

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2009-CP-10-06529

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SC Court of Appeals

Amber Johnson.....Respondent,

v.

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

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

v.

Charles Feeley.....Third Party Defendant.

INITIAL BRIEF OF APPELLANT STANLEY E. ALEXANDER

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STATEMENT OF THE CASE

This appeal follows a grant of summary judgment against Appellant Stanley Alexander (“Alexander”) for legal malpractice.

On October 15, 2009, Respondent Amber Johnson (“Johnson”) filed suit against Alexander and Mario S. Inglese and Mario S. Inglese, PC (collectively “Inglese”) stemming from a real estate closing that occurred in September 2006. Johnson alleged that Alexander failed to discover or disclose that the subject property was subject to a tax sale on October 5, 2005, for delinquent taxes. Alexander answered the complaint denying the allegations, and in the alternative pursuant to Rule 8, SCRCP, asserted cross claims against Inglese. Inglese answered the complaint and joined a third-party defendant, Charles Feeley (“Feeley”).

On January 14, 2011, Johnson filed a motion for partial summary judgment as to liability of Alexander. In moving for partial summary judgment, Johnson only attached excerpts of deposition testimony of Alexander and did reference the testimony of Johnson’s retained expert witness, Attorney John Brown (“Brown”). In opposition to the motion, Alexander submitted an affidavit, excerpts of deposition testimony, and documentation produced in discovery in opposition to this motion.

On May 9, 2011, the motion was heard by Judge J.C. Nicholson, Jr.¹ After hearing arguments, Judge Nicholson recessed the hearing and requested the parties submit additional information concerning notice to the public of the tax sale. (Trs. p. 4-5). The hearing was scheduled to resume May 26, 2011. Approximately thirty-six (36) hours before the hearing was reconvened, Johnson submitted affidavits of (a) Mary Scarborough, Delinquent Tax Collector of Charleston County; and (b) Todd Balish, a title examiner in Charleston County. Ms.

¹ A transcript from this hearing could not be generated because South Carolina Court Administration and the court reporter could not locate the records and tape from this proceeding.

Scarborough and Mr. Balish were not previously named as witnesses in this case. In Mr. Balish's Affidavit, he provided expert opinions, although he was never previously identified as an expert. Prior to the rescheduled hearing, Alexander presented the court with a Memorandum in Opposition to Motion for Partial Summary Judgment. It included the affidavit of Third Party Defendant Feeley along with deposition testimony of witnesses. (Memo in Opp.).

At the second hearing, Alexander objected to Johnson submitting the new affidavits of Ms. Scarborough and Mr. Balish, because pursuant to Rules 56 and 6, SCRCP, Johnson, as the moving party, was required to submit this evidence at the time she filed for summary judgment. (Trs. p. 10-30; Collins Ltr. May 25, 2011; Kahn Ltr. May 24, 2011). Alexander also moved for a continuance to allow him the opportunity to depose Ms. Scarborough and Mr. Balish. Judge Nicholson denied Alexander's motion for a continuance, but held that he would not consider any "opinions" offered by Mr. Balish. (Trs. p. 23-24, 30). Judge Nicholson afforded the parties ten (10) days following the hearing to submit "counter-affidavit[s]," but he denied Alexander's motion for a continuance for the purpose of conducting "deposition[s] and discovery" related to these two new witnesses. (Trs. p. 46).

On July 6, 2011, Judge Nicholson issued a written order denying Alexander's request for a continuance and granting Johnson's Motion for Partial Summary Judgment. As this case appeared on the trial roster on or about the same time Judge Nicholson's order was issued, Alexander did not have the opportunity to submit a Rule 59(e) motion. This appeal was filed.

STATEMENT OF FACTS

This is a legal malpractice action arising from a real estate closing. On September 14, 2006, Johnson purchased a single-family home located at 2640 Ranger Drive in North Charleston, South Carolina. Alexander served as the closing attorney. Johnson alleges that Alexander failed to ensure that Johnson purchased the property free and clear with good and marketable title. (Comp. ¶ 8, 16; MSJ p. 2-3). Johnson alleged her damages were her inability to “rent or resale the house and property.” She also sought to recover the costs and expenses in defending a foreclosure of the property. (MSJ p. 3-4).

(a) Factual Dispute Concerning the Title Examination and Closing

Inglese was originally scheduled as the closing attorney, but due to a scheduling conflict, Johnson requested Alexander perform the closing. (Alex. Aff. ¶ 2). Alexander was told that a title examination had been performed by Feeley, an attorney in Charleston who limits his practice to title work. Feeley had prepared a title report showing no encumbrances or liens existed on the property. (Id. at ¶ 2, ex.1). The examination report also reflected all real estate taxes were current and up to date. (Id.). Documentation from the Charleston County Online Tax System in August 2006 showed all taxes were current, paid, and there was no taxes outstanding. (Id. at ¶ 8-9, ex. 2-3). The escrow ledger from the seller’s mortgage company also showed that property taxes were paid each year to the Charleston County Tax Assessor’s Office. (Id., ¶ 10, ex. 5).

Approximately four (4) months *after* the closing, a tax deed was recorded on December 12, 2006, conveying the property to Westwood Properties, LLC, following a tax sale by the Delinquent Tax Collector for Charleston County. (Tax Deed). The sale was purportedly the result of nonpayment of 2004 Charleston County real property taxes. At the time of the title examination and closing, the prior tax sale would not have been revealed in the chain of title for

this property or made publicly available in the Charleston County Register of Mesne Conveyances (RMC) Office. (Feeley Aff., ¶ 5). No notice of tax sale or *lis pendens* was filed as a matter of public record that would have put Alexander or anyone performing a title search notice of this pending, unrecorded tax sale. (Id.)

As to the standard of care employed in examining this title, Feeley testified he acted in conformity with the same routine practice and custom he always followed when performing title examinations. (Id., ¶ 2). As part of his routine practice, Feeley reviewed the Charleston County Online Tax System website. He performed a “Tax Records Search” query by “Parcel ID (TMS).” The first screen that appeared was a ten (10) year history of the property’s tax payments. Each line in the history contains a notation that the taxes are either current or delinquent. If a notation was made indicating that the taxes are delinquent, Feeley’s customary practice was to conduct further inquiry. Feeley would clearly note on the title abstract any evidence of delinquent taxes or a tax sale. For the subject property, Feeley’s review of the ten year history of the tax records contained on the Charleston County Online Tax System website did not reveal the existence of any recorded back taxes or tax sale. (Id., ¶ 2-3).

Alexander testified that one of the duties of a closing attorney is to attempt to convey good and marketable title “according to the information [he] had at the time [of the closing].” (Alex. Depo. p. 16-17, 99). He explained, as to information concerning the title to Johnson’s property, Alexander “had a duty to give [Johnson] what [he] had as to the best of [his] knowledge at the time.” (Id. p. 99, - p. 102, ll. 7-12). Alexander testified he did not have the ability to determine in September 2006 that the property was subject to a pending tax sale. (Id. p. 101). In his affidavit, Alexander set forth in detail the documentation and information he relied upon in reviewing the title. He testified the seller never disclosed to him that property taxes were delinquent or that a tax sale had occurred on the property. (Alex. Aff. ¶ 5). He

further testified that prior to the closing “evidence of a tax sale or information that would place a person on inquiry notice of delinquent taxes was *not* filed with the Charleston Register of Deeds Office.” (Id. ¶ 6). “The title examination revealed no property tax lien existed and that all taxes were current and paid,” showing that the 2005 property taxes were paid on December 13, 2005, and all back taxes were paid. (Id. ¶ 7, Ex. 1). Statements from the Charleston County Tax Assessors’ Office on August 10, 2006, and September 11, 2006, confirmed that property taxes were “Current(Paid)” and that no back taxes were owed or due, with a past due amount of “0.00.” (Id. ¶ 8-9, Ex. 2, 3). Furthermore, based on documentation from the seller’s mortgage servicer, the 2004 and 2005 property taxes were paid from the escrow account. (Id. ¶ 10, Ex. 4, 5).

Alexander attested that “based on the results of the title examination and in particular, the office of public records of the Charleston County Tax Assessor’s Office, [he] understood that no back taxes were due or owing on 2640 Ranger Driver at the time of the closing.” (Id. ¶ 12). In his professional opinion, Alexander testified he “handled this closing with the generally accepted standard of care employed by attorneys performing real estate closings in Charleston County, South Carolina.” (Id. ¶ 13). He further opined that he “acted with the degree of knowledge, care, and skill ordinarily possessed by lawyers in good standing under the same or similar circumstances and that [he] followed the generally accepted practices and procedures in the legal profession.” (Id.).

Johnson employed John Brown (“Brown”), an attorney in Charleston, South Carolina, to serve as her liability expert.² Brown began conducting real estate closings in late 2003. (Brown

² Johnson did not rely on Brown’s testimony in support of her summary judgment motion. This is because Brown’s testimony is *more favorable* to Alexander than Johnson’s. Brown’s testimony explicitly supports that Alexander acted reasonably, or at the very least, that a genuine issue of fact remains for a trier of fact.

Depo. p. 33). Brown does not perform title examinations, and conceded that he is “[un]qualified” to perform them. (Id. at p. 43). He is unfamiliar with how public records for real property are kept. (Id. p. 100). In this case, Brown could not identify any particular measure that a reasonable attorney in a similar position could have undertaken to discover the title irregularity for this property. He testified any opinion as to the existence of documentation that would place a reasonable attorney on notice of this title irregularity would be speculation. (Id. p. 108-110). Brown failed to identify the correct standard of care, or any specific act or omission of Alexander. Rather, in Brown’s opinion, a closing attorney has the “absolute duty to ensure that clear and marketable title is conveyed to the purchaser,” and the “mere failure to convey clear and marketable title is conduct that falls below the applicable standard of care.”³ (Id. p. 69-72). He believes the responsibility for conveying perfect title “ultimately...falls at the feet of the closing attorney.” (Id.). Brown admitted if he had served as the closing attorney for this transaction, he would not have discovered the unrecorded tax sale or the issue of delinquent taxes on the property. (Id. p. 110-111).

Johnson submitted surprise affidavits of Ms. Scarborough and Mr. Balish without affording Alexander the opportunity to depose these new witnesses. Ms. Scarborough testified generally about how the Delinquent Tax Office informs the public about the status of taxes regarding real property in Charleston. In her opinion, she believed that information related to the tax sale could have been publicly available prior to the closing. Ms. Scarborough rendered her opinion based on documentation that she accessed on May 18, 2011, and attached to her affidavit. (Scarborough Aff.). She presented no documentation which was publicly available in 2006, and she could not testify as to what Feeley actually saw when he conducted the title examination on the property. In Mr. Balish’s affidavit, he testified that he conducted a title

³ As discussed below, Brown’s opinion is an incorrect statement of the law.

examination on November 15, 2007, over a year after the closing. (Balish Aff.). Mr. Balish testified about what the tax records showed on November 15, 2007, but since he did not conduct the title examination in 2006, he could not testify as to what the online system showed when Feeley conducted the title examination.

(b) Factual Dispute of Whether Johnson Has Suffered Damages.

Johnson alleged her damages were the inability to “rent or resell the house and property” and the costs and expenses incurred in defending a foreclosure action on the property. (MSJ p. 3-4). Johnson provided no evidence that she was unable to rent or resell her property, and further, she presented no evidence she incurred any costs or expenses in defending the foreclosure action. Johnson, instead, relied on hypothetical questions and answers posed to Alexander at his deposition. Those hypothetical questions lacked any basis in fact. (MSJ p. 3-4)

Johnson purchased the subject property for \$75,000 with no down payment and 100% lender financing. (Memo in Opp. p. 1; Johnson Depo. p. 98-99). In order to purchase the property, Johnson submitted a mortgage application that contained material inaccuracies. Among other misrepresentations, the application falsely stated she would be an owner-occupant of the property. Owner-occupants are preferred borrowers. Under the terms of the note and mortgage, these misrepresentations operate as a default under the loan. The Mortgage states:

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

(Mortgage, p 8). Johnson testified she was living in Florida, and had no intention of occupying, establishing, or using the property as her residence. (Johnson Depo. p. 99). Alexander argues

that, but for Johnson's own conduct, she would not have been a party to this real estate transaction in the first place. (Memo in Opp. p. 12-14).

Further, Alexander presented evidence that Johnson has not actually suffered the damages she alleged in this case. Johnson testified she *actually rented* the property for \$700 per month from October 2006 until March 2009, receiving over \$20,000 in rental payments from the tenant. (Johnson Depo. p. 160-161, 176; M. Brown Depo. p. 35-58). Moreover, Johnson received an additional payment of \$9,608.08, representing half of the overage from the tax sale, by merely having an interest in the property.⁴ Alexander presented evidence that his alleged actions were not the cause of the foreclosure action. Johnson testified that she discontinued paying on her note and mortgage until April 2007. (Johnson Depo. p. 161-163). She *admits* that her failure to make the monthly payment resulted in a breach of the terms of the note and mortgage, giving rise to the foreclosure action. (p. 98-99). Johnson received a letter from the mortgagor warning that the foreclosure action was imminent if she did not "bring the loan current." (Id.) Her failure to make mortgage payments is inexplicable because during the time she ceased making mortgage payments, she continued to rent the property for \$700.00 per month, until March 2009. (Id. at 163, 176-177; M. Brown, p. 35, 58).

⁴ This Court can take judicial notice of this fact as set forth in the Order dated May 26, 2010, and Amended Order entered June 7, 2010, in *The Bank of New York Mellon as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2006- 23 v. Amber Johnson, et. al.*, 2009-CP-10-4588, as followed by a Consent Order entered January 25, 2012, in the matter of *The Bank of New York Mellon as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2006- 23 v. Amber Johnson, et. al.*, 2010-CP-10-4973. See Charleston County, Public Index, <http://jcmsweb.charlestoncounty.org/PublicIndex/PI Search.aspx> (last accessed Sept. 31, 2012). See *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (holding that courts "may properly take judicial notice of matters of public record").

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRPC. Edwards v. Lexington Cnty. Sheriff's Dep't, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010). "Rule 56(c), SCRPC, provides that summary judgment may be granted if a review of all documents submitted to the court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Bass v. Gopal, Inc., 395 S.C. 129, 133, 716 S.E.2d 910, 913 (2011).

"Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." Id. Summary judgment should only be granted "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 654, 661 S.E.2d 791, 796 (2008). "Since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002).

LAW/ANALYSIS

I. THE TRIAL COURT ERRED IN FINDING THAT JOHNSON HAD PROVEN THE ELEMENTS OF LEGAL MALPRACTICE AS A MATTER OF LAW AND THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED.

The circuit court erred in granting summary judgment in favor of Johnson because a genuine issue of material fact existed on the issue of whether Alexander committed legal malpractice. To prevail in a claim for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. Smith v. Haynesworth, Marion, McCay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996). "A plaintiff in a legal malpractice action must generally establish the standard of care by expert testimony." Id. "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." Holy Loch Distributions, Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). In a legal malpractice action, "a court should never measure a professional's performance through the lens of hindsight. Although an attorney may be liable for damages to a client for failure to act with a reasonable degree of skill and care, this does not mean, however, that an attorney acts as an insurer of the outcome." Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 291, 701 S.E.2d 742, 750(2010) (citations omitted).

A. A Genuine Issue of Material Fact Exists Whether Alexander Breached the Standard of Care.

The trial court erred in finding that Alexander breached the standard of care as a matter of law. The question of breach of duty is a jury question. "Breach of duty is a fact question to be decided by the jury on the evidence presented in each case." Hatfield v. Van Epps, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004) (citations omitted); Singletary v. S.C. Dep't of

Education, 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994) (“The breach of a duty of due care is ordinarily a question of fact.”). To overcome summary judgment, Alexander was only required to show a mere scintilla of evidence that then was a dispute. Summary judgment must be denied when facts are in conflict or the inferences to be drawn can be disputed. Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294, 417 S.E.2d 631, 632 (Ct. App. 1992). “When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury.” Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006). The record before the court presents a genuine issue of material fact and precludes summary judgment.

In this case, Johnson alleges Alexander breached his duty because she did not receive the “property free and clear with good and marketable title.” (MSJ p. 2-3; Compl. ¶ 14-16, 24). The circuit court found that “Johnson established Alexander was negligent with more than reasonable certainty” based on the evidence before the court. (Order p. 8). The circuit court disregarded the summary judgment standard by attempting to weigh the competing evidence. The circuit court incorrectly accepted Johnson’s version of the facts and did not construe all inferences in favor of Alexander as the non-moving party.

The Order found that Alexander “admits he breached duties owed to Johnson.” (Order p. 7-9). This is flatly erroneous. Alexander has never admitted that he was negligent. Rather, he explained, “after this came to light we looked back and it appears the county had made no notes anywhere that [the property] had been sold at a tax sale. Plus, they were accepting current taxes and they don’t [accept current taxes] when back taxes are due. So something was not right [with the public records].” (Alex. Depo. p. 86-87). He explained that the county “didn’t make a note of it [and when] we go back and look at the back taxes and it says paid, period.” He testified the tax documentation in his possession at the closing “said paid...it didn’t say sold, it said paid...all

the tax records said paid.” (Alex. Depo. p. 100-101). Alexander testified he did not have the ability to determine in September 2006 that the property was subject to a pending tax sale. (Id. p. 101). Further, Alexander was asked in his deposition:

Q: Is it fair to say that as a result of your failure to determine anything to do with the tax sale that took place in 2005 that Mrs. Johnson had a cloud on her title?

[Mr. Goings: Object to the form of the question.]

A: No.

Q: And why do you say “no?”

A. Because I relied on the title work of a perfectly capable attorney.

Q: Alright. You agree that ultimately it’s the responsibility of the lawyer handling the closing to ensure that the papers, including the title work, is proper?

[Mr. Goings: Object to the form of the question.]

A. Well, unless you are doing to do the title again, I don’t know how you would do that. And I don’t know any lawyer who is going to check the title again after he paid for someone else to check the title.

In his affidavit, Alexander testified “prior to or at the time of the closing, evidence of a prior tax sale or information that would place a person on inquiry notice of delinquent taxes was **not** filed with the Charleston County Register of Deeds Office.” (Alex. Aff ¶ 6) (emphasis added). He explained, “the title examination revealed that no property tax lien existed and that all taxes were current and paid,” and provided written documentation in his file that substantiated that all past property taxes were paid. (Id. at ¶ 7-12). Based on this evidence, Alexander testified that he “handled this closing with the generally accepted standard of care employed by attorneys performing real estate closings in Charleston County, South Carolina,” and that he “acted with a degree of knowledge, care, and skill ordinarily possessed by lawyers in good standing under the same or similar circumstances, and that [he] followed the generally accepted

practices and procedures in the legal profession.” (Id. at ¶ 13). At summary judgment, the circuit court was required to review the testimony and draw all inferences of the evidence in the light most favorable to Alexander. The circuit should not have weighed the evidence or determined the credibility of conflicting testimony. S.C. Nat’l Bank v. Silks, 295 S.C. 107, 110, 367 S.E.2d 421, 422 (Ct. App. 1988) (holding “the trial judge is not to weigh the evidence and determine the credibility of witnesses and of documents”). As a result, the circuit court erred in granting summary judgment.

Further, public records from Charleston County in Alexander’s possession showed that all property taxes were noted as “Current (Paid)” with a current due amount of “(0.00)” and a *nulla bona* amount of “(0.00).” (Alex Aff., Ex. 2 and 3). As further evidence that no back taxes were due and owing, documentation from the seller’s mortgage servicer showed that tax payments for 2004 and 2005 were paid from escrow. (Alex. Aff., Ex. 5). Based on these records, a jury could reasonably conclude that Alexander was not put on notice of a tax sale on the property. These records alone demonstrate that a genuine issue of fact exists as to whether Alexander breached the duty of care.

The affidavit of the title examiner, Attorney Charles M. Feeley, further creates a genuine issue of material fact. (Feeley Aff.) While Mr. Feeley admittedly cannot recall every detail of this particular title examination from 2006, he testified about this examination based on his routine practice pursuant to Rule 406, SCRE. Mr. Feeley testified he conducts his title examinations “with strict routines of practice and habits” and “always perform[s] his title examinations in the same manner.” (Id. at ¶ 2-3). Mr. Feeley testified that after he conducted his tax payment history search on this property, he “noted on the abstract summary sheet that all of the taxes were paid and/or current, and that no back taxes were due or owing for the property.” He testified that he “acted in conformity with [his] routine practice and custom when [he]

performed the title examination for this property.” (Id.) Mr. Feeley further explained that the existence of the prior tax sale would not have been disclosed in the chain of title for this property or made publicly available prior to the closing because the tax sale deed was not recorded in the Charleston County Register Mesne Conveyance (RMC) Office until after the closing, on December 12, 2006. (Id. at ¶ 5). Additionally, no *lis pendens* was filed or recorded as a matter of public record to place the public on notice of an unrecorded tax sale. Feeley’s testimony makes clear that evidence of this tax sale was not recorded as a matter of public record prior to the closing. His testimony and the inferences to be drawn from it clearly created a question of fact.

The testimony of Johnson’s own liability expert, Attorney John Brown, further proves that Alexander’s conduct was reasonable and prudent under the circumstances. Brown admitted that had he been the closing attorney, he would not have discovered the encumbrance on the property. Brown testified as follows:

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

A: Well, I don’t know that I would have.

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

A: Absolutely.

.....

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

A: I believe I could be.

(Brown Depo p. 110-111).

Given these circumstances, Johnson’s own expert witness, John Brown, would not have discovered the unrecorded tax sale. Simply put, Alexander cannot be found negligent as a matter of law if this title irregularity would have been unavoidable even to Johnson’s own expert. If the

title irregularity was not reasonably apparent to Brown, then a fact finder can reasonably conclude Alexander's conduct was not negligent under the circumstances. See Harris Teeter, Inc., at 281, 701 S.E.2d at 745 (2000) ("In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession.")

Based on the totality of the evidence, Alexander demonstrated a genuine issue of fact as to whether he breached the standard of care. A genuine issue of fact clearly exists as to what the public records for this property showed at the time of the title examination and whether Alexander acted reasonably under the circumstances. The issue of professional negligence was far from being "admitted" and "undisputed" as the circuit court erroneously found.

B. The Circuit Court Erred in Concluding that Alexander Had an Affirmative Duty to Convey Clear and Marketable Title to the Property.

The circuit court erred in holding Alexander had a duty to ensure the property was transferred to Johnson free and clear with good and marketable title. Johnson's theory of liability, as adopted in this Order, is fundamentally flawed and disregards the South Carolina Supreme Court's opinion of Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993).

"The law does not require that an attorney be infallible and simply because an attorney has made a mistake does not establish negligence or malpractice as a matter of law." Cianbro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784, 789 (D.S.C. 1992), aff'd, 10 F.3d 806 (4th Cir. 1993). The law does not require absolute accuracy either in practice or decision-making. The law does not hold an attorney to such standards of perfection. Alexander's acts or omissions are to be weighed using the standard of reasonableness. Reasonableness is based on the facts and circumstances reasonably known at the time, not in light of what hindsight may reveal. See Harris Teeter, Inc., at 291, 701 S.E.2d at 750 ("We adhere to the principle that the exercise of a

professional's judgment (and accompanying acts and omissions) must be considered at the time the professional service is rendered and not through the lens of hindsight.”).

The Supreme Court in Bass v. Farr addressed the exact issue confronted by this Court. In Bass, the plaintiff hired an attorney to close a real estate transaction. The closing attorney represented that the title was marketable; however, a year later it was determined that the title was unmarketable. The Supreme Court held, “[t]he fact that an attorney is incorrect as to the ultimate marketability of a title to real estate does not establish that he was negligent.” Id. at 404, 434 S.E.2d at 277 (emphasis added). The Supreme Court relied upon Jennings v. Lake, 267 S.C. 677, 230 S.E.2d 903 (1976), for the proposition that legal malpractice only arises when the “attorney negligently certifies title.” Id. The Supreme Court, in deciding Bass v. Farr, once again reaffirmed that the law does not require an attorney to be “infallible” or mistake-free.

Therefore, failing to ensure good and marketable title to the property at closing is not a *per se* breach of the standard of care. To hold otherwise would require this Court to apply the rejected doctrine of *res ispa loquitur*⁵ or create strict liability for real estate closing attorneys. Rather, Johnson was required to present evidence from an expert witness attorney that Alexander's conduct fell below the standard of care and that he negligently certified the title. By failing to require proof there was no genuine issue of material fact that Alexander certified title in a negligent manner, the circuit court erred. Summary judgment should have been denied.

C. The Circuit Court Erred in Granting Summary Judgment Without Sufficient Expert Testimony to Establish Duty and Breach.

The circuit court erred in ruling Alexander committed legal malpractice because there was not sufficient testimony from an expert witness to establish a duty and a breach of that duty. Johnson moved for summary judgment *without* relying on the testimony of her retained expert

⁵Crider v. Infinger Trans., Co., 248 S.C. 10, 16, 148 S.E.2d 732, 735 (1966) (rejecting the doctrine of *res ispa loquitur*).

witness. (Pl. MSJ). Further, her expert witness (a) lacked the qualifications to testify as to the standard and procedures of examining title to real property because he does not do that type of work; (b) failed to identify any undisputed negligent act or omission that Alexander allegedly committed; and (c) and admitted that if he had been the closing attorney, he would not have discovered the unrecorded tax deed either.

In spite of this, the circuit court found Brown's opinion of professional negligence was "not necessary." The circuit court barred its entry of partial summary judgment on the erroneous conclusion that Alexander admitted he breached the standard of care (Order p. 9-10), and that, regardless, "Johnson's expert is competent to testify about the standard of care of a closing attorney." (Order p. 10). These rulings were erroneous.

(i) Johnson failed to present sufficient expert testimony to establish Alexander breached a duty of care.

The circuit court erred in finding that expert testimony was not required to prove liability in this case. (Order p. 9-10).

"Generally, a plaintiff in a legal malpractice action must establish th[e] standard of care by expert testimony." Harris Teeter, Inc., at 282, 701 S.E.2d at 745. The recognized exceptions to this rule are if the subject matter is of common knowledge to lay persons or if the defendant admits the standard of care was owed to the plaintiff. Sims v. Hall, 357 S.C. 288, 295, 592 S.E.2d 315, 319 (Ct. App. 2003). Neither of these exceptions apply in this case. First, questions of reasonable conduct related to a title examination and real estate closings are not subject matters within the common knowledge of laypersons. Second, and most germane to this case, Alexander did not admit that he breached a standard of care.

As more fully described above, Alexander testified in his deposition and in an affidavit that he acted reasonably and properly under the circumstances. (Alex. Depo.; Alex. Aff.). He relied on a title examination that verified back taxes were paid, as well as additional

documentation that was available to him as a matter of public record. As Alexander testified, a reasonable attorney had no reason to know this property had been sold at a tax sale. (Id.). It cannot be overstressed that evidence of the tax sale did not appear as a matter of public record at the RMC office until three (3) months *after* the closing, on December 12, 2006. (Feely Aff. at ¶ 5). Chain of title issues to real property cannot always be prevented with reasonable diligence, regardless of the carefulness or exactness of the closing attorney. This is why Johnson, and most other purchasers of real property, obtained title insurance as an added measure of security.⁶ (Brown Depo. p. 55-56).

Moreover, expert testimony is necessary because Johnson bears the burden of proving that Alexander “*negligently* certifie[d] title.” *Id.* Despite the circuit court’s erroneous conclusion, Alexander did not admit that he was negligent in certifying title. The title examiner, Mr. Feeley, did not admit that he was negligent in conducting the title examination. Johnson’s expert witness failed to identify any specific negligent act or omission on the part of Alexander or the title examiner. Brown conceded he would not have discovered the title irregularity if he had conducted the title examination or conducted the closing. Brown also admitted that marketable title cannot be guaranteed even with a proper title examination and that public records are not always accurate. (Brown p. 55-56). At the very least, an issue of fact exists regarding whether Alexander’s alleged breach would rise to the “most probable” standard for expert testimony. *See Pearson v. Bridges*, 337 S.C. 524, 533, 524 S.E.2d 108, 113 (Ct. App. 1999) (recognizing “the most probable standard to prove proximate cause” if expert testimony is required).

Thus, the circuit court erred in finding that expert testimony was not necessary in this case.

⁶ The title insurance company cured the title irregularity on the property.

(ii) The circuit court erred in finding that Brown was competent to testify as an expert that Alexander breached a duty of care as matter of law.

The circuit court erred in holding that Brown was competent to testify as an expert regarding the standard of care to establish liability. (Order p. 10). This finding is erroneous for two reasons: (1) Brown's expert opinion runs afoul of the holding of Bass v. Farr; and (2) Brown lacks the qualifications to testify as to the standards and procedures of examining title to real property in South Carolina.

First, Brown's opinion is based on his incorrect personal belief that a real estate closing attorney has the "absolute duty to ensure that clear and marketable title is conveyed to a purchaser." (Brown Depo. 69-71). Brown opined that the mere failure to convey clear and marketable title is *per se* legal malpractice.

Without identifying the standard of care or identifying what Alexander should have done differently, Brown simply opined, "it was the failure to discover the tax sale, and the failure to ensure that she was receiving clear title to the property" which constituted a breach of the standard of care. (Id. p. 71). In Brown's opinion, a closing attorney has the "absolute duty to ensure that clear and marketable title is conveyed to the purchaser" and the "mere failure to convey clear and marketable title is conduct that falls below the applicable standard of care." He claimed this "ultimately...falls at the feet of the closing attorney." (Id. p. 72). Brown wrongfully concluded that failure to convey clear title is, in and of itself, *per se* legal malpractice.

Brown's legal theories are directly contradicted by the holding of Bass v. Farr. In that case, the Supreme Court held, "the fact that an attorney is incorrect as to the ultimate marketability of a title to real estate does not establish that he was negligent." Bass, at 404, 434 S.E.2d at 277. The circuit court erred in relying upon these personal opinions and erroneous legal conclusions. See Shields v. S.C. Dep't of Highways and Pub. Transp., 303 S.C. 439, 444, 401 S.E.2d 185, 188 (1991) (holding an expert witness cannot express an opinion as to the law

because this is the province of the court); Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 383, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (excluding expert testimony at summary judgment phase that was based on witness's personal beliefs rather than any law). Thus, without Brown testifying as to the standard of care and identifying a negligent act or omission committed by Alexander, his testimony cannot serve as the basis for a finding that Alexander committed legal malpractice.

Additionally, Brown is not competent to testify as an expert witness, pursuant to Rule 702, SCRE, as interpreted in Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Watson found that "expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability." Id. The Supreme Court has explained:

Expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gate keeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Id. The circuit court held that Brown was competent to testify, and relied upon his erroneous conclusions and unsupported opinions, without making these preliminary findings.

Attorney Brown did not satisfy Rule 702, both in terms of expert qualifications and reliability. Brown has no particular knowledge, skill, experience, training, or education in conducting title examinations. Brown began conducting real estate closings in late 2003. (Brown Depo. p. 33). Brown does not perform title examinations. (Id. p. 43). In fact, Brown has never performed a full title examination. These admissions alone should render him

unqualified as an expert under Rule 702. (Id. at 48). Brown concedes that he is “[un]qualified” to perform title examinations. (Id.) If Brown is unqualified to perform title examinations, he is equally unqualified to testify whether the title examination for the subject property was properly conducted. Brown admitted he could not and would not have discovered the title irregularity. Thus, Brown lacks the qualifications to testify as to the standard of care and Alexander’s alleged breach of that standard.

Furthermore, Brown’s opinion lacks reliability. His opinion contradicts South Carolina law. Brown conducted no investigation into how the title examination was conducted. Based on the facts here, Brown could not identify any particular measure that a reasonable attorney in a similar position could have undertaken to discover the unrecorded tax sale deed. He had no knowledge as to what types of information would be reasonably available to a title examiner to give sufficient notice of this encumbrance. Any opinion as to the existence of documentation that would put a reasonable attorney on notice was admittedly based on “speculation.” (Brown Depo. p. 108-110). He is unfamiliar with the Charleston County Online Tax system and how public records are kept. He admitted he does not know where to search for the applicable records. (Id.) Without sufficient proof of reliability, the circuit court erred in using Brown’s opinions to find there was no genuine issue of material fact and that summary judgment should be entered against Alexander.

D. A Genuine Issue of Material Fact Exists As to Damages.

The circuit court erred finding there was no genuine issue of material fact that Johnson has suffered damages as a matter of law. The Order found that Johnson has sustained damages, leaving the amount of damages for a jury to determine. (Order p. 11-12). The circuit court incorrectly found that Johnson suffered damages, without any supporting evidence presented by

Johnson. The circuit court only relied on hypothetical questions posed to Alexander in his deposition, which questions lacked any factual basis.

“[D]amage to the client” is a necessary element of a legal malpractice claim. Smith v. Haynesworth, Marion, McCay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996). The finding of damages is a question of fact for a jury. Scott ex. rel. Scott v. Porter, 340 S.C. 158, 169, 530 S.E.2d 389, 394 (Ct. App. 2000). The circuit court found that damages existed as a matter of law, despite the fact, as previously explained, the Plaintiff may not be able at trial to prove any damages were sustained. See Steven v. Allen, 342 S.C. 47, 53, 536 S.E.2d 663, 666 (2000) (holding that “a verdict assessing liability against the defendant but awarding the plaintiff zero damages is inconsistent and contrary to South Carolina law”). The law is clear that “neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991).

In this case, Alexander strongly submits Johnson suffered no damages proximately caused by any act or omission of Alexander. Alexander presented significant evidence to the circuit court that Johnson had not incurred damages from the alleged inability to rent the property or from the foreclosure action. The evidence offered to the circuit court proved that Johnson actually profited from this transaction, receiving \$700.00 per month in rent from October 2006 until March 2009 while not making any mortgage payment. She also received a windfall of an additional \$9,608.08 for half of the overage paid by the purchaser at the tax sale. (Johnson Depo; M. Brown Depo, pp. 35, 50-52 and 58). Further, any evidence of alleged damages stemming from the foreclosure action were never presented to the court. The evidence proves the foreclosure action was caused by Johnson not paying her mortgage, not from the title irregularity.

Accordingly, the circuit court erred. It should have found at the very least a genuine issue of material fact existed as to whether Johnson suffered damages.

E. A Genuine Issue of Material Fact Exists As to Causation.

The circuit court erred in concluding that the alleged breach of care was the proximate cause of Johnson's alleged damages. "The question of proximate cause ordinarily is one of fact for the jury." Madison v. Babcock Ctr., Inc., 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006). "Only on the rarest occasion should the trial court determine the issue of proximate cause as a matter of law." Burnett v. Family Kingdom, 387 S.C. 183, 191, 691 S.E.2d 170, 175 (Ct. App. 2010); Newton v. S.C. Pub. Rys. Comm'n, 312 S.C. 107, 110, 439 S.E.2d 285, 287 (Ct. App. 1993). "[W]hen the evidence is susceptible to only one inference it becomes a matter of law for the court." Small v. Pioneer Mach., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). At this stage, only a mere scintilla of evidence with all inferences drawn in favor of Alexander is required to defeat Johnson's motion.

Alexander does not admit causation. In his Answer, Alexander alleges that Johnson's own conduct and the conduct of others were the cause of her alleged damages. Alexander also pleaded the defense of comparative fault. (Answer ¶ 45-49).⁷ See Berberich v. Jack, 392 S.C. 278,

⁷ The Answer pleads in relevant part:

For A Ninth Defense:

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

For An Eleventh Defense:

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

For a Twelfth Defense:

Even if this Defendant was negligent in any respect, which is expressly denied, and such conduct

709 S.E.2d 607 (2011) (“Under South Carolina’s comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage.”). This is especially true because South Carolina law provides, “no person [is to] be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. This doctrine applies at both law and in equity and whether the cause of action is in contract or in tort.” Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993). The determination of comparative fault, and apportionment of liability, is an issue for the jury. Trivelas v. S.C. Dep’t of Transp., 348 S.C. 125, 138-39, 558 S.E.2d 271, 277-78 (Ct. App. 2001) (reminding that comparative fault is a jury question and reversing a grant of summary judgment on causation).

In this case, the circuit court erred in granting summary judgment because a genuine issue of material fact exists as to whether the alleged breach of care was the proximate cause of Johnson’s alleged damages. Alexander presented evidence of Johnson’s own misconduct that should have precluded any finding of summary judgment against him. But for Johnson’s own conduct, her alleged damages would not have occurred. First, Johnson obtained financing to purchase this property by submitting a Residential Loan Application that contained admitted

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

For a Thirteenth Defense:

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

false statements and material misrepresentations. In the application, she certified that this property would only be used as her primary residence. (Johnson Depo. p. 99, Ex. 5 to Depo). However, she admitted in her deposition that she did not occupy, establish, or use the property as her principal residence, nor had *any intention* to use this property as her primary residence. (Id.) The application states that she was moving into this house from her parents' home in Charleston; however, she was living in Florida at the time. She also made other material misrepresentations, such as falsifying her employment and personal assets. (Johnson Depo. p. 64, 72, 77-79). Based on the language of the note and mortgage, Johnson's conduct operated to void the real estate transaction, the mortgage and her ownership of the property.

Furthermore, Johnson's failure to make required monthly mortgage payments was the proximate cause of any damages she incurred. This is why there was a foreclosure. Johnson's alleged failure to obtain marketable title did not result in the foreclosure. Johnson *admits* she breached the terms of the mortgage and failed to make the required mortgage payments. (Id. p. 98-99). Johnson *admits* that she discontinued paying on her note and mortgage in April 2007. (p. 161-163). Johnson even received a letter from the mortgagor stating that the foreclosure action resulted from Johnson's refusal "to bring the loan current." (Johnson Depo., Ex. 13). Alexander cannot be held liable for causing a foreclosure action that was instituted because Johnson failed to pay the mortgage. In fact, Johnson failed to make the mortgage payments *even though she continued to profit and receive rent payments from the tenant*. (Id. p. 160, 176-177). Johnson's testimony confirms that if she had applied the rental payments each month to pay the mortgage, then no foreclosure action would have been brought. (Johnson Depo. p. 176).

The title irregularity did not negate Johnson's legal duty to make mortgage payments, thus, Alexander cannot be the proximate cause of the mortgage foreclosure. Pursuant to South Carolina law, Johnson had a duty to make the mortgage payments on the property irrespective of

the claim of lack of marketable title. In addressing this issue, the South Carolina Supreme Court held in Wilson v. Moseley, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997): “[E]ven if there were a cloud [based on tax deed], it was not the proximate cause of the foreclosure. The proximate cause of appellant’s loss was her failure to make payments according to the note, which obligations were *separate and independent of any alleged problem with the title.*” (emphasis added). Therefore, the circuit court erred in finding no genuine issue of material fact and that Alexander’s alleged conduct was the proximate cause of Johnson’s alleged damages.

The circuit court also found that proximate cause was established by misconstruing Alexander’s Answer and Crossclaim. The circuit court’s Order excused Johnson’s own conduct claiming that Alexander did not assert the defense of fraud. The circuit court ignored the fact Alexander pled Johnson’s misconduct through the assertion of various comparative fault defenses. “In construing a [pleading]... the court must review the entire pleading.” Doe ex rel. Legal Guardian v. Barnwell Sch. Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006). This finding is clearly erroneous and the circuit court should have considered the evidence of Johnson’s own conduct, much of it admitted by her, for purposes of making a ruling on causation.

Also, the Order relies on paragraphs 73 and 78 of the Crossclaim to erroneously find that “Alexander himself admits” that the title irregularities were “the proximate cause of the damages sustained by...Johnson.” (Order p. 11). In his Answer, Alexander specifically *denied* the allegations of the Complaint as to causation. (Answer ¶ 18, 19, 26, 27). In accordance with Rule 8(e), SCRPC, Alexander asserted *in the alternative* as a Twenty-Fourth Defense a crossclaim against Inglese to the extent that Johnson prevailed on the merits. (Answer and Crossclaim ¶ 62). Parties are allowed to set forth defenses in the alternative or hypothetically. See Rule 8, SCRPC; Harper v. Ethridge, 290 S.C. 112, 118, 348 S.E.2d 374, 377 (Ct. App. 1986) (holding

that a party “may join as alternative claims as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent”). Alexander did not admit in his Answer and Crossclaim that his conduct was the proximate cause of Johnson’s alleged damage.

For these reasons, the circuit court erred in determining causation as a matter of law at the summary judgment stage.

II. The Circuit Court Erred in Denying Alexander’s Motion for Continuance.

The circuit court erred in denying Alexander’s request for a continuance and in considering affidavits submitted by Johnson less than thirty-six (36) hours prior to the hearing on this motion. (Trs. of Hearing; Letters between counsel on May 24 and May 25, 2011)

Rules 56 and 6(d), SCRPC require that all affidavits submitted *in support* of summary judgment must be filed with the motion. See also Smith v. Hastie, 367 S.C. 410, 418, 626 S.E.2d 13, 17 n. 10 (Ct. App. 2005) (holding the circuit court may abuse its discretion in considering an untimely affidavit if opposing party is prejudiced).

Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 654, 661 S.E.2d 791, 796 (2008). Furthermore, “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Baughman v. AT&T, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Here, Alexander was blindsided⁸ by affidavits of two witnesses not previously identified, including a new purported expert witness. Johnson did not rely on these witnesses in her original motion for summary judgment. Alexander was not given the opportunity to depose and cross-examine these witnesses on their affidavits. The circuit court then prevented Alexander from attempting to depose these witnesses. (Trs. p. 46). This was clearly prejudicial to Alexander.

⁸ It should be noted that Ms. Scarborough signed her affidavit on May 20, 2011, but Johnson’s counsel did not send it to Alexander’s counsel until the afternoon of May 24, 2011.


Based on the circuit court's ruling, Alexander was unable to test the basis, the accuracy or credibility of this testimony. He was unable to develop grounds to challenge the expert qualifications. He was unable to develop counter testimony to refute some of the assertions contained in the affidavits. If the circuit court granted a continuance, thereby enabling Alexander to depose these witnesses, Alexander could likely have obtained admissions from these witnesses that they lacked actual knowledge of what the online records *actually* showed in 2006 when the title was examined. He likely would have obtained admissions that the 2006 screen cannot now be replicated. Also, Alexander could have presented these witnesses with documentation in his possession at the time of the closing, which indicate that all past taxes were paid and that no tax sale deed or lis pendens had been filed.

“Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses.” Graham Law Firm, P.A., v. Makawi, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012) (multiple citations omitted). Alexander was prejudiced and should have been allowed the opportunity to fully explore the factual issues involved through further discovery and cross-examination of witnesses. On the other hand, Johnson would have suffered no prejudice. The circuit court should have granted Alexander's request for a continuance to allow him the opportunity to confront these new witnesses through cross-examination. Because Alexander needed to show there was genuine issue of material fact as to causation, the prejudice to him is clear.

CONCLUSION

For the reasons set forth herein, Stan Alexander respectfully requests this Honorable Court reverse the entry of summary judgment against him and remand this case for a jury trial on the merits.

Respectfully submitted,

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