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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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.

v.

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

v.

Charles Feeley.....Third Party Defendant.

AMENDED BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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B. Did the Court of Appeals err by limiting the scope of the representation and duties of a closing attorney in such a way that he could not be liable if he relies on another's title exam?

C. In a professional negligence suit against a closing attorney, did the Court of Appeals err in finding questions of fact about the attorney's reasonable reliance and legal relationship with his title examiner were material to the claim?

D. Did the Court of Appeals err by determining that a closing attorney's admissions as to the standard of care were subject to a different factual interpretation than what the lower court determined?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

i. Complaint

Petitioner Amber Johnson (hereinafter Johnson) hired Respondent Stanley Alexander, Esq., (hereinafter Alexander) to be her closing lawyer for a house she was buying. (App. 25-36). Alexander failed to discover public records showing the property had been sold 11 months earlier to satisfy

delinquent property taxes.[1] Shortly after the September 14, 2006 closing, the statutory period of redemption expired, a tax deed was issued to the tax sale purchaser, and Johnson was stripped of her property and title. *Id.* She filed a suit alleging professional malpractice for Alexander's failure to determine the house had been sold in a delinquent tax sale before closing.

Johnson also named as a defendant Mario Inglese, Esq. (hereinafter Inglese), whom Alexander alleged he paid to do the "title work." (App. 33). Alexander filed an Answer and Cross-claim against Inglese for negligence in failing to discover the tax sale records. (App. 37-48). Inglese, in turn, filed a third-party complaint against Charles M. Feeley, Esq. (hereinafter Feeley) claiming he delegated the task of performing the title search to Feeley.

ii. Motion for Partial Summary Judgment

After both parties participated in discovery, Johnson filed a Motion for Partial Summary Judgment as to Alexander's liability for failing to see and act upon the delinquent tax records. (App. 72-94). A hearing was held before the Hon. J.C. Nicholson, Jr. (App. 7-20). In opposition, Alexander claimed a question of fact existed as to whether tax records and documents concerning

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[1] Pursuant to S.C. Code Ann. §12-51-80 property may be redeemed within 12 months of the tax sale by paying the delinquent taxes and fees. Timely redemption prevents a tax deed from being issued to the tax sale purchaser.

the tax sale were publicly available, because he claimed the records were searched but the sale and tax delinquency was not discovered. (App. 298). Judge Nicholson continued the hearing and ordered the parties to submit evidence as to what Charleston County records reflected about the tax sale and delinquent taxes during the time period before the closing. (App. 8-9, App. 222 lines 18–24, App. 232-233, App. 237-239).

Johnson filed an affidavit from Mary Scarborough, the Charleston County Delinquent Tax Collector, attesting the delinquent property tax records for the home were public and available at the time of the closing. (App. 202-209).

Alexander, however, ignored the court's request to submit evidence about what records were public and available, and instead filed an affidavit from Feeley stating that he could not "recall the details of this title examination" but followed his usual practice and did not discover the tax records. (App. 128 ¶ 2). Feeley stated he performed a title examination on August 9, 2006 for Inglese, not Alexander. (App. 128 Feeley ¶ 2).

A second hearing was held May 26, 2011. (App. 214-262). Alexander requested a continuance but did not articulate a reason. The trial court denied the continuance. (App. 241 lines 7-8, App. 243, lines 2-3).

In opposition to Scarborough's affidavit, Alexander's counsel argued, "nobody can say what the screen showed in 2006." (App. 247, lines 16-17, App. 249, lines 8-9.) Following the hearing, at Alexander's request, the Court gave both sides an additional 10 days to submit affidavits, depositions or other materials. (App. 257-260). Alexander submitted nothing.

iii. Order Granting Partial Summary Judgment for Johnson

On July 6, 2011, the trial court entered an order granting partial summary judgment as to liability. The trial court found no material question of fact existed as to whether Alexander was negligent for "his failure to determine from the public records that the property had been sold at a tax sale" (App. 14-15) and was liable for the failure to discover the public tax sale records. (App. 7-20). In the order the trial court noted,

> 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. 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.

(App. 203-204). The trial court also relied on Alexander's admissions about a closing lawyer's duties to his client, including:

- A lawyer handling a closing has the responsibility to make sure the purchaser gets good and marketable title to the property. (App. 84-85.) "That would be your job." (App. 85, lines 1-7).
- Alexander had a duty to make sure Johnson got the property free and clear with good and marketable title. (App. 91, lines 13-16, 84, lines 16-20).
- Alexander conducted a closing precisely to ensure that Johnson got good and marketable title. (App. 84).

Due to the lack of recall of the specifics of the transaction at issue, the court found Feeley's affidavit lacked sufficient facts to create a question of fact (App. 11, n. 1) and Alexander failed to meet his burden of coming forward with specific admissible facts. (App. 19). Those findings were not appealed. (App. 345-346.)

The trial court did not address whether Alexander "reasonably relied" on Feeley to perform the title search. After the order was entered, Alexander did not file a Rule 59(e), SCRCP motion to reconsider, nor did he ask the trial court to rule on any issue or facts related to agency or "reasonable reliance."[2] Alexander simply filed a Notice of Appeal.

iv. Court of Appeals Reversed

On March 19, 2014, the Court of Appeals reversed the lower court and remanded for factual determinations related to Alexander's use and

[2] Johnson raised Alexander's failure to file a Rule 59(e), SCRCP motion in her response to Alexander's appeal. (App. 346-347).

"reasonable reliance" on Feeley's title work, as well as whether Feeley was Johnson's agent. (App. 380-385).

v. Petition for Certiorari Granted

Johnson filed a Petition for Rehearing on April 2, 2014. It was denied on May 16, 2014. (App. 400-401.) The Supreme Court granted Johnson's request for *certiorari* on December 10, 2014.

B. Evidence Presented For Motion for Summary Judgment

The following evidence was submitted as part of Johnson's motion for summary judgment as to liability:

i. Attorney-Client Relationship Between Johnson and Alexander

- Alexander represented Johnson in closing the sale of the property. (App. 25, Compl. ¶5, App. 37, Answer ¶5) and conducted the closing that took place September 14, 2006. (App. 10 Order ¶ 2). There is "no dispute you were [Johnson's] attorney in the closing." (App. 80, lines 21-23).
- Alexander represented Johnson in a prior closing. (App. 80, lines 24-25, 81, line 1).
- Alexander had a fiduciary relationship with Johnson (App. 28, ¶ 22, App. 38, ¶ 22).

- Johnson relied upon Alexander telling her she was getting good and marketable title. (App. 11).

ii. Alexander Owed Professional Duties to Johnson

- As closing lawyer, Alexander owed Johnson the duty to properly and fully examine the title to the property and review all tax records, including past due taxes. (App. 27, ¶ 14, App. 38, ¶14).

- Alexander owed the duty to ensure that Johnson was receiving good and clear title to the property free of any encumbrances, liens or clouds on title before conducting the closing. If a problem arose after closing, he owed the duty to correct any deficiencies or advise Johnson how to correct the deficiencies. (App. 27, ¶16, App. 38, ¶16).

- Alexander pleaded he retained Inglese to conduct a title search to ensure Johnson was receiving good and marketable title. (App. 26, ¶6, App. 37, ¶6).

- Alexander "prepared title documentation" for the real estate closing. (App. 37, ¶8). He reviewed additional documents, including county records printed by him on September 11, 2006, prior to closing. (App. 112 ¶ 9, citing Ex. 3 App. 120). This was more than 30 days after Feeley's claimed title exam.

- Feeley cannot recall the specific details of the title examination at issue. (App. 128, ¶3). The trial court found Feeley's affidavit did not create any question of fact because Feeley could not remember or provide sufficient details of how this particular title search took place. (App. 11, fn. 1.)

iii. Tax Sale Records were Public Records

- Johnson presented the affidavit of the Charleston County Delinquent Tax Collector, Mary B. Scarborough, showing that information about the delinquent tax sale of the home was a public record had been available at the time Alexander was closing the sale. (App. 202-209).

C. DECISION OF THE COURT OF APPEALS

In *Johnson v. Alexander*, 400 S.C. 58, 757 S.E.2d 553 (Ct. App. 2014), the Court of Appeals reversed summary judgment as to liability for Alexander's failure to discover and act upon public records showing the subject property had already been sold to pay delinquent taxes.

The appeals court determined the lower court erred by focusing on what public records existed at the time of the title search, holding that

> To determine Alexander's liability, the issue is not whether a reasonable attorney conducting a title search on property would have found the information, but whether Alexander acted

> reasonably under the existing circumstances in relying on the title search performed by Feeley.

(App. 383). It remanded the case to answer the question of fact as to whether Alexander's reliance was reasonable. The Court of Appeals also held an issue of fact may exist as to whether Feeley was Alexander's agent because the Supreme Court has not previously addressed the agency relationship between a title examiner and closing lawyer.[3]

D. STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A grant of summary judgment is proper 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), SCRCP. The Supreme Court reviews questions of law *de novo*. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 109-110, 662 S.E.2d 40, 41 (2008).

The *de novo* review applies only to those issues properly preserved. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)

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[3] Alexander failed to provide admissible facts for a ruling on reasonable reliance or agency to the trial court. (App. 127-129). This is discussed more fully *infra*, pp. 23-31.

(Appeals court must determine if negligence claim was properly raised and ruled on below before addressing trial court's grant of summary judgment dismissing it). It is well-settled law that an issue cannot be raised for the first time on appeal. *Id.* "The ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court." *Id.*, *quoting State v. Nelson*, 331 S.C. 1, 5, 501 S.E.2d 716, 718 n. 6 (1998).

III. ARGUMENT

The simple issue presented is whether a closing lawyer is liable to his client when he obtains or performs a negligent title search that results in the client losing the property shortly after closing. In its ruling, the Court of Appeals determined that a closing lawyer may not be liable for a negligent title exam if he can show he reasonably relied on a third party to perform that essential task.

Intentionally or not, the decision creates immunity for closing attorneys who delegate key tasks associated with their representation when those tasks are performed negligently. This works against the prevailing jurisprudence regarding nondelegable duty, and swims upstream of this Court's ongoing efforts to protect the public and hold attorneys responsible for their work. The decision also conflicts with two recent rulings regarding the duty and liability of attorneys to their clients. Further, the trial court did

not rule on questions of reasonable reliance or agency and the record is devoid of any facts supporting reliance. Indeed, Alexander testified he had no idea Feeley was conducting the title exam at the time. (App. 144, lines 11-21). Without knowledge that Feeley was performing the exam at the time of the closing, Alexander cannot show reasonable reliance.

Notably, the Court of Appeals did not disturb the trial court's finding that failing to find public tax sale records during a title exam is negligence. It stated that "Feeley is the attorney who failed to discover the contents of the public record. If Feeley is negligent, Feeley is liable." *Johnson*, 400 S.C. at 63, 757 S.E.2d at 555. This observation highlights the chief flaw in the appeals court's ruling: Alexander is ultimately responsible to his client, Johnson. Certainly, Alexander as a closing attorney can delegate a required *task*. But the Court of Appeals' ruling allowing him to delegate the *liability* when that task is performed negligently is contrary to South Carolina law, and leaves Johnson without a remedy for her losses.

Feeley may be liable to Alexander, but as to Johnson's claim, only Alexander was Johnson's closing attorney.

This Court should reverse the Court of Appeals' ruling, affirm the trial court, and clarify that a closing attorney is responsible to the client when the tasks the lawyer undertakes or supervises are performed negligently.

A. Court of Appeals Erred by Creating Immunity For a Closing Attorney Who Uses a Negligently Performed Title Search That Results in The Client Losing Real Property

i. Closing Lawyer Performs or Supervises Title Exams

The Court of Appeals' ruling conflicts with existing attorney-client law. In South Carolina only an attorney can close a real estate transaction because only attorneys "have the ability to furnish *their clients* legal advice should the need arise...[P]rotection of the public is of paramount concern." *State v. Buyers Services Co., Inc.*, 292 S.C. 426, 434, 357 S.E.2d 15, 19 (1987) (Emphasis added). The Court of Appeals overlooked the fact that Alexander, as Johnson's closing attorney accepted the representation to provide legal services necessary to protect Johnson's interests and was the only person who had the duty to supervise the closing and provide his client with legal advice.

One of the essential functions of closing a sale of real estate is the title exam, which "requires expert legal knowledge and skill," and which this Court has held must be conducted under the supervision of a licensed

attorney "for the protection of the public." *Id.* at 432, 18. That duty to supervise makes the attorney liable when the task is performed negligently. Johnson hired Alexander — and only Alexander — to perform the tasks associated with the closing.

Under the Court of Appeals' ruling, Johnson must seek recompense from Feeley, the title examiner, with whom she had no privity, knowledge or other legal relationship. The Court of Appeals decision forces the client to discover and identify all those to whom her lawyer delegated tasks related to the representation to seek liability for those negligently performed tasks. This is bad policy and bad law.

ii. Closing Lawyer Responsible for Negligent Title Exams

The Court of Appeals' decision conflicts with two of its recent decisions regarding the duties and liability of attorneys, including one published after Johnson filed her petition for writ of *certiorari.* In the most recent case, *Tuten v. Joel*, 410 S.C. 104, 763 S.E.2d 54 (Ct. App. 2014), the court held Joel, the defendant attorney, was liable to the plaintiff for the misdeeds of his former associate because Joel and the client had an attorney-client relationship. Even though the associate told the client Joel was no longer involved, the Court held that Joel was liable for the associate's failure

to serve and otherwise prosecute the client's complaint. *Id.* at 116, 61. Similarly, here Alexander is responsible for the title work he performed or delegated to others.

In *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687 (Ct. App. 2013), the Court of Appeals recognized that given South Carolina's policy of requiring that only an attorney close real estate transactions, "[t]he attorney's role...is to protect the participants in real estate transactions from the numerous potential problems that may arise." *Inglese*, 402 S.C. at 296, 742 S.E.2d at 690. Certainly, among "the numerous potential problems that may arise" is a previous sale of real estate in a delinquent tax sale.

It is undisputed that:

- Alexander was Johnson's closing attorney.
- Johnson had no legal relationship, attorney-client or otherwise, with Feeley, a man she never hired or knew existed.
- The title exam missed public records showing the home Johnson was purchasing had already been sold to pay back taxes.
- Had the delinquent tax sale been discovered, Johnson could have cured the defect on title or avoided the sale.
- Johnson lost her home when the delinquent tax deed was issued to the tax sale purchaser.

If allowed to stand, the Court of Appeals' decision likely will absolve an attorney of responsibility if he claims "reasonable reliance" on another to perform a task, even if that task is central to his representation. It will leave

aggrieved clients without recourse, creating a new standard hostile to consumers. And because it appears to conflict with *Tuten* and *Inglese*, two recent rulings by the Court of Appeals, allowing *Johnson* to stand is likely to cause confusion among the public and the Bar. Thus, it should be reversed.

B. Closing Attorney Cannot Escape Liability By Delegating a Task Within His Scope of Representation

i. Closing Attorney's Claimed Reasonable Reliance on One Who Performs a Negligent Title Exam Is Not a Defense

The Supreme Court requires an attorney to close a real estate sale. *State v. Buyers Services Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). Taken to its logical conclusion, the Court of Appeals' decision in *Johnson* may allow any attorney to escape liability for negligent work as long as he claims to have "reasonably relied" on someone else to do the work even if that someone else is another attorney with whom the client had no relationship.

The Court should make clear the same rules of nondelegability that apply to City Halls, hospitals and trucking companies apply to closing attorneys. As this Court explained in *Simmons v. Tuomey Regional Medical Center*, "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." *Simmons,* 341 S.C. 32, 44, 533 S.E. 2d 312, 317 (2000).

During a thorough discussion of the doctrine in *Simmons*, this Court explained,

> 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* p. 654 (S.C. Bar 1997).

ii. Closing Attorney has Nondelegable Duty to Perform or Supervise Title Exam

This Court has recognized the nondelegable duty in many situations outside the hospital: 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. 6-8.

A closing attorney is entrusted with important duties as well, and should not be excluded from this list. In discussing the unique role of a closing attorney, the Court of Appeals previously 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. at 296, 742 S.E.2d at 690, *citing State v. Buyers Serv. Co.*, 292 S.C. at 431, 357 S.E.2d at 18. The Court correctly recognized "[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. See also*, *Kleeman v. Rheingold*, 81 N.Y.2d 270, 275, 614 N.E.2d 712, 716 (1993) (law firm had nondelegable duty to effectuate service and was liable for negligent failure of independent contractor process server to properly serve process. Given the central importance of this duty, attorneys cannot be allowed to evade responsibility for its careful performance by the simple expedient of "farming out" the task to independent contractors.)

One potential problem Alexander or any other closing attorney must anticipate and prevent is the loss of a client's property due to a previous delinquent tax sale. No one disputes checking tax records for clouds on title is a core duty of the closing attorney. *See* Charles T. Manning, *Handbook for South Carolina Dirt Lawyers* 2d, 22-23 (2008). Further, this Court's *Guidelines for a Closing Attorney in a Residential Purchase*, issued Sept. 23, 2009, states the attorney is to "[c]ertify the title to the subject property."

It is undisputed the title exam at issue in this case failed to discover public records showing the home had been sold at a tax sale nearly a year before Johnson's closing. As a matter of law, Alexander — as Johnson's fiduciary (App. 91, lines 18-21) and closing attorney (App. 112, ¶ 2) — should be held liable for the negligence associated with work he undertook to perform and oversee, and for which he collected a fee. Alexander may (and did) seek indemnification for the negligent title exam from those to whom he delegates tasks. (App. 49-52). However, as the closing attorney, he remains liable to his client for the negligent title exam.

C. PERMITTING A CLOSING ATTORNEY TO ESCAPE LIABILITY FOR A NEGLIGENT TITLE SEARCH THAT RESULTS IN THE LOSS OF PROPERTY LEAVES THE INJURED CLIENT WITHOUT REDRESS

Permitting immunity from liability for closing attorneys who use someone else's work to complete the essential tasks of their representation is bad public policy. Accordingly, the Supreme Court should reverse.

Quare: Where does the client who is harmed by a negligent title search find relief, if not from the attorney she hired to do the work?

The Court of Appeals suggests the client could or should sue someone with whom she has no privity, stating "Feeley is the attorney who failed to discover the contents of the public record. If Feeley was negligent, Feeley is liable." (App. 383).

In reality, under the Court of Appeals' ruling, the client would have no recourse as long as the closing attorney can show "reasonable reliance" on another. How could Feeley be liable to Johnson for legal malpractice? Feeley may be an attorney, but he was not Johnson's attorney. No privity or attorney-client relationship existed between them so as to make him liable to her for his professional negligence. *See Harris Teeter Inc. v. Moore & Van Allen PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010) (to prove liability

for legal malpractice, a plaintiff must first show the existence of an attorney-client relationship).

South Carolina has an interest in compensating victims for injuries accruing here in South Carolina resulting from legal professional negligence and breach of fiduciary duty claims, and provides causes of action for such injuries. *See Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 140, 697 S.E.2d 644 (Ct. App. 2010); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); *Sims v. Hall*, 357 S.C. 288, 592 S.E.2d 315 (Ct. App. 2003); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Henkel v. Winn*, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Moreover, South Carolina has a particular stake in protecting its legal consumers from negligent lawyers when the resulting injury occurs in South Carolina. "[A] state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there." Restatement (Second) of Conflict of Laws § 145 cmt. d (1971). The basic policy underlying an action for professional negligence, to compensate the victim, further supports South Carolina's interest as the state where the

injury occurred and where its citizens, including the Appellant, reside. *See Id.* § 145 cmt. c.

The Court of Appeals wrongly suggests that initially Johnson retained Inglese, but "there is no dispute" Alexander was "her attorney in the closing that's at issue in this case." (App. 381 and App. 80, lines 21-23). No facts and nothing in the record shows Johnson knew Alexander chose to delegate the task of performing the title work to someone else. As Alexander was her closing attorney, he alone is responsible for the negligence of those to whom he delegates tasks associated with his representation of Johnson.

Johnson urges the Court to adopt a simple and equitable standard: The closing attorney is responsible for negligence arising from tasks he chooses to delegate, unless he expressly limits his scope of representation and liability, per Rules 1.2 and 1.4, Rules of Professional Conduct, discussed *infra* and in accordance with this Court's orders. To permit otherwise creates confusion and uncertainty in the Bar and the public and would constitute an injustice.

D. THE COURT OF APPEALS ERRED BY CHANGING THE SCOPE OF REPRESENTATION AND DUTIES OF A CLOSING ATTORNEY

In finding that a closing attorney may not be held liable for a negligent title search if he reasonably relied on another's work, the Court of Appeals

unilaterally allowed an attorney to limit the scope of his representation without the client's consent.

This conflicts with an important distinction inherent in the South Carolina Rules of Professional Conduct: While an attorney may choose to delegate a task within the lawyer's scope of representation, he cannot delegate his liability when that task is performed negligently. Rule 1.8(h), Rule 407, SCACR, Rules of Professional Conduct (RPC).

Under the rules, "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances *and the client gives informed consent.*" Rule 1.2(c), RPC. (Emphasis added). 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." *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 491-92, 713 S.E.2d 335, 337 (Ct. App. 2011), *citing* Rule 1.0(g), RPC.

The Court of Appeals' decision would improperly limit the scope of Alexander's representation without his client's consent. Alexander admitted that he and Johnson had an attorney-client relationship and that, as her

closing attorney, he had a duty to assure there was a conveyance of good and marketable title to Johnson (App. 84, lines 13-20, App. 91 lines 13-16, App. 268, lines 17-23).

Inherent in the job of the closing attorney is to protect against title defects. (App. 84-85, App. 91 lines 13-16). Here, "there was a failure in the title." (App. 83, line 1). In the context of a home purchase, under the Rules, Alexander could not have limited the scope of his representation by disclaiming a duty to provide a competent title search without at least advising his client to consult other counsel.

By allowing an attorney to limit liability by claiming "reasonable reliance," the Court of Appeals exceeded its bounds and improperly limited Rule 1.2, RPC. This Court should rectify this result and find that a lawyer hired to perform an essential task related to the representation is responsible for ensuring it is done right or bear the consequences.

E. Questions of Fact About the Closing Attorney's Reasonable Reliance and Legal Relationship with a Title Examiner are Immaterial to the Client's Claim.

The Court of Appeals reversed partial summary judgment as to Alexander's liability and remanded the case for 1) determination by the lower court on whether Alexander reasonably relied on Feeley and 2)

whether Feeley was Alexander's agent because the 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."

The answer to either question is immaterial to Johnson's claim against Alexander, and thus the holding should be reversed.

i. Questions of Reasonable Reliance and Agency Were Not Properly Before the Court of Appeals Because Closing Attorney Failed to Preserve Those Issues

As a threshold matter, questions of agency or whether Alexander "reasonably relied" on Feeley were not properly before the Court of Appeals because Alexander never asked the trial court for a ruling on those questions. Under well-established South Carolina law, "appellate 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).

The trial court's order granting partial summary judgment did not address 1) whether Alexander "reasonably relied" on Feeley or 2) question whether Feeley was his agent.

As to reasonable reliance, Alexander failed to file a motion asking the court to address the issue of whether he reasonably relied on Feeley and, if so, whether that absolved him of liability for the botched title search. Thus, the issue is not preserved.

As to the existence of agency, the lower court held that "Alexander was negligent...because he (*or his agent*) failed to determine that public records showed the delinquent taxes...and the property had been sold." (App. 15) (emphasis added). Alexander never challenged the determination of liability via "his agent" by filing a Rule 59(e), SCRCP motion asking the trial court to reconsider the factual finding of "his agent." The "his agent" factual finding is the law of the case.

Therefore, the Court of Appeals' decision to remand for determination of "reasonable reliance" or agency is reversible error, as those issues were neither properly preserved by Alexander nor before it.

ii. Reliance is Immaterial

The Court of Appeals did not disturb the lower court's finding that the delinquent tax records were public and should have been discovered as part of the title exam. (App. 7-20). As discussed above, Alexander admitted he owed a duty to Johnson to ensure the title work was performed in compliance with the standard of care, such that she received good and marketable title. (App. 84-85, App. 267, lines 5-18). Absent his client's proper consent to delegate that duty, a closing attorney should not be permitted to escape liability regardless of whether his reliance on another was reasonable or not.

While not addressed directly in South Carolina, other courts have determined a lawyer may be liable to his client for the acts and omissions of another attorney if the lawyer had assumed responsibility to the client, or if the defendant attorney assigned work to a temporary lawyer with no direct relationship to the client. Hiring an outside attorney — such as Feeley — to handle a task makes the outside lawyer a subagent as a matter of law, and the first lawyer is liable for his negligence. *See* Restatement (Third) of Law Governing Lawyers § 58, cmt. e (2000); *see also Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey*, 53 A.D.3d 912, 913-14, 863 N.Y.S.2d 100, 102

(App. Div. 2008) (New York attorney who hired Florida attorney to file notice of a claim on behalf of client liable for Florida attorney's failure to timely act). The court determined the client "had no contact with [the Florida lawyer] and did not enter into a retainer agreement with that firm." *Whalen*, 53 A.D.3d at 914. Therefore, the New York attorney was responsible for the Florida attorney's negligence. *Id.*

Here, Alexander assumed the responsibility to perform a title examination. Alexander claims to have paid Inglese who claims that Feeley was to do it. The title examiner, Feeley, had no relationship with Johnson. Thus, Alexander, the attorney with the attorney-client relationship, is liable to his client for the negligent exam regardless of whether it was performed by Feeley, Inglese or Alexander himself.

Whether Alexander "reasonably relied" on a third party is immaterial to Alexander's duty to ensure that Johnson's title work was performed correctly and, if it was not performed correctly, to take responsibility for the damages. The Court of Appeals' decision to reverse partial summary judgment was error.

iii. Agency is Immaterial

The "question of fact" as to whether Feeley was Alexander's agent is similarly irrelevant, and somewhat manufactured. As the Court of Appeals correctly found, Johnson hired Alexander to close her purchase. Alexander admitted he was her attorney and that they had an attorney-client relationship. (App. at 80, lines 21-23, App. 381).

Alexander hired and paid Inglese to perform the "title work." (App. 33). The record contains a copy of the check Alexander issued to Inglese for "title work" for the property. (App. 71). Separately, Feeley claims the abstract (App. 116) was completed on August 9, 2006, not for Alexander but rather for Inglese. (App. 128, ¶ 2). After September 11, 2006, more than 30 days after Feeley's abstract, Alexander updated the title work when he generated and reviewed a new document from the Tax Assessors' office. (App. 120). Alexander reviewed it and understood that no back taxes were owed at the time of the closing. (App. 112-113). Alexander examined Charleston County tax records *after* Feeley performed the title abstract and he also failed to discover the tax records and sale. (App. 112-113, ¶ 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.") Alexander reviewed existing and *new* materials prior to moving forward with the closing. He did not simply rely on someone else's work.

The nature of the relationship among Alexander, Feeley and Inglese should not determine Johnson's claim against Alexander who admits Johnson hired him.[4]

Johnson presented the trial court with an affidavit from the Charleston County Delinquent Tax Collector, Mary Scarborough, attesting to the availability of delinquent tax sale records regarding the home Johnson was purchasing. (App. 202-209). Johnson also presented multiple South Carolina cases holding that, unsurprisingly, public records regarding property are considered public and that someone in Alexander's position shall be held to have actual notice of the information contained therein. *See, e.g., Taylor v. Mill*, 310 S.C. 526, 528, 426 S.E.2d 311, 312 (1992) (delinquent tax records are public as a matter of law). The trial court found that the tax records were public and Alexander was, "estopped to argue such information was not available to him" (App. 15, fn. 4) when he claimed Inglese missed them.

[4] Although the Court of Appeals suggests there is some question about this, that suggestion is mistaken. The record is devoid of any evidence or argument that Johnson hired Feeley or anyone other than Alexander to conduct the closing.

Thus, the facts and Alexander's own testimony show the Court of Appeals erred in finding the trial court improperly focused its inquiry on whether the Charleston County public records were available and should have been discovered as part of the title search. (App. 20). That was precisely the determinative question and remains so.

The Court of Appeals' decision to remand for determination of two side issues — reasonable reliance and agency — was clearly error. This Court should reverse.

iv. Alexander Cannot Show He Reasonably Relied on Feeley

Even if this Court determines that "reasonable reliance" on an undisclosed title examiner is a defense to a negligently performed title exam, the facts presented to the lower court show just the opposite.

Alexander asserts no claims against Feeley. Alexander testified that before the closing he did not know of Feeley's involvement in the title work.[5] ("I didn't know anything about Charles [Feeley] at the time.") (App. 144, Dep. Alexander lines 15-16.) Additionally, Feeley's Affidavit states he prepared a title abstract for Inglese (App. 128 ¶ 2), not Alexander.

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[5] In an affidavit created after his deposition, Alexander for the first time claims the "title examination was conducted by Charles Feeley at the request of the first attorney that was retained to originally close this transaction, Mario S. Inglese." (App. 112, Affidavit Alexander ¶ 3.)

Alexander's claim against Inglese states he "contracted with Inglese to conduct a title search" for the subject property. (App. 44 ¶ 63, App. 45 ¶ 69). Alexander testified he paid Inglese "for the title work." (App. 144, Dep. Alexander, App. 45 ¶ 67). Alexander further asserted, "Inglese warranted and represented to Defendant Stanley E. Alexander that he properly and fully examined the title to the subject property..." (App. 45 ¶¶ 65 and 66).

The fact is Alexander did not know of Feeley. Alexander hired and paid Inglese to do the title work. There is no question of material fact as to whether Alexander could or did "reasonably rely" on Feeley to perform the title search properly.

Accordingly, the decision to delve into Alexander's reasonable reliance as a basis for reversing the trial court's determination of liability as to Johnson should be reversed, and the trial court order should be affirmed.

F. Court of Appeals Erred by Ignoring The Plain Meaning of The Closing Attorney's Admissions About the Standard of Care

Alexander told the trial court that he had a duty to ensure Johnson obtained good title to the house she was buying. (App. 84). The Court of Appeals erred in deciding that Alexander did not mean what he said. Specifically, the Court of Appeals stated:

> 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.

(App. 384). However, a professional in a professional negligence case may establish the standard of care owed to a client. *Sims v. Hall*, 357 S.C. 288, 296, 592 S.E.2d 315, 319 (Ct. App. 2003). *See also Mali v. Odom*, 295 S.C. 78, 81, 367 S.E.2d 166, 168 (Ct. App. 1988) (holding that defendant, a practicing lawyer, established the applicable standard of care for a closing attorney). Alexander made clear admissions, including:

- He represented Johnson in the closing (App. 84, lines 13-15);
- He had a duty to convey good and marketable title to Johnson (App. 268, lines 17-23);
- As a closing lawyer, he was required to exercise good and prudent judgment and use the tools available. (App. 267, lines 13-18); and
- The title work was defective (App. 133) because it did not reveal the delinquent tax sale. (App. 134).

The Court of Appeals erred in finding the attorney's admissions may mean something other than what they plainly say. Alexander's truthful testimony further established the standard of care and its breach. Under *Sims*

it was error to hold otherwise. The Court of Appeals attempted to minimize Alexander's admissions 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.'" (App. 384).

"To the best of my abilities" is never the standard of care because it is subjective. For the professional, this Court has held there exists only an objective standard of care. *State v. Brown*, 240 S.C. 590, 595, 533 S.E.2d 308, 310 (2000). *See also McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995) holding "good faith" does not pass muster to exculpate. The Court of Appeals attempted to free Alexander from his admissions by suggesting his "best of my abilities" comment somehow creates a question of fact. This is reversible error.

IV. CONCLUSION

In reversing the lower court, the Court of Appeals created a shield from liability for a closing lawyer that has not been recognized by this Court and that is contrary to established principles. The Court of Appeals did not specifically find the lower court committed any error, but rather declared the factual focus should have been on issues not ruled upon by the trial court —

Alexander's claimed reasonable reliance on another who allegedly was to perform tasks associated with the title examination when the facts show there could be no such reliance.

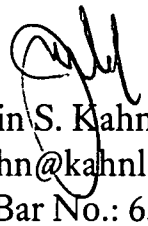
Further, reliance is immaterial. Alexander, and Alexander alone, was hired to represent Johnson as her closing attorney. Whatever side deals or arrangements he had with others are immaterial to his responsibility to his client. It was his duty to ensure the title exam was performed competently and properly. When it was not, he became liable for the damages.

The decision by the Court of Appeals puts the client in the impermissible position of having her lawyer not be liable for the tasks he was hired to perform and trying to find and prosecute whomever his attorney may have hired without the client's consent. This solution creates more problems than it solves.

This Court should reverse the Court of Appeals, affirm the trial court's awarding Johnson partial summary judgment on the question of liability and allow the trial to move forward only on the issue of damages. If there is other further and proper relief, that should be granted as well.

If oral argument would assist the Court, it would be welcomed.

Respectfully submitted,



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January 23, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 29 2015

S.C. Supreme Court

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

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.

v.

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

v.

Charles Feeley.....Third Party Defendant.

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ATTORNEYS FOR PETITIONER

I, Justin S. Kahn, do hereby affirm that on January 26, 2015, I served one copy of the Amended Brief of Petitioner as Provided by Rule 242(i), SCACR on the following named individuals by placing a copy in the United States Mail, first class, postage prepaid addressed to the following:

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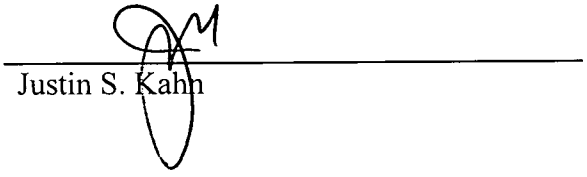

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January 26, 2015

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Clerk of Court
Supreme Court of South Carolina
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Re: Amber Johnson v. Stanley Alexander
Case No.: 2009-CP-10-06529

Appellate Case No.: 2014-001167

Dear Mr. Shearouse:

Enclosed for filing are 18 copies of Amended Brief of Petitioner, along with Proof of Service. The enclosed original copy of the Amended Brief of Petitioner is being filed unbound, pursuant to Rule 267(d), SCACR. By copy of this letter I am serving a copy of this brief on counsel for Respondent.

Please file the original and copies for the Court, mark the extra three copies filed and return them to us in the enclosed, postage-prepaid envelope.

Thank you very much.

Sincerely,

Justin S. Kahn

JSK/pm
Encl.
cc: Joel W. Collins, Esq. (via U.S. Mail, w/encl.)
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