THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 5208 (S.C. Ct. App. Filed March 19, 2014)
Appellate Case No. 2014-001167

Amber Johnson.....Petitioner,

v.

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

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

v.

Charles Feeley.....Third Party Defendant.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Joel W. Collins, Jr. (Bar # 1341)
COLLINS & LACY, P.C.
1330 Lady Street, 6th Floor
Columbia, South Carolina 29201
Telephone: (803) 256-2660
Facsimile: (803) 771-4484

Robert F. Goings (Bar # 74855)
GOINGS LAW FIRM, LLC
Post Office Box 436
Columbia, South Carolina 29202
Telephone: (803) 350-9230
Facsimile: (877) 789-6340
Attorneys for Respondent

August 13, 2014
Columbia, South Carolina

Other Counsel of Record:

Mary Leigh Arnold (Bar # 419)
Mary Leigh Arnold, P.A.
749 Johnnie Dodds Blvd., Suite B
Mount Pleasant, SC 29464

Justin Kahn (Bar # 65100)
Wes B. Allison (Bar # 100533)
Kahn Law Firm, LLC
PO Box 31397
Charleston, SC 29417-1397
Attorneys for Petitioner

INDEX

STATEMENT OF THE CASE

This action arises out of Petitioner Amber Johnson's purchase of real property located at 2640 Ranger Drive, North Charleston, South Carolina ("subject property") from Carla Anderson. (App. 25-36, 182). Defendant Mario S. Inglese with Defendant Mario S. Inglese, P.C. (collectively, "Inglese") was the attorney Johnson retained to close the transaction. (App. 140, line 22 – App. 141, line 21). Third Party Defendant Charles Feeley is the attorney Inglese contracted with to perform a title search on the subject property. (App. 128). Respondent Stanley E. Alexander is the attorney who conducted the actual closing after Inglese was unable to do so. (App. 141, lines 11-21).

Johnson filed this lawsuit in the Charleston County Court of Common Pleas on October 15, 2009, asserting causes of action for negligence, breach of fiduciary duty, and breach of contract against Inglese and Alexander on the grounds that they failed to discover or disclose past due taxes for the subject property. (App. 25-36). Alexander answered, denying, *inter alia*, that he breached any standard of care, and in the alternative, asserting cross claims against Inglese. (App. 37-48). Inglese answered the Complaint and joined Feeley as a third party defendant.

Thereafter, Johnson moved for partial summary judgment as to Alexander's liability. (App. 72-94). Arguments on the Motion were heard on May 9, 2011, before the Honorable Judge J.C. Nicholson, Jr., after which Judge Nicholson recessed the hearing and requested the parties submit additional information concerning notice to the public of the tax sale. (App. 21-23). The hearing was scheduled to resume May 26, 2011. Approximately thirty-six (36) hours before the hearing was reconvened, Johnson submitted affidavits of Mary Scarborough, Delinquent Tax Collector of Charleston County, and Todd Balish, a title examiner in Charleston County, neither

of whom had been named as witnesses previously. (App. 202-213). Alexander submitted a Memorandum in Opposition to Johnson's Motion together with supporting documentation, including the Feeley Affidavit. (App. 95-201).

At the May 26, 2011 hearing Alexander objected to the affidavits of Ms. Scarborough and Mr. Balish under Rules 6 and 56, SCRCP, and moved for a continuance to allow Alexander the opportunity to conduct depositions and discovery with respect to the affiants. (App. 223- 53, 261, 264-265). Judge Nicholson denied Alexander's motion for a continuance, instead affording the parties ten (10) days following the hearing to submit *only* "counter-affidavit[s]" (not depositions) and indicating he would not consider any "opinions" offered by Mr. Balish. (App. 236-237, 243, 260).

By Order filed July 6, 2011, Judge Nicholson granted partial summary judgment in favor of Johnson. (App. 7-20). Alexander filed the Notice of Appeal on July 21, 2011. By opinion filed March 19, 2014, the Court of Appeals reversed the decision of the circuit court and remanded the case for trial. Johnson v. Alexander, 408 S.C. 58, 757 S.E.2d 553 (Ct. App. 2014). Johnson filed a Petition for Rehearing on April 12, 2014. The Petition for Rehearing was denied on May 16, 2014. On July 16, 2014, Johnson petitioned this Court to issue a writ of certiorari.

STATEMENT OF FACTS

In 2006, Johnson entered into a contract to purchase the subject property from Carla Anderson.[1] (App. 25-36, 182). Johnson retained Inglese to close the transaction. (App. 140, line 22 – App. 141, line 21). Inglese contracted with Feeley to perform a title search on the subject

[1] Johnson purchased the subject property with 100% lender financing. (App. 187-188). To obtain such financing, Johnson submitted a loan application in which she falsely stated she would be the owner-occupier of the subject property. (App. 160-163). In breach of the terms of the mortgage agreement, Johnson did not occupy the subject property as her primary residence, but instead rented the subject property to another party. (App. 172, 188-190, 193, 197-198).

property. (App. 128; App. 132, lines 13-22). Due to a scheduling conflict, Inglese was unable to conduct the closing and Alexander acted as the closing attorney. (App. 112; App. 132, lines 13-22; App. 141, lines 11-21). Alexander paid Inglese for Feeley's report of the results of his title search. (App. 140, line 22 – App. 141, line 6).

Feeley's report[2] indicated all taxes due on the subject property had been paid, and no encumbrances or liens existed on the subject property. (App. 112, 116). August 2006 documentation from the Charleston County Online Tax System showed all taxes were current and paid, and no taxes were outstanding. (App. 112-113, 118, 120). 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. (App. 113, 122). The seller did not disclose that any property taxes were delinquent or that the subject property had been sold at a tax sale. (App. 112).

The closing occurred on September 14, 2006. (App. 112). Approximately four (4) months ***after*** the closing, a tax deed was recorded on December 12, 2006, conveying the property to Westwood Properties, LLC, following an October 2005 tax sale by the Delinquent Tax Collector for Charleston County by virtue of tax executions for tax year 2004 against Carla Anderson. (App. 124-125). The existence of the prior tax sale would not have been disclosed in the chain of title for the subject property or made publically available at the Charleston County Register

[2] Feeley stated he acted in conformity with the same routine practice and custom he always followed when performing title examinations. (App. 128). As part of his routine practice, Feeley reviewed the Charleston County Online Tax System website. (App. 128). 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. (App. 128). Each line in the history contains a notation that the taxes are either current or delinquent. (App. 128). If a notation was made indicating that the taxes are delinquent, Feeley's customary practice was to conduct further inquiry. (App. 128). Feeley would clearly note on the title abstract any evidence of delinquent taxes or a tax sale. (App. 128). 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 <u>not</u> reveal the existence of any recorded back taxes or tax sale. (App. 128-129).

Mesne Conveyance ("RMC") Office at the time of the 2006 title examination and closing because the tax sale deed was not recorded as a matter of public record with the RMC Office until four months later. (App. 129). 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. (App. 129).

Following her purchase of the subject property Johnson began making her required monthly mortgage payments to the lender. (App. 190-192). However, after making five or six of the required payments, Johnson ceased making mortgage payments. (App. 187-188, 190-192). During this period of time, beginning in October 2006, she rented the subject property to a third party for seven hundred dollars ($700.00) per month. (App. 189-190, 193-194, 197-198). The subject property was rented continuously and associated rental income received until March 2009, even after Johnson discontinued payment of the mortgage. (App. 193-194). Despite the receipt of the aforementioned rental income, Johnson did not make the required payments, and as a result, the lender filed an action to foreclose on the subject property. (App. 187-188, 193-194, 197-198).[3]

[3] Johnson received $9,608.08 as part of the resolution of the foreclosure action, representing half of the overage from the tax sale. The 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 Aug. 6, 2014). 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").

ARGUMENT

Pursuant to Rule 242(b), SCACR, a writ of certiorari is not a matter of right, but of sound judicial discretion, which will be granted only where there are special and important reasons warranting the grant of certiorari. No such reasons exist here. Accordingly, Johnson's Petition should be denied.

In support of her Petition, Johnson claims that novel questions of law exist as to the responsibilities and non-delegable duties of a closing attorney which justify issuance of a writ of certiorari. (Pet. p. 2). Contrary to Johnson's assertion, the Court of Appeals specifically declined to address the novel issue of "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." Johnson, 408 S.C. at 65, 757 S.E.2d at 556. Instead, the Court of Appeals based its decision on the well-established law of this State:

> 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.

Id. at 61-62, 757 S.E.2d at 554-55.

The Court of Appeals based its decision on well-established law and declined to address any novel issues before it. Thus, despite Johnson's creative attempt to frame the questions presented, the decision of the Court of Appeals does not concern any novel questions of law. No special or important reasons exist which warrant the grant of certiorari in this case.

I. The Court of Appeals Properly Found That an Attorney Closing a Real Estate Transaction Cannot Be Held Liable for Malpractice as a Matter of Law Simply Because the Attorney Conducting the Title Examination Failed to Discover Certain Information Which Might Impact the Title to the Subject Property.

An attorney is 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., 340 S.C. at 26, 531 S.E.2d at 285. 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., 399 S.C. at 331, 732 S.E.2d at170; Harris Teeter, 390 S.C. at 289, 701 S.E.2d at 749. 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, 315 S.C. at 404, 434 S.E.2d at 277. 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. Here, the Court of Appeals properly identified the standard of care in question as that which a real estate closing attorney must meet in relying on a title search performed by another attorney, and further, properly found a genuine issue of material fact exists as to this issue.

A. The Decision of the Court of Appeals Does Not Conflict with South Carolina Law Regarding Non-Delegable Duty.

Johnson asserts that the Court of Appeals' decision creates immunity for an attorney who delegates certain tasks and is in contravention to the law concerning non-delegable duty. In so arguing Johnson ignores a number of key issues: (1) the title search was not within the scope of Alexander's representation; (2) Alexander did not contract with Feeley; (3) no South Carolina law exists that indicates a closing attorney may not delegate certain duties to another attorney; and (4) the Court of Appeals did not determine that Feeley was negligent.

Johnson's argument regarding the alleged "non-delegable" duties of an attorney is a logical fallacy as the title examination was not within the scope of Alexander's representation. In addressing the practice of law in the context of real estate closings, this Court has divided the purchase of residential real estate into four steps: (1) title search; (2) preparation of loan documents; (3) closing; and (4) recording title and mortgage. Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2002); State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987). Different attorneys may supervise different parts of the real estate transaction, although each has a responsibility to see that another attorney has been involved in the other aspects of the transaction requiring attorney participation. In re Pstrak, 357 S.C. 1, 4, 591 S.E.2d 623, 625 (2004); see also Johnson, 408 S.C. at 63, 757 S.E.2d at 555 (noting the trial court recognized a closing attorney may rely upon the title examination performed by others); (App. 14-15).

Here, it is undisputed that Feeley, not Alexander, performed the title examination. (App. 127-129). Additionally, the evidence in the Record indicates Johnson knew Alexander did not perform the title search and was relying on the title work of another attorney. (App. 132-133, 140, 142-144). Thus, the scope of Alexander's representation of Johnson did not include

performing the title examination and Alexander should not be held liable for a duty he did not undertake to perform.

Johnson's argument also ignores the fact that Alexander did not contract with Feeley to perform the title search. Rather, Inglese, with whom Johnson had an attorney-client relationship, commissioned Feeley to conduct the title examination. (App. 127-129, 132-133, 140, 142-144). Accordingly, even assuming *arguendo* that a non-delegable duty exists in this context, it was Inglese, not Alexander, who delegated a duty to Feeley.

South Carolina has not established any non-delegable duties in the context of a real estate closing as Johnson suggests. Rather, the law holds that different attorneys may supervise different parts of the real estate transaction, although each has a responsibility to see that another attorney has been involved in the other aspects of the transaction requiring attorney participation. In re Pstrak, 357 S.C. at 4, 591 S.E.2d at 625. In point of fact, none of the cases Johnson cites concern the application of the non-delegable duty doctrine to attorneys, much less closing attorneys. Instead, Johnson relies entirely on cases where there was a risk of physical, not merely economic, injury to the plaintiff. South Carolina courts have not adopted, and should not adopt, the negligence per se, strict liability, or *res ispa loquitur* theory of liability Johnson seeks to advance. See RFT Mgmt. Co., 399 S.C. at 331, 732 S.E.2d at 170; Harris Teeter, 390 S.C. at 289, 701 S.E.2d at 749. **"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, 315 S.C. at 404, 434 S.E.2d at 277. Rather, to prove negligence, a plaintiff must establish the standard of care by expert testimony, and prove the attorney breached that standard. Harris Teeter, 390 S.C. at 282, 701 S.E.2d at 745. Here, Johnson simply failed to establish the standard

of care for a closing attorney in this case, and further, failed to prove that Alexander breached that standard.

Johnson's argument also fails because the trial court's findings are not undisturbed as Johnson suggests. The Court of Appeals reversed the decision of the trial court in its entirety because the trial court applied an incorrect standard of care. The trial court's decision was based entirely on the premise that the failure to discover certain records by itself constitutes negligence. That is not the law of this State. See Bass, 315 S.C. at 404, 434 S.E.2d at 277. Rather, the failure must have been the result of negligence. Jennings, 267 S.C. at 680, 230 S.E.2d at 904. The Court of Appeals did not agree that it was necessarily negligent not to discover the tax records. Instead, the Court of Appeals stated, "Feeley is the attorney who failed to discover the contents of the public record. ***If*** Feeley was negligent, Feeley is liable." Johnson, 408 S.C. at 63, 757 S.E.2d at 555 (emphasis added). Thus, whether Feeley was negligent in conducting the title examination is an issue that remains to be resolved at trial after remand. See (App. 128-129).

B. The Standard of Care Applied by the Court of Appeals Does Not Leave an Aggrieved Party Without Recourse.

Johnson asserts, without evidence, that she has no recourse if Alexander is found to have reasonably relied on a negligent title search. This assertion is incorrect for a number of reasons. First, as discussed *supra*, Alexander did not commission Feeley to conduct the title search, Inglese did. (App. 127-129, 132-133, 140, 142-144). So, to the extent Johnson's theory is even tenable, Inglese would be liable to Johnson.

Second, Johnson states Feeley is not her attorney, but offers no support for this assertion. Under South Carolina law the attorney-client relationship is created when the attorney undertakes to perform a particular legal service for the client. 1 S.C. Jur. Attorney and Client § 18; In re Broome, 356 S.C. 302, 589 S.E.2d 188 (2003) (a signed retainer agreement is not

necessary to create an attorney-client relationship). Here, the evidence in the Record indicates Feeley, an attorney, was retained by Inglese for Johnson to act on her behalf in conducting the title search. (App. 127-129, 132-133, 140, 142-144). Johnson alleges this fact in her Complaint. It was not necessary for Johnson to have a direct relationship with Feeley. As the Court of Appeals properly held, "[i]f Feeley was negligent, Feeley is liable." Johnson, 408 S.C. at 63, 757 S.E.2d at 555.

C. The Standard of Care Applied by the Court of Appeals Does Not Conflict with the Rules of Professional Conduct.

"In order to relate to the standard of care in a particular case... a Bar rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm." Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 437, 472 S.E.2d 612, 614 (1996) (citation omitted); see also Spence v. Wingate, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) ("It is the breach of a duty, not the breach of a rule, that is of determinative import."); Preamble to RPC, Rule 407, SCACR (stating a "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached").

Johnson asserts that South Carolina Rule of Professional Conduct 1.8(h) stands for the proposition that an attorney cannot delegate his liability. Rule 1.8(h) states, in pertinent part: "A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement..." Johnson misconstrues the meaning of the rule. Comment 14 to Rule 1.8(h) makes it clear the rule is not intended to be interpreted in the manner Johnson seeks to advance:

> [T]his paragraph [does not] limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for ***his or her own conduct*** and the firm

> complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

(Emphasis added). The standard of care applied by the Court of Appeals allows that an attorney can be liable for his or her own conduct.

Johnson also contends the Court of Appeals decision runs afoul of Rule of Professional Conduct 1.2(c), which states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(g), RPC, Rule 407, SCACR. Again, Johnson ignores the intended purpose of the rules. Comment 6 to Rule 1.0, RPC, provides in part:

> ***A lawyer need not inform a client or other person of facts or implications already known to the client or other person***; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

(Emphasis added). Comment 7 to Rule 1.0, RPC states in part: "Consent may be inferred... from the conduct of a client or other person who has reasonably adequate information about the matter."

Here, the evidence in the Record indicates Johnson, an attorney, already knew Inglese had commissioned the title search from Feeley, and that Alexander would be relying on Feeley's title work. (App. 127-129, 132-133, 140, 142-144). At the very least, the evidence in the Record indicates Inglese, a person who had reasonably adequate information about the matter, gave informed consent for Alexander to use Feeley's title work. (App. 127-129, 132-133, 140, 142-144). Thus, the evidence before this Court indicates Alexander's representation of Johnson was in accordance with the rules. There is nothing in the standard of care applied by the Court of Appeals that conflicts with the Rules of Professional Responsibility.

II. The Court of Appeals Properly Found That a Material Issue of Fact Exists as to Whether Alexander Acted with Reasonable Care in Relying on Feeley's Title Search.

The Court of Appeals properly reasoned that the correct issue is whether Alexander acted with reasonable care in relying on Feeley's title search. Johnson argues such reliance is immaterial because (1) the court found the contents of the public record should have been discovered; (2) absent proper consent a closing attorney should not be able to escape liability by claiming reasonable reliance; and (3) Alexander admitted he owed a duty to Johnson to insure the title work was performed in compliance with the standard of care. Johnson's argument fails as each of the three articulated grounds is based on a misapprehension of the evidence in the Record and the law applicable in this case.

Regarding Johnson's first enumerated ground, as discussed *supra*, the Court of Appeals reversed the decision of the trial court in its entirety and did not agree that it was necessarily negligence to not discover the tax records. Instead, the Court of Appeals stated, "Feeley is the attorney who failed to discover the contents of the public record. ***If*** Feeley was negligent, Feeley is liable." Johnson, 408 S.C. at 63, 757 S.E.2d at 555 (emphasis added).

As to the second enumerated ground, as discussed *supra*, the law holds that different attorneys may supervise different parts of the real estate transaction, although each has a responsibility to see that another attorney has been involved in the other aspects of the transaction requiring attorney participation. In re Pstrak, 357 S.C. at 4, 591 S.E.2d at 625. The evidence in the Record indicates that it was Inglese, not Alexander, who commissioned Feeley to perform the title search. Moreover, the evidence in the Record indicates that Johnson, or at least Inglese, a person who had reasonably adequate information about the matter, gave informed consent for Alexander to use Feeley's title work. (App. 127-129, 132-133, 140, 140-142).

Finally, regarding the third enumerated ground, as discussed in more detail *infra*, Alexander 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 to do a title search himself. See Johnson, 408 S.C. at 64, 757 S.E.2d at 556; (App. 111-113, 129, 132-135, 267-268). Accordingly, the decision of the Court of Appeals was proper.

III. The Court of Appeals Properly Found That the Issue of Whether Feeley Was Alexander's Agent Is a Question to Be Resolved on Remand.

Pursuant to Rule 242(d)(2), SCACR, "[o]nly those questions raised in the Court of Appeals ***and*** in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (Emphasis added). Johnson first raised the issue of Alexander allegedly acting negligently independent of Feeley in the Petition for Rehearing. Compare (App. 391), with Johnson, 408 S.C. 58, 757 S.E.2d 553; and (App. 7-20, 72-94, 214-260). An issue is not preserved where it is raised for the first time in the petition for rehearing and it was not addressed by either the trial court or the Court of Appeals. Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000). Accordingly, this issue is not properly included in the Petition as a question presented to the Supreme Court.

Assuming *arguendo* that this question is included in the Petition, the Court of Appeals properly found that the issue of whether Feeley was Alexander's agent is a question to be resolved on remand. Johnson argues the issue of agency is irrelevant because Alexander committed independent acts of negligence in not discovering the delinquent taxes allegedly in the public records in his own search. Johnson's argument creates a Catch-22. Under Johnson's reasoning, even if the standard of care is that articulated by the Court of Appeals – whether the closing attorney was negligent in his reliance on the title search attorney or in his decision not to do the title search – Alexander is still negligent ***because he acted in accordance with the standard of care*** by checking the results reached by the title search attorney. Such flawed reasoning, and a tortured application of the law should not be the basis for a writ of certiorari.

Further, there is at least a genuine issue of material fact as to whether Alexander acted negligently. Johnson presented no expert evidence as to the appropriate standard of care for a closing attorney, but instead offered expert testimony as to the standard of care for a title examiner. 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"). Additionally, Johnson's own expert witness testified that Alexander was reasonable in relying on Feeley's title examination:

> 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.

(App. 157, lines 16-22; App. 158, lines 14-18). Johnson's own expert admits that Alexander did not violate the standard of care of a similarly situated attorney. Accordingly, as the Court of Appeals held, the issue of agency is a question that should be resolved on remand.

IV. The Court of Appeals Properly Found That, 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.

The Court of Appeals properly found that, 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. Alexander presented both affidavit and deposition testimony that at least created a genuine issue of material fact as to whether he acted as a reasonable and ordinary attorney would have acted under the circumstances, and in particular, whether there was any concession that he had an absolute duty to convey good and marketable title. (App. 111-113, 129, 132-135, 267-268). See Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) ("In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.") (internal citations omitted). Accordingly, as the Court of Appeals held, for summary judgment purposes, "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." Johnson, 408 S.C. at 64, 757 S.E.2d at 556.

"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, 315 S.C. at 404, 434 S.E.2d at 277. Therefore, failing to ensure good and marketable title to the property at closing is not a *per se* breach of the standard of care. To hold otherwise would require this Court to apply the rejected doctrine of *res ispa loquitur* or create strict liability for real estate closing attorneys.

V. Additional Grounds Exist for Denying Johnson's Petition for Writ of Certiorari.[4]

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, 322 S.C. at 435, 472 S.E.2d at 613. In reversing the decision of the trial court, the Court of Appeals focused primarily on the standard of care of a closing attorney and whether Alexander could be said to have breached the standard of care. See Johnson, 408 S.C. 58, 757 S.E.2d 553. However, reversal of the decision of the trial court, and denial of Johnson's Petition for Writ of Certiorari, is also proper because a genuine issue of material fact exists as to whether Johnson suffered damages, and if so, whether those damages were proximately caused by the breach of any duty by Alexander.

A. A Genuine Issue of Material Fact Exists as to Whether Johnson Suffered Damages.

"[D]amage to the client" is a necessary element of a legal malpractice claim. Smith, 322 S.C. at 435, 472 S.E.2d at 613. 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 erroneously found that damages existed as a matter of law, despite the fact that Johnson may be

[4] In support, Alexander incorporates by reference all arguments made before the Court of Appeals, and all arguments contained in his Final Brief to the Court of Appeals and Final Reply Brief to the Court of Appeals as if fully restated herein.

unable to prove at trial that 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"); Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) ("[N]either the existence, causation nor amount of damages can be left to conjecture, guess or speculation.").

In this case, the evidence in the Record suggests Johnson suffered no damages proximately caused by any act or omission of Alexander, but instead, 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. (App. 187-194, 197-198). She also received a windfall of an additional $9,608.08 for half of the overage paid by the purchaser at the tax sale. (App. 108, 197-201). Further, any evidence of alleged damages stemming from the foreclosure action was never presented to the trial court. Accordingly, a genuine issue of material fact exists as to whether Johnson suffered any damages.

B. A Genuine Issue of Material Fact Exists as to Causation.

"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).

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. (App. 37-48). See Berberich v. Jack, 392 S.C. 278, 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."). 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).

Any damages Johnson suffered were the result of her own actions, not the actions of Alexander. In Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 862 (1997), the appellant purchased real property from an individual who had acquired the property through a tax sale in 1983. Respondent Moseley closed the purchase for the appellant. The appellant refinanced the property through Carolina Investors. Respondent Fayssoux closed the refinancing transaction and issued a title insurance policy. The appellant subsequently defaulted on the note and mortgage held by Carolina Investors and the mortgage was foreclosed. The appellant subsequently sued the attorney respondents for malpractice, arguing *inter alia*, because of an allegedly defective title she was unable to sell the property and she stopped making mortgage payments, consequently the property was foreclosed. The court rejected the appellant's argument:

> Even if there were a cloud, 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 (emphasis added).

Here, as in Wilson, Johnson's failure to make required monthly mortgage payments was the proximate cause of any damages she incurred, including the foreclosure. Johnson *admits* she

breached the terms of the mortgage and failed to make the required mortgage payments. (App. 187-188). Johnson *admits* that she discontinued paying on her note and mortgage in April 2007. (App. 188-192). Johnson even received a letter from the mortgagor stating that the foreclosure action resulted from Johnson's refusal "to bring the loan current." (App. 185).

Additionally, Johnson made material misrepresentations in the Residential Loan Application which operated to void the real estate transaction based upon the language of the note and the mortgage. The mortgage agreement states, in part:

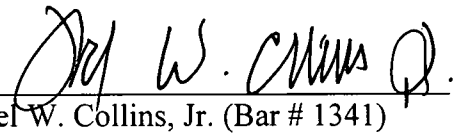
> Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with 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.***

(App. 172 (emphasis added)). In the application, she certified that the subject property would only be used as her primary residence. (App. 160-163, 188). However, she 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. (App. 160-163, 188). The application states that she was moving into this house from her parents' home in Charleston; however, she was living in Florida and attending law school at the time. (App. 160-163, 188). She also made other material misrepresentations, such as falsifying her employment and personal assets. (App. 270-274). Thus, any damages Johnson sustained were not caused by Alexander, but rather, were the result of Johnson's own actions.

CONCLUSION

For the reasons stated, Alexander asks the Court to deny the Petition for Writ of Certiorari and issue the Remittitur to the circuit court.

Respectfully Submitted:



Joel W. Collins, Jr. (Bar # 1341)
COLLINS & LACY, P.C.
1330 Lady Street, 6th Floor
Columbia, South Carolina 29201
Telephone: (803) 256-2660
Facsimile: (803) 771-4484

Robert F. Goings (Bar # 74855)
GOINGS LAW FIRM, LLC
Post Office Box 436
Columbia, South Carolina 29202
Telephone: (803) 350-9230
Facsimile: (877) 789-6340
Attorneys for Respondent

Columbia, South Carolina

August 13, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 5208 (S.C. Ct. App. Filed March 19, 2014)
Appellate Case No. 2014-001167

Amber Johnson.....Petitioner,

v.

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

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

v.

Charles Feeley.....Third Party Defendant.

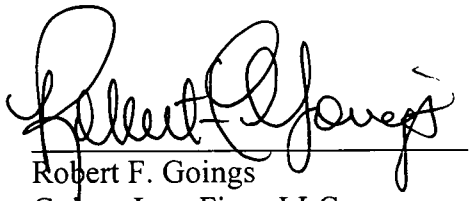
PROOF OF SERVICE

I, Robert F. Goings, do hereby affirm that on August 13, 2014, I served one copy of the Respondent's Return to Petition for Writ of Certiorari on the following named individuals by placing a copy in the United States Mail, first class, postage prepaid to the following:

Mary Leigh Arnold (Bar # 419)
Mary Leigh Arnold, P.A.
749 Johnnie Dodds Blvd., Suite B
Mount Pleasant, SC 29464

Justin Kahn (Bar # 65100)
Wes B. Allison (Bar # 100533)
Kahn Law Firm, LLP
PO Box 31397
Charleston, SC 29417-1397
Attorneys for Petitioner

I further affirm that on this same date, I caused the Respondent's Return to Petition for Writ of Certiorari to be hand-delivered to the Clerk of Court of the Supreme Court of South Carolina.



Robert F. Goings
Goings Law Firm, LLC

Columbia, South Carolina

August 13, 2014