STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Case No. 2009-CP-10-6529

Amber Johnson.....Respondent,

v.

Stanley E. Alexander, Mario S. Inglese and Mario S. Inglese, P.C.,
of whom Stanley E. Alexander is the .....Appellant.

v.

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

v.

Charles Feeley.....Third Party Defendant.

RESPONDENT'S INITIAL BRIEF

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Charleston, South Carolina
November 5, 2012

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V. Did the trial court err in determining Ms. Alexander's expert closing attorney was qualified to testify as to the standard of care for a closing attorney?

III. STATEMENT OF THE CASE

On October 15, 2009, Ms. Amber Johnson (Johnson) filed this legal malpractice claim against her closing attorney Stanley E. Alexander, Esq. (Alexander). She claimed he was negligent for failing to discover the property she was buying had been sold for delinquent taxes approximately one year earlier and failing to take action with that knowledge. Alexander answered on April 20, 2010.

On October 5, 2010, Alexander filed a motion to stay alleging the damages Johnson sought against him were "wholly contingent on and directly related to the outcome of the Foreclosure Action" (Alexander Motion to Stay, p. 2) initiated by an entity claiming to be the holder of the note. On October 13, 2010, he filed a motion for protection to stop discovery. On November 8, 2010, an order was issued denying Alexander's motions and directing Alexander to make himself available for deposition.

On December 2, 2010, Alexander filed an Answer to a cross-claim and third-party complaint filed by Mario Inglese, Esq., a co-defendant. After discovery was conducted, on January 14, 2011, Johnson filed a Motion for Partial Summary Judgment as to liability and attached supporting materials. Five months later, on May 5, 2011 Alexander filed his affidavit in opposition.

On May 9, 2011, a hearing was held before Judge Nicholson. Because Alexander claimed tax records and documents concerning the tax sale were not publicly available, the lower court continued the hearing and ordered the parties to obtain and submit additional information as to what the public records of Charleston County reflected concerning the tax sale and delinquent taxes. By agreement, the matter was rescheduled for May 26, 2011.

On May 17, 2011, Alexander filed an affidavit of Charles M. Feeley, Esq. in opposition to the Motion for Summary Judgment. On May 24, 2011, Johnson filed and served affidavits of Todd Balish, a title examiner, and Mary Scarborough, the Charleston County Delinquent Tax Collector. On May 25, 2011, Alexander filed a memorandum in opposition to Johnson's Motion for Summary Judgment. On the same day, via email Alexander requested a continuance.

On May 26, 2011, the hearing resumed. Alexander argued for a continuance, which was denied. The lower court heard further argument concerning all materials submitted, including requested information about public records. On May 27, an order was issued that partial summary judgment was taken under advisement. The lower court gave Alexander 10 additional days to submit any additional materials to consider. Despite the offer of additional time, Alexander chose to submit nothing. On June 6, the Court issued an order protecting the case from trial until it ruled.

On July 6, 2011, the Court entered an order granting partial summary judgment as to liability. Alexander did not file a Rule 59(e) motion to reconsider. On July 22, 2011, Alexander filed a notice of appeal.

On April 2, 2012, an order was issued to reconstruct the record of the hearing conducted on May 9, 2011 due to the court reporter losing the hearing tapes.

On June 18, 2012, the lower court issued a consent order reconstructing the record. The parties agreed arguments presented to the lower court on May 9, 2011 were contained within the filings made in the court as of May 9, 2011 along with the materials contained in Alexander's Memo filed May 25, 2011.

IV. STANDARD OF REVIEW

Two standards of review govern this appeal: abuse of discretion as to the lower court's evidentiary rulings and the denial of the request for a continuance, and *de novo* as to the granting partial summary judgment.

A. ABUSE OF DISCRETION

1. Evidentiary Issues Are Controlled by an Abuse of Discretion Standard.

Much of Alexander's argument is based on documents and materials the lower court ruled inadmissible. The excluded material Alexander relies upon is not available to consider for *de novo* review because he has not challenged the evidentiary determinations.

Among other things, the lower court excluded or determined inadmissible:

- The affidavit of Alexander's purported agent, Charles M. Feeley, Esq., who conducted the title examination, because he could lacked personal knowledge as he did not recall the details of the title exam. (Order, p. 5, fn. 1);
- Alexander's assumption that payment of the property taxes in 2005 meant they must have been paid on-time in previous years was inadmissible for lack of support (Order, p. 5, fn. 1);
- An unauthenticated copy of a non-party, non-government printout claiming taxes had been paid on property was inadmissible hearsay (Order, p. 8, fn. 3);
- Allegations Johnson engaged in fraudulent conduct involving her loan application with a non-party bank were unsupported, irrelevant and not properly plead (Order at p. 10-11);
- Whether Johnson stopped paying the note months *after* she lost title to the property was irrelevant as to whether Alexander's negligence caused damage, and thus was inadmissible. (Order at pp. 11-12; *see also* p. 11, fn. 5); and that
- An expert is not required to establish the standard of care if the professional defendant himself admits the standard of care owed to a client. (Order, p. 9).

A decision about the "admissibility or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *Allegro Inc. v. Scully*, _ S.C. _, _ S.E.2d _, Op. No. 4997 (S.C. Ct. App. 2012), *quoting State v. Byers,* 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* Further, to warrant reversal, appellant must show prejudice in addition to the error of the ruling. *Id.* Alexander has not shown or argued such rulings were erroneous.

2. Lower Court did not abuse its discretion by denying a request for a continuance.

A motion for continuance is within the sound discretion of the trial court, and the ruling will not be reversed without a clear showing of abuse. *First Sav. Bank v. McLean*, 314 S.C. 361, 362, 444 S.E.2d 513, 514 (1994). Alexander did not state any viable reason why he needed additional time or what additional time would allow him to present. Following his request, he was given an additional 10 days to submit materials and did not. Further, Alexander fails to argue the lower court abused its discretion in denying the request for a continuance for a hearing.

B. SUMMARY JUDGMENT IS SUBJECT TO A DE NOVO REVIEW

An appellate court reviews a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRCP. *Edwards v. Lexington Co. Sheriff's Dep't.*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2012). The *de novo* review applies to matters properly preserved and admitted into evidence." *Hansen, v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *clarified by* 319 S.C. 79, 459 850 (1995). Summary judgment is available when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Rule

56(c), SCRCP. Admitted evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991). However, this initial burden "may be discharged by 'showing' — that is, pointing out to the court —the absence of evidence to support the nonmoving party's case." *Baughman*, 306 S.C. at 115, 410 S.E.2d at 165, *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A genuine issue of fact "can be created only by evidence which would be admissible at trial." *Hansen*, 316 S.C. at 510, 450 S.E.2d at 627. .

In order for this Court to consider materials and affidavits in opposition to summary judgment, they must be admissible and "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993).

V. TAX SALE PROCEDURAL BACKGROUND

A landowner is liable for the payment of taxes assessed by counties and municipalities. S.C. Code Ann. § 12-37-610 (1976). A statutory lien attaches to all real property owned by a taxpayer on December 31 for all taxes that are assessed during the following year. S.C. Code Ann. § 12-49-20 (1976). If the taxes are not timely paid, state law prescribes a procedure by which the County may sell the property to pay the taxes. After providing notice to the record title holder and the public, including running newspaper advertisements, the County publicly sells the property to the highest bidder

and uses the proceeds to pay the past due taxes within 30 days after the sale. S.C. Code Ann. § 12-51-80(1976). The delinquent owner still has 12 months to redeem the property by paying the delinquent taxes and fees. Timely redemption prevents a tax deed from being issued to the tax sale purchaser. S.C. Code Ann. § 12-51-90(A) (1976) If the property is not redeemed, a tax deed for the property is issued to the tax sale purchaser and the balance of the proceeds after paying the taxes is paid to the titleholder of record. S.C. Code Ann. § 12-51-60. The tax sale becomes incontestable 12 months after the tax deed is issued. S.C. Code Ann. § 12-51-90 (C).

VI. STATEMENT OF FACTS

A. DELINQUENT TAXES AND TAX SALE ARE PUBLIC RECORDS

On Oct. 3, 2005, almost one year before Johnson purchased the property and house at 2640 Ranger Dr., North Charleston (the Property), the County of Charleston sold it to pay delinquent 2004 taxes. The property sold to a third-party bidder. The County applied a portion of the proceeds to the tax bill on October 14, 2005. (Affidavit of Mary Scarborough, Charleston County delinquent tax collector, p. 3, ¶ 11; Tax Deed). Alexander agrees and offered no contrary evidence that: 1) the County sold the property at a public tax sale in 2005 (Alexander Dep. p. 34, lines 21-22); 2) delinquent tax records are public as a matter of law (*See e.g. Taylor v. Mill*, 310 S.C. 526, 528, 426 S.E.2d 311, 312 (1992)); 3) the title work was defective because it did not pick up the tax sale (Alexander Dep. p. 87, lines 2-9); 4) the tax sale was a matter of public record (Alexander Dep. p. 35, lines 1-4). Further, Alexander agrees there is no evidence the County improperly entered the tax sale information into the public record in a way that would result in a lawyer not finding it. (Alexander Dep. p. 87, lines 14-18).

There is no dispute Charleston County is a public body and the records it maintains are public, including delinquent tax records and notice of tax sales. Delinquent tax records are public as a matter of law. A "public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. S.C. Code Ann. § 30-4-20(c) (1976).

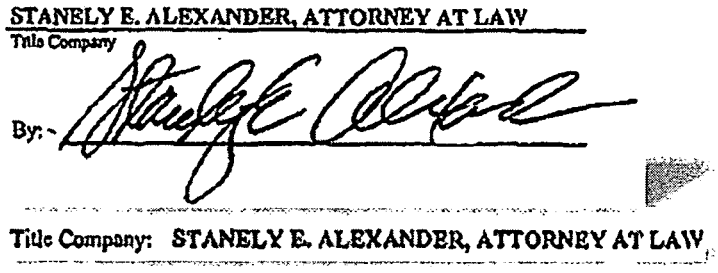
B. ALEXANDER ADMITS ATTORNEY-CLIENT RELATIONSHIP, PERFORMING THE TITLE WORK AND DUTIES OF A CLOSING ATTORNEY

On September 14, 2006, just shy of one year after the public tax sale, Alexander conducted the closing for Johnson for the Property. Alexander represented Johnson in the closing. (Alexander Dep. p. 45, 1-3). Alexander had a duty to convey good and marketable title to Johnson. (*Id.* at 67, lines 17-23). Alexander had the ultimate responsibility as the closing lawyer to review all of the closing documents to make sure they were correct. (*Id.* at 44, lines 10-18). Alexander admits a closing lawyer is required to exercise good and prudent judgment and use the tools available. (*Id.* at p. 35, lines 14-18). Alexander was paid to handle the title work. (*Id.* at 47, lines 2-10). Alexander admits that the title work was defective (*Id.* at 86, lines 14-18) because it did not reveal the delinquent taxes and the tax sale. (*Id.* at 87, lines 2-9).

Alexander failed to look at the public tax records before the closing. (Alexander Dep. pp. 87, lines 1-3). Alexander examined the title abstract that came from an agent's office and "didn't see any real questions about it." (*Id.* at 129, lines 24-25, p. 130, lines 1-2). Alexander did not speak with or correspond with anyone about the title work for the

property. (*Id.* at 129, lines 3-23, p. 130, lines 3-7). Alexander claims he relied on the work of his agent, Charles M. Feeley, Esq., a title examiner. (App. Br. p. 12).

However, Alexander unequivocally signed a "First Lien Letter" stating "Stanley E. Alexander, Attorney at Law" is the "Title Company." (Alexander Dep., Ex. 10).



Alexander issued a written opinion stating that "[a]ll taxes and special assessments which presently constitute a valid lien on the subject property have been paid in full." (Alexander Dep., Ex. 10).

C. ALEXANDER ADMITS JOHNSON WAS NOT AT FAULT

On appeal, counsel for Alexander repeatedly attempts to cast blame on Johnson. However, Alexander admitted that Johnson "was put into the situation she is in through no fault of her own." (Alexander Dep. Ex. 2). He cannot now claim through *innuendo* and speculation that she contributed to *his* failure to determine the property had been sold at a tax sale or that her actions minimize any damages she suffered.

Eventually, the bank holding Johnson's mortgage sued Alexander for professional negligence. It is believed he or his insurer paid for his failure to provide good and marketable title. As to Johnson, there were two foreclosure actions brought against her by entities claiming to own or have an interest in the note. Both cases were dismissed with prejudice without any finding that she did anything improper or failed to do something she was required to do. Alexander seeks to impugn Johnson. However, there has never

been any evidence, allegation by any lender or finding in any court that Johnson engaged in improper conduct associated with the purchase of the Property. Indeed, the lower court found Alexander's assertions "lack proof and are irrelevant." (Order Granting Partial S.J., p. 10 (hereafter, Order)). These evidentiary findings have not been appealed.

D. ALEXANDER COULD HAVE REDEEMED PROPERTY AT TIME OF CLOSING.

It is also undisputed that at the time of closing, the 12-month redemption period had not expired. The Charleston County Delinquent Tax Collector, Mary Scarborough, issued and recorded the tax deed on December 12, 2006, almost two months after Johnson closed. (Scarborough Aff., p. 2, ¶ 6; Tax Deed). Alexander admits that had he determined the property been sold at a tax sale, he could have redeemed the property at the time of closing. (Alexander Dep. p. 83, lines 15-20). Thus, Johnson would not have lost title as a result of the tax sale and would have suffered no other damages had Alexander acted properly and redeemed the property at the time of closing.

Instead, by operation of law, title was transferred from Johnson to Westwood LLC, the tax sale purchaser, on Dec. 12, 2006. (Alexander Dep., Ex. 6, Tax Deed, Ex. 2 Alexander Letter stating property sold at a tax sale had "been deeded to the new owner.").

As a direct result of the tax sale and the failure of Alexander to redeem the property at the closing, Johnson immediately lost title to the property and incurred direct, consequential and incidental damages. (*See e.g.* Alexander Dep. Ex. 2 where Alexander states "Johnson could not rent or resale the house...the property has been out of Ms. Johnson's control, and still is. She was put into the situation she is in through no fault of her own.").

VII. SUMMARY OF THE ARGUMENT

Johnson seeks damages from Alexander as her closing attorney on grounds that Alexander negligently failed to discover the property Johnson was buying had been sold at a county tax sale 11 months earlier. Further, Alexander failed to redeem the property at the closing or thereafter. Alexander's failures directly caused Johnson to lose title to the property shortly after the closing, when a tax deed was issued to the tax sale purchaser.

To prove liability for professional negligence, one must show 1) the existence of an attorney-client relationship; 2) a breach of the attorney's duty; 3) damage resulting from the negligence; and 4) proximate cause of the client's damages by that breach of duty. *Harris Teeter Inc. v. Moore & Van Allen PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). Attorneys must render services with the degree of skill, care, knowledge and judgment usually possessed and exercised by members of the profession. *Id.*

Alexander admitted he failed to discover the tax sale. Alexander admits Johnson lost the property through no fault of her own. Alexander failed to offer any material and admissible facts showing that the tax sale records and delinquent status were not public records available to him. Nothing further need be considered. Alexander's arguments are nothing more than distractions, which have no bearing on the Court's decision to grant summary judgment as to liability.

Although Alexander claims Johnson suffered no damage, she lost title to the property; she incurred expenses to repair the property prior to losing title; she was unable to realize a profit from selling the property after improving it; and she continued to make payments on the mortgage note for several months after she lost title. These are damages.

The lower court properly determined Johnson presented evidence of each element sufficient to establish liability for professional negligence. The existence of an attorney-client relationship is not in dispute. As to the other elements, Alexander argues the lower court erred in finding no material question of fact existed as to the disputed elements and that summary judgment was inappropriate.

Alexander anchors his appeal in two key arguments: First, because Alexander or his agent failed to see the public records regarding the tax sale, a question of fact exists as to whether the public tax records were there to be seen. Second, he claims that Johnson's alleged tortious or improper conduct caused the damages she blames on Alexander.

As to the first argument, Alexander offers no admissible evidence to create a question of fact as to whether the Charleston County delinquent tax or tax sale records were publicly available and should have been discovered by Alexander or his agent.

As to the second, Alexander fails to challenge on appeal the lower court's findings that his allegations of Johnson's wrongdoing were irrelevant as to his liability and inadmissible. Those findings, therefore, are the law of the case, and the Court of Appeals may not, and should not, consider Alexander's allegations in conducting its *de novo* review of summary judgment. To the extent this Court does consider Alexander's allegations of comparative fault, Alexander does not challenge the lower court's finding that his negligence was the proximate cause of many other losses, discussed below.

Finally, regarding the lone procedural matter before this Court, Alexander fails to show how the lower court abused its discretion in denying Alexander's motion to continue the May 26, 2011 hearing on summary judgment, or to show prejudice stemming

from the ruling. Specifically, Alexander ignored the lower court's extension of 10 more days to produce additional support for his opposition to summary judgment.

VIII. ARGUMENT

A. ALEXANDER ADMITS TO NEGLIGENCE AND CAUSATION; THUS, THE COURT PROPERLY DETERMINED LIABILITY.

Alexander fails to appeal the court's finding that an expert is not needed in a professional negligence case if the professional defendant establishes the standard of care owed to a client. (Order, p. 9). *See Sims v. Hall*, 357 S.C. 288, 296, 592 S.E.2d 315, 319 (Ct. App. 2003). Alexander admits that as a closing attorney, he is responsible for ensuring his client obtains good and marketable title to her property. (*E.g.*, Alexander Dep., pp. 16 and 102). Alexander admits she did not obtain such title. Order p. 5.

The court properly determined that "Alexander himself admits 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." Order p. 11. The court properly relied upon many of Alexander's admissions conceding his duties, the breaches and resulting damage. Those findings are contained on pages 5 and 6 of the Order. They include:

- A lawyer handling a closing has the responsibility to make sure the purchaser gets good and marketable title to the property.
- Alexander had a duty to make sure Johnson got the property free and clear with good and marketable title.
- Alexander conducted a closing precisely to ensure that Johnson had good and marketable title.
- Johnson relied upon Alexander telling her she was getting good and marketable title to the property.

- The issuance of the tax deed made Johnson unable to rent or sell the property.

- Johnson suffered direct, incidental and consequential damage as result of the subject property being transferred by virtue of the tax deed.

- Johnson suffered damage as result of not obtaining clear marketable title to the property.

Even if the duty to transfer property free and clear is not absolute, Johnson's expert properly testified that Alexander fell below the standard of care for failing to find the public records showing the delinquent taxes and tax sale. (Brown Aff., p. 2, ¶13).

In any case, given Alexander's own admission and lack of opposing expert opinion, the court properly determined there was no material issue of fact as to Alexander's liability.

B. THE LOWER COURT CORRECTLY HELD TAX RECORDS WERE PUBLIC RECORDS

The lower court properly determined that as of October 14, 2005, almost one year before the Johnson closing, information about the delinquent taxes and tax sale of the Property was "publicly and readily available for abstractors, closing attorneys and the general public in the county's Register Mesné Conveyance Office." (Order p. 4, ¶¶ 5-6). Given the availability of these records and Alexander's admissions, the lower court properly found Alexander breached his duty as a closing attorney by failing to discover them. (Order, pp. 7-8). Alexander fails to submit admissible evidence to create a material question of fact that these records were not public and available.

1. Non-Moving Party Must Come Forward with Admissible Facts to Create A Genuine Issue of Material Fact.

In response to a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SCRCP, Rule 56(e). Once the moving party carries its initial burden of showing no material question of fact exists, the opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts," and "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545, *quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). No court "is required to single out some morsel of evidence to create an issue of fact that is not genuine." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993), *citing Main v. Corley,* 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). The court is not required to attach great significance to [admissible] evidence introduced solely to create an issue of fact that is not genuine. *See* James F. Flanagan, *South Carolina Civil Procedure 3d*, 463-64 (S.C. Bar 2010). Unsupported and conclusory statements contesting the critical issues are not genuine disputes of material facts. *Id.*

In attempting to explain how he or his agent missed the public records, delinquent taxes and tax sale, Alexander offers only the unsupported speculation or conjecture that "something was not right." (App. Br. p. 11). Raising a material question of fact requires more than asking an unanswered question.

2. Tax Records Are Public Records

As a matter of law, delinquent property taxes are public records. *Taylor*, 310 S.C. at 528, 426 S.E.2d at 312. This basic fact forms the gravamen of Johnson's negligence claim against Alexander. No one disputes that checking those records is a core function of

title examiners, or that a title examiner is supposed to check back property taxes for a period of 10 years. *See* Charles T. Manning, *Handbook for South Carolina Dirt Lawyers* 2d, 22-23 (2008). Alexander himself testified the standard was 60 years. (Alexander Dep. p. 105, lines 4-19). In support of summary judgment, Johnson submitted the affidavit of Mary Scarborough, the Charleston County delinquent tax collector, who stated the delinquent tax records and record of the tax sale specifically regarding the Property were publicly available as early as Oct. 14, 2005 — almost a year before the closing — on the mainframe computer system, called the Vista 3270, in the RMC office. (Scarborough Aff., p. 3-4, ¶¶11-14). The delinquent taxes also were publicly available over Internet via the County's Web site. (*Id.* at p. 3, ¶13). The fact that Alexander or his agent Feeley, failed to look for or to see these records does not create a question of fact as to their existence. Thus, the trial court did not err in finding Alexander was negligent in discovering them and he did not create a question of fact by claiming not to see them.

3. Alexander Offers No Admissible Evidence That The Public Records Showing the Tax Sale Were Not Public and Available

Alexander does not dispute that delinquent tax records by law are a matter of public record. He offers no evidence to support the idea that public records regarding the Property were somehow not public when his agent allegedly conducted the title search. Alexander agreed he could not say Charleston County improperly entered information regarding the tax sale in a way that prevents a lawyer from finding it. (Alexander Dep. p. 87, lines 15-20). He points to no fire, flood or system error, or any reason whatsoever as to why the day he or his agent looked, the records were not where they always are.

Instead, Alexander seeks to create a *non-material* question of fact by claiming no "records were discovered" so as to put him "on notice that property taxes were delinquent or that a tax sale had occurred on the property." (Alexander Aff. p. 3, ¶ 11). Alexander attempts to rely upon Feeley's affidavit to create a material question of fact as to whether the delinquent tax or tax sale records existed at the time of Johnson's closing. (App. Br. p. 12). Such reliance is misplaced. First, the fact that Feeley did not see the records does not create a question of fact as to the records' existence. Second, Feeley's affidavit is *not* based on personal knowledge, as required per Rule 602, SCRE. Feeley admits he does "not recall the details from this title examination." (Feeley Aff.) He states only that he *usually* looks at a County web site on the Internet and contends he did not see that the taxes on the subject property had been delinquent or that the property had been sold at a county tax sale. (Feeley Aff. ¶ 3, p. 2.).

Third, neither Alexander nor Feeley ever demonstrates or even states that delinquent tax records did not exist or were not publicly available in the RMC office. Rather, Alexander suggests that Feeley's failure to find the records creates a material question of fact as to whether they were there to be found. (App. Br. pp. 13-14). To bolster his case, Alexander cites Feeley's statement that "if I see a delinquency or tax sale on the first screen...I notate it on my abstract summary sheet" (*Id.*) Here, the "abstract summary sheet" he completed for the property shows no taxes were due (Feeley Aff. ¶ 3, p. 2.). Alexander never establishes its admissibility into evidence; if it is offered merely for the truth of the matter asserted within the document, it is properly excluded hearsay. Even if the summary sheet was properly admitted, it is known Feeley did not find the

records — his hand-written "abstract summary sheet" does not somehow provide verification the records were missing or create a material question of fact as to whether they existed.

As the lower court properly recognized, Alexander must come forward with admissible facts and Alexander failed "to meet his burden." (Order p. 13).

Fourth, the lower court properly disregarded the statements in Feeley's affidavit as evidence because Feeley admitted, "I do not recall the details from this title examination," and so his statement was not based on his personal knowledge (Order p. 5 fn. 1) as required by SCRCP, Rule 56(e). Alexander never challenges this evidentiary finding, and thus it is the law of the case.

In contrast to Alexander's ambiguity about what was or was not available, Johnson offered the affidavit of Ms. Scarborough, who set forth detailed, admissible facts proving the records were public and available as well as a method for obtaining them on-line or at the RMC office via computers. Alexander never disputes her statements.

Therefore, given that Alexander fails to come forth with admissible evidence sufficient to create a material questions of fact as to the availability of the public records, this Court should affirm the lower court's finding that Alexander breached his duty as a closing attorney by negligently failing to discover the delinquent tax records and the tax sale prior to Johnson's closing.

4. No Unfair Surprise from Scarborough's Affidavit

Alexander claims Scarborough's affidavit was a surprise (App. Br. p. 6) and that the lower court erred in considering it "less than 36 hours before the hearing." (*Id.* at 27). His contention is baseless. The trial court specifically ordered Alexander to bring

evidence to support his contention that the records were not public. Alexander chose not to do so. The court also allowed Johnson to supply additional information, which she did.

As a threshold matter, one filing a motion for summary judgment is not required to provide any materials or affidavits. Rather, if affidavits are used to support a motion, they may be served with the motion. SCRCP, Rule 6(d). Additional or opposing affidavits may be served not later than two days before the hearing, *unless the court permits them to be served at some other time. Id.* (Emphasis added). The moving party may serve reply affidavits any time before the hearing. *Id.* Further, prior to ruling on a summary judgment motion, the Court may "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." SCRCP, Rule 56(f).

At the hearing on May 9, 2011, Alexander failed to come forward with any evidence showing the delinquent tax records were not public or unavailable at the time of Johnson's closing. The lower court *allowed Alexander* an opportunity to continue the hearing. The parties were ordered to return with additional information about delinquent tax records and what was or was not public when the title examination was conducted in August and September of 2006. (Hearing Trans. May 26, 2011, p. 4).

5. Alexander did not object and did not comply with order.

Before the hearing resumed May 26, 2011, Johnson produced the affidavit of Ms. Scarborough, a disinterested public official, which detailed how delinquent tax and tax sale records are kept. She explained how and why those regarding the Property were publicly available at the time of the closing. (Scarborough Aff. pp. 2-3). She clearly stated the records reflected the Property had been sold for delinquent taxes. (*Id.*) Alexander, on

the other hand, produced the affidavit of Feeley, who "cannot recall the specifics" but concludes based on reviewing his handwritten summary sheet that all taxes were paid and current. (Feeley Aff., pp. 2-3, ¶ 4). This does not create a relevant or material issue of fact. His assumptions based on his notes do not change the fact that the Property was sold for delinquent taxes.

Alexander argues the court erred in considering Scarborough's "surprise" affidavit, because it was not filed with the motion for summary judgment. (App. Br. p. 6). The affidavit was no surprise as it was submitted at the request of the court and timely provided to Alexander before the hearing. Alexander cannot fairly claim prejudice due to his failure to depose Ms. Scarborough before the court considered her affidavit when he made no attempt to depose her or proffer what her purported testimony would be. (App. Br. p. 27).

When Alexander sought to claim prejudice to the trial judge, the court responded as follows:

> Okay, because I thought it was very, very specific. You — *you raised the issue that* [Alexander] didn't have notice [of the delinquent taxes and tax sale], the abstracter didn't have notice because it wasn't available. And I said I'll continue it *to give you an opportunity* to bring live witnesses, affidavits, or however you want to present it to the Court as to notice to the public on the issue of tax liens. (May 26, 2011, Trans. pp. 4, lines 22-25 - 5, lines 1-3).

Now, as then, Alexander cannot legitimately claim he was "blindsided" by Scarborough's affidavit when the lower court ordered the parties to produce additional materials; nor can he reasonably claim the court abused its discretion by considering "untimely" affidavits when both sides were given equal opportunities to supplement

information. Given the nature of this lawsuit, the director of the delinquent tax office was a natural source for information, yet Alexander took no steps to seek her affidavit before the hearing, to subpoena her for the hearing, to subpoena records from Charleston County, or to obtain a counter-affidavit from anyone else. Surprise is a claim he cannot legitimately make and is unsupported by the facts.

C. THERE WAS NO ERROR IN DENYING A CONTINUANCE

Alexander argues the court erred by denying his May 26, 2011 motion for a continuance. (App. Br. p. 27). He claims he was prejudiced because he lacked time to depose Scarborough or counter Plaintiff's other evidence that records regarding the delinquent taxes and tax sale were public and available. (*Id.*)

First, Alexander never asserts the court abused its discretion in denying the continuance. "Abuse of discretion" is the proper scope of review. Therefore, this issue is not properly before this Court and should be deemed abandoned.

Should this Court find Alexander infers the lower court abused its discretion, the facts and record do not support this position. Plaintiff's motion for summary judgment was filed nearly five months before the first hearing. The hearing was continued to allow each side to produce affidavits, live testimony, or other evidence to show the tax records for the Property had been publicly available at the time of the closing; Alexander provided nothing substantive when the hearing resumed; and the lower court then gave him another 10 days to provide more. (May 26, 2011, Trans. pp. 4, lines 22-25, p. 5, lines 1-3). He simply failed to accept the court's overly indulgent offers and chose to produce inadmissible affidavits.

On appeal, Alexander argues he should have been allowed to depose Scarborough to show she "could not testify as to what Feeley actually saw when he conducted the title examination on the property" (App. Br. p. 6); that he could have obtained "admissions ...that [she] lacked actual knowledge of what the online records actually showed in 2006 when the title was examined" (*Id.* at 28); and that he could have confronted her with "documentation in his possession at the time of the closing which indicate that all past taxes were paid and no tax sale deed or *lis pendens* had been filed." (*Id.*)

First, these arguments were not presented to nor ruled upon by the lower court; thus, Alexander failed to preserve them for appeal. Regardless, he fails to show how these points would have created a question of material fact as to what records were public and available when Alexander closed on the Property. Scarborough's testimony was offered only to show what public records were available to one who looked—whether Feeley actually saw them is immaterial to her testimony. Thus, not only did Alexander fail to preserve the issue, but he fails to show how the lower court abused its discretion in denying his motion for a continuance or how he was prejudiced.

D. CERTAIN "FACTS" NOT MATERIAL

Alexander attempts to create a material question of fact as to whether the records were public and available by raising several immaterial and irrelevant facts, including that 1) the tax deed was not recorded when Alexander closed on the property; 2) certain screen shots for a current year signify that no prior taxes were delinquent and fully paid; and 3) no *lis pendens* was filed against the property. Aside from failing to preserve the lower court's finding that these "facts" are irrelevant and inadmissible to the question of his liability, these distractions are presented merely in an attempt to confuse the Court:

1. Red Herring No. 1: The Tax Deed Was Not Recorded at the Time of Ms. Johnson's Closing.

Alexander's "proof" the public records were unavailable is that the tax deed was not recorded until Dec. 12, 2006, nearly two months after the closing. (App. Br. p. 14). So what? By statute, a tax deed is *never* recorded until after the 12-month redemption period has expired. (Alexander Dep., Ex. 6, Tax Deed for 2640 Ranger Dr.). It is misleading for Alexander to state that the lack of a recorded tax deed relieves him of his duty to discover the tax delinquency, liens or subsequent sale.

In *Taylor*, a tax deed from the county property tax sale had not been recorded before the plaintiff recorded his deed. *Taylor*, 310 S.C. at 528, 426 S.E.2d at 312. The Supreme Court did not relieve Taylor of the responsibility of discovering the delinquent taxes, since tax records are public. *Id.* The same applies here, and the fact the tax deed for the Property had not been recorded at the time of Johnson's closing does not create a question of fact as to whether the delinquent taxes records were public and available, or whether Alexander, as Johnson's closing attorney, is negligent for missing them.

2. Red Herring No. 2: Appellant's "Documentation" shows All Taxes Paid

Alexander argues that "documentation in [his] possession at the time of the closing" showed all past taxes were paid so a question of fact exists as to what the public record showed regarding delinquent taxes and the tax sale. (App. Br., p. 28). Alexander claims "after this came to light we looked back and it appears the county had made no notes anywhere that [the property] had been sold. Plus, they were accepting current taxes and they don't [accept current taxes] when back taxes are due." (Alexander Dep., pp. 86, lines 24-25, p. 87, line 1).

First, Alexander does not appeal the trial court's finding that he offered no admissible evidence to support the claim the county will not accept money for current taxes owed if past taxes have not been paid. (Order, p. 5, fn. 1). Thus, this argument is not properly before this Court.

Second, screen shots from Aug. 10, 2006 and Sep. 11, 2006 showing taxes on the property were paid for the year 2005 attached to Alexander's affidavit are irrelevant as to whether taxes were delinquent in 2004, which prompted the tax sale. (Scarborough Aff., p. 3, ¶10). If the taxes showed paid, it was because the Property was sold at a tax sale. The proceeds received from the third party bidder paid those taxes to purchase the Property if the Property was not timely redeemed.

Thus, whether Alexander's "documents" show taxes were paid for the current year does not create a material question of fact as to whether the prior property taxes had been delinquent, or whether public records showed Johnson's property had been sold in a delinquent tax sale and that the redemption period was about to expire.

3. Red Herring No. 3: No Lis Pendens

Alexander seeks to create a question of fact as to whether the public record showed the delinquent taxes and tax sales by claiming no *lis pendens* had been filed against the property. (App. Br., p. 4). This statement is also designed merely to distract and confuse, as it is wholly unrelated. Filing a *lis pendens* is not part of the statutory process for selling property at a delinquent tax sale. S.C. Code Ann. § 12-51-40, *et seq.*

Alexander also fails to challenge the lower court's finding that his *lis pendens* claim is irrelevant and inadmissible (Order, p. 5, fn. 1.). Thus, even if it were relevant, it is not

properly before this Court whether the lack of a *lis pendens* creates a material question of fact as to what records were publicly available regarding the delinquent taxes or tax sale.

E. APPELLANT RELIES ON INADMISSIBLE AND UNPRESERVED FACTS

The lower court correctly held "Alexander fails to meet his burden" of coming "forward with *admissible* facts that dispute the moving party's contention...." (Order p. 13) (emphasis added). On appeal, Alexander does not challenge multiple findings by the lower court that his submissions were inadmissible. As much of his argument is based on unappealed evidentiary rulings determining his documents were not admissible, those materials underpinning Alexander's arguments are not properly before this Court.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Even if an issue has been preserved before the lower court, the appellant must raise the error to the appellate court or else lose it forever. "Unappealed rulings become the law of the case and should not be considered by this court." *Sims v. Hall*, 357 S.C. 288, 293, fn. 2, 592 S.E.2d 315, 318, fn. 2 (Ct. App. 2003).

In its order granting summary judgment, the lower court found Alexander "fails to meet his burden" of producing any admissible evidence to dispute Johnson's contention that she was entitled to judgment as a matter of law. (Order, p. 13). The lower court excluded or did not provide weight to:

- The affidavit of Alexander's purported agent, Charles M. Feeley, Esq., who conducted the title examination, because he could not recall the details of the title exam. (Order, p. 5, fn. 1);
- Alexander's assumption that payment of the property taxes in 2005 meant

they must have been paid on-time in previous years was inadmissible for lack of support (Order, p. 5, fn. 1);

- An unauthenticated copy of a non-party, non-government printout claiming taxes had been paid on property was inadmissible hearsay (Order, p. 8, fn. 3);

- Allegations Johnson engaged in fraudulent conduct involving her loan application with a non-party bank were unsupported, irrelevant and not properly plead (Order at p. 10-11);

- Whether Johnson stopped paying the note months *after* she lost title to the property was irrelevant as to whether Alexander's negligence caused damage, and thus was inadmissible. (Order at pp. 11-12; *see also* p. 11, fn. 5); and that

- An expert is not required to establish the standard of care if the professional defendant himself admits the standard of care owed to a client. (Order, p. 9).

Although the standard of review of an order for summary judgment is *de novo*, a genuine issue of fact "can be created only by evidence which would be admissible at trial." *Hansen*, 316 S.C. at 510, 450 S.E.2d at 627. It is well-established that "the admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *Allegro Inc. v. Scully*, __ S.C. __, __ S.E.2d __, Op. No. 4997 (S.C. Ct. App. filed July 11, 2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* Further, to warrant reversal, the appellant must show prejudice in addition to judicial error. *Id.* Prejudice is a "reasonable probability" that the outcome would have been different had the court ruled the other way. *Id.*

The record below shows Alexander never argued the basis for the admissibility of these submissions to the lower court before the court issued its order granting partial summary judgment on July 6, 2011. After the order was issued, he neglected to file a Rule 59(e), motion asking the court to reconsider these evidentiary findings.

Finally, he failed to appeal the lower court's rulings by arguing to this Court that the lower court erred in its evidentiary rulings or even listing them in his Statement of the Issues. "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues." Rule 208(b)(1)(B), SCACR. An appellate court *may* consider the appeal of a point that is not included in the Statement of the Issues, but only if the ruling being challenged is reasonably clear from the appellant's arguments. *Eubank v. Eubank*, 347 S.C. 367, 374, fn. 2, 555 S.E.2d 413, 417, fn. 2 (Ct. App. 2001); *see also* Jean Hoefer Toal, *Appellate Practice in South Carolina* 2d at 75 (2002). Here, that clarity is absent. Appellant's brief cites no rules of evidence, law, or even argument explaining why the trial judge abused his discretion (or otherwise erred) in excluding Alexander's purported evidence. Alexander never even uses the term "abuse of discretion" to describe these evidentiary findings. Alexander abandoned issues concerning materials deemed inadmissible and the lower court's evidentiary findings are the law of the case.

1. Appellant Abandons Argument that Feeley's Affidavit is Irrelevant to Show a Question of Material Fact

On appeal, Alexander argues Feeley's affidavit creates a material question of fact as to what records regarding the delinquent taxes and tax sale of the Property were publicly available. However, Alexander failed to file a Rule 59(e) motion to challenge the lower court's finding that Feeley's affidavit was inadmissible and did not create a material question of fact for lack of personal knowledge. (Order, p. 5, fn. 1). Alexander also fails to appeal the lower court's finding of inadmissibility to this Court.

Without arguing any error, Alexander asserts Feeley's affidavit creates a question of fact because his habit or routine practice may be offered as evidence to prove

conformity therewith, per Rule 406, SCRE. (App. Br., p. 13). However, the fact Mr. Feeley routinely conducts title examinations by looking at a County web site is not evidence that his method complies with the standard of care, is effective, or even not negligent. This does not create a material question of fact as to whether the records were public and available, especially since delinquent tax records are public as a matter of law.[1]

Thus, Alexander's failure to challenge the lower court's finding that Mr. Feeley's affidavit does not create a question of fact, either by filing a Rule 59(e) motion below or by arguing an error on appeal, means the issue is abandoned, and the contents of his affidavit are not properly before the Court for consideration.

2. Additional Ground for Inadmissibility: Reliance on Feeley Immaterial

In its *de novo* review of the facts, this Court can consider an additional ground for excluding Feeley's affidavit as irrelevant: Alexander admits he was ultimately responsible for the title work. Although on appeal Alexander contends he reasonably relied on Feeley's work (App. Br. p. 12), Alexander was paid for the title work (Alexander Dep., Ex. 7, Disbursement Summary), and he certified to the bank as "Stanley E. Alexander, Attorney at Law, Title Company" that all taxes and special assessments "which presently constitute a valid claim on the property have been paid in full." (Alexander Dep., Ex. 10, First Lien Letter). Whether he relied on Feeley's title exam does not obviate his duties as the closing attorney. Alexander admitted to the duties of fully and properly examining the

[1] In his affidavit, Feeley references a title examination summary sheet he completed showing his findings regarding the property. However, this sheet is not attached to the affidavit Appellant offers to this Court.

title and the resulting damage for his failure to properly do so. (Alexander's Answer and Cross-Claim, March 4, 2010, ¶¶ 60-86 and Order p. 11)

Therefore, for purposes of determining whether a question of fact existed, Feeley's affidavit is inadmissible, irrelevant and does not create a material issue of fact.

3. Alexander Failed to Preserve Argument that Non-party's bank records creates a question of fact

Appellant argues on appeal that "[a]s 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." (App. Br., p. 13). However, the circuit court determined that this "documentation from the seller's mortgagee" concerning the status of tax payments was inadmissible hearsay. (Order granting summary judgment, p. 8, fn. 3). "If documentation from seller's mortgagee generally sufficed, South Carolina homebuyers would have no need to obtain title searches." *Id.*

Alexander failed to challenge this evidentiary finding by filing a Rule 59(e) motion to reconsider at the court below. Again, on appeal Alexander fails to allege the court erred in excluding the materials, let alone cite rules, law, or other authority to show how the lower court abused its discretion. Thus, he failed to preserve the circuit court's finding or properly present the issue for appeal. This Court is not to consider these materials in determining whether a material question of fact exists as to whether public records showed taxes on the home had been delinquent or the home had been sold at a tax sale.

4. Allegations of Fraud and Comparative Fault Are Not Preserved

Alexander argues, without any evidentiary or factual support, that alleged misrepresentations Johnson made on her loan application broke any causal chain between

his actions and her damages. (App. Br. pp. 24-25). In his Memo in Opposition to Summary Judgment, Alexander called her actions "fraudulent conduct." (Def. Mem. in Opp., pp. 12-13). In his appellate brief, he calls her actions "comparative fault."

His specious and illogical argument goes like this: Had Johnson not made the alleged misrepresentations, she could not have bought the house. (App. Br. pp. 24-25). Had she not bought the house, Alexander would not have been her closing attorney. Had he not served as her closing attorney, he could not have been negligent in handling the closing. *Ergo*, Alexander concludes, "[b]ut for Johnson's own conduct, her alleged damages would not have occurred." (App. Br. 24). He also claims below that her "fraudulent conduct voided the real estate transaction." (Def. Mem. in Opp. to Partial S.J., p. 12; *see* App. Br. p. 25). Alexander claims the court erred in granting summary judgment because a question of comparative fault is a question for the jury.

The court properly found that "Alexander's unsupported and bald assertions of fraud based upon inadmissible documents do not create a material issue of fact." Order p. 11. Alexander fails to preserve the lower court's findings that his assertions of wrongdoing lack proof and are irrelevant to the question of liability. (Order, p. 10). Thus, this Court is precluded from considering the unsupported claims as a basis for reversal.

5. Lower Court Correctly Determined Fraud Improperly Plead and Unsupported

In its July 6, 2011, order, the lower court found that Alexander had not properly pleaded the defense of fraud in his answer and, as such, he was unable to argue it in an effort to show Johnson's conduct created a material question of fact as to proximate cause. (Order, pp. 10-11). The court also found the allegations were "irrelevant to the Court's consideration as to . . . liability," and that Alexander's "bald assertions of fraud

[were] based upon inadmissible documents," and thus did not create a question of fact. (Order, pp. 10-11).

Alexander argues on appeal the court erred in dismissing the fraud allegations because it "ignored the fact Alexander pled Johnson's misconduct through the assertion of various comparative fault defenses." (App. Br. p. 26). First, fraud and comparative fault are not interchangeable defenses.[2] Second, Alexander never argued this alleged error to the lower court, or filed a Rule 59(e) motion asking the court to reconsider its finding that he failed to plead fraud as an affirmative defense. Therefore, any allegations of fraud are not preserved for appellate review.

6. Lower Court Properly Determined Comparative Fault Lacking

Perhaps in recognition the two are not interchangeable, on appeal Alexander abandoned his claim of fraud and instead now argues that Johnson's "comparative fault" creates a material question of fact as to the proximate cause of her damages. (App. Br., p. 26, stating that "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."). He claims the court erred in not considering her comparative fault because he pleaded it as a defense in his Answer. (App. Br., p. 26).

However, simply raising a claim in a pleading is not sufficient to preserve that claim for appeal if the lower court never rules on it; the appellant still must file a Rule

[2] Allegations of fraud must be pleaded with specificity per Rule 9(b), SCRCP, while comparative fault is a general affirmative defense. Alexander also fails to offer any evidence that the lender alleged fraud against the plaintiff, and no court has found Johnson engaged in wrongdoing. In fact, Appellant admits she lost the property through no fault of her own. (Alexander Dep., Ex. 2, Alexander's Letter).

59(e) motion to reconsider. *Banks v. St. Matthew Baptist Church*, 391 S.C. 475, 482, 706 S.E.2d 30, 34 (Ct. App. 2011) (finding plaintiffs failed to preserve the trial court's dismissal of a pleaded claim when the judge did not specifically address the claim in his order of dismissal, and plaintiffs failed to file a Rule 59(e) motion).

The lower court's order properly determined that "Alexander's unsupported and bald assertions of fraud [are] based upon inadmissible document [that] do not create a material issue of fact." (Def. Memo. in Opp. to S.J., pp. 1, 12-13; Order, pp. 10-11). The order did not address the defense of comparative fault and Alexander did not seek a ruling on or clarification of this issue. Under the *Banks* rule, Alexander is now barred from claiming the lower court erred by failing to consider his comparative fault defense, as he never filed a Rule 59(e) motion to preserve it.

Finally, whether he calls it fraud or comparative negligence, Alexander fails to challenge the trial court's finding that "[t]he loan application process with a third party is separate and distinct" from Alexander's negligence, and thus is irrelevant. (Order, p. 11; *see* App. Br. pp. 1-30).

Alexander failed to preserve or properly appeal the court's findings that Johnson's alleged misconduct is irrelevant and inadmissible. This Court should not consider it for purposes of determining if a material question of fact exists as to proximate cause.

7. Appellant fails to preserve the lower court's ruling that whether Johnson stopped paying the mortgage was irrelevant as to his liability

Alexander repeatedly argues that any damage Johnson suffered was caused by her decision to quit making mortgage payments on a home she no longer owned, which resulted in a foreclosure action being filed against her. (App. Br. pp. 3, 22, 25). He

contends this shows summary judgment was inappropriate because a material question of fact exists as to whether she suffered any damage as a result of Alexander's conduct. (*Id.* at 25).

First, Alexander argued to the lower court that the foreclosure action filed against Johnson was admissible to show she suffered no damage. When the lower court found this was irrelevant (Order, p. 12) because she lost title months before she stopped paying, Alexander failed to file a Rule 59(e) motion asking the court to reconsider the ruling. In his appeal, Alexander again fails to allege the lower court erred in finding the foreclosure irrelevant. Nor does he cite any rules, law, or other authority as to why it ought to be considered. It is now the law of the case that whether she stopped paying her mortgage is irrelevant to the question of Alexander's liability.

Second, even if the foreclosure was Johnson's fault, Alexander fails to argue the lower court erred in finding she suffered other damages as a result of his negligence. This damage includes the failure to obtain good and marketable title; the loss of her property; the inability to sell her property; and legal expenses incurred as a result of Alexander's mistake. (Order, p. 11-12). It also is undisputed that Johnson continued paying the mortgage note *for four months* after she lost title on Dec. 12, 2006. (Order, p. 12).

Finally, the lower court reserved for the jury the question of the value of her damages. (*Id.*) But because Alexander fails to argue on appeal that the lower court erred in finding any damage, the findings of the lower court are the law of the case, and no material question of fact exists as to damages.

Therefore, the argument that Johnson is solely responsible for any damages she suffered because she stopped paying on the note has been abandoned; the court's finding that she suffered at least some damage is the law of the case; and the Court of Appeals may not consider her fault when determining if any material question of fact exists as to whether she suffered any damages.

8. No Excuse for Appellant's Failure to File Rule 59(e) Motions

Alexander appears to have anticipated the argument that he failed to preserve the lower court findings, as he preemptively claims in his appeal that he was unable to file a Rule 59(e) motion because "this case appeared on the trial roster at or about the same time as Judge Nicholson's order was issued." (App. Br. p. 2). Alexander leaves to the imagination why that should matter. He offers no rule, case law, statute or other authority to support the proposition that being on the trial roster operates as some sort of "freeze" and prevents a party from filing a Rule 59(e) motion to reconsider any ruling. The case already had been protected from trial until the trial court ruled on Plaintiff's motion for summary judgment; had Defendant truly felt too rushed to act, he could have asked the judge for protection once again. Yet he did nothing except to wait until this appeal to complain.

This Court should not excuse Alexander's failure to file the Rule 59(e) motions required to preserve for appeal the lower court's evidentiary findings.

F. NO QUESTION OF MATERIAL FACT THAT JOHNSON SUFFERED DAMAGES

Alexander argues a material question of fact exists as to whether Johnson suffered any damage as a result of his failure to find the tax sale. (App. Br., p. 22). A showing of

damage is required to prove professional negligence. *See Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745.

The lower court left it for the jury to determine the value of her damages. Even without valuation, however, Alexander fails to create a question of material fact as to whether Johnson suffered *any* damage, and once again he fails to dispute the lower court's finding that she suffered damage: The loss of title to the property; the need to engage in legal assistance; and the inability to sell the property. (Order, p. 12). Alexander claims Johnson rented the property for a time after the tax deed was recorded; thus she suffered no loss. Issues as to the value of the loss are for the trier of fact.

On appeal, Alexander argues Johnson's splitting the overage created by the tax sale with an entity claiming to hold title to the note resulted in a "windfall" of $9,608.08 (App. Br. p. 22).[3] First, this is not a matter properly before this court. However, had Alexander done his job, Johnson would have had title to the property and been able to dispose of it for a greater profit or use it as she pleased. As titleholder of record, Johnson was entitled to the entire proceeds because at the time the tax deed was issued she was the last title holder of record. This second foreclosure action that is improperly raised by Alexander was dismissed with prejudice. Additionally, these proceeds were an offset to the continuing and ongoing damage she suffered as a result of the loss of the property due to Alexander's negligence and defense of the improper foreclosure actions.

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[3] Alexander asks this Court to take judicial notice of this fact, citing a rule that permits a court to take such notice of a public record. (App. Br. p. 8, fn. 4). This is an ironic request for an Appellant whose defense depends on casting doubt on the public availability of public records.

Alexander admits "as a result of the tax sale that had taken place in 2005 Ms. Johnson did not receive good and marketable title." (Alexander Dep. pp. 67-68; *see also Id.* at 16, lines 11-12. ("I'm saying she didn't get a marketable title to it.")). That is damage. It also is undisputed that she continued paying on the mortgage note until April 2007, four months after she lost the property. (Order, p. 12).

1. Foreclosure Action Does Not Break the Causal Chain as to "Any" Damage

Alexander argues that any damage she suffered as a result of the foreclosure filed against her was her fault. (App. Br. p. 8). However, Alexander failed to challenge the lower court's finding that "[w]hether she stopped paying on a note in April 2007 is irrelevant as to Alexander's negligence in September of 2006." (Order, p. 12). Thus, this issue has been abandoned. Further, as said many times, she lost title to the property months before payments were not made on the property. This does not mean she did not have available defenses to the foreclosure. Indeed, both foreclosure actions were dismissed without any determination or finding that she breached any terms of the note or otherwise did or failed to do something she was required to do. As the court noted, one foreclosure action was dismissed because the party bringing the action did not exist. Order p. 11, n. 5.

Had Johnson kept making payments on property she did not own, Alexander would likely argue she failed to mitigate her loss by continuing to make payments instead of stemming her losses.

Also, as discussed above, Johnson suffered other damages aside from the foreclosure action, which Alexander never disputes. Thus, Alexander offers no evidence to create a question of material fact as to whether Johnson was damaged by his negligence.

2. Alleged Conduct regarding Johnson's loan application is Irrelevant

Alexander claims Johnson made various misstatements on her loan application, and therefore her "fraudulent conduct voided the real estate transaction." (Def. Mem. in Opp. to Partial S.J., p. 12; *see* App. Br., p. 25). If the real estate transaction was void, Mr. Alexander suggests, she could not have suffered any damages from his negligence. (App. Br., pp. 24-25). This argument is patently frivolous. First, the court found Alexander's "unsupported and bald assertions of fraud based on inadmissible documents do not create a material issue of fact as to his liability or break the chain of causation." Order p. 11. Second, her loan application was never void — there's no dispute she obtained a loan and the sale occurred. Last, Alexander was not a party to the loan agreement, and he has no standing to assert fraud or misrepresentation regarding the loan as a defense to his malpractice.

South Carolina courts define fraud or misrepresentation as "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." *Regions Bank v. Schmauch,* 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App.2003).[4] Per Rule 9, SCRCP, it must be pleaded with particularity, which Alexander did not do in his Answer. Our courts also have held that proving fraud or material misrepresentation requires proving nine elements, including the "intent that the representation be acted upon . . . the

[4] Proving fraud requires nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Regions Bank*, 354 S.C. at 672, 582 S.E.2d at 444-45.

hearer's reliance on its truth [and] the hearer's consequent and proximate injury." *Regions Bank*, 354 S.C. at 672, 582 S.E.2d at 444-45. Alexander offers no evidence to suggest he relied on the truth of any statements Johnson made to her lender. Nor does he offer any evidence that Johnson intended to deceive him, as is also required to prove fraud. *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010).

Therefore, for purposes of establishing liability against Alexander, this Court should uphold the trial court's finding that no material question of fact exists as to whether Johnson suffered any damage from his conduct.

G. NEGLIGENCE *PER SE* NOT NEEDED TO FIND BREACH

Alexander argues the lower court erred by applying a strict liability standard to determine no question of fact existed that he breached his duty as a closing attorney by negligently failing to discover the tax sale. He attempts to rely on *Bass v. Farr*, 315 S.C. 400, 404, 434 S.E.2d 274, 277 (1993) for the proposition that being incorrect as to the "ultimate marketability of title to real estate" does not establish an attorney's negligence (App. Br. p. 16). To find Alexander liable "would require this Court to apply the rejected doctrine of *res ispa loquitur* or create strict liability for real estate closing attorneys," he argues. He also states that *Bass* "addressed the exact issue confronted by this Court." (Id.)[5]

These arguments are disingenuous, as the facts here are readily distinguishable from *Bass*. Johnson never alleged—and the trial court never found—Alexander was strictly liable simply for failing to deliver good title. Alexander breached his duty by

[5] His appellate argument notwithstanding, in his deposition Alexander admitted he had a responsibility to ensure Johnson got good and marketable title. (Alexander Dep. p. 16-17).

negligently missing public records showing the delinquent taxes and tax sale, which resulted in Johnson's failure of title. Alexander himself admits this omission prevented Johnson from getting good and marketable title. (Alexander Dep. p. 16, lines 11-12).

In *Bass*, unlike the present case, the defendant closing attorney examined all relevant property records, including the chain of title and an old restrictive covenant limiting the subject property to residential use. *Bass*, 315 S.C. at 403-04, 434 S.E.2d at 276-77. Because the property had been used commercially for years, the attorney advised his clients the restrictive covenant probably was not effective. *Id.* When a court later found otherwise, the clients successfully sued the attorney for his failure to deliver good and marketable title. *Id.* at 402, 275. The Supreme Court overturned, finding he was not *per se* liable because he had considered all relevant facts and records in advising them.

The Court never suggests a closing attorney has no duty to convey good or marketable title—only that the duty is not absolute. As the Court explained, "liability arises where the attorney *negligently* certifies title." *Bass*, 315 S.C. at 403, 434 S.E.2d at 277, *citing Jennings v. Lake*, 267 S.C. 677, 230 S.E.2d 903 (1976) (emphasis in original).

Alexander was negligent because he failed to find the relevant public tax records that he admits would have alerted him to the problem. He could not then properly advise Johnson or cure the defect so that she could have obtained good and marketable title, which he admits would have been easy. (Alexander Dep., p. 83, lines 15-20). Therefore, the court did not inappropriately apply a strict liability standard, and this Court should uphold its finding of summary judgment.

H. PLAINTIFF'S EXPERT SUFFICIENT

Finally, Alexander argues on appeal that Johnson's expert, John G. Brown II, is

not competent to establish the standard of care for a closing attorney because he admits he cannot conduct a title examination. (App. Br. pp. 18-19). This is irrelevant, as Mr. Brown is offered not as a title examiner, but as an experienced closing attorney in South Carolina. (Brown Aff., p. 1, ¶2). In that capacity, Brown testified by affidavit that Alexander fell below the standard of care by failing to discover the delinquent taxes and tax sale. (*Id.* at 2, ¶13 and Order, pp. 8 and 10.)

Alexander also fails to appeal the lower court's ruling that "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." (Order, p. 8). As such, this finding is the law of the case. Brown was competent and Alexander's admissions support the liability determination made by the court.

IX. ORAL ARGUMENT REQUESTED

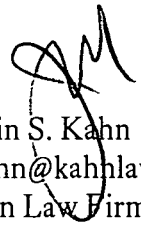
Appellee respectfully requests this Court hear oral arguments, if deemed necessary.

X. CONCLUSION

Therefore, for the foregoing reasons, Plaintiff-Appellee Amber Johnson respectfully asks this Court to uphold the lower court's finding of partial summary judgment against Defendant-Appellant Stanley E. Alexander for liability for professional negligence, as Alexander fails to create a material question of fact as to whether he owed a duty to Ms. Johnson as her closing attorney, that he breached the standard of care of a closing attorney, and that she suffered damages as a result.

Accordingly, this Court should order this matter be heard at trial only on the question of damages.

Respectfully Submitted,



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Case No. 2009-CP-10-6529

Amber Johnson.....Respondent,

v.

Stanley E. Alexander, Mario S. Inglese and Mario S. Inglese, P.C., of whom Stanley E. Alexander is the.....Appellant.

v.

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

v.

Charles Feeley.....Third Party Defendant.

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AMBER JOHNSON

I, Justin S. Kahn, do hereby affirm that on November 5, 2012, I served one copy of the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal, on the following named individuals by placing a copy in the United States Mail, first class, postage prepaid to the following:

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November 5, 2012

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
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Re: Amber Johnson v. Stanley Alexander
Case No.: 2009-CP-10-06529

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal along with Proof of Service. By copy of this letter I am serving one copy of each of these documents on all counsel.

Please file the originals, mark the extra 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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