments was inadmissible hearsay. (R. p. 12 - Order granting summary judgment, p. 8, fn. 3). "If documentation from seller's mortgagee generally sufficed, South Carolina homebuyers would have no need to obtain title searches." *Id.*

Alexander failed to challenge this evidentiary finding by filing a Rule 59(e) motion to reconsider at the court below. Again, on appeal Alexander fails to allege the court erred in excluding the materials, let alone cite rules, law, or other authority to show how the lower court abused its discretion. Thus, he failed to preserve the circuit court's finding or properly present the issue for appeal. This Court is not to consider these materials in determining whether a material question of fact exists as to whether public records showed taxes on the home had been delinquent or the home had been sold at a tax sale.

4. Allegations of Fraud and Comparative Fault Are Not Preserved

Alexander argues, without any evidentiary or factual support, that alleged misrepresentations Johnson made on her loan application broke any causal chain between

his actions and her damages. (App. Br. pp. 24-25). In his Memo in Opposition to Summary Judgment, Alexander called her actions "fraudulent conduct." (R. pp. 104-105 - Def. Mem. in Opp., pp. 12-13). In his appellate brief, he calls her actions "comparative fault."

His specious and illogical argument goes like this: Had Johnson not made the alleged misrepresentations, she could not have bought the house. (App. Br. pp. 24-25). Had she not bought the house, Alexander would not have been her closing attorney. Had he not served as her closing attorney, he could not have been negligent in handling the closing. *Ergo*, Alexander concludes, "[b]ut for Johnson's own conduct, her alleged damages would not have occurred." (App. Br. 24). He also claims below that her "fraudulent conduct voided the real estate transaction." (R. p. 104 - Def. Mem. in Opp. to Partial S.J., p. 12; *see* App. Br. p. 25). Alexander claims the court erred in granting summary judgment because a question of comparative fault is a question for the jury.

The court properly found that "Alexander's unsupported and bald assertions of fraud based upon inadmissible documents do not create a material issue of fact." (R. p. 15 - Order p. 11). Alexander fails to preserve the lower court's findings that his assertions of wrongdoing lack proof and are irrelevant to the question of liability. (R. p. 14 - Order, p. 10). Thus, this Court is precluded from considering the unsupported claims as a basis for reversal.

5. *Lower Court Correctly Determined Fraud Improperly Plead and Unsupported*

In its July 6, 2011, order, the lower court found that Alexander had not properly pleaded the defense of fraud in his answer and, as such, he was unable to argue it in an effort to show Johnson's conduct created a material question of fact as to proximate cause.

(R. pp. 14-15 - Order, pp. 10-11). The court also found the allegations were “irrelevant to the Court’s consideration as to . . . liability,” and that Alexander’s “bald assertions of fraud [were] based upon inadmissible documents,” and thus did not create a question of fact. (R. pp. 14-15 - Order, pp. 10-11).

Alexander argues on appeal the court erred in dismissing the fraud allegations because it “ignored the fact Alexander pled Johnson’s misconduct through the assertion of various comparative fault defenses.” (App. Br. p. 26). First, fraud and comparative fault are not interchangeable defenses.² Second, Alexander never argued this alleged error to the lower court, or filed a Rule 59(e) motion asking the court to reconsider its finding that he failed to plead fraud as an affirmative defense. Therefore, any allegations of fraud are not preserved for appellate review.

6. *Lower Court Properly Determined Comparative Fault Lacking*

Perhaps in recognition the two are not interchangeable, on appeal Alexander abandoned his claim of fraud and instead now argues that Johnson’s “comparative fault” creates a material question of fact as to the proximate cause of her damages. (App. Br., p. 26, stating that “the circuit court should have considered the evidence of Johnson’s own conduct, much of it admitted by her, for purposes of making a ruling on causation.”). He claims the court erred in not considering her comparative fault because he pleaded it as a defense in his Answer. (App. Br., p. 26).

² Allegations of fraud must be pleaded with specificity per Rule 9(b), SCRCP, while comparative fault is a general affirmative defense. Alexander also fails to offer any evidence that the lender alleged fraud against the plaintiff, and no court has found Johnson engaged in wrongdoing. In fact, Appellant admits she lost the property through no fault of her own. (R. pp. 67-68 - Alexander Dep., Ex. 2, Alexander’s Letter).

However, simply raising a claim in a pleading is not sufficient to preserve that claim for appeal if the lower court never rules on it; the appellant still must file a Rule 59(e) motion to reconsider. *Banks v. St. Matthew Baptist Church*, 391 S.C. 475, 482, 706 S.E.2d 30, 34 (Ct. App. 2011) (finding plaintiffs failed to preserve the trial court's dismissal of a pleaded claim when the judge did not specifically address the claim in his order of dismissal, and plaintiffs failed to file a Rule 59(e) motion).

The lower court's order properly determined that "Alexander's unsupported and bald assertions of fraud [are] based upon inadmissible documents [that] do not create a material issue of fact." (R. pp. 104-105 - Def. Memo. in Opp. to S.J., pp. 12-13; R. pp. 14-15 - Order, pp. 10-11). The order did not address the defense of comparative fault and Alexander did not seek a ruling on or clarification of this issue. Under the *Banks* rule, Alexander is now barred from claiming the lower court erred by failing to consider his comparative fault defense, as he never filed a Rule 59(e) motion to preserve it.

Finally, whether he calls it fraud or comparative negligence, Alexander fails to challenge the trial court's finding that "[t]he loan application process with a third party is separate and distinct" from Alexander's negligence, and thus is irrelevant. (R. p. 15 - Order, p. 11; *see* App. Br. pp. 1-30).

Alexander failed to preserve or properly appeal the court's findings that Johnson's alleged misconduct is irrelevant and inadmissible. This Court should not consider it for purposes of determining if a material question of fact exists as to proximate cause.

7. *Appellant fails to preserve the lower court's ruling that whether Johnson stopped paying the mortgage was irrelevant as to his liability*

Alexander repeatedly argues that any damage Johnson suffered was caused by her decision to quit making mortgage payments on a home she no longer owned, which resulted in a foreclosure action being filed against her. (App. Br. pp. 3, 22, 25). He contends this shows summary judgment was inappropriate because a material question of fact exists as to whether she suffered any damage as a result of Alexander's conduct. (*Id.* at 25).

First, Alexander argued to the lower court that the foreclosure action filed against Johnson was admissible to show she suffered no damage. When the lower court found this was irrelevant (R. pp. 15-16 - Order, pp. 11-12) because she lost title months before she stopped paying, Alexander failed to file a Rule 59(e) motion asking the court to reconsider the ruling. In his appeal, Alexander again fails to allege the lower court erred in finding the foreclosure irrelevant. Nor does he cite any rules, law, or other authority as to why it ought to be considered. It is now the law of the case that whether she stopped paying her mortgage is irrelevant to the question of Alexander's liability.

Second, even if the foreclosure was Johnson's fault, Alexander fails to argue the lower court erred in finding she suffered other damages as a result of his negligence. This damage includes the failure to obtain good and marketable title; the loss of her property; the inability to sell her property; and legal expenses incurred as a result of Alexander's mistake. (R. pp. 15-16 - Order, p. 11-12). It also is undisputed that Johnson continued paying the mortgage note for *four months* after she lost title on Dec. 12, 2006. (R. pp. 15-16 - Order, pp. 11-12).

Finally, the lower court reserved for the jury the question of the value of her damages. (R. p. 16 - *Id.*). But because Alexander fails to argue on appeal that the lower court erred in finding any damage, the findings of the lower court are the law of the case, and no material question of fact exists as to damages.

Therefore, the argument that Johnson is solely responsible for any damages she suffered because she stopped paying on the note has been abandoned; the court's finding that she suffered at least some damage is the law of the case; and the Court of Appeals may not consider her fault when determining if any material question of fact exists as to whether she suffered any damages.

8. *No Excuse for Appellant's Failure to File Rule 59(e) Motions*

Alexander appears to have anticipated the argument that he failed to preserve the lower court findings, as he preemptively claims in his appeal that he was unable to file a Rule 59(e) motion because "this case appeared on the trial roster at or about the same time as Judge Nicholson's order was issued." (App. Br. p. 2). Alexander leaves to the imagination why that should matter. He offers no rule, case law, statute or other authority to support the proposition that being on the trial roster operates as some sort of "freeze" and prevents a party from filing a Rule 59(e) motion to reconsider any ruling. The case already had been protected from trial until the trial court ruled on Plaintiff's motion for summary judgment; had Defendant truly felt too rushed to act, he could have asked the judge for protection once again. Yet he did nothing except to wait until this appeal to complain.

This Court should not excuse Alexander's failure to file the Rule 59(e) motions required to preserve for appeal the lower court's evidentiary findings.

F. NO QUESTION OF MATERIAL FACT THAT JOHNSON SUFFERED DAMAGES

Alexander argues a material question of fact exists as to whether Johnson suffered any damage as a result of his failure to find the tax sale. (App. Br., p. 22). A showing of damage is required to prove professional negligence. *See Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745.

The lower court left it for the jury to determine the value of her damages. Even without valuation, however, Alexander fails to create a question of material fact as to whether Johnson suffered *any* damage, and once again he fails to dispute the lower court's finding that she suffered damage: The loss of title to the property; the need to engage in legal assistance; and the inability to sell the property. (R. p. 16 - Order, p. 12). Alexander claims Johnson rented the property for a time after the tax deed was recorded; thus she suffered no loss. Issues as to the value of the loss are for the trier of fact.

On appeal, Alexander argues Johnson's splitting the overage created by the tax sale with an entity claiming to hold title to the note resulted in a "windfall" of \$9,608.08 (App. Br. p. 22).³ First, this is not a matter properly before this court. However, had Alexander done his job, Johnson would have had title to the property and been able to dispose of it for a greater profit or use it as she pleased. As titleholder of record, Johnson was entitled to the entire proceeds because at the time the tax deed was issued she was the last title holder of record. This second foreclosure action that is improperly raised by Alexander was dismissed with prejudice. Additionally, these proceeds were an offset to

³ Alexander asks this Court to take judicial notice of this fact, citing a rule that permits a court to take such notice of a public record. (App. Br. p. 8, fn. 4). This is an ironic request for an Appellant whose defense depends on casting doubt on the public availability of public records.

the continuing and ongoing damage she suffered as a result of the loss of the property due to Alexander's negligence and defense of the improper foreclosure actions.

Alexander admits "...she didn't get marketable title to it." (R. p. 82 – lines 11-12 - Alexander Dep., p. 16, lines 11-12). That is damage. It also is undisputed that she continued paying on the mortgage note until April 2007, four months after she lost the property. (R. pp. 15-16 - Order, p. 11-12).

1. Foreclosure Action Does Not Break the Causal Chain as to "Any" Damage

Alexander argues that any damage she suffered as a result of the foreclosure filed against her was her fault. (App. Br. p. 8). However, Alexander failed to challenge the lower court's finding that "[w]hether she stopped paying on a note in April 2007 is irrelevant as to Alexander's negligence in September of 2006." (R. p. 16 - Order, p. 12). Thus, this issue has been abandoned. Further, as said many times, she lost title to the property months before payments were not made on the property. This does not mean she did not have available defenses to the foreclosure. Indeed, both foreclosure actions were dismissed without any determination or finding that she breached any terms of the note or otherwise did or failed to do something she was required to do. As the court noted, one foreclosure action was dismissed because the party bringing the action did not exist. (R. p. 15 - Order p. 11, n. 5).

Had Johnson kept making payments on property she did not own, Alexander would likely argue she failed to mitigate her loss by continuing to make payments instead of stemming her losses.

Also, as discussed above, Johnson suffered other damages aside from the foreclosure action, which Alexander never disputes. Thus, Alexander offers no evidence

to create a question of material fact as to whether Johnson was damaged by his negligence.

2. *Alleged Conduct regarding Johnson's loan application is Irrelevant*

Alexander claims Johnson made various misstatements on her loan application, and therefore her "fraudulent conduct voided the real estate transaction." (R. p. 104 - Def. Mem. in Opp. to Partial S.J., p. 12; *see* App. Br., p. 25). If the real estate transaction was void, Mr. Alexander suggests, she could not have suffered any damages from his negligence. (App. Br., pp. 24-25). This argument is patently frivolous. First, the court found Alexander's "unsupported and bald assertions of fraud based on inadmissible documents do not create a material issue of fact as to his liability or break the chain of causation." (R. p. 15 - Order p. 11). Second, her loan application was never void — there's no dispute she obtained a loan and the sale occurred. Last, Alexander was not a party to the loan agreement, and he has no standing to assert fraud or misrepresentation regarding the loan as a defense to his malpractice.

South Carolina courts define fraud or misrepresentation as "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003).⁴ Per Rule 9, SCRCPP, it must be pleaded with particularity, which Alexander did not do in his

⁴ Proving fraud requires nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) 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. *Regions Bank*, 354 S.C. at 672, 582 S.E.2d at 444-45.

Answer. Our courts also have held that proving fraud or material misrepresentation requires proving nine elements, including the “intent that the representation be acted upon ... the hearer's reliance on its truth [and] the hearer's consequent and proximate injury.” *Regions Bank*, 354 S.C. at 672, 582 S.E.2d at 444-45. Alexander offers no evidence to suggest he relied on the truth of any statements Johnson made to her lender. Nor does he offer any evidence that Johnson intended to deceive him, as is also required to prove fraud. *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010).

Therefore, for purposes of establishing liability against Alexander, this Court should uphold the trial court's finding that no material question of fact exists as to whether Johnson suffered any damage from his conduct.

G. NEGLIGENCE *PER SE* NOT NEEDED TO FIND BREACH

Alexander argues the lower court erred by applying a strict liability standard to determine no question of fact existed that he breached his duty as a closing attorney by negligently failing to discover the tax sale. He attempts to rely on *Bass v. Farr*, 315 S.C. 400, 404, 434 S.E.2d 274, 277 (1993) for the proposition that being incorrect as to the “ultimate marketability of title to real estate” does not establish an attorney's negligence (App. Br. p. 16). To find Alexander liable “would require this Court to apply the rejected doctrine of *res ipsa loquitur* or create strict liability for real estate closing attorneys,” he argues. He also states that *Bass* “addressed the exact issue confronted by this Court.” (*Id.*)⁵

⁵ His appellate argument notwithstanding, in his deposition Alexander admitted he had a responsibility to ensure Johnson got good and marketable title. (R. p. 82, line 16 – p. 83, line 7 – Alexander Dep. pp. 16-17).

These arguments are disingenuous, as the facts here are readily distinguishable from *Bass*. Johnson never alleged—and the trial court never found—Alexander was strictly liable simply for failing to deliver good title. Alexander breached his duty by negligently missing public records showing the delinquent taxes and tax sale, which resulted in Johnson's failure of title. Alexander himself admits this omission prevented Johnson from getting good and marketable title. (R. p. 82, lines 7-12 - Alexander Dep. p. 16, lines 7-12).

In *Bass*, unlike the present case, the defendant closing attorney examined all relevant property records, including the chain of title and an old restrictive covenant limiting the subject property to residential use. *Bass*, 315 S.C. at 403-04, 434 S.E.2d at 276-77. Because the property had been used commercially for years, the attorney advised his clients the restrictive covenant probably was not effective. *Id.* When a court later found otherwise, the clients successfully sued the attorney for his failure to deliver good and marketable title. *Id.* at 402, 275. The Supreme Court overturned, finding he was not *per se* liable because he had considered all relevant facts and records in advising them.

The Court never suggests a closing attorney has no duty to convey good or marketable title—only that the duty is not absolute. As the Court explained, “liability arises where the attorney *negligently* certifies title.” *Bass*, 315 S.C. at 403, 434 S.E.2d at 277, citing *Jennings v. Lake*, 267 S.C. 677, 230 S.E.2d 903 (1976) (emphasis in original).

Alexander was negligent because he failed to find the relevant public tax records that he admits would have alerted him to the problem. He could not then properly advise Johnson or cure the defect so that she could have obtained good and marketable title. Therefore, the court did not inappropriately apply a strict liability standard, and this

Court should uphold its finding of summary judgment.

H. PLAINTIFF'S EXPERT SUFFICIENT

Finally, Alexander argues on appeal that Johnson's expert, John G. Brown, II, is not competent to establish the standard of care for a closing attorney because he admits he cannot conduct a title examination. (App. Br. Pp. 18-19). This is irrelevant, as Mr. Brown is offered not as a title examiner, but as an experienced closing attorney in South Carolina. (R. p. 33 - Brown Aff., p. 1, ¶¶ 1-2). In that capacity, Brown testified by affidavit that Alexander fell below the standard of care by failing to discover the delinquent taxes and tax sale. (R. p. 34 - *Id.* at 2, ¶ 12-¶13 and R. pp. 12 and 14 - Order, pp. 8 and 10.)

Alexander also fails to appeal the lower court's ruling that "the standard of care for a title examination is not the issue. The issue is the standard of care for an attorney conducting a real estate closing." (R. p. 12 - Order, p. 8). As such, this finding is the law of the case. Brown was competent and Alexander's admissions support the liability determination made by the court.

IX. ORAL ARGUMENT REQUESTED

Appellee respectfully requests this Court hear oral arguments, if deemed necessary.

X. CONCLUSION

Therefore, for the foregoing reasons, Plaintiff-Appellee Amber Johnson respectfully asks this Court to uphold the lower court's finding of partial summary judgment against Defendant-Appellant Stanley E. Alexander for liability for professional

negligence, as Alexander failed to create a material question of fact as to whether he owed a duty to Ms. Johnson as her closing attorney, that he breached the standard of care of a closing attorney, and that she suffered damages as a result.

Respectfully Submitted,



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**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**

Case No. 2009-CP-10-6529

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.

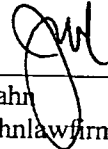
RESPONDENT'S RULE 211(b) CERTIFICATION

The undersigned hereby certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.

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SC Court of Appeals



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

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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.

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LAW/ANALYSIS

I. JOHNSON MISSTATES THE STANDARD OF REVIEW-- THE STANDARD OF REVIEW ON SUMMARY JUDGMENT IS *DE NOVO*, NOT "ABUSE OF DISCRETION."

Johnson misstates the proper standard of review to be utilized by this Court in reviewing a grant of summary judgment. Johnson urges this court to adopt an "abuse of discretion" standard of review for the "evidentiary determinations" made by the circuit court. (Res. Brief p. 3-4). This is erroneous. Well-settled law provides the only proper standard of review of a summary judgment is *de novo*.¹ The determination of whether evidence presented was "relevant," "material," or "genuine" must be reviewed *de novo*, not by affording the circuit court great deference through an "abuse of discretion" standard.

Appellate courts review a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRCP. Edwards v. Lexington Cnty. Sheriff's Dep't., 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010); Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999) (citing 5 Am. Jur. 2d Appellate Review § 700 (1995) ("In reviewing a grant of summary judgment, the appellate court is limited to the evidence that was before the trial court and applies the same standard of review as did the trial court.")). 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). The purpose of summary judgment is not to determine admissibility of evidence or make conclusions of fact.

While it is true that to defeat summary judgment, the party opposing the motion must present competent or genuine evidence which would be admissible at trial to show a genuine issue of fact exists, Old Southern Life Ins. Co. v. Bank of North Carolina, N.A., 36 N.C. App.

¹ The abuse of discretion standard is only applicable to the circuit court's failure to grant a continuance of the motion.

18, 244 S.E.2d 264 (NC Ct. App. 1978), the appellate court's review of that determination by a trial court is *de novo*. South Carolina courts have never held that an appeal from a summary judgment ruling is by an "abuse of discretion" standard. This court cannot apply a heightened standard of review for determining whether evidence presented at summary judgment is "genuine" or "admissible" because it is inconsistent with the proper *de novo* standard of review.

In S.C. Labor Ltd., LLC v. Eastern Tree Serv., 362 S.C. 654, 609 S.E.2d 305 (Ct. App. 2005), the Court addressed a trial court's grant of summary judgment on the grounds that affidavits presented were not based on personal knowledge, and therefore, were not considered admissible or genuine evidence. The Court of Appeals cited the standard of review that "when reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court", and found that the trial court erred in granting summary judgment based on its own review that the evidence could be admissible. *Id.* at 656, 609 S.E.2d at 305. In determining that evidence was admissible, the Court of Appeals did not apply an "abuse of discretion" standard, but rather addressed this evidentiary issue *de novo*. As such, this court should conduct a full *de novo* review of the evidence to determine if a genuine issue of fact was presented.

II. JOHNSON'S CLAIM THAT ALEXANDER DID NOT APPEAL CERTAIN FINDINGS OF THE CIRCUIT COURT IS ERRONEOUS.

Throughout her brief, Johnson mistakenly asserts that Alexander has either failed to appeal or abandoned the following findings of the circuit court. As summarized below, Alexander does directly appeal these issues:

1. The circuit court's finding of a lack of evidence related to Johnson's conduct giving rise to the alleged damages. (Res. Brief pp. 8-9 and 11.). Alexander directly appeals this finding of the lower court as it relates to both causation and damages. (App. Brief p. 21- 26).
2. The circuit court's finding that an expert is not needed in a professional negligence case if the professional defendant establishes the standard of care owed to a client.

(Res. Brief p. 1). Alexander directly appeals this finding of the lower court. (App. Brief p. 16-20).

3. The circuit court's findings related to the admissibility of the affidavit testimony of Charles Feeley. (Res. Brief p. 15-17, 26). Alexander directly appeals this finding of the lower court. (App. Brief p. 13-15).

4. The prejudice sustained by Alexander in failing to grant the continuance based on Ms. Scarborough's newly submitted affidavit. (Res. Brief p. 17, 26). These arguments were raised and ruled upon by the circuit court (R. pp. 214-241; 262-263) and directly presented in this appeal. (App. Brief. p. 27-28).

5. The circuit court's finding that Johnson suffered damages. (Res. Brief p. 32-33). Alexander directly appeals this finding, and he presented evidence Johnson suffered no damages. (App. Brief p. 22)

6. The circuit court's findings related to Johnson's failure to make her mortgage payments and the resulting foreclosure action. (Res. Brief p. 35). Alexander directly appeals this finding of the circuit court. (App. Brief p. 25-26).

7. The court's findings regarding whether Alexander breached the standard of care of a real estate closing attorney. (Res. Brief p. 39). Alexander directly appeals this finding of the lower court. (App. Brief p. 10-16).

Further, it should be noted that Alexander directly appeals that the circuit court erred in granting summary judgment on all elements of the cause of action for professional negligence: duty, breach, causation, and damages.

III. ALEXANDER DOES NOT ADMIT HE WAS NEGLIGENT AND DENIES THAT ANY ALLEGED NEGLIGENT CONDUCT WAS THE PROXIMATE CAUSE OF DAMAGES.

Johnson claims that summary judgment should be affirmed because "Alexander admits to Negligence and Causation." (Res. Brief p. 11). In making this argument, Johnson turns a blind eye to the evidence submitted. Alexander never admitted in his Answer that he was negligent. (R. pp. 35-46). In opposition to summary judgment, Alexander presented both deposition and affidavit testimony establishing that he did not deviate from the standard of care and that his conduct was reasonable and proper under the circumstances. (R. pp. 109-111; 130-133; 265-266). The title examiner, Mr. Charles Feeley, did not admit that he was negligent in conducting the title examination. (R. pp. 125-127). Johnson's own expert, attorney John Brown, offered favorable testimony to further support the conclusion that Alexander was not negligent. Brown admitted if he had served as the closing attorney he would not have discovered the encumbrance on the property. (R. pp. 155-156). While it is true that every closing attorney strives to convey a clear and marketable title, the failure to ultimately convey perfect title does not equate to legal malpractice. The South Carolina Supreme Court has directly affirmed this proposition in Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993), holding "[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."

Johnson fails to address in her Brief the threshold issue of liability discussed in Bass. Rather, she equates the lack of a successful outcome, such as conveying unmarketable title, with malpractice. An attorney is not required by law to be infallible and there is thus no liability merely because an attorney made a mistake. Cianbro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784 (D.S.C. 1992), aff'd, 10 F.3d 806 (4th Cir. 1993) (mistake does not establish negligence or malpractice as a matter of law). This is especially true when the opposing party's expert admits he would have made the same mistake!

On appeal, Johnson's argument that Alexander admitted to liability is based on an improper *weighing* of the conflicting evidence. Johnson's arguments are flawed and based on the same erroneous reasoning as that of the circuit court. Johnson and the circuit court disregard clearly established law, simply "[a]t the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 397, 693 S.E.2d 1, 4 (Ct. App. 2010) (emphasis added); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."). For the court to become the fact finder, to disregard evidence, and to weigh evidence at the summary judgment stage is wholly improper. "Summary judgment should be granted only where it is perfectly clear that no issue of fact is involved." Vaughn v. A.E. Green Co., Inc., 277 S.C. 392, 393, 287 S.E.2d 493, 494 (1982) (emphasis added). In this case, Alexander presented substantial, if not overwhelming evidence of a genuine issue of fact as to liability, causation, and damages. When there is conflicting evidence, the questions of liability, causation and damages are reserved for the jury, not the court. This is the purpose of our cherished right guaranteed by the Seventh Amendment.

Further, on the issue of liability, Johnson argues that "Alexander fails to appeal the court's finding that an expert is not needed in a professional negligence case if the professional defendant establishes the standard of care owed to a client." (Res. Brief p. 11). Alexander did not establish the standard of care merely by generally stating in his deposition that the intention of all closing attorneys is to convey marketable title. However, not every title is marketable and not every encumbrance is reasonably discoverable. Alexander does not admit that he reasonably should have done more to discover this title irregularity. Alexander demonstrates that the

records available for review likely did not reflect the title defect. Nevertheless, Alexander does directly appeal the finding that expert witness testimony was not required in his brief at pages 16 through 20 under the heading "**C. The Circuit Court Erred in Granting Summary Judgment Without Sufficient Expert Testimony to Establish Duty and Breach.**" Johnson's position is without merit.

It is clear, Alexander did not admit as a matter of law that he was negligent or that his conduct was the proximate cause of Johnson's purported damages.

IV. A GENUINE ISSUE OF FACT EXISTS AS TO THE EXISTENCE OF PUBLIC RECORDS ON THE DATE OF THE TITLE EXAMINATION.

A genuine issue of fact remains as to the availability of public records concerning the title to the property on the date of the title examination. The circuit court and Johnson largely rely on the Affidavit of Mary Scarborough to support the conclusion that all records related to the tax sale of the subject property were available via the mainframe computer system to title examiners as well as the public at large. (Res. Brief p. 12-19). Alexander does not dispute that such records are supposed to be available. What Alexander disputes is whether the records available to the public *on the day the title examination was performed* were accurate and correct. While Ms. Scarborough testifies as to the manner that such information is given the public, she cannot, and does not, definitively state, based on personal knowledge, that the information related to the tax sale of the property was actually available at the time the title examination was performed. Ms. Scarborough is not able to provide the court with any documentation or other information that verifies the existence of the records available to the public on the day Charles Feeley performed the title examination in 2006. The exhibits to her affidavit depict what the public records showed as of *May 18, 2011*, not what it showed in 2006.

Scarborough's testimony relating to the public records in 2006 is further called into question based on records from the Charleston County Tax Assessors' Office on August 10,

2006, and September 11, 2006. These records confirm that property taxes were "Current (Paid)" and that no back taxes were owed or due, with a past due amount of "0.00." (R. pp. 110; 116; 118). In addition, evidence of the tax sale and delinquent taxes were admittedly not revealed in the chain of title for this property or made publicly available in the Charleston County Register of Mesne Conveyances (RMC) Office. (R. p. 127).

Ms. Scarborough's affidavit is directly contradicted by the affidavit testimony of the title examiner, Charles Feeley. Johnson urges this court not to accept the ineluctable conclusion that Feeley's affidavit creates a genuine issue of material fact. Johnson argues Feeley's testimony is not competent evidence and not based on his personal knowledge. But, Johnson overlooks the fact Feeley's affidavit is based on conformity with his routine practices pursuant to Rule 406, SCRE. Feeley's affidavit sets forth in detail his strict routine habits and practices in reviewing real property taxes in a title examination. Clearly, Feeley had personal knowledge of his habits and practices. Feeley testified that he followed his routine and practice in reviewing past property taxes and, if he had seen evidence of unpaid taxes, then he would have noted that issue on the abstract summary sheet. Since he did not note any back taxes during his examination, the clear inference to be drawn from his testimony is that all past due taxes had been paid. This is further consistent with the documentation from the Charleston County Tax Assessors' Office on August 10, 2006, and September 11, 2006 stating that property taxes were "Current(Paid)" and that no back taxes were owed or due, with a past due amount of "0.00." Because Feeley's affidavit was based on his routine practice, his testimony creates a material question of fact.

Additionally, Johnson's argument that Feeley's affidavit fails to comport with Rule 56(e) as "personal knowledge" has been rejected by this court in S.C. Labor Ltd., LLC v. Eastern Tree Serv., 362 S.C. 654, 609 S.E.2d 305 (Ct. App. 2005). In S.C. Labor Ltd., LLC, the trial court granted summary judgment by disregarding an affidavit as not being based on the affidavit's

"personal knowledge" because it was based on routine practice and custom. On appeal, the Court of Appeals found the affidavit *did* create a genuine issue of fact because the testimony was based on one's routine practice, custom, and course of dealing. In reversing summary judgment, the Court of Appeals held that "[s]tatements as to a routine practice of an organization are admissible to prove what was done in a given situation was in conformity with routine practice" and that "evidence of custom and practice can be used to rebut evidence of fact." *Id.* at 657, 609 S.E.2d at 306.

Thus, based on conflicting evidence, a genuine issue of fact remains as to whether public records of the delinquent taxes that were reasonably available to a title examiner at the time, and whether Alexander had a right to reasonably rely on the public information provided to him.

V. JOHNSON DOES NOT ADDRESS THE MERITS OF ALEXANDER'S MOTION FOR CONTINUANCE, BUT ONLY ARGUES THIS ISSUE IS NOT PROPERLY BEFORE THE COURT.

Johnson does not address the merits of the circuit court's failure to grant a continuance, only raising procedural arguments in opposition. (Res. Brief. p. 19-20). Johnson claims "Alexander never asserted [in his Brief] the court 'abused its discretion'...therefore, this issue is not properly before this Court and should be deemed abandoned." (Res. Brief p. 20). Alexander is not required to quote the standard of review to present this issue on appeal, and in no way did he abandon his argument. In his Brief, Alexander devotes two pages of legal arguments to explaining why the circuit court committed prejudicial error by denying his motion for a continuance, which would have afforded him the opportunity to depose and cross-examine a newly named witness for Johnson. (App. Brief p. 27-28). Within his argument, Alexander directly cites to Smith v. Hastie, 367 S.C. 410, 418, 626 S.E.2d 13, 17 n. 10 (Ct. App. 2005), a case which addresses when a circuit court abuses its discretion in considering an untimely affidavit on summary judgment.

Next, Johnson side-steps the merits of the refusal to grant a continuance by arguing another procedural technicality— namely that the arguments as to prejudice were not presented to the circuit court and ruled upon. The hearing transcript does not support Johnson’s argument.

By way of background, Alexander’s counsel wrote a letter to Judge Nicholson prior to the hearing pointing out that these affidavits were from previously unidentified witnesses and requesting “the opportunity to depose these witnesses,” especially in light of the “speculative conclusion” about what documents were readily and publicly available. (R. pp. 262-263). This letter was presented to the circuit court, filed and made part of the record. (R. p. 229). During the hearing, Alexander’s counsel respectfully attempted to explain the basis for the continuance, but Judge Nicholson interrupted him throughout. (R. p. 214-229; 238-239). When Alexander’s counsel asked if he could “make [his] record about [the motion for continuance], Judge Nicholson stated “*Forget about your record. I’m gonna make a decision....and quit worrying about your record.*” (emphasis added.) See State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) (reasoning that the “tone and tenor of the trial judge’s remarks” renders any alleged failure to preserve the record futile). Despite the circuit court judge’s intolerance, Alexander’s counsel attempted to explain that the affidavit of Mary Scarbrough was provided “thirty-six hours” before the hearing (even though it was obtained by opposing counsel 4 days prior), and Alexander needed the opportunity to depose her. He further explained to Judge Nicholson that cross-examination testimony could be elicited from this witness that would call into question whether public documents were actually available in 2006 prior to the closing, as explained in Mr. Feeley’s affidavit. (R. pp. 226-229; 238; 244-245). After Judge Nicholson heard these arguments, the motion was denied. (R. pp. 239; 241). Now, on appeal, Alexander asserts the same grounds for a continuance that were argued to the circuit court and rejected. Thus, it

cannot be reasonably argued that Alexander's arguments in support of a requested continuance were not raised to and ruled upon.

VI. ALEXANDER PRESENTED FACTS WHICH ARE MATERIAL AND NOT "RED HERRINGS."

Johnson accused Alexander of presenting the circuit court with three "immaterial and irrelevant" facts which are "red herrings" and "presented merely in an attempt to confuse the Court." (Res. Brief p. 20-23). This evidence concerns what Alexander considered, in part, in conducting the real estate closing, namely (1) the fact that no tax deed was recorded, (2) the fact that documentation from the title examiner and from the records of Charleston County reflected that past taxes were paid, and (3) the fact that no *lis pendens* on the property had been filed.

These facts are material because they demonstrate what evidence Alexander reasonably relied upon in certifying title for the purpose of the real estate closing. This evidence demonstrates that Alexander was never on inquiry notice of the pending tax sale. Alexander conducted the closing after the title examination revealed no delinquent taxes on the property.

The court should recognize this is not a case where Alexander conducted a real estate closing without a title examination. This is also not a case where Alexander ignored the title examination report or otherwise closed the transaction with knowledge of irregularities. These so-called "red-herrings" are facts that create genuine issues for a jury to consider. Alexander was reasonable in closing this transaction. These facts support the conclusion that he acted with the degree of skill, care, knowledge, and judgment of a competent, reasonable attorney acting in similar circumstances. Further, Johnson's own expert witness testified that if he were closing this transaction, he would not have been able to uncover the title irregularity. (R. p. 155). The evidence in this case demonstrates Alexander acted reasonably and in a manner similar to attorneys in a similarly situated position.

VII. ALEXANDER DOES NOT RELY UPON UNPRESERVED ISSUES ON APPEAL.

The issues on appeal are preserved for appellate review despite Alexander not filing a Rule 59(e) motion due to this case appearing on the trial roster. A motion to reconsider is not necessary for appellate review if the issue presented to the lower court was raised to and ruled upon by the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (Rule 59(e) motions are “not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”).

Here, Alexander presented substantial evidence to the lower court and argued that a genuine issue of material fact as to all the elements of legal malpractice (a) duty, (b) breach, (c) causation; and (d) damages. After the circuit court considered Alexander’s legal arguments and the affidavits and deposition testimony submitted in opposition, it erroneously ruled that no genuine issue of fact existed as to each of these elements as a matter of law. All issues on appeal were directly raised to the circuit court and ruled upon. This court must take a *de novo* review of the evidence presented at summary judgment to determine if a “mere scintilla” of a disputed material fact existed for any one of the elements for legal malpractice. Summary judgment is not the stage in litigation to determine the admissibility of evidence and “abuse of discretion” is not the proper standard in reviewing whether a genuine issue of fact was presented. On appeal under *de novo* review standard, the parties and this Court are not bound by any purported determinations that evidence presented was not genuine or relevant to a finder of fact.

VIII. JOHNSON FAILS TO ADDRESS THE HOLDING OF WILSON V. MOSELEY ON THE ISSUE OF PROXIMATE CAUSATION AND DAMAGES.

While Johnson’s appellate brief is nearly 40 pages in length, she fails to address, or cite to one of the most important cases related to proximate cause and damages, namely, the South Carolina Supreme Court opinion of Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 863 (1997). Her silence speaks volumes. Wilson is controlling in the case at bar for purposes of proximate

causation and damages. Johnson claims the foreclosure, and the costs incurred therein, were proximately caused by the title irregularity. In addressing a factually analogous situation, the South Carolina Supreme Court in Wilson held that “[E]ven if there were a cloud [based on tax deed], it was not the proximate cause of the foreclosure. The proximate cause of appellant’s loss was her failure to make payments according to the note, which obligations were separate and independent of any alleged problem with the title.” Id. at 147, 488 S.E.2d at 864. Johnson even *admits* that her failure to make the mortgage payments was the cause of the foreclosure action. (R. pp. 185-186). Thus, as in Wilson, Alexander cannot be held liable for Johnson’s damages as a result of her failure and refusal to make her mortgage payments.

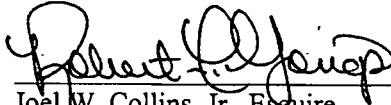
While Wilson is directly dispositive to issues of proximate causation and the existence of damages, the facts of this case have revealed that Johnson has actually profited from this transaction. She pocketed \$700.00 per month from October 2006 until March 2009 (approximately \$21,000.00) in rent on the property while never paying her mortgage, and after the tax sale, she received a windfall of an additional \$9,608.08 for half of the overage paid by the purchaser at the tax sale. (R. pp. 106; 187, 191; 195-199; Charleston County, Public Index, [http://jcmsweb.charlestoncounty.org/PublicIndex/PI Search.aspx](http://jcmsweb.charlestoncounty.org/PublicIndex/PI%20Search.aspx) (last accessed ^{March 19} Feb. 22, 2013).

Despite extensively briefing Wilson and presenting evidence of no damages to the circuit court, the circuit court found that Johnson “suffered damages” and that “whether she stopped paying on the note in April of 2007 is irrelevant.” (R. p. 16). The circuit court erred in finding Johnson had incurred damages, when the presented evidence demonstrated that the damages alleged were caused by Johnson’s failure to pay the her note and mortgage. The evidence proved Johnson actually profited from her ownership of the property. A jury should be allowed to weigh these facts and determine if Johnson actually suffered damages, and if Alexander proximately caused these damages.

CONCLUSION

For these additional reasons, Alexander respectfully requests this Court reverse summary judgment and remand this case for a trial on the merits.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

Columbia, South Carolina
March 19, 2013

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

Amber Johnson, Respondent,

v.

Stanley E. Alexander, Mario S. Inglese, and Mario S.
Inglese, P.C., Defendants,

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.

Appellate Case No. 2011-196007

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5208
Heard October 16, 2013 – Filed March 19, 2014

REVERSED AND REMANDED

Joel W. Collins, Jr., Collins & Lacy, P.C., of Columbia,
and Robert Fredrick Goings, Goings Law Firm, LLC, of
Columbia, for Appellant.

Justin S. Kahn, Kahn Law Firm, LLP, of Charleston, and
Mary Leigh Arnold, Mary Leigh Arnold, P.A., of Mt.
Pleasant, for Respondent.

FEW, C.J.: This is an appeal from an order of partial summary judgment in a legal malpractice action in which the circuit court ruled attorney Stanley E. Alexander breached his duty to his client Amber Johnson and proximately caused her damages in connection with a real estate closing. We reverse and remand for trial.

I. Facts and Procedural History

In 2006, Johnson entered into a contract to purchase real estate in North Charleston from Carla Anderson, and retained attorney Mario Inglese to close the transaction. Inglese contracted with attorney Charles Feeley to perform a title search on the property. Due to a scheduling conflict, Inglese was unable to conduct the closing and Alexander acted as the closing attorney. Alexander paid Inglese for Feeley's report of the results of his title search. The report indicated all taxes due on the property had been paid. In actuality, Anderson had not paid the 2003 and 2004 taxes, and in October 2005, the Charleston County delinquent tax collector seized the property from Anderson and sold it at a tax sale to Westwood Properties, LLC.

Johnson sued Alexander, Inglese, and Inglese's law firm. Alexander admitted an attorney-client relationship existed, and thus he owed a duty of reasonable care to Johnson, but denied he breached his duty. Alexander cross-claimed against Inglese and his law firm, claiming he reasonably relied on the title search Inglese provided to him. Inglese cross-claimed against Alexander and filed a third-party complaint against Feeley. After discovery, Johnson filed a motion for partial summary judgment against Alexander. The circuit court granted the motion, finding as a matter of law Alexander breached his duty to Johnson and caused her damages in an amount to be determined at trial.

II. Standard of Review

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRPC." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (citation omitted). Rule 56 provides the trial court shall grant summary judgment if "there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCF. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

III. Analysis

The attorney-client relationship is fiduciary in nature, *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011), and requires the attorney "to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). An attorney is not a guarantor of a favorable result to the client, but is liable only if he fails to meet the appropriate standard of care. See *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (stating "[a] plaintiff in a legal malpractice action must establish four elements," including "a breach of duty by the attorney"); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010) (citing language quoted above from *Holy Loch Distributors* as "[t]he correct standard of care" for attorneys). In the specific context of a real estate closing, "[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." *Bass v. Farr*, 315 S.C. 400, 404, 434 S.E.2d 274, 277 (1993); see also *Jennings v. Lake*, 267 S.C. 677, 680, 230 S.E.2d 903, 904 (1976) (stating "an attorney, who negligently certifies a title to be good, is liable to his client for the damages sustained as a proximate result of such negligence" (emphasis added)). Rather, a plaintiff alleging legal malpractice arising out of a real estate closing must establish the standard of care for the particular situation and prove the attorney breached the standard. *Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745.

The circuit court focused its inquiry on whether an attorney conducting a title search on this property should have discovered the delinquent taxes from 2003 and 2004 and the tax sale from 2005. That inquiry, in turn, focused on whether the information was in fact reflected in the public records of Charleston County when Feeley performed the title search in August 2006. On this question, Johnson submitted affidavits from the interim Delinquent Tax Collector and a non-lawyer in the business of conducting title searches, both of whom stated the information

was publicly available at that time. The circuit court ruled based on these affidavits that "[i]n August 2006, . . . Charleston County Delinquent Tax records showed the property taxes were delinquent in the years 2003 and 2004, and that the Property had been sold at a tax sale on October 3, 2005," and "the public records concerning these issues were available . . . by using the Charleston County Online Tax System."

This would be the correct focus if the issue were the liability of the attorney who performed the title search. Alexander, however, did not perform the title search. To determine Alexander's liability, the issue is not whether a reasonable attorney conducting a title search on the property would have found the information, but whether Alexander acted reasonably under the existing circumstances in relying on the title search performed by Feeley. The circuit court correctly recognized this as the issue, stating, "The standard of care for a title examination is not the issue. The issue is the standard of care for an attorney conducting a real estate closing." The circuit court noted "a closing lawyer may rely upon the title examination performed by others," and correctly stated "the closing attorney must not be negligent" in doing so.¹ The court went on to conclude:

Alexander was negligent in not ensuring good and marketable title because he (or his agent) failed to determine that public records showed the delinquent taxes on the property . . . and that the property had been sold at a tax sale It was the failure to discover and properly act upon public records that results in Alexander being negligent and liable to Johnson.

The court's correct identification of the issue—whether Alexander acted with reasonable care in relying on Feeley's title search—is inconsistent with its ruling that Alexander is liable as a matter of law for Feeley's failure to discover what was in the public records. Feeley is the attorney who failed to discover the contents of the public record. If Feeley was negligent, Feeley is liable. For Alexander to be liable, however, his reliance on Feeley, or his decision not to do the title search himself, must have been negligent. As to Alexander's liability, Johnson was not entitled to summary judgment. First, Johnson offered no evidence as to the standard of care a real estate closing attorney must meet in relying on a title search

¹ The court actually stated "the closing attorney must not be negligent in ensuring the purchaser gets good and marketable title to the property." We address the significance of this language below.

performed by another attorney. *See 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"). Second, the circuit court recognized "a closing attorney may rely upon the title examination performed by others," and yet held Alexander liable as a matter of law because the "other" attorney did not discover the information about the delinquent taxes and sale.

We find the evidence relating to the correct issue—whether Alexander acted with reasonable care in relying on Feeley's title search—viewed in the light most favorable to Alexander, leaves a genuine issue of material fact for trial and thus precludes judgment for Johnson as a matter of law.

The circuit court ruled, and Johnson argues on appeal, Alexander admitted his standard of care when Alexander stated Johnson "was supposed to have good and marketable title," and he "had a duty or responsibility to make sure that she got the property free and clear with good and marketable title." 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." We have no doubt these statements by Alexander will be important at trial. For summary judgment purposes, however, 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.

Johnson also argues Alexander is liable because Feeley was Alexander's agent. However, the circuit court did not grant partial summary judgment on the basis of agency. Though the circuit court made a reference to Feeley being Alexander's agent, the court made no findings as to whether Johnson established the elements of agency as a matter of law. *See generally Jamison v. Morris*, 385 S.C. 215, 221-22, 684 S.E.2d 168, 171 (2009) (defining agency); *Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) (defining actual authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (defining apparent authority). In most situations, "[a]gency is a question of fact," *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984), and "questions of agency ordinarily should not be resolved by summary judgment." *Fernander v. Thigpen*, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (citation omitted). Our supreme court has not addressed whether or under what circumstances an agency

relationship exists as a matter of law between a real estate closing attorney and a person performing a title search, and we decline to address the issue here. Whether Feeley was Alexander's agent is a question to be resolved on remand.

IV. Conclusion

We hold Alexander cannot be liable as a matter of law simply because Feeley failed to discover the unpaid taxes and tax sale. The decision of the circuit court is **REVERSED** and the case is **REMANDED** for trial.

KONDUROS, J., concurs.

PIEPER, J., concurring in result.

I concur in the result reached in the majority opinion to reverse the grant of summary judgment and to remand. I believe a material dispute exists as to the nature of any agency relationship between the attorneys involved. I also believe a material dispute exists as to whether Johnson, as the client, authorized the use of, or agreed to rely upon, the title work of any other attorney. *See Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed."); *Simmons v. Berkeley Elec. Co-op. Inc.*, 404 S.C. 172, 178, 744 S.E.2d 580, 584 (Ct. App. 2013) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

**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

Case No. 2009-CP-10-6529

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SC Court of Appeals

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

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).¹

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

¹ 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

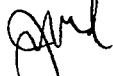
duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.” *Id.* at 44.

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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Attorneys for Respondent Amber Johnson

Charleston, South Carolina
April 2, 2014

The South Carolina Court of Appeals

Amber Johnson, Respondent,

v.

Stanley E. Alexander, Mario S. Inglese, and Mario S.
Inglese, P.C., Defendants,

Of whom Stanley E. Alexander is the Appellant.

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

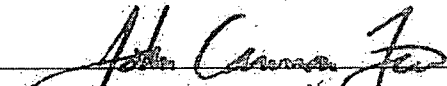
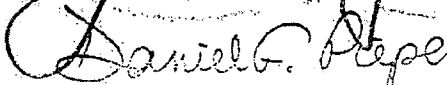
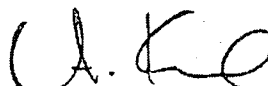
v.

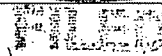
Charles Feeley, Third-Party Defendant.

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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.


5/16/14 

Columbia, South Carolina

cc: Joel W. Collins Jr., Esquire
Justin S. Kahn, Esquire
Robert Fredrick Goings, Esquire
Mary Leigh Arnold, Esquire
The Honorable J. C. Nicholson Jr.