THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Judge

Case No: 2009-CP-26-12046

First American Title Insurance Company, Respondent

v.

Michele Paddy Refosco, Attorney at Law, Defendant
and

v.

Michele Paddy Refosco, Attorney at Law, Respondent

v.

AmeriSearches, LLC and Wade Schaffner, Appellants,

Appellate Case No: 2012-213001.

APPELLANTS' FINAL BRIEF

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STATEMENT OF THE CASE:

This litigation arises out of a South Carolina Bank & Trust mortgage that was allegedly "missed" on a title search conducted as part of the closing of a mortgage from owners RMB Homes, LLC to First Federal Savings and Loan. It was the intent of SCB&T and First Federal that each mortgage be a first lien on various lots, including the subject property, lots 9, 12 and 40 in Cedar Woods subdivision. All parties to this action participated in the same roles relative to the SCB&T mortgage transaction and then, about three (3) months later, to the First Federal mortgage transaction. **(R.p.28-44; R.p.45-66; R.p.67-80)**

Later, RMB Homes defaulted and SCB&T commenced foreclosure proceedings which resulted in an Order that the subject lots be sold free and clear of the First Federal mortgage. First American Title Insurance Company ("FATIC") intervened, buying the subject lots out of the foreclosure to protect the interests of First Federal. **(R.p.28-44)**

On December 16, 2009, FATIC sued its agent, attorney Michelle Paddy Refosco ("Refosco") seeking contractual indemnity pursuant to its agency agreement with Refosco, requesting an award for the SCB&T payment, prejudgment interest, attorney's fees and costs. **(R.p.28-44)** Refosco filed an Answer and Third Party Complaint against Appellants AmeriSearches, LLC and Wade Schaffner ("AmeriSearches"), who performed title work for Refosco. **(R.p.45-66)**

Refosco sued AmeriSearches for negligence and sought indemnity, seeking an award for all costs and charges associated with the FATIC action, plus her attorney's fees and costs incurred in defending the action. **(R.p.45-66)**

AmeriSearches answered, generally denying the allegations, alleging that as a licensed attorney Refosco owed a nondelegable duty relative to the title search as part of the practice of law such that she could delegate the task but not the liability or the duty; alleging that Refosco closed the SCB&T mortgage and had personal and professional knowledge of it and alleging the following defenses: Rule 8 & 12 defenses/motion to dismiss, waiver and/or release, lack of duty, lack of subject matter jurisdiction, sole negligence of defendant/third party plaintiff, sole negligence of Horry County or its agents, servants and employees, comparative negligence, assumption of the risk, lack of reliance, not a professional within meaning of statutory/case law and/or impossibility, reservation of right to amend, no record notice; improperly filed/indexed mortgage, and the incorporation of all defenses pled by any party. **(R.p.67-80)**

The parties conducted written discovery and took certain deposition testimony. **[R.p.256-350 (Refosco) and R.p.351-467 (Schaffner)]** The parties then conducted an unsuccessful mediation, after which Refosco and AmeriSearches moved for summary judgment. **[R.p.190-198 (AmeriSearches) and R.p.199-206 (Refosco)]** The summary judgment motions came on for a hearing on September 7, 2011. **(R.p.207-236)**

The trial court denied AmeriSearches' Motion for Summary Judgment and granted Refosco's, entering an Order requiring AmeriSearches to indemnify Refosco. **(R.p.3-27)**

Then, AmeriSearches filed a Motion for Reconsideration. **(R.p.116-189)** That motion was heard on August 13, 2012. **(Transcript of Motion for Reconsideration)** The trial court denied the motion, declining to reconsider its prior ruling, by Order dated 8/27/12 and recorded 8/29/12 and received by AmeriSearches on 9/4/12. **(R.p.1-2)**

AmeriSearches timely appealed by Notice of Appeal dated and served September 21, 2012 and filed by this Court on September 24, 2012. **(R.p.81-115)**

STATEMENT OF THE FACTS:

This action arises from a pre-existing SCB&T mortgage not reported to FATIC by its agent, Refosco, when she closed a mortgage from First Federal Savings and Loan to RMB Homes. **(R.p.28-44)** Refosco is an attorney licensed to practice in South Carolina. Her practice is in Horry County and focuses on real estate. **(R.p.4, #29; R.p.5)** Refosco has FATIC's agent since January 8, 2004. **(R.p.32, #3, R.p.38-40)**

AmeriSearches, LLC is a Limited Liability Corporation owned by Wade Schaffner. **(R.p.357, l. 9-15)** Refosco often retained AmeriSearches to search and abstract titles for her real estate transactions and she only wrote title policies through FATIC for which she earned a sixty four (64%) percent commission. **(R.p.364, l. 13 – p.365, l. 21; R.p.38-40; R.p.327, l. 17-22; R.p.315, l. 11-19)** Gaetan (Guy) and Susan (Sue) Remillard and their companies were long-standing clients for whom Refosco has handled over 300 transactions. **(R.p.5; R.p.267, l.12- p. 272, l. 23)**

In June of 2007 RMB retained Refosco to close a fairly large loan from SCB&T. Refosco assigned the title search to AmeriSearches for property in Red Bluff Subdivision and several tracts in Cedar Woods Subdivision. **(R.p.320, l. 24-p. 322, R.p.304, l. 20-p. 306, l. 7; R.p.45-66)** Refosco then closed the loan of $1,940,700.00 from South Carolina Bank & Trust to RMB Homes which was primarily secured by the Red Bluff lots with the Cedar Woods lots being additional collateral. Refosco then wrote the title policy for SCB&T through FATIC. **(R.p.28-44; R.p.45-66; R.p.276, l. 12-p. 278, l.2, R.p.283, l. 1-p.284, l.12; R.p.48, l.12-18; R.p.316, l.13-p.320, l.17)**

Just prior to the closing of the First Federal Mortgage in September of 2007, Ms. Refosco was checking on the status of a judgment against the Cedar Woods lots, and had conferred with local attorney Gene Connell about the judgment. Then she had Schaffner of AmeriSearches pull the judgment role to verify that it was released as to the lots that would later be the subject of the First Federal Mortgage. **(R.p.377, l. 19- p. 379, l. 24 andR.p.597; R.p.307 l.22-p. 314, l.20)**

About three (3) months after the SCB&T closing, in September of 2007, RMB again contacted Refosco, this time to close a loan of $175,000.00 from First Federal Savings and Loan which would be secured by a first mortgage on several lots in Cedar Woods. Refosco assigned the title search to AmeriSearches. **(R.p.28-44; R.p.45-66; R.p.298, l.3- p.299, l. 15; R.p.273, l4-p.276, l.13)** During the title search Schaffner ran across Horry County RMC's index listing of the SCB&T Mortgage but the index showed that the mortgage bound several tracts in Red Bluff. Schaffner was not searching lots in Red Bluff so he did not pull the Red Bluff mortgage. **(r.P.45-66; R.P.p. 383, l. 9- p. p. 396, l. 21; R.p.59, l.7 – p. p.413, l.21; R.p. 89, l.1-15)**

Schaffner returned a report of title to Refosco showing the Cedar Woods lots clear of mortgages but it included his standard disclaimer which states as follows: "All title searches are subject to the records of Horry and Georgetown County being filed and indexed correctly." **(R.p.414, l. 8–24)** After being advised of the supposedly missed mortgage and checking the index to see that the lots in Cedar Woods he was checking were covered by the SCB&T mortgage indexed as several lots in Red Bluff subdivision, he contacted the ROD or Clerk's office to report the mis-indexing and was told to fill out a mis-indexing form and they would fix it. Schaffner filled in the form but never checked to see if the entry was fixed. **(R.p.443, l.4-p. 445, l.14)** Schaffner's form included the disclaimer because records in Horry County are often mis-indexed and mis-indexing can't be prevented because it is a product of simple human error.

(R.p.414, l. 18– p.415, l.13; p. 440, l. 5-19) Schaffner took a photograph of the mis-indexed entry. **(R.p.604)** And Schaffner testified that at the time of this incident, the screen shown, complete with the little dots at the end, is the full screen visible. It was not possible to see the rest of the entry at the time this occurred, but today there are computer monitors at the ROD where the whole screen can be expanded. **(R.p.424, l.19 –p.427, l. 15)** Ms. Refosco checked remotely rather than going to the ROD to check on the abstracting machines and therefore Ms. Refosco got a different screen via the "Gateway" or Horry County's online index, but the online site is not used by title abstractors because it is not certified, is unreliable and not updated as regularly as the ROD computers. **(R.p.397, l. 14-p.398, l. 24)**

The SCB&T mortgage was indexed based on the way it was drafted by Refosco. The legal description put all of the information for the Red Bluff lots as the primary entry, and only referred to the Cedar Woods lots (at issue in this case) in the additional collateral clause. Had the description referenced lots in Red Bluff Subdivision and Cedar Creed Subdivision and then given the particulars, it would have been indexed accordingly. **(Exhibit 6 to Schaffner Dep)**

Ms. Refosco testified that she thought her responsibilities in supervising a loan closing and/or title abstract included the responsibility to: (1) to prepare and review the loan documents, including reviewing them with the borrowers; (2) to order and review a title search and act on the information provided; (3) to use a reputable contractor to get that search; (4) to request further search if there are "obvious errors, something that I am currently aware of, that I recognize is not included in that search." **(R.p.330, l. 9-p.331, l.18)** Ms. Refosco testified that "what she should recognize" as problematic in this case included that there was no mortgage listed on any of the three (3) title search summaries. **(R.p.330, l. 14-24)** She testified that she felt her duty to follow up on the absence of a mortgage on the lots because her clients and their companies bought "that

many lots" and Refosco knew that when you buy that many lots "you borrow money to do it." **(R.p.330, l. 18-p.331, l. 17)**

To verify the absence of a mortgage on the subject three (3) lots from Cedar Woods, Refosco *asked the borrowers* who advised that there was no mortgage. **(R.p.330, l.23 –p.331, l. 4)** Refosco had closed the SCB&T mortgage ninety (90) days before the First Federal loan and as part of the SCB&T closing she wrote two (2) FATIC title insurance policies (an owners and a lenders' policy). Yet, when the next closing from these long-time clients came in, Refosco didn't check her own records. **(R.p.299-p.304;R.p.387, l. 14-p.390, l.5)** Had Refosco checked her records to provide AmeriSearches with full information or after the search, to satisfy her duty as to those "obvious errors", she would still not have located the SCBT mortgage file because her office files were indexed by "purpose." **(R.p.303, l. 22-24)** The "main purpose" of the SCB&T loan was to take down Red Bluff, so that was how Refosco's file was indexed. **(R.p.303, l. 10-p.304, l6)**

Refosco's files were not cross-indexed. **(R.p.304, l. 15-19)** Refosco had no master list of files for title abstract purposes or title insurance purposes. **(R.p.305, l.21- p.306, l.10; R.p.332, l.22- p.333, l. 19)** Considering Refosco's "purpose" filing system, had she checked her files to see if these lots in Cedar Woods were mortgaged, she would have missed the mortgage because her files were mis-indexed, very similarly to those at the ROD Office in Horry County.

Refosco testified that she relied on the title abstractor's "expertise in searching the title work at the courthouse" and felt no obligation to provide AmeriSearches what her file showed. **(R.p.304, l. 20-p.306, l. 9)** Schaffner testified that he was relying on Refosco who was "on top of everything" and didn't feel he needed his father to pull AmeriSearches' prior file information. **(R.p.390**, l. 1-5)

Refosco produced no evidence about the standard of care for an attorney in situations such as those present in this case, including, but not limited to: closing a mortgage loan, assigning and directly supervising a title abstractor, providing the abstractor with full and adequate information, properly reviewing and verifying information on the title abstract form, preparing title insurance policies and maintaining, arranging and checking her own file information for dealings with clients doing large scale real estate developments.

However, Schaffner did testify about the standard of care for a title abstractor, saying that title abstractors rely upon the ROD descriptions for deeds and mortgages and that they do not pull every mortgage. "Say I do a John Smith tomorrow and there's six hundred mortgages. I'm just looking for the ones that are particular to my property. Now, if they don't specify here, or they say several parcels, or they don't specify the property, then I click on it. But if they specify the property that to me means that they have – the Register of Deed has looked through it. They know that there's only these lots that are contained on that." **(R.p.454, l.10-20).** Schaffner testified that practice is standard in Horry County and he knows that because he works there every day and no one pulls every document in a chain. Schaffner was aware of no other standard used in Horry County. **(R.p.454, l.21 – p.455, l. 5)**

Subsequently SCB&T filed a foreclosure action, naming First Federal as a party, and seeking and obtaining an Order naming First Federal's interest as junior to SCB&T's mortgage and that the Cedar Woods lots be sold free and clear of First Federal's mortgage. **(R.p.28-44)** FATIC stepped in and discharged SCB&T's lien by paying the amount due for the Cedar Woods lots on the SCB&T mortgage - $120,726.49 and it then filed this action against its agent, Refosco who filed the present Third Party Complaint against AmeriSearches. **(R.p.45-66; R.p.67-80)**

ARGUMENT:

The Trial Court committed error such that its Order should be reversed in (1) not granting Appellants Amerisearches, LLC and Wade Schaffner's (Hereinafter, "AmeriSearches") Motion For Summary Judgment; and (2) in granting Respondent Refosco's Motion for Summary Judgment; and (3) in awarding Refosco indemnity from AmeriSearches, especially considering the following?

I. The Standard Of Review:

Summary Judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), *SCRCP*

When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. The purpose of Summary Judgment is to expedite the disposition of cases which do not require the services of a fact finder. The remedy should be cautiously invoked so that no party is improperly deprived of a trial on disputed factual issues. Turner v. Milliman, 381 SC 101, 671 SE2d 636 (Ct.App. 2009)

II. The South Carolina Supreme Court Regulates Paralegals, Lay Persons, Nonlawyers And The Unauthorized Practice Of Law By Regulating Lawyers?

Only licensed attorneys who are members of the South Carolina Bar Association may practice law in this state. §40-5-310, *SC Code Ann.*, 1976 The SC Supreme Court has original

and exclusive jurisdiction over the practice of law. S.C. Const. art. V, 4; see also S.C. Code Ann. 40-5-10 (declaring and recognizing the "inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law"). In 1991, after thirteen (13) years of collecting information and a full year of drafting the rules, a special sub-committee of the South Carolina Bar submitted proposed rules governing the unauthorized practice of law to the Supreme Court. In Re Unauthorized Practice Of Law Rules, 309 S.C. 304 (1992) These proposed rules tried to "define and delineate the practice of law, and to establish clear guidelines so that professionals other than attorneys can ensure they do not inadvertently engage in the practice of law." *Id*

The Supreme Court thanked the Bar for its "Herculean" efforts, but declined to adopt the rules, finding it "neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy." *Id* at p. 305. The SC Supreme Court's decision not to adopt rules defining the practice of law came two (2) years after the United States Supreme Court's decision which is regarded by some as "legitimizing" the paralegal profession. Missouri v. Jenkins, 491 U.S. 274; 109 S. Ct. 2463; (1989); 53 S.C. L. Rev. 487 *"Avoiding the Unauthorized Practice of Law: Proposed Regulations for Paralegals in South Carolina,"* 2002

Prior to the SC Supreme Court's decision not to adopt the proposed rules defining the practice of law, a number of other states had recognized the paralegal profession and developed rules and procedures for licensing and certifying paralegals. *53 S.C. L. Rev. 487* According to the Bureau of Labor Statistics, paralegals perform a variety of tasks generally, including preparing

documents for real estate closings and researching titles. *Id* Instead of establishing formal regulations controlling paralegal practice, the Court controls paralegals indirectly by regulating the activities of attorneys. *53 S.C. L. Rev. 487*

> While there are no regulations dealing specifically with paralegals, requiring a paralegal to work under the supervision of a licensed attorney ensures control over his or her activities by making the supervising attorney responsible. *See* Rule 5.3 of the Rules of Professional Conduct, Rule 407 SCACR (supervising attorney is responsible for work of nonlawyer employees).
> State v. Robinson, 321 S.C. 286; 468 S.E.2d 290 (1996)

Hence, in South Carolina, the state Supreme Court, in 1992, declined to adopt rules defining the practice of law and governing the activities of non-lawyer employees performing legal functions. Five (5) years later in State v. Robinson, the Court stated that it chooses to control non-lawyer employees by controlling attorneys, making attorneys responsible for the activities of non-attorneys working under their supervision. *Id*

Based upon the foregoing, no action should lie against paralegals, legal secretaries, nonlawyers or laypersons to whom a licensed attorney delegates a task that is part of the practice of law. This case concerns actions for negligence and indemnity, but AmeriSearches contends that this court's holdings should apply equally to other possible causes of action, including, but not limited to, those for breach of contract or *quantum meruit*. For the purpose of clarity on the liability of title abstractors to attorney's or to title insurance companies or third parties, such as clients, it should be noted that this principal means that also barred is any action against a title abstractor arising from the abstractor's performance of a task delegated that is part of a licensed attorney's practice of law. That bar should include, but not be limited to, actions for breach of contract or *quantum meruit*.

III. Examining Titles In South Carolina Is Part Of The Practice Of Law. Therefore, It Was Error For The Trial Court To Deny AmeriSearches Motion For Summary Judgment And to Grant Refosco's:

Previously, the State of SC sought and obtained a declaratory judgment holding that a corporation had engaged in the unauthorized practice of law and an injunction prohibiting the company from performing future similar acts. In that case, Buyer's Services, a commercial title company, handled a real estate transaction beginning with receipt of the contract of sale, all the way through dispersing funds, holding closings and preparing and recording legal documents. The company would send an employee to abstract a title, charging the customer for the service. A non-attorney employee would review the completed abstract. After the State filed suit, the company began retaining an attorney and paying a flat fee to have that attorney review the closing documents. The trial court heard the case and issued the injunction sought by the state, finding that certain matters constituted the practice of law. One of the things Buyer's was enjoined from was providing reports, opinions, or certificates as to the status of titles to persons other than licensed attorneys. State of SC v. Buyers Service Company, Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). In so holding, in relevant part, the SC Supreme Court stated as follows:

> The State argues that even though the buyer does not see the title abstract, he nevertheless relies upon it to determine if he receives good, marketable title. That is, because the buyer knows a title search has been conducted, he reasonably assumes title is good if nothing adverse is reported. We agree.
>
> The same principles which render the preparation of instruments the practice of law apply equally to the preparation of title abstracts. In Beach Abstract & Guar. Co. v. Bar Ass'n of Ark., 230 Ark. 494, 326 S.W.2d 900 (1959), the court relied upon its earlier holding in *Arkansas Bar Ass'n v. Block, supra,* in holding that title examination, when done for another, constitutes the practice of law. The court rejected the title insurance company's arguments that the examinations were performed only incidentally to its own business and that no separate fee was charged.
> State v. Buyers at p. 432-433.

Similar issues came before the Court several years later in a case filed by a SC attorney against the Attorney General, petitioning the Supreme Court in its original jurisdiction for a judgment declaring whether her business association with a lender and title company constituted assistance with the unauthorized practice of law. Doe v. Condon, 351 S.C. 158, 568 S.E.2d 356 (2002). Doe contended that the title company had the right to furnish title because it was incidental to its business. In considering this contention, the SC Supreme Court stated as follows:

> In *Buyers Service,* this Court addressed a commercial title company's preparation of title abstracts for persons other than attorneys or themselves. The State in the case argued the buyer relies on the title search to determine if he receives good, marketable title. We agreed and rejected the title company's argument that it did not need attorney supervision because the title search was merely incidental to their own business. Instead, we found the title search company could conduct title examinations only under the supervision of a licensed attorney because the "examination of titles requires expert legal knowledge and skill" and the search affected the rights of buyers. *Id.* at 432, 357 S.E.2d at 18.
>
> According to the stipulated facts it appears Title Company conducts a title search and prepares a commitment, for the benefit of the Lender, without supervision by a licensed attorney. While Doe notes the Title Company is licensed to do business in South Carolina, we rejected the incidental-to-business approach in *Buyers Service.*
>
> Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.
> Doe v. Condon at p. 163-164.

About a year after Doe v. Condon, another case on the issue was brought before the SC Supreme Court in its original jurisdiction. That case was filed by Tax Collectors and County Attorneys for several counties that would retain non-attorney abstractors to search a title of a

property going into a tax sale. The County is required to notify all property owners and lien holders and it would use the title report to advise as to who should receive such notice. In the wake of Buyer's Services and Doe v. Condon, disagreement arose whether such title abstractors were engaging in the practice of law. Ex Parte Watson, 356 S.C. 432, 589 S.E.2d 760 (2003). The in this case was squarely whether a title search and report on the status of a title constituted the practice of law and the Court held that " ***...examining titles and preparing title abstracts constitute practicing law. Therefore, we require that licensed attorneys either conduct or supervise such activities. This requirement was established in Buyers and continues today for the purpose of protecting the public. 292 S.C. at 432-33, 357 S.E.2d at 19"*** Ex Parte Watson *at p. 435.*(emphasis added)

About a year after Watson the Court of Appeals considered a case involving a real estate contract where the buyers backed out after the title examination turned up a permanent 4-inch sewer easement. Slack v. James, 364 SC 609, 614 SE2d 636 (Ct.App. 2005) In reaching its holding, the Court of Appeals construed Watson as holding that: "examining titles and preparing title abstracts constitute practicing law and therefore such activities must be conducted or supervised by licensed attorneys." Id. Thus, the SC Court of Appeals considers that Ex Parte Watson means what it says and that when Watson says that examining titles is part of the practice of law, the Court of Appeals thinks that is what Watson meant.

IV. The Trial Court Lacked Subject Matter Jurisdiction To Consider The Claims In This Case Because The SC Supreme Court Governs The Unauthorized Practice Of Law And There Is No Civil Action For The Unauthorized Practice Of Law. Therefore, It Was Error For The Trial Court To Deny AmeriSearches Motion For Summary Judgment And To Grant Refosco's:

The issue of whether a civil cause of action exists for the unauthorized practice of law came before the Supreme Court several years after the "practice of law" cases. In Hambrick v. GMAC Mortgage Corp., mortgagors filed a civil suit against mortgagee Ditech alleging that the mortgagee engaged in the unauthorized practice of law in the course of their loan closing by preparing loan closing documents without the use of an attorney and by closing the loan without an attorney. Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (2006). The Court held that no private right of action exists for the unauthorized practice of law. The Court also upheld the trial court's dismissal of the suit and finding that it lacked jurisdiction to hear the case, stating that "only our supreme court has the constitutional duty to determine what acts constitute the unauthorized practice of law." Hambrick at p. 124.

V. Refosco Had A Non Delegable Duty And Non Delegable Liability Which She Could Not Delegate Or Assign To A Title Examiner. Therefore, It Was Error For the Court To Deny AmeriSearches' Motion For Summary Judgment And To Grant Refosco's:

As noted above, the SC Supreme Court regulates the practice of law and it has determined that examining titles and preparing title abstracts constitutes practicing law. Ex Parte Watson, 356 S.C. 432, 589 S.E.2d 760 (2003). In Watson, the SC Supreme Court stressed the import of an attorney directly supervising title searches. "Without direct supervision" by a licensed attorney, the title checker's examination is as much the unauthorized practice of law as is a paralegal's preparation of deeds and mortgages. State v. Buyers Services, *id.*

In fact, In Re Watson goes further, it holds that "the title abstractor's report must either be generated or approved by a licensed attorney." In Re Watson at p. 435. The Court notes the requirement of the involvement of an Attorney in performing or overseeing the title examination and in the preparation of the title abstract. In Re Watson at p. 436. Significantly, Watson addressed the possibility of abstractor error. The Court stated that "property owners, buyers, lien holders and counties depend on the tax collector to notify all those statutorily entitled to notice. If the title abstractor's report contains errors, a tax sale may be invalidated and the county may be subject to due process claims from those who did not receive notice." In Re Watson at p. 435. The Court acknowledged that the involvement of attorneys will increase costs to counties, but felt that allowing abstractors to perform the work without direct attorney involvement, supervision, and the review/signature of the abstractor's report would prove more costly. The Court stated: "But we believe the mistakes, such as failing to notify the proper parties, may prove more costly. On balance, the consequences of relying on a defective report may expend more county resources than the costs associated with taking proper measures from the outset." In Re Watson, p. 435-436.

The Watson decision shows that the Supreme Court requires the involvement of attorneys upon whom buyers, lenders and the public can rely rather than allowing abstractors to do the work independently, since buyers, lenders and the public could not rely on such independent examination. **In discussing potential title examiner mistakes and the costs of such mistakes, the Court only references the costs to counties.** It could have noted that the counties' costs could be defrayed by claims against the title examiner, but it does not do so. The counties had the duty and the court references the counties as bearing the costs of abstractor error.

In Buyer's Services, the Supreme Court held that "The examination of titles requires expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay persons, must be under the supervision of a licensed attorney. *Id.* The Buyers Services case also holds that instructions to the recording office as to the manner of recording instruments, if given by a lay person for the benefit of another, must be given under the supervision of an attorney. *Id.*

The Rules of Professional Conduct also address a licensed attorney duties and responsibilities for non-attorney employees or independent contractors. Rule 5.3(b), *SCACR* provides that a lawyer with direct supervisory responsibility must make reasonable efforts to ensure that a nonlawyer's conduct is compatible with the professional obligations of the lawyer. The comments to the rule state that "Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors ACT FOR THE LAWYER IN RENDITION OF THE LAWYER'S PROFESSIONAL SERVICES (emphasis added)." Rule 5.3, *SCACR*, Comment (1). Rule 5.5, *SCACR* provides that a lawyer should not assist another in the unauthorized practice of law. The comments to Rule 5.5 states "This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, SO LONG AS THE LAWYER SUPERVISES THE DELEGATED WORK AND RETAINS RESPONSIBILITY FOR THEIR WORK. See Rule 5.3." Rule 5.5, *SCACR*, Comment (2)

The term "nondelegable duty" is a misnomer. If a party is under a nondelegable duty to perform a task, the performance of the task can be delegated but if the party performing does so negligently, then the party who owed the duty remains liable. It is the liability, not the task, that is nondelegable. Simmons v. Tuomey, 341 SC 32, 533 SE2d 312 (2000) In determining that

hospitals owe nondelegable duties to emergency room patients in some situations, the SC Supreme Court said that "a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong." Simmons, p. 318

> It is well-settled law that an employee who, by reason of his calling or the business to which he is engaged, owes special legal duties and obligations to the public or to those with whom there exists some contractual relation cannot shirk or evade such special duties and obligations by committing its performance to another; he is bound absolutely to perform the obligation, and he is liable for a failure to do so in any respect whereby injury results to others, whether such failure results from criminal conduct of the employee or agent to whom the duty has been committed. Being bound to do the act or perform the duty, if he does it by another the employer is treated as having done it himself.
> Carson v. Vance, 326 S.C. 543, 485 SE2d 126 (Ct. App. 1997)

Although Carson v. Vance construed North Carolina law, the SC Court of Appeals stated that the language quoted above "is in accord with our own law on the subject. Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993) (finding one who has a statutorily imposed non-delegable duty cannot escape liability to third persons by engaging an independent contractor to accomplish the work)." Carson v. Vance at p. 550

According to the decisions of the SC Supreme Court, the entity charged with regulating the practice of law, and the Rules of Professional Conduct, Refosco's obligation to search the title are part of her professional duties and are nondelegable. Rules 5.3 and 5.5 of the Rules of Professional Conduct make it clear that whether it is the paralegal who fails to enter a Statute of Limitations on the calendar or a title examiner who fails to note a mortgage on an examination, the assistants are acting for the lawyer in rendering professional services and THE LAWYER RETAINS RESPONSIBILITY. Rule 5.3, *SCACR*, Rule 5.5, *SCACR* and official comments.

In a professional practice context where an obligation is imposed by law or statute, such as in the practice of law, the delegation to a subordinate is disregarded and it is considered that the professional performed the act himself. Carson v. Vance, *supra.*

VI. The Indemnity Claim Against AmeriSearches Should Have Been Dismissed As A Matter Of Law And It was Error For The Court To Grant Summary Judgment To Refosco Granting Her Claim For Indemnity:

There is no written contract between the parties whereby AmeriSearches or Schaffner agree to indemnify Refosco and without that underlying contract, indemnity must sound in negligence. (McCain Manufacturing Corp. v. Rockwell International Corp., 528 F.Supp. 524, 1981 U.S.Dist Lexis 16279 (D.S.C. 1981). As a matter of law, Refosco's negligence prevents her from gaining the remedy of indemnification in South Carolina.

"Ordinarily if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury." Addy v. Bolton, 257 S.C. 28, 183 SE2d 708 (1971), quoting Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 70, 132 SE2d 172, 176 (1963). "Whatever the general rule may be, the law of South Carolina does not recognize a right to indemnification by one whose personal negligence, albeit "passive," contributed to the injury for which he has been held liable. " McCain Manufacturing v. Rockwell International, *supra.* An indemnitee is barred from the remedy if he was guilty of any personal negligence which joined as a proximate cause of the injury to the third party, even if the prospective indemnitee's negligence was merely passive. *Id.*

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not." Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 363 SC 53, 518 S.E.2d 301 (1999). "Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him. Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E.2d 172 (1963). This is subject to the proviso that no personal negligence of his own has joined in causing the injury." *Id*

Also, in South Carolina, one with a statutorily imposed non-delegable duty is not allowed to escape liability to third persons by retaining an independent contractor to accomplish the work. Carson v. Vance, *supra*

VII. The Trial Court's Order Contains Errors Of Law And Fact:

The Trial Court's Order contains a number of errors of law and fact. Those errors include the following:

1. That the case involves claims from a properly indexed mortgage when AmeriSearches contends that evidence exists from which the jury could conclude that the mortgage was not properly indexed. **(R.p.4)**;

2. That the title search was performed by Schaffner on behalf of his company when the search was performed by AmeriSearches, LLC with the company's employee, Schaffner, physically performing the search; **(R.p.4);**

3. That the missed mortgage ultimately resulted in title insurance claims being paid by the Plaintiff FATIC when AmeriSearches contends that the facts show that all parties, including FATIC, were involved in the SCB&T mortgage closing such that FATIC, through its employees, software and processes or through its agent, Refosco, was negligent and this negligence is separate and apart from any issues between Refosco and AmeriSearches; **(R.p.4);**

4. Fails to find that Refosco only indexed the SCB&T search under "Red Bluff Village" and did not cross-index or reference it at all in her files for the "Cedar Woods" lots covered as additional collateral on the mortgage she drafted; **(R.p.6);**

5. That there is no evidence that the information provided by Refosco to AmeriSearches to conduct the title search was incorrect or inadequate when AmeriSearches contends that as part of her duties generally and as part of her duties to directly supervise, Refosco should have provided AmeriSearches with information about the SCB&T mortgage, which was contained in her files; **(R.p.7);**

6. That Schaffner (AmeriSearches) admits that the SCB&T mortgage could have been located in this title search when AmeriSearches claims Refosco had a duty to provide all important information in her possession, including the SCB&T mortgage and when AmeriSearches contends that the SCB&T mortgage was mis-indexed as only applying to Red Bluff Village, which mis-indexing likely occurred based on the way the mortgage was drafted by Refosco which only referenced the Cedar Woods lots at the bottom, rather than putting the reference at the top where the ROD staff would have picked it up; **(R.p.7);**

7. That "it is admitted" by Schaffner that the computer index at the ROD included the SCB&T mortgage under RMB but he failed to note it due to the property description on the index. This is an error of fact because AmeriSearches contends that the property description was improper-inadequate such that the mortgage was mis-indexed and AmeriSearches contends that under the standard in Horry County, abstractors would not click on a mortgage indexed as applying only to "Red Bluff Village" when the abstractors were searching lots in "Cedar Woods); **(R.p.7);**

8. That the index description was obviously partial or incomplete. This is an error because it ignores AmeriSearches contention that instead of listing one subdivision included in a mortgage applying to more than one subdivision, that the index should have read "various lots. **(R.p.8);**

9. That the mortgage was "missed" because Schaffner did not click on the index entry and that Schaffner located it in 2008 by recreating his search and clicking the link he passed over. This ignores that there were numerous reasons why this mortgage was not located, including the negligent drafting by Refosco and the negligent/improper indexing by the Register of Deeds' staff and this ignores that the SCB&T mortgage was also located in 2008 because Refosco and AmeriSearches were advised that a SCB&T mortgage had been missed. **(R.p.8);**

10. That Refosco failed to do more to confirm the absence of a mortgage than to ask the client which fails to deal with AmeriSearches contentions that the attorney was obligated to do more since she was conducting the title search via having assigned it to a nonlawyer abstractor. **(R.p.8);**

11. That Refosco failed to recollect the SCB&T mortgage she had closed ninety (90) days earlier without finding that she was obligated to have recollected the mortgage and/or that she was obligated to have searched her files. **(R.p.8);**

12. That Refosco did not locate the SCB&T mortgage in her files because it was stored in her Red Bluff Villages files. This ignores the attorney's negligence in her filing system and her negligence in having failed to check her files and provide the SCB&T mortgage to the title abstractor when the search was assigned. **(R.p.8);**

13. That Refosco's failure to note the SCB&T mortgage as an exception on the First Federal title policy was due to her not being "aware" of the SCB&T mortgage. This ignores her obligation to be aware of the mortgage, to correctly create a filing system, to check her files and provide the mortgage to the abstractor AND to check her prior files for RMB/the Remillards and their companies for which she had written FATIC coverage. It also ignores Refosco's failure to separately maintain an indexing/cross-indexing-master list system for her filing and title policies. **(R.p.8-9);**

14. That the title search alone was not the practice of law and that AmeriSearches defenses in this regard are "without merit." The Order also states that "it is clear that the South Carolina Supreme Court has not mandated that a title search must actually be performed by an attorney."That title searches are part of the practice of law is a matter of law and the court's contrary finding is a clear error of law and the court erred as a matter of law and fact in finding AmeriSearches defenses in this regard "without merit). **(R.p.10-13);**

15. That the Order misstates, misconstrues, and inaccurately relates the holdings in the cases of Buyers Services, Doe v. McMaster, McMaster I and McMaster II. It addresses the "policy" of the cases, and it states that none of the cases considered a lay person's liability to a "supervising" attorney for errors in a title search and it says the SC Supreme Court's orders stand for the proposition that a lay person can conduct a title search as long as an attorney supervises. In all of the foregoing, the Order fails to correctly construe the holdings of the cases involved and it fails to state, consider or address the Court's actual holding that conducting a title search is part of the practice of law. **(R.p.11);**

16. That the Order holds - more than once – that "it is clear" that if the subject title search were performed properly it should have revealed this mortgage. This overlooks many of AmeriSearches contentions as made above and it overlooks the fact that the Court never rules upon the "proper" way to perform a title search and only Schaffner of AmeriSearches testified about "standards" for abstractors and the Court disregarded that testimony and ruled to the contrary without any evidence of "standards" for attorneys, title abstractors and without any contradictory evidence in the record of the "standard" to which Schaffner testified. **(R.p.12, p.15);**

17. That there is no issue or material fact as to proper supervision by Refosco when the above indicates that AmeriSearches has and had significant issues and questions and believes that at a minimum, it was for the jury to determine. **(R.p.12);**

18. That because searching a title is not the practice of law no proof of standard of care is required as to attorneys and that the proper standard is that of a reasonable person or title searcher. This is an error of law because title searching is the practice of law and that regardless of that legal error, proof of the standard of care was required – at a minimum – to prove proper supervision. **(R.p.12-13);**

19. That the Court erred in dismissing the defense of unauthorized practice of law and further AmeriSearches contends that the Trial Court lacked subject matter jurisdiction to consider this claim. **(R.p.13);**

20. That "it is undisputed" that lay person Schaffner/AmeriSearches knew that licensed attorney Refosco would rely on the accuracy of its title search in performing a closing. This is an error of law and an error of fact as it is not "undisputed". Schaffner was entitled to rely on Refosco, but the reverse is not true because a lawyer cannot rely on a nonlawyer to practice law up to the standards required of an attorney. **(R.p.14);**

21. That it errs in holding that Schaffner/AmeriSearches assumed the risk and "improperly" relied on the ROD legal description. This is an error of fact and law – legally, there was no risk for AmeriSearches to assume and there was no testimony as to standards for title abstractors or attorneys in performing title searches save Schaffner's testimony, which the Court disregards in this holding without any contradictory standards upon which the Court could have based this holding.

22. That it errs in finding Refosco "innocent", in not finding that – as a matter of law – she was negligent, in not finding as a matter of law that an attorney cannot seek indemnity from a title abstractor nor hold him liable in negligence because abstracting a title is part of the practice of law. See the foregoing. **(R.p.13-16);**

23. That it errs as a matter of fact and law in dismissing the following AmeriSearches defenses: imputed knowledge, assumption of the risk, lack of reliance, non-delegable duty, mis-indexing, lack of duty, comparative negligence and waiver and release. AmeriSearches continues to assert these defenses and alleges that they were dismissed based on the court's other erroneous holdings and mistakes of fact and law and AmeriSearches continues to allege the same. **(R.p.16-25);**

24. That the Court erred as a matter of law in failing to dismiss all claims against Schaffner, individually. Schaffner performed any acts in connection with this matter as an employee of AmeriSearches. Further, the Order bases its holding upon case law pertaining to an agent committing a tort against a third person, which does not apply under these facts. **(R.p.22);**

VIII. APPLICATION OF THE FACTS TO THE LAW:

South Carolina law considers that attorney Refosco examined the title herself and therefore no action for negligence or indemnity will lie as they are wholly derivative of Refosco's primary liability. Carson v. Vance, Durkin v. Hansen, *supra* The goals of the case law and the Rules of Professional Conduct are to make an attorney responsible for all acts or failures to act that compose the practice of law. These goals would be thwarted if attorneys can evade their nondelegable duties and professional obligations by assigning them to an independent contractor or nonlawyer employee.

Pursuant to case law and the Rules of Professional Conduct, including Rules 5.3 and 5.5, lawyers can retain assistants. BUT whether those assistants are employees or independent contractors, they act "in rendition of the lawyer's professional services" and the lawyer retains responsibility for the work. Rules 5.3, *SCACR*, Rule 5.5, *SCACR* and official comments.

In this state examining a title and reporting an abstract of title are part of the practice of law. *See: Section I, above,* and In Re Watson, Doe v. Condon, Slack v. James, *supra*

Whether a lawyer examines a title by going to the courthouse herself or by sending a paralegal employed by the firm or an independent abstractor, the lawyer has examined the title. "Being bound to do the act if he does it by another" the lawyer is treated as having done it himself. Carson v. Vance, *supra.* Since the lawyer examines the title, as she is bound to do by her professional obligations pursuant to the exclusive franchise granted to practice law, the lawyer cannot contract with another to shift the liability or attempt to do so in negligence or via indemnity.

Under South Carolina law, Refosco, as the licensed Attorney, had the DUTY to directly supervise AmeriSearches and to generate or approve its report. In Re Watson, *supra.* If AmeriSearches/Schaffner failed to perform the search properly (which is denied) then Refosco's requisite direct supervision failed and the attorney should not have approved the report. As a matter of law, Refosco was (at least) negligent in her direct supervision and in approving AmeriSearches/Schaffner's report. Further, as stated above, South Carolina regards Refosco as having performed this title examination, whether she did it herself, through staff or through an independent contractor. Rule 5.3, *SCACR*, Rule 5.5, *SCACR* and official comments. Refosco cannot maintain this indemnity action and the Trial Court's Order erred in not granting AmeriSearches' Motion for Summary Judgment and in granting Refosco's and in ordering that the nonlawyer indemnify the lawyer for part of the practice of law. **(R.p.3-27)**

Under our state's law Refosco performed the title examination, whether she did it by driving to the courthouse or by assigning it to an assistant, paralegal or title examiner. Rule 5.3, *SCACR,* Rule 5.5, *SCACR*, and official comments. Refosco had the duty not merely to supervise the search, but to *directly* supervise the search. State v. Buyers Service Company, 292 SC 426, 357 SE2d 15 (1987) If Refosco did not *directly* supervise the search, then she was involved in assisting and promoting the practice of law without a license. If she did *directly* supervise the search and it failed to locate all of the liens, including the SCB&T mortgage that Refosco had in her file, then she was also negligent in her direction and control.

As between Refosco and Schaffner, Refosco was the attorney, specially trained and licensed to practice law. Performing this title abstract and reporting the results of the title examination constitute the practice of law. As such, Refosco performed the search and reported the results, whether she did it at the courthouse or through an employee or abstractor.

Because Refosco was negligent as a matter of law, preventing an indemnity claim, and because indemnity sounds in professional negligence and it was Refosco who was the professional and not Schaffner, the indemnity claim should have been dismissed and summary judgment should have been granted to AmeriSearches. Counsel is aware of no South Carolina case holding that an attorney's action for negligence, indemnity or breach of contract will lie against an employee or contractor through whom the attorney performs an act which constitutes the practice of law.

Examining and abstracting titles is part of the practice of law in SC and a non-attorney cannot be held liable to an attorney for not practicing law competently. To hold AmeriSearches liable in negligence to Refosco would be to charge AmeriSearches with the unauthorized practice of law. The SC Supreme Court has exclusive jurisdiction over the practice of law and the unauthorized practice of law. To the extent that Ms. Refosco seeks to hold AmeriSearches liable for negligently practicing law, the trial court lacked subject matter jurisdiction to hear or decide this case because only the South Carolina Supreme Court could consider and rule upon the issue.

Additionally, the Trial Court erred in granting Refosco's Motion for Summary Judgment and Ordering that AmeriSearches indemnify Refosco because there is evidence in this case of Refosco's own negligence. **(R.p.3-27)** That evidence includes, but is not limited to, the following acts or failures to act by Refosco:

(1) Her failure to pull her files and provide AmeriSearches with full information as to the Cedar Woods tracts, inclusive of the SCB&T file information;

(2) Her failure to provide her nonlawyer abstractor had a copy of the SCB&T mortgage, particularly because it contained an "additional collateral" provision which may create difficulties for nonlawyers and challenges for the ROD staff;

(3) Her failure to check her own files prior to assigning this title examination and her manner and method of supervising the title examination did not comply with the requisite duty of direct supervision;

(4) Her failure to fully/properly review the title examination report and to point out the absence of the SCB&T mortgage from the report;

(5) Her failure to check either her own files regarding this developer client for whom she did a great deal of work and her failure to check with FATIC regarding prior title policies written for this developer client;

(6) Her failure to properly maintain, index and cross index her files;

(7) Her failure to maintain a "master list" regarding clients who engaged in a large volume of real estate, such as this group of developers;

(8) Her failure to create separate filing entries for each lot/subdivision involved rather than filing only "by purpose";

(9) Her failure to properly draft the subject mortgage so that all subdivisions involved would be listed at the top of the legal description or so that the additional collateral provision would be referenced at the top of the legal description;

(10) Her failure to go to the ROD office herself to check/verify the absence of a mortgage and/or the misindexing claimed by AmeriSearches;

(11) Her failure to account for the disclaimer on AmeriSearches' title summary making all title searches subject to the records of Horry County having been indexed correctly;

(12) Her failure to properly and fully verify the absence of a current mortgage, especially given her knowledge of this client's precarious financial position;

(13) Her failure to recall the mortgage that she closed only three (3) months previous to the First Federal loan, especially given that she and AmeriSearches had been involved in checking a judgment placed on the Cedar Woods lots by local attorney Gene Connell shortly before closing the First Federal mortgage;
(See: Statement of Facts As To All of the Foregoing)

The Trial Court erred in granting Refosco indemnity against AmeriSearches's and, as a matter of law, the Trial Court should have granted AmeriSearches Motion for Summary Judgment as to indemnity. **(R.p.3-27)** South Carolina law is clear in this regard:

> Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong had thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury. *Addy v. Bolton*, 257 S.C. 28 at 34, 183 S.E.2d 708 at 710 (1971) (quoting *Atlantic Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)).

Refosco was negligent in the practice of law and her negligence, possibly combined with that of FATIC, caused the SCB&T mortgage not to be picked up during the First Federal transaction. Refosco closed the loan to SCB&T. Then, shortly before the First Federal closing, Refosco was working on Cedar Woods regarding a lawsuit and judgment, she conferred with a local attorney and had Schaffner pull a copy of the Order documenting that the three (3) Cedar Woods lots to be closed were released from the judgment. Then, **three (3) months after the SCB&T closing**, Refosco did not advise Amerisearches of the outstanding mortgage when she assigned the title search, she did not pull her own records to confirm that the Cedar Woods tracts were clear of a mortgage, and had she pulled her records she did not have a sufficient filing system that indexed and cross-indexed every piece of property involved in a closing. **(Statement of Facts)** AS A MATTER OF LAW, Refosco is charged with notice of the SCB&T mortgage because she closed it, she certified the title, wrote the title policy and as the attorney she cannot come into Court blaming a non attorney for not practicing law properly. A party is not entitled to equitable indemnity if she was negligent. Addy v. Bolton, *id.*

The trial court also erred by granting Summary Judgment to Refosco and denying it to AmeriSearches when the evidence shows that the SCB&T mortgage was – or could have been found by a jury to be - improperly indexed by the Horry County RMC office. It listed only the Red Bluff tracts and its description should have read "various lots" which would require

everyone to pull the mortgage to determine what it covered. **(Statement of Facts)** All of the abstractors in Horry County rely on the indexes as to which documents it is necessary to pull. **(Statement of Facts)** The subject title search was returned to Refosco with a disclaimer that it – like all of AmeriSearches title searches – was subject to the records of Horry County being properly indexed. **(R.p.602-603)**

Even had AmeriSearches not been entitled to judgment as a matter of law, which it was, there were a number of genuine issues of material fact which should have compelled the trial court to deny Refosco's Motion for Summary Judgment and send the case to trial for a jury to find all necessary facts.

Some of the issues of genuine material fact that made it erroneous for the trial court to grant Refosco summary judgment included, but are not limited to: (1) the exact contents of the search screen at the ROD office and the then-existing limitations on expanding the screen; (2) how ROD employees responded to Schaffner's report of mis-indexing; (3) whether Refosco's acts constituted "direct supervision" of Schaffner; (4) whether Refosco's acts and failures to act met the standard of care, inclusive of her failure to recall the SCB&T mortgage three (3) months later and inclusive of her failure to maintain a cross-indexed filing system; (4) whether Refosco satisfied her due diligence in adequately verifying the lack of a mortgage on the subject tracts by simply asking her clients; (5) the effectiveness of AmeriSearches disclaimer as to mis-indexing under the specific facts of this case.

For all of the foregoing reasons, the Trial Court erred in denying AmeriSearches Motion for Summary Judgment and in granting Refosco's Motion, including her request for indemnity. This Court should, therefore, reverse the Order of the trial court and enter judgment granting

AmeriSearches and Schaffner's Motion for Summary Judgment, or, alternatively, reverse the Order of the trial court and bind this case over for a jury trial.

For many of the same reasons that AmeriSearches Motion for Summary Judgment should, as a matter of law, be granted as to Refosco's claims in their entirety and especially as to her claim for equitable indemnity, Refosco's Motion for Summary Judgment Should fail and be denied. In addition to the reasons stated above, by bringing this action **Refosco's claims seek to hold a non-attorney liable for not practicing law up to professional standards. All matters relating to the practice of law are solely governed by the SC Supreme Court and this Court lacks Subject matter jurisdiction to even consider this claim, so it too should be dismissed.**

SC holds checking or examining a title to be part of the practice of law. The attorney can check the title herself or assign the title search to an employee or independent contractor. However the task gets done, because it is part of the practice of law, the attorney is liable if the task is done incorrectly. Refosco failed to properly supervise the abstractor by providing information about the SCB&T mortgage and she failed to confirm there was no mortgage by keeping her files and computer system properly cross indexed and by not even checking her own records. Asking the clients who needed the money was, per se, inadequate confirmation of whether the tracts were mortgaged and the abstractor required the attorney to confirm the absence of a mortgage.

In addition to all of the foregoing, the abstractor's report of title takes exception to any matters not properly indexed and the SCB&T mortgage was improperly indexed. Refosco retains responsibility for certifying the title. This abstractor's report was returned with an exception taken to improper indexing. The burden for improper indexing must be assigned to the

attorney because checking this title was part of the practice of law and that would include confirming that matters were properly indexed.

FATIC is far from blameless in the situation. It had records of the SCB&T Mortgage in its own files. It, through its agent Refosco, wrote the title policy for the "missed" SCB&T mortgage. At the time it wrote the title policy for the First Federal Mortgage it knew or should have known from its own records that the title certification was incorrect. Therefore, FATIC is not entitled to recover - at least from the abstracting company with whom it had no privity or contractual relationship.

The Court should grant AmeriSearches and Schaffner's Motion and dismiss this action as to them entirely.

CONCLUSION:

South Carolina courts have repeatedly held that examining a title is part of the practice of law and reporting the results of that examination is part of the practice of law. As a licensed attorney, Ms. Refosco could perform or delegate this task, under her direct supervision and control. She could delegate the task, but not the responsibility or the liability for the task.

The practice of law is regulated by statute and only licensed attorneys who are members of the South Carolina Bar Association may practice law in this state. §40-5-310, *SC Code Ann.*, 1976 It is also regulated and controlled by the South Carolina Supreme Court. One with statutorily imposed non-delegable duties cannot escape liability to third persons by engaging an independent contractor to accomplish the work. Carson v. Vance at p. 550 Whether Refosco drove to the courthouse and examined the title, sent a secretary or paralegal, or sent an abstractor is irrelevant. The law considers that Refosco examined the title and she cannot successfully sue

AmeriSearches for negligence or indemnity as to a task the law regards Refosco as having performed. Although not part of this case, for the purpose of overall clarity on the liability of title abstractors to attorney's or to title insurance companies or third parties, such as clients, it should be noted that this bars any action against a title abstractor arising from the abstractor's performance of a delegated task that is part of a licensed attorney's practice of law.

Other states have different standards and some of those may not consider that examining titles and reporting the results of that examination constitute the practice of law. Yet, the South Carolina Supreme Court has determined that it does. The Trial Court's Order committed plain error in creating and/or enforcing duties and standards for title abstractors when in South Carolina our Supreme Court in the In Re Unauthorized Practice of Law case specifically declined to do so and said that it regulates nonlawyers by regulating lawyers.

This Court should speak to the equitable principals and hold that it would be inequitable for the attorney not to be held fully responsible. One might ask that if a title examiner isn't responsible for his negligence then is there reason for an attorney to use a title examiner at all? Attorneys use assistants, paralegals and title examiners every day to do acts that constitute the practice of law. If the support staff cannot be held responsible for negligence, why use them? Attorneys use support staff because certain functions take time and if the lawyer uses support staff, she can spend her time on other billable functions. By choosing to use support staff, the attorney assumes the risk of their negligent performance.

How, then, would a title examiner be held accountable? The same way staff would be accountable. By the wallet. If an attorney is displeased with staff, they get fired It is the same with independent title examiners. If they don't perform the tasks well then they don't get retained to do them anymore.

And if title abstractors are not liable for their title searches, then why have insurance? Insurance policies obligate a carrier to defend and the costs of defending can be substantial and so is the benefit to an insured abstractor. In addition to providing abstractors a defense, this case shows the general uncertainty in his area of law. There are trial judges, attorneys and title insurance companies who believe that a title abstractor can be liable to an attorney for matters arising out a title search. As long as that is the case, and until the law is clarified, a prudent abstractor would be best served to carry insurance.

Every act constituting the practice of law is important, and every act is one that clients assume their attorney is directly performing. That is why South Carolina law holds that an attorney does perform every act that comprises the practice of law. If counsel makes a decision to delegate one of those acts, she does so knowing the risks. It is no more unreasonable for title examiners not to have an independent burden of negligence than it is unreasonable for a secretary or paralegal not to have one, even when the nonlawyer employee misses a filing date for a statute of limitations, errs in drafting an answer or notes the calendar wrong for the deadline to notice an appeal.

An attorney can choose to do every act herself. But in practice, she is unlikely to decide to enter every deadline or search every title. Economics and the press of other business will keep attorneys retaining support staff and title examiners. And every time a hand reaches out to calendar a statute or search a title, South Carolina law sees that hand as being the attorney's.

Based on all of the foregoing, appellants AmeriSearches and Schaffner ask that this Court reverse the Order of the trial court, granting appellants' summary judgment and/or that this Court reverse the Order of the trial court and remand this case for a jury trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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