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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.

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I. ARGUMENT

A. INTRODUCTION

The Court of Appeals erred by holding a closing attorney may escape liability for a negligently performed title exam simply by claiming he “reasonably relied” on someone else to do it.

A title exam is an essential task of a real estate closing attorney. The title exam failed to determine the house had been previously sold at the Charleston County delinquent tax sale. As a result, shortly after the closing, Petitioner lost title to the home when the statutory redemption period passed and the tax deed was issued.

The trial court properly granted partial summary judgment against Alexander as to liability for the closing he conducted on September 14, 2006. Alexander admitted that Johnson was his client and he had the duty to examine title. Petitioner’s expert testified similarly. There were no material questions of fact and as a matter of law Alexander (or his agent) was negligent for failing to find the public delinquent tax sale records. (App. 16).

The Court of Appeals reversed on grounds that Alexander “may” be able to establish facts that he reasonably relied on Charles Feeley for the title search. Alexander admitted he did not know Feeley before the closing so he cannot show reliance. The appeals court’s ruling erroneously would allow an

attorney to escape liability for a negligently performed task central to his representation, as long as he shows he “reasonably relied” on someone else.

This holding is bad policy and bad law and would leave Johnson with no recourse for her damages, as she has no privity with Feeley. While an attorney may certainly delegate a *task* central to his representation, he is not allowed to delegate the *liability* when the task is performed negligently.

B. ALEXANDER IS JUDICIALLY BOUND BY HIS PLEADINGS AND HIS ARGUMENTS TO THE CONTRARY SHOULD BE DISREGARDED

In his brief, Alexander makes several claims that conflict with the record and his own admissions including, insinuating that Johnson hired someone else as her closing attorney or someone other than Alexander had the duty to perform the title exam. However, it is well-established law that,

[P]arties are judicially bound by their pleadings unless withdrawn, altered [,] or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts [that] are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Town of Kingstree v. Chapman, 405 S.C. 282, 311, 747 S.E.2d 494, 509 (Ct. App. 2013).

Alexander admitted facts and duties owed to Johnson in his Answer (App. 37-48) and Cross-Claim (App. 49-52). As discussed *infra* the trial court correctly held Alexander is bound by his deposition testimony (*See, e.g.* App. 15-16), his pleadings (App. 7) and admissions (*See, e.g.* App. 14, 16-17).

As Alexander admits the duties he owed to Johnson, this Court should disregard the new and inconsistent positions stated in his Reply Brief.

C. ALEXANDER’S ANSWER ADMITS HE OWED JOHNSON THE DUTY TO PERFORM A PROPER TITLE EXAMINATION AS PART OF THE CLOSING PROCESS

Alexander admits a title search is a central task of the closing attorney. (Resp. Brief p. 8). Alexander cites *Doe v. McMaster*, 355 S.C. 306, 312, 585 S.E.2d 773, 776 (2003) and *State v. Buyers Service Company, Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987) for the proposition that the four steps of the closing “process” include the title search. “The title search and subsequent preparation of related documentation is permissible only when a licensed attorney *supervises the process.*” *Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003) (emphasis added). The cases cited make clear that the closing is a “process” and there must be a “supervising” attorney to review all of the documents and materials, including the title work, and advise the client at the closing. In the context of this transaction, only

Alexander was the closing attorney, which means he was the “supervising” attorney. To the extent Alexander claims other lawyers were involved, as the supervising attorney for the closing process, he is responsible to supervise their work and competence as well. Rules 1.1 and 5.1(b), SCRPC.

In his Answer, Alexander admitted that the scope of his representation included the duty:

to properly and fully examine title to the relevant property, including reviewing all tax records...

(App. 27 Complaint ¶ 14, App. 38 Answer ¶ 14) (“Defendant admits the allegations contained in Paragraph 14 of the Complaint.”). Alexander admitted he “had professional duties to properly and fully examine title to the relevant property, including reviewing all tax records...” and to “determin[e] the status of the property with regard to the tax sale that had taken place before going forward with closing on the property.” (App. 27, Complaint ¶ 15, App. 38 Answer ¶ 15). At his deposition, Alexander agreed he “had a duty or responsibility to make sure she got the property free and clear with good and marketable title.” (App. 91, Alexander Dep. lines 13-16). Based on these admissions, the trial court properly found Alexander represented Johnson as her closing attorney and owed Johnson a duty to perform a proper title examination. (App. 10-11, Order).

Now, Alexander claims he “should not be held liable for a duty he did not undertake to perform.” (Resp. Brief, p. 9). He claims “the scope of Alexander’s representation of Johnson did not include performing the title examination” (Resp. Brief p. 9) and the title exam was “outside of the scope of Alexander’s representation of Johnson.” (Resp. Brief, pp. 8, 10).

However, Alexander’s new and unsupported excuses evaporate under the heat of his own pleadings, admissions and testimony.

Repeatedly, Alexander admitted he owed Johnson the duty to:

ensure that Plaintiff [Johnson] 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.

(App. 27 Complaint ¶ 16, App. 38 Answer ¶ 16) (“Defendant admits the allegations contained in Paragraph 16 of the Complaint.”).

Alexander cannot now disregard, ignore or argue around his own admissions. *Town of Kingstree v. Chapman*, 405 S.C. at 311, 747 S.E.2d at 509. Therefore, the trial court’s findings that Alexander owed a duty to Johnson to competently perform the title search should be upheld.

D. ALEXANDER CONDUCTED THE CLOSING AND ADMITS HE HAD THE DUTY TO EXAMINE THE TITLE

In his Brief, Alexander claims that Johnson originally retained another attorney, Mario Inglese, Esq. to close the purchase of the home (Resp. Brief p. 4), somehow suggesting Alexander should not be responsible for the loss of Johnson's home.

Before the trial court, in the "FACTS" section of Alexander's memorandum in opposition to summary judgment, he stated Inglese was "originally scheduled to close the transaction, but *due to a conflict*, Alexander was requested to serve as the closing attorney." (App. 96) (emphasis added).

In any case, regardless of who was initially to close, Alexander performed the closing and admitted he alone had the duty to determine,

the status of the property with regard to the tax sale that had taken place before going forward with the closing...

(App. 27 Complaint ¶ 15, App. 38 Answer ¶ 15) ("Defendant admits the allegations contained in Paragraph 15 of the Complaint"). Thus, there is no question of fact that Alexander was the closing attorney who owed the duty to ensure the title exam was properly performed.

Alexander attempts to muddy the waters and spread the blame by implying others *may* have been retained or may be responsible to Johnson for

the negligent title work. He points his finger in different directions and claims things like:

there were “three lawyers to assist Johnson in the purchase...” (Resp. Brief p. 9);

other attorneys assisted Johnson before him (Resp. Brief p. 10);

Johnson had an attorney-client relationship with Inglese. (Resp. Brief p. 9)

These kinds of statements directly contradict Alexander’s pleadings, admissions and testimony. For example, Alexander swore in his affidavit that he “was the closing attorney” for Johnson’s purchase. (App. 112, Alexander Affidavit ¶ 2). In his deposition, he agreed there was “no dispute” he was “her attorney...” (App. 80, Alexander Dep. lines 21-23, App. 84, lines 13-15). He stated, “Alexander acted solely as the closing attorney.” (App. 102).

Alexander told Johnson “[t]hat what she was getting at the time of closing was good and marketable title.” (App. 90, Alexander Dep. lines 13-16). He admitted Johnson had a “right to rely on the information” he represented to her at the time of the closing. (App. 11, Order ¶ 3d, App. 89-90, Alexander Dep. pp. 98-99).

He should not now be allowed to create any questions of fact by taking a new contrary position. Thus, any suggestion by Alexander that a question of

fact exists as to whom is responsible for the negligent title work, other than him, is without merit and contrary to his own admissions.

i. Alexander Claims He Hired Inglese to Do the Title Work

Alexander pleaded he, not Johnson “contracted with Inglese to conduct a title search attendant to a real estate closing that occurred on or about September 14, 2006...” (App. 44, Alexander Cross-Claim ¶63). There are more examples of Alexander stating that he hired Inglese as his own agent:

Alexander “*specifically subcontracted to Inglese to perform...*” the title work. (App. 48, Alexander Cross-Claim Inglese ¶ 86) (emphasis added).

“*Alexander entered into a contract with Inglese...to properly and fully examine title to [the] subject property and to advise if the subject property was free of any encumbrances, liens, or deficiencies to title.*” (App. 45, Alexander Breach of Contract Claim, ¶ 69) (emphasis added).

The title exam Alexander ordered from Inglese was “for the benefit or reliance upon” Alexander. (App. 44, Alexander Cross-Claim Inglese, ¶ 64).

Based on his own admissions and pleadings, Alexander hired Inglese to perform the title search for his own benefit and use.

ii. Alexander Did Not Assert Informed Consent as a Defense and Agreed to Duty to Properly Perform Title Search

Alexander has never raised informed consent as a defense. Now, in an convoluted attempt to escape liability, he claims Johnson knew Inglese hired

Feeley and that Inglese, not Johnson, “gave informed consent for Alexander to use Feeley’s title work.” (Resp. Brief, p. 14-15). This new and unsupported claim does not allow Alexander to escape liability for the title work task he agreed he had the duty to perform. Alexander never shows he delegated the *liability* for a negligently performed title exam to someone else.

The Rules of Professional Responsibility, Rule 1.2(c), SCRPC states:

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

As Alexander previously pleaded and admitted that the scope of his representation included the duty to perform the title search for Johnson (*See e.g.* App. 27 Complaint ¶ 14, App. 38 Answer ¶ 14), he cannot now claim that the scope of his representation was properly limited to exclude that task in accordance with Rule 1.2(c). Further, as to Johnson’s alleged informed consent, the record is devoid of any fact or writing showing Alexander delegated this task *and the liability*. To the contrary, Alexander admitted that he owed the duty to perform the title examination properly.

Last, Alexander erroneously represented to this Court that Johnson was “an attorney,” as if that should somehow alter Alexander’s duties to her. (Resp. Brief, p. 14.) At the closing, Johnson was about to enter law school.

She was not an attorney. She was Alexander's client and he has admitted that he had the duty to examine title.

In sum, Alexander cannot show informed consent to exclude his liability for the defective title search he obtained because he pleaded and agreed he had the duty to properly perform it. Thus, the scope of representation was not limited in accordance with Rule 1.2(c) and Alexander remains liable.

E. ALEXANDER COULD NOT RELY ON FEELEY BECAUSE HE DID NOT KNOW ABOUT FEELEY BEFORE THE CLOSING

The Court of Appeals suggests Alexander may not be liable if he "reasonably relied" on Feeley to perform the title work. The Court of Appeals held that whether Alexander reasonably relied upon Feeley was a question of fact to be determined on remand.

There is no question of fact concerning whether Alexander relied on Feeley because Alexander testified he "didn't know anything about Charles [Feeley] at the time [of the closing]." (App. 144, Alexander's Dep. p. 134, lines 15-16). Rather, he testified "Mario [Inglese] just told me *later* that Charles [Feeley] did his title work for him." (App. 144, Alexander's Dep. p. 134, lines 20-21) (emphasis added).

Before the appeal, Alexander repeatedly claimed he hired Inglese and did not know anything about Feeley before the closing. Consistent with this,

Feeley never claimed he worked for Alexander or even Johnson. Instead, he testified the abstract was completed for Inglese. (App. 128, Feeley Aff. ¶2).

The only person Alexander pleaded he had a right to rely upon was Inglese, whom he hired. Alexander pleaded, “Inglese owed...Alexander a duty of care to ensure that information communicated to him was accurate, complete and truthful and...Alexander had a right to rely on the representations of Inglese.” (App. 46, Alexander Cross-Claim Against Inglese, ¶ 76) (emphasis added).

As Alexander admitted he had the duty to perform the title exam and he hired Feeley, the trial court properly found Alexander “or his agent” failed to determine that public records showed the problem. (App. 15, Order). “It was the failure to discover and properly act upon public records that results in Alexander being negligent and liable to Johnson.” *Id.* Further, it is immaterial whether Alexander “reasonably relied” on Feeley, Inglese or anyone else because it was Alexander who owed Johnson the duty of care and it is Johnson to whom Alexander is liable.

F. JOHNSON ESTABLISHED THE STANDARD OF CARE, THE BREACH AND RESULTING DAMAGE WITH EXPERT TESTIMONY, ALEXANDER'S JUDICIAL ADMISSIONS AND DEPOSITION TESTIMONY

Alexander argues Johnson “failed to establish the standard of care for a closing attorney in this case” and that her expert admitted that Alexander did not violate the standard of care. (*See e.g.* Resp. Brief, pp. 11, 16 and 19).

The trial court correctly held Johnson’s expert was competent and that he stated the standard of care and departures resulting in damage to Johnson.

(App. 16). Johnson’s expert, a real estate attorney, testified as follows:

Q ... Mr. Alexander’s conduct fell below the applicable standard of care and this failure caused Ms. Johnson to lose title on property, correct?

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

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

A Ultimately, it was the failure to discover the tax sale...

(App. 154, lines 1-8).

A ... I believe a proper title exam should discover that tax sale had occurred.

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

A Should and could have. Yes. I’ll go with both of those.

(App. 156, lines 13-19).

The trial court properly recognized Johnson established the standard of care, the departure and resulting harm with her own expert closing attorney. (App. 16). The trial court properly held Alexander, as a professional defendant, could and did establish the standard of care as well. (App. 15-16).

Further, Alexander also admitted causation by agreeing there was harm resulting from the negligence of “failing to perform a thorough and proper title examination...” (App. 47, Alexander Cross-Claim Against Inglese, ¶ 82). Alexander also pleaded that 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.” (App. 17, citing Alexander’s Answer and Cross-Claim. *See also*, App. 15, Order n. 4.)

Based on these admissions and other undisputed facts, the trial court properly determined “[i]t was the failure to discover and properly act upon public records that results in Alexander being negligent and liable to Johnson.” (App. 15). The trial court held partial summary judgment as to liability was proper and the amount of damages resulting from her loss of title was to be determined.

Johnson established the standard of care, the breach and resulting harm with competent expert testimony and Alexander’s admissions.

G. LACK OF FRAUD, LACK OF FAULT AND LACK OF RECALL BY FEELEY

Alexander's additional arguments are irrelevant or without merit.

First, as to fraud, the trial court disregarded Alexander's suggestion of fraud and that determination was not appealed. The trial court found Alexander's claims were "unsupported and bald assertions of fraud based on inadmissible documents..." (App. 17). Further, fraud was not pleaded by Alexander as a defense. (App. 16, Order).

Second, as to Johnson's alleged fault, Alexander agreed Johnson was not at fault when he stated "Johnson was put into this situation through no fault of her own..." (App. 12, Order citing Alexander's Letter dated July 13, 2009). Johnson's failure to make payments months *after* she lost title to her property did not result in her losing title to the property in the first place. The trial court recognized that "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. Whether she stopped paying on a note in April of 2007 is irrelevant as to Alexander's negligence in September of 2006." (App. 17-18).

Third, the trial court properly found that the affidavit Alexander provided from Feeley was not admissible and did not create questions of fact about the propriety of the title exam because the witness could "not recall

the details from this title examination” and only suggested what he usually did. (App. 11, Order n. 1) Feeley did not even attach the alleged “title work” or “summary sheet” referenced in his affidavit for the trial court to see.

The trial court properly found Alexander “offered no admissible evidence to support” his assertion that the assumption that taxes were paid in the current year meant taxes for the previous year were paid. (App. 11, Order n. 1). The determination of inadmissibility was not appealed.

As discussed in depth in Petitioner’s brief, allowing an attorney to escape liability for an essential task of the representation he delegates to someone else is bad law and bad policy. The various assertions claimed by Alexander about Johnson in this Court do not relieve him of liability.

II. CONCLUSION

Alexander was Johnson's closing attorney. He had the duty to examine title as part of the closing process. Public records were missed as part of the title examination Alexander was responsible to perform. The trial court properly determined that Alexander "or his agent" is responsible to his client for the negligent acts of those with whom he delegates essential tasks. (App. 15, Order, p. 9.) The trial court correctly determined partial summary judgment was proper, as the admissions, pleadings and expert testimony did not create a question of fact as to Alexander's liability.

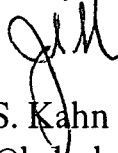
On appeal, Alexander should not be allowed to create issues of fact by misstating and ignoring the facts to which he pleaded, swore and testified.

The Court of Appeals committed error by improperly creating an issue that was not before the trial court: If Alexander can show he "reasonably relied" on Feeley for the title exam, Alexander may not be liable to Johnson.

As shown above, Alexander could not have relied upon Feeley and as to Alexander, the attorney who was to supervise the entire process, "[t]he buck stops with the closing attorney." *Inglese v. Beal*, 403 S.C. 290, 295, 742 S.E.2d 687, 690 (Ct. App. 2013).

For reasons articulated here and in Petitioner's Brief, the Court of Appeals should be reversed.

Respectfully submitted,



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March 4, 2015

STATE OF SOUTH CAROLINA
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Appeal from Charleston County
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of whom Stanley E. Alexander is theRespondent.

v.

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

v.

Charles Feeley.....Third Party Defendant.

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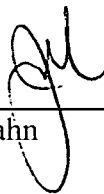
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I, Justin S. Kahn, do hereby affirm that on March 4, 2015, I served one copy of the Reply Brief of Petitioner as Provided by Rule 242(i), SCACR on the following named individuals by placing a copy in the United States Mail, first class, postage prepaid addressed to the following:

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S.C. Supreme Court

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 Reply Brief of Petitioner, along with Proof of Service. The enclosed original copy of the Reply 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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