The Supreme Court of South Carolina

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August 14, 2015

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Amber Johnson v. Stanley Alexander
Lower Court Case No. 2009CP1006529
Appellate Case No. 2014-001167

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Joel W. Collins, Jr., Esquire
Robert Fredrick Goings, Esquire
Justin S. Kahn, Esquire
Mary Leigh Arnold, Esquire
Wes Baker Allison, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amber Johnson, Petitioner,

v.

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

v.

Mario S. Inglese and Mario S. Inglese, PC, Third Party Plaintiffs,

v.

Charles Feeley, Third Party Defendant.

Appellate Case No. 2014-001167

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27553
Heard June 2, 2015 – Filed July 29, 2015

REVERSED AND REMANDED

Mary Leigh Arnold, of Mary Leigh Arnold, PA, of Mt. Pleasant; Justin S. Kahn and Wes B. Allison, both of Kahn Law Firm, LLP, of Charleston, for Petitioner.

Joel W. Collins, Jr., of Collins & Lacy, PC, of Columbia, and Robert F. Goings, of Goings Law Firm, LLC, of Columbia, for Respondent.

JUSTICE HEARN: In this attorney malpractice case, Amber Johnson alleges her closing attorney, Stanley Alexander, breached his duty of care by failing to discover the house Johnson purchased had been sold at a tax sale the previous year. The trial court granted partial summary judgment in favor of Johnson as to Alexander's liability. On appeal, the court of appeals held Alexander could not be held liable as a matter of law simply because the attorney he hired to perform the title work may have been negligent. Instead, the court determined the relevant inquiry was "whether Alexander acted with reasonable care in relying on [another attorney's] title search"; accordingly, it reversed and remanded. *Johnson v. Alexander*, 408 S.C. 58, 64, 757 S.E.2d 553, 556 (Ct. App. 2014). We disagree and find the trial court properly granted summary judgment as to liability. We therefore remand to the trial court for a hearing on damages.

FACTUAL/PROCEDURAL BACKGROUND

Alexander acted as Johnson's closing attorney when she purchased a home in North Charleston on September 14, 2006. The title examination for the home had been performed by attorney Charles Feeley at the request of Johnson's previous attorney, Mario Inglese. Alexander purchased the title work from Inglese and relied on this title exam in concluding there were no back taxes owed on the property. Thereafter, Johnson learned the house had been sold at a tax sale and she did not have title to the property. In fact, the property had been sold October 3, 2005, almost a year prior to Johnson's purchase. Because of the title issue, the mortgage payments on the home ceased and the property eventually went to foreclosure.

Johnson brought this cause of action for malpractice, breach of fiduciary duty, and breach of contract against Alexander and Inglese. Specifically, Johnson alleged the attorneys owed her a duty to perform a complete title exam on the

property to ensure she received good and clear title.

Johnson moved for partial summary judgment as to Alexander's liability. At the hearing, Johnson submitted the affidavit of Mary Scarborough, the Delinquent Tax Collector for Charleston County. She attested that she "had direct and personal knowledge that information regarding delinquent taxes for real properties located in Charleston County, South Carolina, was readily and publicly available in July, August and September of 2006" in the Office of the Register Mesné Conveyance for Charleston County via a mainframe database. Furthermore, she stated that the Delinquent Tax data for Charleston County real properties has been publicly available on a mainframe database since 1997, when she helped design the system currently in use.

Alexander presented an affidavit from Feeley stating that although he could not remember the specific details of this title exam, he conducted all his examinations the same. Feeley further detailed his process at length, explaining his reliance on the Charleston County Online Tax Systems and his practice of searching back ten years of tax payments. He indicated his notes showed he found no back taxes due or owing. Feeley also attested that a prior tax sale would not have been disclosed in the chain of title for this property or made publically available in the RMC office at the time of the title examination and closing in 2006 because the tax sale deed was not recorded until December 12, 2006.

The circuit court granted Johnson's motion as to Alexander's liability. The court relied heavily on Alexander's pleadings and admissions in his deposition that as a closing attorney he had a responsibility to ensure marketable title. Additionally, the court found Alexander had proximately caused Johnson's damages, but left the determination of the amount for a later hearing.

On appeal, the court of appeals reversed and remanded, holding the circuit court incorrectly focused "its inquiry on whether an attorney conducting a title search on this property should have discovered the delinquent taxes from 2003 and 2004 and the tax sale from 2005." *Johnson*, 408 S.C. at 62, 757 S.E.2d at 555. Instead, the court of appeals held the proper question was "whether Alexander acted reasonably under the existing circumstances in relying on the title search performed by Feeley." *Id.* at 63, 757 S.E.2d at 555. Finding there was a genuine issue of material fact as to whether Alexander acted reasonably, the court of appeals reversed the grant of summary judgment and remanded for trial. *Id.* at 64,

757 S.E.2d at 556. This Court granted certiorari to review the opinion of the court of appeals.

ISSUE PRESENTED

Did the court of appeals err in reversing the circuit court's grant of summary judgment and remanding the case for trial?

STANDARD OF REVIEW

When reviewing a grant of summary judgment, this Court applies the same standard as the circuit court pursuant to Rule 56(c), SCRCP. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the Court views the evidence and all reasonable inferences that may be drawn in the light most favorable to the non-moving party. *Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 81–82, 708 S.E.2d 745, 748 (2011). To withstand a summary judgment motion in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

LAW/ANALYSIS

Johnson argues the court of appeals erred in reversing the circuit court's grant of summary judgment because it misapprehended the proper standard of care. Specifically, Johnson argues the court of appeals erred in holding the requisite inquiry is whether an attorney reasonably relied on another attorney's work where that work is outsourced. Johnson contends that an attorney should be liable for negligence arising from tasks he chose to delegate unless he has expressly limited the scope of his representation. We agree.

In a claim for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). 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. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000).

In determining the scope of Alexander's duty, we accept his consistent characterization of this responsibility—ensuring Johnson received good title. In her complaint, Johnson alleged "[d]efendants had professional duties to ensure that Plaintiff was receiving good and clear title to the subject property free of any encumbrances, liens, or clouds on title before conducting the closing and if there was a problem after the closing, to correct said deficiencies and/or advise Plaintiff how to correct said deficiencies." In Alexander's answer he *admitted* those allegations. Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions. *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("[T]he general rule[is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible."). Additionally, during Alexander's deposition, he plainly conceded he owed a duty to Johnson to have clear title:

> Q. Alright. And you were hired, or you were her attorney for this closing? Right?
>
> A. Correct.
>
> Q. And you had responsibility to make sure that she got good and marketable title? Correct?
>
> A. Correct.
>
> Q. And that's one of the responsibilities of a lawyer handling the closing, representing the purchaser? Right?
>
> A. Correct.

Alexander cannot now assert his duty was anything other than what he has admitted—that he ensure good and clear title.

However, even absent Alexander's admissions, we find the court of appeals erroneously equated delegation of a task with delegation of liability. Certainly, Feeley's negligence is the issue here, but that does not displace Alexander's ultimate responsibility. While an attorney may delegate certain tasks to other attorneys or staff, it does not follow that the attorney's professional decision to do so can change his liability to his client absent that client's clear, counseled consent. *See* Rule 1.8(h), RPC, RULE 407, SCACR ("A lawyer shall not. . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."). Thus, Alexander owed Johnson a duty and absent her agreement otherwise, he was liable for that responsibility regardless of how he chose to have it carried out.[1]

We therefore agree with Johnson that an attorney is liable for negligence in tasks he delegates absent some express limitation of his representation. Stated another way, without an express limitation in representation, attorneys cannot delegate liability for tasks that are undertaken in carrying out the duty owed the client. *See* 7A C.J.S. Attorney & Client § 289 ("Since an attorney has, in general, no authority to employ another attorney to attend to the matters in which the first attorney has been retained, it follows that, if the first attorney does entrust to another the performance or prosecution of matters entrusted to him or her, the first

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[1] Alexander separately alleges that because Johnson knew he did not personally perform the title examination, its accuracy was not within the scope of his representation of her. We find this contention unpersuasive. Pursuant to Rule 1.2(c), of the Rules of Professional Conduct, Rule 407, SCACR, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." In determining whether an attorney obtained informed consent, comment 6 to Rule 1.0 of the Rules of Professional Conduct, Rule 407, SCACR, clarifes that "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." Even assuming Johnson knew Alexander purchased the title work from another attorney, this does not alleviate Alexander's responsibility to ensure good title. It would only indicate she is aware he has delegated a task.

attorney becomes liable to the client for any negligence or wrongdoing on the part of the other attorney."). A holding to the contrary would effectively allow an attorney to independently limit the scope of his representation through the manner in which he performs his duties instead of being bound by what the client understands his responsibilities to be.

Applying this standard to the facts, we find the grant of summary judgment was proper because there is no genuine issue of material fact as to liability. The circuit court relied on Scarborough's affidavit in concluding Johnson "proved to the Court what the public records reflected at the time of closing—taxes for the Property were delinquent for the tax years 2003 and 2004 and the Property had been sold on October 5, 2005 at a tax sale." Although Alexander submitted an affidavit by Feeley stating he would have discovered the information if it was public, we agree with the circuit court's ultimate conclusion that there was no issue of fact. Feeley admitted he did not remember the specifics of that transaction and provided no documentation supporting his assertion that he performed a ten year search and found no notice of the sale.

Furthermore, we find the circuit court properly held there was no genuine issue of material fact as to proximate cause. Because of Alexander's failure to discover the tax sale, Johnson did not receive marketable title—or any title—to the property she purchased. She was therefore unable to sell or rent the property. Alexander's arguments that the property foreclosure was due to Johnson's own negligence in failing to pay the mortgage will certainly be considered during the hearing on damages; however, that allegation does not alter the fact that Johnson's purchase of the property that had already been sold was a direct result of his failure to ensure she received good title.

CONCLUSION

Based on the foregoing, we reverse the opinion of the court of appeals and hold an attorney is liable for negligence in tasks he chooses to delegate absent an express limitation of his representation. Finding Alexander breached his duty and damages resulted, we reinstate the grant of partial summary judgment as to Alexander's liability and remand for a determination of damages.

TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amber Johnson, Respondent,

v.

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

Of whom Stanley E. Alexander is the Appellant.

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

v.

Charles Feeley, Third-Party Defendant.

Appellate Case No. 2011-196007

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5208
Heard October 16, 2013 – Filed March 19, 2014

REVERSED AND REMANDED

Joel W. Collins, Jr., Collins & Lacy, P.C., of Columbia, and Robert Fredrick Goings, Goings Law Firm, LLC, of Columbia, for Appellant.

Justin S. Kahn, Kahn Law Firm, LLP, of Charleston, and Mary Leigh Arnold, Mary Leigh Arnold, P.A., of Mt. Pleasant, for Respondent.

FEW, C.J.: This is an appeal from an order of partial summary judgment in a legal malpractice action in which the circuit court ruled attorney Stanley E. Alexander breached his duty to his client Amber Johnson and proximately caused her damages in connection with a real estate closing. We reverse and remand for trial.

I. Facts and Procedural History

In 2006, Johnson entered into a contract to purchase real estate in North Charleston from Carla Anderson, and retained attorney Mario Inglese to close the transaction. Inglese contracted with attorney Charles Feeley to perform a title search on the property. Due to a scheduling conflict, Inglese was unable to conduct the closing and Alexander acted as the closing attorney. Alexander paid Inglese for Feeley's report of the results of his title search. The report indicated all taxes due on the property had been paid. In actuality, Anderson had not paid the 2003 and 2004 taxes, and in October 2005, the Charleston County delinquent tax collector seized the property from Anderson and sold it at a tax sale to Westwood Properties, LLC.

Johnson sued Alexander, Inglese, and Inglese's law firm. Alexander admitted an attorney-client relationship existed, and thus he owed a duty of reasonable care to Johnson, but denied he breached his duty. Alexander cross-claimed against Inglese and his law firm, claiming he reasonably relied on the title search Inglese provided to him. Inglese cross-claimed against Alexander and filed a third-party complaint against Feeley. After discovery, Johnson filed a motion for partial summary judgment against Alexander. The circuit court granted the motion, finding as a matter of law Alexander breached his duty to Johnson and caused her damages in an amount to be determined at trial.

II. Standard of Review

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRCP." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (citation omitted). Rule 56 provides the trial court shall grant summary judgment if "there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

III. Analysis

The attorney-client relationship is fiduciary in nature, *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011), and requires the attorney "to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). An attorney is not a guarantor of a favorable result to the client, but is liable only if he fails to meet the appropriate standard of care. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (stating "[a] plaintiff in a legal malpractice action must establish four elements," including "a breach of duty by the attorney"); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010) (citing language quoted above from *Holy Loch Distributors* as "[t]he correct standard of care" for attorneys). In the specific context of a real estate closing, "[t]he fact that an attorney is incorrect as to the ultimate marketability of a title to real estate does not establish that he was negligent." *Bass v. Farr*, 315 S.C. 400, 404, 434 S.E.2d 274, 277 (1993); *see also Jennings v. Lake*, 267 S.C. 677, 680, 230 S.E.2d 903, 904 (1976) (stating "an attorney, who *negligently* certifies a title to be good, is liable to his client for the damages sustained as a proximate result of such *negligence*" (emphasis added)). Rather, a plaintiff alleging legal malpractice arising out of a real estate closing must establish the standard of care for the particular situation and prove the attorney breached the standard. *Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745.

The circuit court focused its inquiry on whether an attorney conducting a title search on this property should have discovered the delinquent taxes from 2003 and 2004 and the tax sale from 2005. That inquiry, in turn, focused on whether the information was in fact reflected in the public records of Charleston County when Feeley performed the title search in August 2006. On this question, Johnson submitted affidavits from the interim Delinquent Tax Collector and a non-lawyer in the business of conducting title searches, both of whom stated the information

was publicly available at that time. The circuit court ruled based on these affidavits that "[i]n August 2006, . . . Charleston County Delinquent Tax records showed the property taxes were delinquent in the years 2003 and 2004, and that the Property had been sold at a tax sale on October 3, 2005," and "the public records concerning these issues were available . . . by using the Charleston County Online Tax System."

This would be the correct focus if the issue were the liability of the attorney who performed the title search. Alexander, however, did not perform the title search. To determine Alexander's liability, the issue is not whether a reasonable attorney conducting a title search on the property would have found the information, but whether Alexander acted reasonably under the existing circumstances in relying on the title search performed by Feeley. The circuit court correctly recognized this as the issue, stating, "The standard of care for a title examination is not the issue. The issue is the standard of care for an attorney conducting a real estate closing." The circuit court noted "a closing lawyer may rely upon the title examination performed by others," and correctly stated "the closing attorney must not be negligent" in doing so.[1] The court went on to conclude:

> Alexander was negligent in not ensuring good and marketable title because he (or his agent) failed to determine that public records showed the delinquent taxes on the property . . . and that the property had been sold at a tax sale . . . . It was the failure to discover and properly act upon public records that results in Alexander being negligent and liable to Johnson.

The court's correct identification of the issue—whether Alexander acted with reasonable care in relying on Feeley's title search—is inconsistent with its ruling that Alexander is liable as a matter of law for Feeley's failure to discover what was in the public records. Feeley is the attorney who failed to discover the contents of the public record. If Feeley was negligent, Feeley is liable. For Alexander to be liable, however, his reliance on Feeley, or his decision not to do the title search himself, must have been negligent. As to Alexander's liability, Johnson was not entitled to summary judgment. First, Johnson offered no evidence as to the standard of care a real estate closing attorney must meet in relying on a title search

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[1] The court actually stated "the closing attorney must not be negligent in ensuring the purchaser gets good and marketable title to the property." We address the significance of this language below.

performed by another attorney. *See Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745 (stating "a plaintiff in a legal malpractice action must establish this standard of care by expert testimony"). Second, the circuit court recognized "a closing attorney may rely upon the title examination performed by others," and yet held Alexander liable as a matter of law because the "other" attorney did not discover the information about the delinquent taxes and sale.

We find the evidence relating to the correct issue—whether Alexander acted with reasonable care in relying on Feeley's title search—viewed in the light most favorable to Alexander, leaves a genuine issue of material fact for trial and thus precludes judgment for Johnson as a matter of law.

The circuit court ruled, and Johnson argues on appeal, Alexander admitted his standard of care when Alexander stated Johnson "was supposed to have good and marketable title," and he "had a duty or responsibility to make sure that she got the property free and clear with good and marketable title." Alexander also stated in the same discussion, however, that his responsibility was "to close [Johnson's] transaction for her to the best of my abilities and based on the information I had at the time." We have no doubt these statements by Alexander will be important at trial. For summary judgment purposes, however, we do not believe Alexander's statements can be fairly interpreted as a concession that he had an absolute responsibility to deliver good and marketable title. Rather, considering Alexander's statements in the light most favorable to him, he conceded only that he must act with reasonable care in closing the transaction, including his decision to rely on Feeley's title search and not do a title search himself.

Johnson also argues Alexander is liable because Feeley was Alexander's agent. However, the circuit court did not grant partial summary judgment on the basis of agency. Though the circuit court made a reference to Feeley being Alexander's agent, the court made no findings as to whether Johnson established the elements of agency as a matter of law. *See generally Jamison v. Morris*, 385 S.C. 215, 221-22, 684 S.E.2d 168, 171 (2009) (defining agency); *Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) (defining actual authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (defining apparent authority). In most situations, "[a]gency is a question of fact," *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984), and "questions of agency ordinarily should not be resolved by summary judgment." *Fernander v. Thigpen*, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (citation omitted). Our supreme court has not addressed whether or under what circumstances an agency

relationship exists as a matter of law between a real estate closing attorney and a person performing a title search, and we decline to address the issue here. Whether Feeley was Alexander's agent is a question to be resolved on remand.

IV. Conclusion

We hold Alexander cannot be liable as a matter of law simply because Feeley failed to discover the unpaid taxes and tax sale. The decision of the circuit court is **REVERSED** and the case is **REMANDED** for trial.

KONDUROS, J., concurs.

PIEPER, J., concurring in result.

I concur in the result reached in the majority opinion to reverse the grant of summary judgment and to remand. I believe a material dispute exists as to the nature of any agency relationship between the attorneys involved. I also believe a material dispute exists as to whether Johnson, as the client, authorized the use of, or agreed to rely upon, the title work of any other attorney. *See Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed."); *Simmons v. Berkeley Elec. Co-op. Inc.*, 404 S.C. 172, 178, 744 S.E.2d 580, 584 (Ct. App. 2013) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").