

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

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.

REPLY BRIEF OF APPELLANT STANLEY E. ALEXANDER

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LAW/ANALYSIS

I. **JOHNSON MISSTATES THE STANDARD OF REVIEW-- THE STANDARD OF REVIEW ON SUMMARY JUDGMENT IS *DE NOVO*, NOT “ABUSE OF DISCRETION.”**

Johnson misstates the proper standard of review to be utilized by this Court in reviewing a grant of summary judgment. Johnson urges this court to adopt an “abuse of discretion” standard of review for the “evidentiary determinations” made by the circuit court. (Res. Brief p. 3-4). This is erroneous. Well-settled law provides the only proper standard of review of a summary judgment is *de novo*.¹ The determination of whether evidence presented was “relevant,” “material,” or “genuine” must be reviewed *de novo*, not by affording the circuit court great deference through an “abuse of discretion” standard.

Appellate courts review a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRCP. Edwards v. Lexington Cnty. Sheriff’s Dep’t., 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010); Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999) (citing 5 Am. Jur. 2d Appellate Review § 700 (1995) (“In reviewing a grant of summary judgment, the appellate court is limited to the evidence that was before the trial court and applies the same standard of review as did the trial court.”). The appellate court has a “duty to undertake a thorough and meaningful review of the trial court’s order and the entire record on appeal.” Bowen v. Lee Process Sys. Co., 342 S.C. 232, 235, 536 S.E.2d 86, 22 (Ct. App. 2000). The purpose of summary judgment is not to determine admissibility of evidence or make conclusions of fact.

While it is true that to defeat summary judgment, the party opposing the motion must present competent or genuine evidence which would be admissible at trial to show a genuine issue of fact exists, Old Southern Life Ins. Co. v. Bank of North Carolina, N.A., 36 N.C. App.

¹ The abuse of discretion standard is only applicable to the circuit court’s failure to grant a continuance of the motion.

18, 244 S.E.2d 264 (NC Ct. App. 1978), the appellate court's review of that determination by a trial court is *de novo*. South Carolina courts have never held that an appeal from a summary judgment ruling is by an "abuse of discretion" standard. This court cannot apply a heightened standard of review for determining whether evidence presented at summary judgment is "genuine" or "admissible" because it is inconsistent with the proper *de novo* standard of review.

In S.C. Labor Ltd., LLC v. Eastern Tree Serv., 362 S.C. 654, 609 S.E.2d 305 (Ct. App. 2005), the Court addressed a trial court's grant of summary judgment on the grounds that affidavits presented were not based on personal knowledge, and therefore, were not considered admissible or genuine evidence. The Court of Appeals cited the standard of review that "when reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court", and found that the trial court erred in granting summary judgment based on its own review that the evidence could be admissible. *Id.* at 656, 609 S.E.2d at 305. In determining that evidence was admissible, the Court of Appeals did not apply an "abuse of discretion" standard, but rather addressed this evidentiary issue *de novo*. As such, this court should conduct a full *de novo* review of the evidence to determine if a genuine issue of fact was presented.

II. JOHNSON'S CLAIM THAT ALEXANDER DID NOT APPEAL CERTAIN FINDINGS OF THE CIRCUIT COURT IS ERRONEOUS.

Throughout her brief, Johnson mistakenly asserts that Alexander has either failed to appeal or abandoned the following findings of the circuit court. As summarized below, Alexander does directly appeal these issues:

1. The circuit court's finding of a lack of evidence related to Johnson's conduct giving rise to the alleged damages. (Res. Brief pp. 8-9 and 11.). Alexander directly appeals this finding of the lower court as it relates to both causation and damages. (App. Brief p. 21- 26).

2. The circuit 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.

(Res. Brief p. 1). Alexander directly appeals this finding of the lower court. (App. Brief p. 16-20).

3. The circuit court's findings related to the admissibility of the affidavit testimony of Charles Feeley. (Res. Brief p. 15-17, 26). Alexander directly appeals this finding of the lower court. (App. Brief p. 13-15).

4. The prejudice sustained by Alexander in failing to grant the continuance based on Ms. Scarborough's newly submitted affidavit. (Res. Brief p. 17, 26). These arguments were raised and ruled upon by the circuit court (R. pp. 214-241; 262-263) and directly presented in this appeal. (App. Brief p. 27-28).

5. The circuit court's finding that Johnson suffered damages. (Res. Brief p. 32-33). Alexander directly appeals this finding, and he presented evidence Johnson suffered no damages. (App. Brief p. 22)

6. The circuit court's findings related to Johnson's failure to make her mortgage payments and the resulting foreclosure action. (Res. Brief p. 35). Alexander directly appeals this finding of the circuit court. (App. Brief p. 25-26).

7. The court's findings regarding whether Alexander breached the standard of care of a real estate closing attorney. (Res. Brief p. 39). Alexander directly appeals this finding of the lower court. (App. Brief p. 10-16).

Further, it should be noted that Alexander directly appeals that the circuit court erred in granting summary judgment on all elements of the cause of action for professional negligence: duty, breach, causation, and damages.

III. ALEXANDER DOES NOT ADMIT HE WAS NEGLIGENT AND DENIES THAT ANY ALLEGED NEGLIGENT CONDUCT WAS THE PROXIMATE CAUSE OF DAMAGES.

Johnson claims that summary judgment should be affirmed because “Alexander admits to Negligence and Causation.” (Res. Brief p. 11). In making this argument, Johnson turns a blind eye to the evidence submitted. Alexander never admitted in his Answer that he was negligent. (R. pp. 35-46). In opposition to summary judgment, Alexander presented both deposition and affidavit testimony establishing that he did not deviate from the standard of care and that his conduct was reasonable and proper under the circumstances. (R. pp. 109-111; 130-133; 265-266). The title examiner, Mr. Charles Feeley, did not admit that he was negligent in conducting the title examination. (R. pp. 125-127). Johnson’s own expert, attorney John Brown, offered favorable testimony to further support the conclusion that Alexander was not negligent. Brown admitted if he had served as the closing attorney he would not have discovered the encumbrance on the property. (R. pp. 155-156). While it is true that every closing attorney strives to convey a clear and marketable title, the failure to ultimately convey perfect title does not equate to legal malpractice. The South Carolina Supreme Court has directly affirmed this proposition in Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993), holding “[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.”

Johnson fails to address in her Brief the threshold issue of liability discussed in Bass. Rather, she equates the lack of a successful outcome, such as conveying unmarketable title, with malpractice. An attorney is not required by law to be infallible and there is thus no liability merely because an attorney made a mistake. Cianbro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784 (D.S.C. 1992), aff’d, 10 F.3d 806 (4th Cir. 1993) (mistake does not establish negligence or malpractice as a matter of law). This is especially true when the opposing party’s expert admits he would have made the same mistake!

On appeal, Johnson's argument that Alexander admitted to liability is based on an improper *weighing* of the conflicting evidence. Johnson's arguments are flawed and based on the same erroneous reasoning as that of the circuit court. Johnson and the circuit court disregard clearly established law, simply "[a]t the summary judgment stage of litigation, **the court does not weigh conflicting evidence** with respect to a disputed material fact." Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 397, 693 S.E.2d 1, 4 (Ct. App. 2010) (emphasis added); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."). For the court to become the fact finder, to disregard evidence, and to weigh evidence at the summary judgment stage is wholly improper. "Summary judgment should be granted **only** where it is **perfectly clear** that no issue of fact is involved." Vaughn v. A.E. Green Co., Inc., 277 S.C. 392, 393, 287 S.E.2d 493, 494 (1982) (emphasis added). In this case, Alexander presented substantial, if not overwhelming evidence of a genuine issue of fact as to liability, causation, and damages. When there is conflicting evidence, the questions of liability, causation and damages are reserved for the jury, not the court. This is the purpose of our cherished right guaranteed by the Seventh Amendment.

Further, on the issue of liability, Johnson argues that "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." (Res. Brief p. 11). Alexander did not establish the standard of care merely by generally stating in his deposition that the intention of all closing attorneys is to convey marketable title. However, not every title is marketable and not every encumbrance is reasonably discoverable. Alexander does not admit that he reasonably should have done more to discover this title irregularity. Alexander demonstrates that the

records available for review likely did not reflect the title defect. Nevertheless, Alexander does directly appeal the finding that expert witness testimony was not required in his brief at pages 16 through 20 under the heading “**C. The Circuit Court Erred in Granting Summary Judgment Without Sufficient Expert Testimony to Establish Duty and Breach.**” Johnson’s position is without merit.

It is clear, Alexander did not admit as a matter of law that he was negligent or that his conduct was the proximate cause of Johnson’s purported damages.

IV. A GENUINE ISSUE OF FACT EXISTS AS TO THE EXISTENCE OF PUBLIC RECORDS ON THE DATE OF THE TITLE EXAMINATION.

A genuine issue of fact remains as to the availability of public records concerning the title to the property on the date of the title examination. The circuit court and Johnson largely rely on the Affidavit of Mary Scarborough to support the conclusion that all records related to the tax sale of the subject property were available via the mainframe computer system to title examiners as well as the public at large. (Res. Brief p. 12-19). Alexander does not dispute that such records are supposed to be available. What Alexander disputes is whether the records available to the public *on the day the title examination was performed* were accurate and correct. While Ms. Scarborough testifies as to the manner that such information is given the public, she cannot, and does not, definitively state, based on personal knowledge, that the information related to the tax sale of the property was actually available at the time the title examination was performed. Ms. Scarborough is not able to provide the court with any documentation or other information that verifies the existence of the records available to the public on the day Charles Feeley performed the title examination in 2006. The exhibits to her affidavit depict what the public records showed as of *May 18, 2011*, not what it showed in 2006.

Scarborough’s testimony relating to the public records in 2006 is further called into question based on records from the Charleston County Tax Assessors’ Office on August 10,

2006, and September 11, 2006. These records confirm that property taxes were “Current (Paid)” and that no back taxes were owed or due, with a past due amount of “0.00.” (R. pp. 110; 116; 118). In addition, evidence of the tax sale and delinquent taxes were admittedly not revealed in the chain of title for this property or made publicly available in the Charleston County Register of Mesne Conveyances (RMC) Office. (R. p. 127).

Ms. Scarborough’s affidavit is directly contradicted by the affidavit testimony of the title examiner, Charles Feeley. Johnson urges this court not to accept the ineluctable conclusion that Feeley’s affidavit creates a genuine issue of material fact. Johnson argues Feeley’s testimony is not competent evidence and not based on his personal knowledge. But, Johnson overlooks the fact Feeley’s affidavit is based on conformity with his routine practices pursuant to Rule 406, SCRE. Feeley’s affidavit sets forth in detail his strict routine habits and practices in reviewing real property taxes in a title examination. Clearly, Feeley had personal knowledge of his habits and practices. Feeley testified that he followed his routine and practice in reviewing past property taxes and, if he had seen evidence of unpaid taxes, then he would have noted that issue on the abstract summary sheet. Since he did not note any back taxes during his examination, the clear inference to be drawn from his testimony is that all past due taxes had been paid. This is further consistent with the documentation from the Charleston County Tax Assessors’ Office on August 10, 2006, and September 11, 2006 stating that property taxes were “Current(Paid)” and that no back taxes were owed or due, with a past due amount of “0.00.” Because Feeley’s affidavit was based on his routine practice, his testimony creates a material question of fact.

Additionally, Johnson’s argument that Feeley’s affidavit fails to comport with Rule 56(e) as “personal knowledge” has been rejected by this court in S.C. Labor Ltd., LLC v. Eastern Tree Serv., 362 S.C. 654, 609 S.E.2d 305 (Ct. App. 2005). In S.C. Labor Ltd., LLC, the trial court granted summary judgment by disregarding an affidavit as not being based on the affidavit’s

“personal knowledge” because it was based on routine practice and custom. On appeal, the Court of Appeals found the affidavit *did* create a genuine issue of fact because the testimony was based on one’s routine practice, custom, and course of dealing. In reversing summary judgment, the Court of Appeals held that “[s]tatements as to a routine practice of an organization are admissible to prove what was done in a given situation was in conformity with routine practice” and that “evidence of custom and practice can be used to rebut evidence of fact.” *Id.* at 657, 609 S.E.2d at 306.

Thus, based on conflicting evidence, a genuine issue of fact remains as to whether public records of the delinquent taxes that were reasonably available to a title examiner at the time, and whether Alexander had a right to reasonably rely on the public information provided to him.

V. JOHNSON DOES NOT ADDRESS THE MERITS OF ALEXANDER’S MOTION FOR CONTINUANCE, BUT ONLY ARGUES THIS ISSUE IS NOT PROPERLY BEFORE THE COURT.

Johnson does not address the merits of the circuit court’s failure to grant a continuance, only raising procedural arguments in opposition. (Res. Brief. p. 19-20). Johnson claims “Alexander never asserted [in his Brief] the court ‘abused its discretion’...therefore, this issue is not properly before this Court and should be deemed abandoned.” (Res. Brief p. 20). Alexander is not required to quote the standard of review to present this issue on appeal, and in no way did he abandon his argument. In his Brief, Alexander devotes two pages of legal arguments to explaining why the circuit court committed prejudicial error by denying his motion for a continuance, which would have afforded him the opportunity to depose and cross-examine a newly named witness for Johnson. (App. Brief p. 27-28). Within his argument, Alexander directly cites to Smith v. Hastie, 367 S.C. 410, 418, 626 S.E.2d 13, 17 n. 10 (Ct. App. 2005), a case which addresses when a circuit court abuses its discretion in considering an untimely affidavit on summary judgment.

Next, Johnson side-steps the merits of the refusal to grant a continuance by arguing another procedural technicality— namely that the arguments as to prejudice were not presented to the circuit court and ruled upon. The hearing transcript does not support Johnson’s argument.

By way of background, Alexander’s counsel wrote a letter to Judge Nicholson prior to the hearing pointing out that these affidavits were from previously unidentified witnesses and requesting “the opportunity to depose these witnesses,” especially in light of the “speculative conclusion” about what documents were readily and publicly available. (R. pp. 262-263). This letter was presented to the circuit court, filed and made part of the record. (R. p. 229). During the hearing, Alexander’s counsel respectfully attempted to explain the basis for the continuance, but Judge Nicholson interrupted him throughout. (R. p. 214-229; 238-239). When Alexander’s counsel asked if he could “make [his] record about [the motion for continuance], Judge Nicholson stated “*Forget about your record. I’m gonna make a decision....and quit worrying about your record.*” (emphasis added.) See State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) (reasoning that the “tone and tenor of the trial judge’s remarks” renders any alleged failure to preserve the record futile). Despite the circuit court judge’s intolerance, Alexander’s counsel attempted to explain that the affidavit of Mary Scarbrough was provided “thirty-six hours” before the hearing (even though it was obtained by opposing counsel 4 days prior), and Alexander needed the opportunity to depose her. He further explained to Judge Nicholson that cross-examination testimony could be elicited from this witness that would call into question whether public documents were actually available in 2006 prior to the closing, as explained in Mr. Feeley’s affidavit. (R. pp. 226-229; 238; 244-245). After Judge Nicholson heard these arguments, the motion was denied. (R. pp. 239; 241). Now, on appeal, Alexander asserts the same grounds for a continuance that were argued to the circuit court and rejected. Thus, it

cannot be reasonably argued that Alexander's arguments in support of a requested continuance were not raised to and ruled upon.

VI. ALEXANDER PRESENTED FACTS WHICH ARE MATERIAL AND NOT "RED HERRINGS."

Johnson accused Alexander of presenting the circuit court with three "immaterial and irrelevant" facts which are "red herrings" and "presented merely in an attempt to confuse the Court." (Res. Brief p. 20-23). This evidence concerns what Alexander considered, in part, in conducting the real estate closing, namely (1) the fact that no tax deed was recorded, (2) the fact that documentation from the title examiner and from the records of Charleston County reflected that past taxes were paid, and (3) the fact that no *lis pendens* on the property had been filed.

These facts are material because they demonstrate what evidence Alexander reasonably relied upon in certifying title for the purpose of the real estate closing. This evidence demonstrates that Alexander was never on inquiry notice of the pending tax sale. Alexander conducted the closing after the title examination revealed no delinquent taxes on the property.

The court should recognize this is not a case where Alexander conducted a real estate closing without a title examination. This is also not a case where Alexander ignored the title examination report or otherwise closed the transaction with knowledge of irregularities. These so-called "red-herrings" are facts that create genuine issues for a jury to consider. Alexander was reasonable in closing this transaction. These facts support the conclusion that he acted with the degree of skill, care, knowledge, and judgment of a competent, reasonable attorney acting in similar circumstances. Further, Johnson's own expert witness testified that if he were closing this transaction, he would not have been able to uncover the title irregularity. (R. p. 155). The evidence in this case demonstrates Alexander acted reasonably and in a manner similar to attorneys in a similarly situated position.

VII. ALEXANDER DOES NOT RELY UPON UNPRESERVED ISSUES ON APPEAL.

The issues on appeal are preserved for appellate review despite Alexander not filing a Rule 59(e) motion due to this case appearing on the trial roster. A motion to reconsider is not necessary for appellate review if the issue presented to the lower court was raised to and ruled upon by the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (Rule 59(e) motions are “not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”).

Here, Alexander presented substantial evidence to the lower court and argued that a genuine issue of material fact as to all the elements of legal malpractice (a) duty, (b) breach, (c) causation; and (d) damages. After the circuit court considered Alexander’s legal arguments and the affidavits and deposition testimony submitted in opposition, it erroneously ruled that no genuine issue of fact existed as to each of these elements as a matter of law. All issues on appeal were directly raised to the circuit court and ruled upon. This court must take a *de novo* review of the evidence presented at summary judgment to determine if a “mere scintilla” of a disputed material fact existed for any one of the elements for legal malpractice. Summary judgment is not the stage in litigation to determine the admissibility of evidence and “abuse of discretion” is not the proper standard in reviewing whether a genuine issue of fact was presented. On appeal under *de novo* review standard, the parties and this Court are not bound by any purported determinations that evidence presented was not genuine or relevant to a finder of fact.

VIII. JOHNSON FAILS TO ADDRESS THE HOLDING OF WILSON V. MOSELEY ON THE ISSUE OF PROXIMATE CAUSATION AND DAMAGES.

While Johnson’s appellate brief is nearly 40 pages in length, she fails to address, or cite to one of the most important cases related to proximate cause and damages, namely, the South Carolina Supreme Court opinion of Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 863 (1997). Her silence speaks volumes. Wilson is controlling in the case at bar for purposes of proximate

causation and damages. Johnson claims the foreclosure, and the costs incurred therein, were proximately caused by the title irregularity. In addressing a factually analogous situation, the South Carolina Supreme Court in Wilson held that “[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.” Id. at 147, 488 S.E.2d at 864. Johnson even *admits* that her failure to make the mortgage payments was the cause of the foreclosure action. (R. pp. 185-186). Thus, as in Wilson, Alexander cannot be held liable for Johnson’s damages as a result of her failure and refusal to make her mortgage payments.

While Wilson is directly dispositive to issues of proximate causation and the existence of damages, the facts of this case have revealed that Johnson has actually profited from this transaction. She pocketed \$700.00 per month from October 2006 until March 2009 (approximately \$21,000.00) in rent on the property while never paying her mortgage, and after the tax sale, she received a windfall of an additional \$9,608.08 for half of the overage paid by the purchaser at the tax sale. (R. pp. 106; 187, 191; 195-199; Charleston County, Public Index, <http://jcmsweb.charlestoncounty.org/PublicIndex/PI Search.aspx> (last accessed ^{March 19} Feb. 22, 2013).

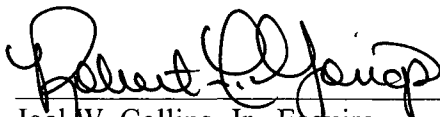
Despite extensively briefing Wilson and presenting evidence of no damages to the circuit court, the circuit court found that Johnson “suffered damages” and that “whether she stopped paying on the note in April of 2007 is irrelevant.” (R. p. 16). The circuit court erred in finding Johnson had incurred damages, when the presented evidence demonstrated that the damages alleged were caused by Johnson’s failure to pay the her note and mortgage. The evidence proved Johnson actually profited from her ownership of the property. A jury should be allowed to weigh these facts and determine if Johnson actually suffered damages, and if Alexander proximately caused these damages.

CONCLUSION

For these additional reasons, Alexander respectfully requests this Court reverse summary judgment and remand this case for a trial on the merits.

Respectfully submitted,

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v.

Charles Feeley.....Third Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant Stanley E. Alexander and the Reply Brief of Appellant Stanley E. Alexander comply with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

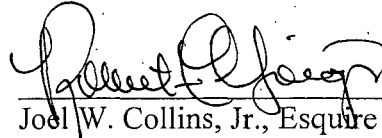
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