

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable Larry B. Hyman

2009-CP-26-12046

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APR 05 2013

SC Court of Appeals

First American Title Insurance Company.....Respondent

vs.

Michele Paddy Refosco, Attorney at Law.....Defendant

and

Michele Paddy Refosco, Attorney at Law.....Respondent

vs.

AmeriSearches, LLC and Wade Schaffner.....Appellants

INITIAL BRIEF OF RESPONDENT, MICHELE PADDY REFOSCO,
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**INITIAL BRIEF OF RESPONDENT, MICHELE PADDY REFOSCO,
ATTORNEY AT LAW**

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STATEMENT OF ISSUES ON APPEAL

- I Did the Trial Court properly apply South Carolina law related to the Unauthorized Practice of Law to determine that an independent contracting title searcher is subject to liability for an erroneous title search?
- II Did the Trial Court correctly determine that while the title search aspect of a South Carolina real estate closing is a non-delegable duty of the attorney to the client, the non-delegable nature of the duty does not eliminate the title searcher's duty and liability to the supervising attorney?
- III Did the Trial Court properly grant Refosco summary judgment on Appellants' defenses of comparative negligence, assumption of the risk, imputed knowledge and reliance, as there was no evidence or proof of negligence by Refosco?
- IV Did the Trial Court properly determine that the mortgage not reported by the Appellants was not mis-indexed?
- V Did the Trial Court properly determine that there was no evidence that Refosco had waived her claim against the Appellants?
- VI Did the Trial Court properly determine that the Appellants owed to Refosco a duty of care?
- VII Did the Trial Court correctly determine that AmeriSearches and Schaffner had a duty to Refosco, and were liable to Refosco for the breach of that duty under the theory of negligence?
- VIII Did the Trial Court correctly determine that AmeriSearches and Schaffner were liable to Refosco for an erroneous title search on the theory of indemnity?
- IX Are the alleged error of law and fact set forth in Section VII of Appellants' Brief presented improperly so as not to be considered by the Appellate Court?

STATEMENT OF THE CASE

This action was commenced on December 16, 2009, by the filing of a Summons and Complaint in the Court of Common Pleas by First American Title Insurance Company (hereinafter referred to as "FATIC") against Michele Paddy Refosco, Attorney at Law (hereinafter referred to as "Refosco"). In the Complaint, FATIC asserts a claim for a breach of the title insurance Agency Agreement and seeks contractual indemnity against Refosco. (Complaint)

On February 10, 2010, Refosco answered the Complaint of FATIC denying liability for indemnity. As part of her Answer, Refosco filed a Third Party Complaint against AmeriSearches, LLC (hereinafter referred to as "AmeriSearches") and Wade Schaffner (hereinafter referred to as "Schaffner"). The Third Party Complaint asserts claims against AmeriSearches and Schaffner centered on AmeriSearches' and Schaffner's conduct in providing a deficient title search. Refosco's claims are for negligence and equitable indemnity. (Answer and Third Party Complaint)

On April 19, 2010, AmeriSearches and Schaffner answered the Third Party Complaint. AmeriSearches and Schaffner asserted the following defenses: negligence of others, comparative negligence, waiver, lack of reliance and no legal duty; that title searching is the practice of law; and that the duty to perform a title search is a non-delegable duty. Schaffner asserted he is not personally liable because AmeriSearches is a limited liability company, and he is not personally liable for the entity's negligence. (Answer of Third Party Defendants to Third Party Complaint)

By motion dated June 10, 2011, AmeriSearches and Schaffner moved for summary judgment against Refosco, seeking summary judgment on all issues raised by their defenses. (Motion to Dismiss or for Summary Judgment) The motion was not supported by any affidavit.

On June 27, 2011, Refosco moved for summary judgment against the Appellants. Refosco's Motion for Summary Judgment sought summary judgment as to all of the defenses raised in AmeriSearches' and Schaffner's Answer to Refosco's Third Party Complaint, and sought summary judgment on Refosco's affirmative claims for negligence or indemnity. (Defendant/Third Party Plaintiff's Notice of Motion and Motion for Summary Judgment) Refosco relied upon the depositions of the parties taken during the pendency of the case.

After a hearing on the cross-motions for summary judgment, the Honorable Larry B. Hyman, Presiding Judge of the Fifteenth Judicial Circuit, granted Refosco's Motion for Summary Judgment and denied AmeriSearches' and Schaffner's Motion to Dismiss and Motion for Summary Judgment. (Order Granting Summary Judgment) Remaining issues are FATIC's claim against Refosco, and a determination of the amount of damages suffered by Refosco to be collected against AmeriSearches and Schaffner. Judge Hyman's Order is dated April 16, 2012, and was filed in the Office of the Clerk of Court for Horry County on April 23, 2012.

On May 2, 2012, AmeriSearches and Schaffner filed a Notice of Motion and Motion for Relief from and/or to Alter, Amend and Reconsider the Order. Judge Hyman denied AmeriSearches' and Schaffner's Motion for

Reconsideration after a hearing. The Order denying AmeriSearches' and Schaffner's Motion for Reconsideration is dated August 27, 2012, and was filed in the Office of the Clerk of Court for Horry County on August 29, 2012. It is from this Order that the appeal by AmeriSearches and Schaffner was taken.

STATEMENT OF FACTS

This case arises from title insurance claims caused by a deficient title search. The title search, completed by Schaffner on behalf of his company, AmeriSearches, failed to disclose the existence of a properly recorded and indexed mortgage. The title search was relied upon by Refosco as part of closings she performed on behalf of her client, RMB Homes, LLC (hereinafter referred to as "RMB"). The missed mortgage ultimately resulted in title insurance claims being paid by FATIC.

Refosco is a licensed South Carolina attorney whose practice is focused on real estate and other transactional work. (Refosco Depo., p. 5, ln. 16-18). Prior to obtaining her law degree, Refosco owned her own title search company, and personally searched titles. (Refosco Depo., p. 7, ln. 12 – p. 8, ln. 7).

As part of her busy real estate practice, Refosco represented Gaetan and Susan Remillard and their various real estate development entities, primarily performing real estate closings and subdivision related work. A solo practitioner, Refosco handled over 300 transactions for the Remillards and their entities. (Refosco Depo, p. 12, ln. 24 – p. 13, ln. 13; p. 15, ln. 12 – p. 17, ln. 12). Refosco used AmeriSearches, an independent contractor, to review the records in Horry County to perform her title abstracts and searches. (Schaffner Depo., p. 7, ln. 5 – p. 9, ln. 4; p. 14, ln. 11 – p. 15, ln. 4; p. 31, ln. 13 – p. 32, ln. 7). Schaffner is the sole owner of AmeriSearches, and actively works in the business. He personally performed the title search which is the basis for this claim.

In June 2007, Refosco represented RMB in a transaction in which RMB acquired forty-six (46) lots in the Red Bluff Village subdivision, located in Horry County. (Refosco Depo., p. 22, ln. 2-23, Defendants Ex 1 (pp. 26-28), Third Party Def. Exs. 8, 10). To finance the purchase, RMB obtained a loan from SCB&T in the amount of One Million Nine Hundred Forty Thousand Seven Hundred and No/100 (\$1,940,700.00) Dollars. In exchange for that loan, SCB&T obtained a first mortgage on the forty-six (46) Red Bluff lots. (Refosco Depo., pg 48 line 10-13; Third Party Def. Ex. 2, Defendant's Ex. 1 (pp. 26-28)). As additional collateral, SCB&T requested the first mortgage also include a first mortgage on six (6) lots owned by RMB in the Cedar Woods subdivision. (Refosco Depo., Third Party Def. Ex 10). The Cedar Woods lots had previously been acquired by RMB in 2005, and were unencumbered.

To complete the SCB&T loan transaction, Refosco hired AmeriSearches to perform the title search on the Red Bluff parcels and the Cedar Woods lots. Schaffner, the owner of AmeriSearches, actually conducted the title search and prepared the Title Summary Sheet for this transaction. (Refosco Depo., p. 23, ln. 3 -13; p. 9, ln. 2 - 13). Since the purpose of this transaction was the acquisition of the forty-six (46) lots in Red Bluff, Refosco internally filed the title information for the closing under RMB, and referenced Red Bluff Villages as the client matter. (Refosco Depo., p. 40, ln. 21 – p. 42, ln. 8).

In September 2007, RMB decided to begin construction of homes on lots nine (9), twelve (12) and forty (40) in Cedar Woods. The lots were three (3) of

the six (6) lots given as additional collateral in June 2007 for the SCB&T loan. (Refosco Depo., p. 18, ln. 4-23; p. 43, ln. 3 – p. 44, ln. 13). RMB arranged for construction loans with First Federal Savings and Loan of Charleston (hereinafter referred to as "First Federal"). (Refosco Depo., p. 18, ln. 4-23; p. 43, ln. 3 – p. 44, ln. 13). As part of her work to close the First Federal construction loans, Refosco again ordered a title search from AmeriSearches. This search was also performed by Schaffner. (Refosco Depo., p. 23, ln. 3-24, Third Party Def. Ex. 7).

In her title order to AmeriSearches, Refosco specifically requested a "current owner update", and provided the tax map numbers of the lots, the lot and block numbers, and the date of acquisition by RMB by providing a specific deed book and page reference from which AmeriSearches was to search. (Refosco Depo., p. 23, ln. 3-24; p. 50, ln. 10-24; Third Party Def. Ex. 7; Schaffner Depo., p. 25, ln. 7 – p. 27, ln. 15; Defendant Ex. 1 (1)). The deed referenced in her title order was recorded prior to the SCB&T mortgage. (Refosco Depo., p. 23, ln. 3-24; Third Party Def. Ex. 7).

Schaffner, as an employee of AmeriSearches, actually performed the search and completed the Title Summary Sheet. (Schaffner Depo., p. 9, ln. 2-13; p. 32, ln. 8 – p. 34, ln. 16). In searching the Cedar Woods' title, Schaffner used the computerized index in the Horry County Register of Deeds office. (Schaffner Depo., p. 10, ln. 11 – p. 12, ln. 3; p. 32, ln. 8 – p. 37, ln. 17). It is uncontroverted that the SCB&T mortgage is indexed under RMB Homes, and when Schaffner performed his search in September 2007, the computer index

listed the missed mortgage on the screen. (Schaffner Depo., p. 57, In. 24 – p. 63, In. 21). In performing his search, Schaffner did not locate the SCB&T mortgage, and failed to note it on his Title Summary Sheet. (Schaffner Depo., p. 63, In. 2 – In.13, p. 66 In 23 – p. 68 In 3).

In searching the Register of Deeds' computerized index by name, a list of documents appears on the screen. To view the actual document, the user merely clicks on the computer link, and the full document appears. During his search, when Schaffner input the name RMB Homes, the computer screen description section for the missed SCB&T mortgage had a partial description and identified the property as "sev lots Red Bluff Village S..." (ellipses in the original). It is conceded by Schaffner that despite the partial or incomplete description, he did not click on the link for this mortgage. (Schaffner Depo., p. 57, In. 24 – p. 68 In 3). Schaffner also admits that had he clicked on the link the system would have brought up the actual document, which would have shown the Cedar Woods lots as being subject to the SCB&T mortgage. (Schaffner Depo, p. 57, In. 24 – p. 63, In. 21).

Because Schaffner did not click on this link, he did not identify the SCB&T mortgage as encumbering the Cedar Woods lots. As a result, the mortgage was not noted on his Title Summary Sheet provided to Refosco, nor was a copy of the mortgage provided to Refosco for review. After the issue of the missed mortgage was brought to everyone's attention, Schaffner recreated his search and located the missed mortgage by clicking the link he passed over in his original search. (Schaffner Depo., p. 65, In. 15 – p. 69, In. 3; p. 72, In. 10-24; p.

104, In. 6 - p. 107, In. 1; Defendant Ex 5).

At the closings of the Cedar Woods construction loans, Refosco asked Mr. Remillard if there were any mortgages on the parcel. Remillard indicated he did not believe there were any mortgages. (Refosco Depo., p. 18, In. 4 – p. 19, In. 5; p. 44, In. 19 – p. 45, In. 1). At the time of the closing of the Cedar Wood construction loans, Refosco had no recollection of the Cedar Woods lots being subject to SCB&T's mortgage. (Refosco Depo., p. 47, In. 11 – p. 48, In. 9; p. 74, In. 21 – p. 76, In. 4; p. 79, In. 13-20).

Because Refosco was not aware of the SCB&T mortgage, when the First Federal construction loans were closed, she wrote a title opinion letter, and three (3) FATIC lender's policies, insuring that First Federal's mortgage had a first lien priority. She did not take exception to the SCB&T mortgage. (Refosco Depo., p. 34, In. 16 – p. 36, In. 3).

In August 2008, Refosco was contacted by a banker with SCB&T, who inquired into the status of SCB&T's mortgage on the six (6) lots in Cedar Woods subdivision. (Refosco Depo., p. 34, In. 16 – p. 36, In. 3). Ultimately, RMB defaulted on the SCB&T loan and, in January 2009, SCB&T began a foreclosure action. In its action, SCB&T named First Federal as a junior mortgage lien holder on lots nine (9), twelve (12) and forty (40) of Cedar Woods subdivision. First Federal filed a title insurance claim with FATIC based on the policies written by Refosco. In October 2009, FATIC paid One Hundred Twenty Thousand Seven Hundred Twenty-Six and 49/100 (\$120,726.49) Dollars to SCB&T as payoff of the SCB&T mortgage, which resulted in First Federal becoming the first

lien holder on the three (3) Cedar Woods lots. (Complaint)

FATIC brought suit against Refosco for contractual indemnity based upon her agency contract with FATIC. Refosco denied FATIC's claims, and brought a Third Party Complaint against AmeriSearches and Schaffner. The Third Party Complaint asserts claims of negligence and indemnity against AmeriSearches and Schaffner for failing to properly search the title, and missing the properly indexed mortgage. AmeriSearches and Schaffner denied Refosco's claims, and asserted the defenses of negligence of others, comparative negligence, waiver, lack of reliance and no legal duty. They also assert that title searching is the practice of law, and that the duty to perform a title search is a non-delegable duty. Finally, Schaffner asserts he is not personally liable because AmeriSearches is a limited liability company, and he is not personally liable for the entity's negligence.

STANDARD OF REVIEW

South Carolina Rule of Civil Procedure 56(c) provides that summary judgment may be granted, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is no genuine issue as to any material fact and that [movant] is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. The movant bears the burden of informing the court of the basis for the motion, and identifying those portions of the record that show there is no genuine issue as to any material fact. See, Strother v. Lexington Co. Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992).

Once the movant meets its initial burden:

[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial.
(Rule 56(e), SCRPC)

Thus, "to resist a motion for summary judgment the nonmoving party must come forward with specific facts showing genuine issues necessitating trial". See, NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995); Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine." See, Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). Affidavits submitted to the court to support or resist summary judgment must "be made on personal knowledge...[and] set forth such facts as would be

admissible in evidence and...how affirmatively that the affiant is competent to testify to the matters stated therein". Rule 56(e), SCRCP.

When considering a motion for summary judgment, the Court must draw all reasonable inferences and view the evidence in a light most favorable to the nonmoving party. See, Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863, 864 (1972); NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). However, the Court must rule based "on the record the parties have actually presented, not on one potentially possible". See, Spencer v. Miller, 259 S.C. 453, 456, 192 S.E.2d 863, 865 (1972). And, while matters must be viewed in a light most favorable to the nonmovant, the Court is not "required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine". See, Main v. Corley, 281 S.C. at 527, 316 S.E.2d at 407; Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). Nor can the court "ignore facts unfavorable to [the non-movant]...". See, Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (addressing motion for directed verdict). Instead, the Court "must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts". Id. at 314, 468 S.E.2d at 307. "If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and the motion was properly granted." Id.; Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999); Whelan v. Welch, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. See, Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "in each instance, one party must lose as a matter of law". See, Main v. Corley, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (emphasis added); Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (standard for summary judgment "mirrors" standard for directed verdict); and George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. See, Jackson v. Swordfish Invst, LLC, 365 S.C. 608, 620 S.E.2d 54 (2005); citing, George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

ARGUMENT

I THE TRIAL COURT PROPERLY APPLIED SOUTH CAROLINA LAW RELATED TO THE UNAUTHORIZED PRACTICE OF LAW TO DETERMINE THAT AN INDEPENDENT CONTRACTING TITLE SEARCHER MAY BE SUBJECT TO LIABILITY FOR AN ERRONEOUS TITLE SEARCH.

The trial court granted Refosco summary judgment and dismissed AmeriSearches' and Schaffner's defenses which asserted that Unauthorized Practice of Law (UPL) statute and interpretive cases shielded them from liability. AmeriSearches and Schaffner assert this ruling was in error.

AmeriSearches and Schaffner misconstrue the application of the UPL as it has been applied generally to real estate closings in South Carolina and specifically in this case. AmeriSearches' and Schaffner's argument that they cannot be liable to Refosco for damages she sustains because of their defective title search is akin to arguing that an unlicensed driver of a motor vehicle is not liable for negligently crashing into another.

The underlying purpose of the regulation of the practice of law as related to real estate transactions is "to protect the public for potentially severe economic and emotional circumstances which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law". See, State v. Buyers Service Co., Inc., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987); Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 486-487, 560 S.E.2d 612, 617 (2002). In South Carolina, a title search and the preparation of related documents for a lender has been determined to be the practice of law, and must be supervised by an attorney. See, State v. Buyers Service Co., Inc.,

292 S.C. 426, 432, 357 S.E.2d 15, 18 (1987); Doe v. McMaster et al., 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003); and Doe v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006). However, the South Carolina Supreme Court has held that attorneys may use independent title searchers to perform searches, so long as that search is supervised by the attorney. See, Doe v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006). In this case, the only evidence is that Refosco properly supervised AmeriSearches and Schaffner during the conduct of the title search in question.

The rules regulating the practice of law are not intended to absolve lay persons from liability for actions committed in violation of the applicable rules. In fact, the violation of UPL regulations has been used to support equitable remedies against the violating lay person or entity. See, Wachovia Bank v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244 (Ct. App. 2010); Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011).

The issue to be decided in this appeal is whether an independently contracted title searcher is liable to the supervising attorney for an erroneous search. Taken to its logical conclusion, AmeriSearches' and Schaffner's argument would provide absolute immunity to independent contractor title searchers who perform title searches for supervising attorneys. This assertion is contrary to South Carolina's policy that "[t]here is no tenet more fundamental in our law than liability follows the tortuous wrongdoer". See, Fitzer v. Greater Greenville YMCA, 277 S.C. 1, 3, 202 S.E.2d 230, 231 (1981). "The law's emphasis ordinarily is on liability, not immunity, for wrongdoing." See, Brown v.

Anderson County Hosp. Ass'n., 268 S.C. 479, 486, 234 S.E.2d. 873, 876 (1977) (overruled on other grounds).

The South Carolina UPL cases address the issue of whether certain activities related to real estate transactions are the practice of law. The cases do not address the liability of a non-lawyer (lay person) for negligent acts while performing certain activities as part of a real estate closing. See, State v. Buyers Service Co., Inc., 292 S.C. 426, 432, 357 S.E.2d 15, 18 (1987); Doe v. McMaster et al., 355 S.C. 306, 313 585 S.E.2d 773, 776 (2003); Doe v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006); and Ex Parte Wilson, 371 S.C. 14, 636 S.E.2d 866 (2006).

The Trial Court determined that AmeriSearches' and Schaffner's defenses based upon UPL were not sustainable. Specifically, the Trial Court determined that with the proper supervision and direction of a licensed attorney, the mere reviewing of the public records and reporting back of the findings to the supervising attorney is not in and of itself the practice of law. (Order page 10-11) This ruling is in concert with the reasoning in Ex Parte Wilson, 371 S.C. 14, 636 S.E.2d 866 (2006). In Wilson, the Supreme Court determined that in isolation, disbursement of proceeds was not the practice of law, but when disbursement was part of a real estate closing, attorney supervision was required. Similarly, in isolation, the reviewing of the public records and reporting back of their findings is not the practice of law. It is when it is part of a real estate closing to the public that an attorney must be involved. Hence, the mere review of the public records does not grant AmeriSearches and Schaffner immunity from their negligence or

bar a claim for negligence or indemnity.

The Appellate Court should sustain the Trial Court's determination that the UPL statute and cases do not shield an independent contractor title searcher from liability to the supervising attorney for a negligent or defective review of the public records.

II THE TRIAL COURT CORRECTLY DETERMINED THAT WHILE THE TITLE SEARCH ASPECT OF A SOUTH CAROLINA REAL ESTATE CLOSING IS A NON-DELEGABLE DUTY OF THE ATTORNEY TO THE CLIENT, THE NON-DELEGABLE NATURE OF THE DUTY DOES NOT ELIMINATE THE TITLE SEARCHER'S DUTY AND LIABILITY TO THE SUPERVISING ATTORNEY.

AmeriSearches and Schaffner assert that they are not liable to Refosco for their negligence or in indemnity under the theory of non-delegable duty. AmeriSearches and Schaffner misunderstand the theory of non-delegable duty.

The duty or performance of the title search can be delegated to a non-attorney abstractor, so long as it is properly supervised by the attorney. See, Doe v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006). "A person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." See, Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005). "A person may delegate the *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains *liable* for that breach. It actually is the liability, not the duty that is non-delegable." See, Rock Hill Telephone Co. v. Globe

Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005)
(emphasis in original) citing, Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32,
42, 533 S.E.2d 312, 317 (2000).

The real effect of finding a duty to be non-delegable is to render not the duty but the liability non-delegable; the person subject to a non-delegable duty is certainly free to delegate the duty, but will be liable to the third parties for any negligence of the delegatee, regardless of fault of the delegator. See, Nedrow v. Pruitt, 336 S.C. 668, 676, 521 S.E.2d 755, 759 (Ct. App. 1999).

Applied to this case, the theory of non-delegable duty means only that Refosco cannot, by virtue of delegation of the title search to AmeriSearches and Schaffner, escape the potential liability for AmeriSearches' and Schaffner's negligence in an action by FATIC, the lender First Federal, or her client. However, the theory does not relieve AmeriSearches and Schaffner of their liability to Refosco. Therefore, the Trial Court properly granted Refosco summary judgment on AmeriSearches' and Schaffner's defense of non-delegable duty.

Since there is no question as to a material fact, Refosco was properly granted summary judgment as a matter of law on AmeriSearches' and Schaffner's defense of non-delegable duty, as this theory does not insulate them from liability for their own negligence or equitable indemnity.

III THE TRIAL COURT PROPERLY GRANTED REFOSCO SUMMARY JUDGMENT ON APPELLANTS' DEFENSES OF COMPARATIVE NEGLIGENCE, ASSUMPTION OF THE RISK, IMPUTED KNOWLEDGE AND RELIANCE AS THERE WAS NO EVIDENCE OR PROOF OF NEGLIGENCE BY REFOSCO.

AmeriSearches and Schaffner argue that the defenses of negligence or assumption of the risk bar recovery against them. The record is void of any admissible evidence of negligence or assumption of the risk by Refosco.

Proof of violation of an attorney's standard of care must be by expert testimony. See, Harris Teeter, Inc. v. Moore and Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010). In this case, AmeriSearches and Schaffner have failed to provide any expert testimony or affidavit establishing the standard of care or breach of the standard by Refosco. AmeriSearches and Schaffner have also failed to prove any instance or act of negligence by Refosco.

The doctrine of assumption of the risk as a complete bar to recovery was effectively abolished in 1998. See, Davenport v. Cotton Hope Plantation HPR, 333 S.C. 71, 508 S.E.2d 565 (1998); Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011). The defense has essentially become a part of the defense of comparative negligence.

Even if the defense of assumption of the risk were applicable, there is no proof of any assumption of the risk by Refosco. Historically, there were four requirements to establishing the defense of assumption of risk: (1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger. See, Davenport v. Cotton Hope Plantation HPR, 333 S.C. 71, 79, 508 S.E.2d 565, 569 (1998), citing, Senn v. Sun Printing Co., 295 S.C. 169, 367 S.E.2d 456 (Ct. App. 1988). "The doctrine is predicated on the factual

situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury." Id. at 79, 508 S.E.2d at 569. Assumption of risk may be implied from the plaintiff's conduct. See, Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993).

There is no direct or imputed evidence in the record that Refosco assumed the risk of AmeriSearches' and Schaffner's deficient title search. Therefore, the Trial Court properly granted summary judgment to Refosco on the defense of assumption of the risk.

AmeriSearches and Schaffner assert that Refosco was negligent or otherwise barred from her claims because knowledge of the June 2007 SCB&T transaction. The argument is predicated that her lack of memory is a basis for negligence or is automatically imputed to her when handling the subsequent transaction in September 2007. They also assert that this previous knowledge bars her from reliance on the title search.

South Carolina courts have held that the fact that an attorney was previously involved in a transaction does not automatically impute knowledge to the attorney or the attorney's client in a subsequent transaction. See, First Palmetto Savings Bank v. Patel, 344 S.C. 179, 543 S.E.2d 241 (Ct. App. 2001); Pee Dee State Bank v. Prosser, 295 S.C. 229, 367 S.E.2d 708 (Ct. App. 1988) (overruled on other grounds).

In First Palmetto Savings Bank v. Patel, 344 S.C. 179, 543 S.E.2d 241 (Ct. App. 2001), an attorney was involved in several commercial loan

transactions involving the same parcel of property over several years while representing different parties. The attorney testified that during his work on the transaction questioned in the case, he did not have specific recollection of the particulars of the prior transactions. The Court of Appeals examining the issue of whether knowledge obtained by the attorney in the earlier transaction was imputed to a subsequent client, stated that "a principal [client] is charged with the knowledge an agent [attorney] acquired prior to the formation of the agency only when it is clearly shown that the knowledge was in the mind of the agent while acting for the principal or where he acquired it so recently as to raise the presumption he still retained it in his mind." Id. at 184, 244-45. If the agent does not have actual knowledge of a past act or event, then it cannot be imputed to the principal by whom he is employed. The court thus concluded that the prior knowledge was not imputable.

In Pee Dee State Bank v. Prosser, 295 S.C. 229, 367 S.E.2d 708 (Ct. App. 1988) (overruled on other grounds), the Court of Appeals declined to find actual notice where there was no testimony as to the attorney's state of mind, and since the prior transaction had occurred approximately one year earlier.

The only evidence as to Refosco's knowledge is that she had conducted over four thousand (400) real estate transactions at the time of her deposition, and over three hundred (300) transactions for RMB and its affiliated companies. (Refosco Depo., p. 7, ln. 5; p. 16, ln. 8-19). When closing the First Federal loans, Refosco had no recollection that the Cedar Woods lots served as additional collateral for the prior SCB&T loan. One reason given for her non-recollection

was that the purpose of the SCB&T transaction was the take down of forty-six (46) lots in Red Bluff. (Refosco Depo., p. 22, ln. 14 – p. 23, ln. 2). This is verified by the testimony that, in Refosco's office, the loan documents for the SCB&T mortgage were filed under Red Bluff Development, as it was the purpose of the SCB&T transaction. (Refosco Depo., p. 41, ln. – p. 42, ln. 2; p. 48, ln. 15-21).

Also, Refosco indicated the purpose of the title search is so she does not have to rely on her memory. (Refosco Depo., p. 23 ln. 3-24). Refosco specifically requested from AmeriSearches and Schaffner the information she knew she needed to accurately review the title of the property. (Refosco Depo., p. 42, ln. 11-16).

Prior to closing, Refosco asked her clients if they were aware of any encumbrances on the Cedar Woods lots at the time of the First Federal closing. Her clients indicated there were none. (Refosco Depo., p. 18, ln. 18-21; p. 50, ln. 15-17). Refosco relied solely on the title search performed by Schaffner to indicate the status of the title of the property. (Refosco Depo., p. 24, ln. 2-4). There is no evidence that Refosco had any recollection of the SCB&T mortgage encumbering the Cedar Woods lots when she closed the First Federal construction loans.

Since there is no evidence that Refosco had actual knowledge of the mortgage at the time of the First Federal transaction, there is no basis to impute knowledge of the previous transaction to her. Since there is no basis to impute knowledge, there is no basis for contributory/comparative negligence or

assumption of the risk based on her alleged failure to properly remember. Likewise, there is no evidence that Refosco's lack of recollection, internal filing system, request for title work or reliance on an independent contractor violated the standard of care for a licensed South Carolina attorney.

Since AmeriSearches and Schaffner have failed to prove the applicable standard of care, or any actions that deviated from the standard of care, their defenses of comparative negligence, assumption of the risk, imputed knowledge and reliance were properly dismissed by the Trial Court.

IV THE TRIAL COURT PROPERLY DETERMINED THAT THE MORTGAGE NOT REPORTED BY THE APPELLANTS WAS NOT MIS-INDEXED.

AmeriSearches and Schaffner assert that the mortgage missed during the search was mis-indexed by the Horry County Register of Deeds. AmeriSearches and Schaffner argue that the Register of Deeds' incomplete description of "sev lots Red Bluff Village S..." constitutes a mis-indexing. AmeriSearches and Schaffner aver that because of this alleged mis-indexing, they are excused from liability. The Trial Court ruled that the mortgage was not mis-indexed.

S.C. Code Ann. §§ 30-7-10, 30-9-10, 30-9-20, 30-9-40, and 30-9-75 (1976) govern the indexing of documents filed in the Office of the Register of Deeds in this state. A review of the statutes indicates that the only requirement is that mortgages be indexed in an alphabetical arrangement by name. S.C. Code§ 30-9-10 (1976). There is no requirement that descriptions of the effected property be provided in the index.

South Carolina cases addressing proper indexing of mortgages provide that proper alphabetical indexing of a recorded mortgage by last name is all that is required. See, Liberty Loan Corporation v. Mumford, 283 S.C.134, 322 S.E.2d 17 (Ct. App. 1984). Therefore, the incompleteness of the description, if any, is not "mis-indexing" under South Carolina law, and is not a shield from liability.

Schaffner admits that when he performed the search for the First Federal closing, he located the RMB to SCB&T mortgage in the Register of Deeds' computerized records. However, despite the incomplete description of the property subject to the listed mortgage, Schaffner failed to click on the link to review the full document. (Schaffner Depo., p. 62, ln.16 – p. 63, ln. 21; p. 66, ln. 1 – p. 68, ln. 11; p. 72, ln. 10-14). He admits that had he clicked on the link, the SCB&T mortgage would have appeared, and he would have seen that it encumbered the Cedar Woods lots. The reason given for not clicking the link was because clicking all of the links for RMB would have been too time consuming, and Schaffner's choice to rely on the screen was at his own risk. (Schaffner Depo., p. 72, ln. 10-24; p. 105, ln. 11 – p. 107, ln. 1).

Importantly, AmeriSearches and Schaffner admit that the mortgage, and its book and page of registry, are referenced in the index under the appropriate alphabetical arrangement for RMB. (Schaffner Depo., p. 62, ln. 16 – p. 63, ln. 21; p. 66, ln. 1 – p. 68, ln. 11; p. 72, ln. 10-14). The appropriate inference from the partial description in this case is that Schaffner should have looked at the mortgage because of the incomplete description.

Since there is no question of material fact or issue of law that the

mortgage is correctly indexed in the alphabetical arrangement of the Horry County Register of Deeds' records, Refosco was entitled to summary judgment on AmeriSearches' and Schaffner's defense of mis-indexing.

V THE TRIAL COURT PROPERLY DETERMINED THAT THERE WAS NO EVIDENCE THAT REFOSCO HAD WAIVED HER CLAIM AGAINST THE APPELLANTS.

AmeriSearches and Schaffner assert that Refosco had waived her claims, released her claims, assumed the risk or failed to rely on the title search.

Waiver is the voluntary relinquishment of a known right. See, Janasik v. Fairway Oaks Villas HPR, 307 S.C. 339, 415 S.E.2d 384 (1992). There is no evidence that Refosco has waived or released her rights against AmeriSearches or Schaffner. Because there was not evidence of waiver, the Trial Court properly granted Refosco summary judgment by dismissing the waiver defense.

VI THE TRIAL COURT PROPERLY DETERMINED THAT THE APPELLANTS OWED TO REFOSCO A DUTY OF CARE.

The Trial Court granted Refosco summary judgment against AmeriSearches and Schaffner on the theories of negligence and indemnity. In doing so, Judge Hyman also granted summary judgment and dismissed AmeriSearches' and Schaffner's defense of "no duty."

AmeriSearches and Schaffner allege they do not owe a duty to Refosco. A review of the factual basis asserted in AmeriSearches' and Schaffner's Answer for the defense labeled "No Duty" discloses that AmeriSearches and Schaffner do not make a plea for "no duty", but instead assert the same claims related to the practice of law and imputed knowledge defenses. As argued previously,

AmeriSearches' and Schaffner's assertion that because they are not lawyers they cannot be liable for a deficient title search is not and should not be the law in South Carolina.

Whether the law recognizes a particular duty is an issue of law to be determined by the court. See, Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

"There is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. Suffice it to say that a multiplicity of factors come into play when courts contemplate the question of duty. These factors include the policy of deterring future tortfeasors, the moral culpability of the tortfeasor and numerous other conceivable factors; duty is seen in general terms as requiring a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm." See, Araujo v. Southern Bell, 291, S.C. 54, 57, 351 S.E.2d 908 (Ct. App. 1986).

It is undisputed that AmeriSearches and Schaffner undertook to perform a title search for Refosco, for a fee, as an independent contractor. (Schaffner Depo., p.31 ln. 13 - p. 32 ln. 1). AmeriSearches and Schaffner knew that the search would be relied upon by Refosco as an attorney representing one or more parties in a real estate transaction. Since the law related to UPL provides no defense, and given the nature of the relationship between the parties, the Trial Court properly ruled that AmeriSearches and Schaffner owed a duty to perform the search in a reasonable manner under the circumstances. Since

there is no question of material fact, as a matter of law, Refosco was entitled to summary judgment on AmeriSearches' and Schaffner's defense of "no duty."

VII THE TRIAL COURT CORRECTLY DETERMINED THAT AMERISEARCHES AND SCHAFFNER HAD A DUTY TO REFOSCO AND WERE LIABLE TO REFOSCO FOR THE BREACH OF THAT DUTY UNDER THE THEORY OF NEGLIGENCE.

VIII THE TRIAL COURT CORRECTLY DETERMINED THAT AMERISEARCHES AND SCHAFFNER WERE LIABLE TO REFOSCO FOR AN ERRONEOUS TITLE SEARCH ON THE THEORY OF INDEMNITY.

Refosco claims that, if she is liable to FATIC, since the only basis for liability is the missed mortgage, she is entitled to a claim of negligence and/or equitable indemnity against AmeriSearches and Schaffner, jointly and severally. This claim is based in Refosco's reliance upon the negligently performed title search resulting in FATIC's claims against Refosco. It is also supported by the warranty given by AmeriSearches and Schaffner on their Title Summary Sheet. (Schaffner Depo. p. 64 ln 8 – p. 65, ln 5, Def. Ex. 1 (pg 2)).

The Trial Court agreed that Refosco is entitled to a claim for negligence or indemnity. However, since the claims between FATIC and Refosco have not been resolved, the Trial Court withheld granting a monetary judgment until the amount of damages, if any, are determined. (Order pg. 22)

The elements of a cause of action in negligence are: (1) duty; (2) breach of that duty; (3) proximate causation; and (4) injury. See, Snipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977).

It is not disputed that AmeriSearches was acting as an independent

contractor, and not an employee for Refosco, when performing the title search, and was compensated for its services. (Schaffner Depo., p.31 ln. 13 - p. 32 ln. 1). AmeriSearches and Schaffner also knew that Refosco would rely on the accuracy of their search in performing a closing on the lots for which the search was requested. Therefore, AmeriSearches and Schaffner owed a duty of care to Refosco. See, Araujo v. Southern Bell, 291, S.C. 54, 57, 351 S.E.2d 908 (Ct. App. 1986). (duty is seen in general terms as requiring a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm).

Refosco acted as supervising attorney in this matter. Refosco gave AmeriSearches and Schaffner proper, sufficient and specific instructions as to what date or occurrence to begin the search by providing the deed, and thus the date from whence AmeriSearches and Schaffner were to search the title. This is best evidenced by Schaffner's admission that he received all necessary information to perform his search on the properties. (Schaffner Depo., p. 26, ln. 2-11; p. 29, ln. 25; p. 30, ln. 8 - p. 32, ln. 1). Schaffner started the search from the date requested by Refosco, which was the date of the deed of the property into RMB. (Schaffner Depo., p. 35, ln. 23 - p. 36, ln. 7). All Schaffner was required to do was review the public records, and provide the information sought by Refosco to form her opinions of title.

If performed properly, the title search would have revealed the mortgage missed by Schaffner. (Refosco Depo., p. 23, ln. 10-16; p. 50, ln. 14-20).

Schaffner acknowledges missing the SCB&T mortgage because he did not fully

search the Horry County Register of Deeds' computer index. He admits that he saw the index reference for the SCB&T mortgage, but did not click the link, despite the obviously incomplete property description. (Schaffner Depo., p. 59, ln. 7 – p. 63, ln. 9; p. 66, ln. 12 – p. 67, ln. 16). Schaffner acknowledges his failure to click on each entry of the computer index is at his own understood risk and liability. (Schaffner Depo., p. 72, ln. 10- 24; p.103, ln. 4 – p. 107, ln. 1). AmeriSearches' and Schaffner' own admissions acknowledge that their duty in the title search process is to ensure properly indexed mortgages are reviewed and found. AmeriSearches and Schaffner acknowledge that they failed to locate the mortgage in violation of their duty. Therefore, the Trial Court properly determined that AmeriSearches and Schaffner had violated their duty of care to Refosco.

Courts allow for equitable indemnification when there is a "specific relation of the indemnitee to the indemnitor in dealing with a third party". See, Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). Indemnity creates a "form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party". Id., quoting First Gen. Servs. Of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 449 (1994). "A relationship between a contractor and subcontractor supports a claim for equitable indemnification." Id.

Traditionally, courts have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties. See, Town of Winnsboro v. Wiedeman-Singleton, Inc. (Winnsboro I),

303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II) (citation omitted); First General Servs. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994). 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 for indemnity against the person whose wrong has thus been imputed to him. See, 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 has joined in causing the injury. Id. In Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983), our Supreme Court explained:

We note that the modern trend concerning the right to indemnity is to look to principles of equity. According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join. Stuck v. Pioneer Logging and Machinery, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983).

As shown in Argument III of this Brief, AmeriSearches and Schaffner have provided no admissible evidence of negligence or breach of a standard of care by Refosco. Because there is no proof of Refosco's negligence, she is not barred from asserting indemnity.

The parties had a relationship wherein AmeriSearches and Schaffner knew that, as an independent contracting title searcher, Refosco was relying on the accuracy of AmeriSearches' and Schaffner's searches in issuing title opinions. Schaffner, as the actual searcher, and AmeriSearches, as his employer, negligently performed the title search by improperly relying on a partial

short property description in the computer index. This is especially true since Schaffner knew the risks associated with relying on the partial description, and knowingly accepted the risk by not clicking on unclear descriptions. (Schaffner Depo., p. 104, ln. 2 – p. 107, ln. 1). AmeriSearches and Schaffner understood it was their duty to look at all mortgages under RMB during the time frame requested, and to ensure that the property searched was not encumbered by the properly indexed mortgages. Unfortunately, Schaffner valued speed over accuracy, and did not locate the recorded mortgage.

Schaffner argues he is not personally liable for his own negligence because he was acting as an employee of AmeriSearches. Where an agent or employee has committed a tort against a third person, the agent's liability for the resulting damages is unaffected by the fact he was acting in representative capacity. See, Long v. Norris and Associates, Ltd, 342 S.C 561, 538 S.E.2d 5 (Ct. App. 2000). Vicarious liability does not eliminate the primary liability of the tortfeasor. See, Gilbert v. Mid-South Mach. Co., 267 S.C. 211, 227 S.E.2d 189 (1976). Since Schaffner actually performed the defective title search, he is therefore liable for his own negligence.

Because AmeriSearches and Schaffner had a duty, and violated that duty, proximately causing damage to Refosco, the Trial Court properly granted Refosco summary judgment on the issue of negligence and indemnity.

As an additional sustaining ground, on the bottom of all of its Title Summary Sheets, AmeriSearches warrants: "ALL TITLE SEARCHES ARE SUBJECT TO THE RECORDS OF HORRY AND GEORGETOWN COUNTIES

BEING FILED AND INDEXED CORRECTLY. SEARCHES ARE SUBJECT TO ANY ROLL BACK TAXES ISSUED.” (emphasis in the original). (Schaffner Depo. p. 64 ln 8 – p. 65, ln 5, Def. Ex. 1 (pg 2)). As shown previously, the mortgage missed was indexed in its correct alphabetical arrangement.

Therefore, since the mortgage missed was properly indexed, it is not excluded from this warranty and AmeriSearches and Schaffner are required to indemnify Refosco.

IX THE ALLEGED ERROR OF LAW AND FACT SET FORTH IN SECTION VII OF APPELLANTS’ BRIEF ARE PRESENTED IMPROPERLY SO AS NOT TO BE CONSIDERED BY THE APPELLATE COURT.

Section VII of AmeriSearches’ and Schaffner’s Brief lists 24 alleged errors of law and fact in the Trial Court’s Order. Refosco believes all issues raised in this section have been addressed in the previous sections of Refosco’s Brief. However, to ensure that appropriate responses have been made, Refosco replies as follows:

Issue 1. As previously shown, indexing of a mortgage in South Carolina only requires the correct alphabetical arrangement by name of the mortgagor or mortgagee. There is no evidence that the mortgage was not properly indexed under the name RMB.

Issue 2. The Order is correct in finding that Schaffner completed the title search on behalf of AmeriSearches.

Issue 3. The issue is addressed in the arguments related to AmeriSearches’ and Schaffner’s lack of proof of negligence on behalf of Refosco. AmeriSearches and Schaffner refuse to acknowledge they failed to

provide any expert testimony of a violation of a duty of care, or improper supervision, or errors in the title search order. Finally, AmeriSearches and Schaffner have failed to prove any actual knowledge or state of mind of Refosco.

Issue 4. This argument fails to raise an issue. Even if it does, page 16 of the Order addresses the filing of the SCB&T mortgage in the Red Bluff file. However, there is no evidence that this was negligent.

Issue 5. There is no evidence as to the standard of care of Refosco, and no evidence for a finding of negligence.

Issue 6. Schaffner admits that Refosco provided him all information necessary to complete the search. (Schaffner Depo., p. 26, ln. 2-11; p. 29, ln. 25; p. 30 ln 8- 31 ln. 6) There is no evidence as to a violation of the standard of care by Refosco. There is no evidence of mis-indexing.

Issue 7. AmeriSearches and Schaffner misunderstand and/or misrepresent the requirements for indexing of a mortgage. AmeriSearches and Schaffner also fail to recognize their own admission that reliance on the description portion of the computer screen in the Register of Deeds office is at their own risk. (Schaffner Depo., p. 104, ln. 2 – p. 107, ln. 1)

Issue 8. There is no evidence that the description portion should have said "various lots". A review of the description section indicates that it is an obvious partial description.

Issue 9. The fact that the mortgage was missed because of Schaffner's failure to click on the link in the computerized index is admitted by Schaffner. (Schaffner Depo., p. 62 ln 13- 63 ln 13; p. 72, ln. 10-24; p. 105, ln. 11

– p. 107, ln. 1) AmeriSearches and Schaffner attempt to claim negligence on the part of Refosco, while having failed to provide any admissible evidence of her negligence. Likewise, AmeriSearches and Schaffner failed to show any mis-indexing of the mortgage.

Issue 10. AmeriSearches and Schaffner failed to submit any admissible evidence of negligence on behalf of Refosco. AmeriSearches and Schaffner also fail to recognize that, in addition to asking her client about the existence of a mortgage, Refosco ordered a title search from AmeriSearches.

Issues 11, 12 and 13. AmeriSearches and Schaffner failed to submit any admissible evidence that Refosco's failure to remember a previous closing, or her internal filing system, violated any standard of care for an attorney.

Issues 14 and 15. As previously noted, the applicable South Carolina law is correctly stated and applied by the Trial Court. The UPL cases do not provide immunity to AmeriSearches and Schaffner as their negligence in conducting the title search.

Issue 16. The issue of how to properly conduct a title search was not raised by AmeriSearches and Schaffner in the Trial Court. Additionally, Schaffner admits that he relied, at his own risk, on the partial property description portion of the computer index. (Schaffner Depo., p. 62 ln 13- 63 ln 13; p. 72, ln. 10-24; p. 105, ln. 11 – p. 107, ln. 1).

Issue 17. AmeriSearches and Schaffner failed to offer any admissible evidence that Refosco's supervision of the title search process violated the standard of care for an attorney.

Issue 18. AmeriSearches and Schaffner misstate the Trial Court's Order. The section of the Order cited by AmeriSearches and Schaffner deals with AmeriSearches' and Schaffner's defenses that a title search is the practice of law, and that the applicable standard of conduct is that of a licensed attorney. The Trial Court merely found that the applicable standard of care for the title searcher in reviewing the public index is not that of an attorney. Additionally, it was AmeriSearches' and Schaffner's burden to prove violation of the standard of care by Refosco for their defenses related to claims of negligence by her. AmeriSearches' and Schaffner's failure to provide any proof via expert testimony or affidavit was rightfully determined to be fatal to these defenses.

Issue 19. AmeriSearches and Schaffner argue that because they claim that their title work is the practice of law, the Trial Court was without jurisdiction. In the recent cases of Wachovia Bank v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244 (Ct. App. 2010) and Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 2011 S.C. LEXIS 258 (S.C. 2011), the South Carolina Supreme Court has tacitly approved the lower court's determination of the validity of a defense based upon a claim of a violation of UPL. Since AmeriSearches and Schaffner have raised this claim in a defensive posture, the Trial Court properly retained jurisdiction to determine if the defense was available.

Issue 20. The only evidence is that Schaffner knew that his title search would be relied upon by Refosco.

Issue 21. Schaffner admits that he relied on the description at his own

risk. (Schaffner Depo., p. 104, ln. 2 – p. 107, ln. 1).

Issue 22. AmeriSearches and Schaffner provided no evidence of a violation of the standard of care for an attorney.

Issues 23, 24 and 25. Refosco believes that the issues raised in these alleged errors do not require a response. To the extent they do, they are addressed previously in this Brief.

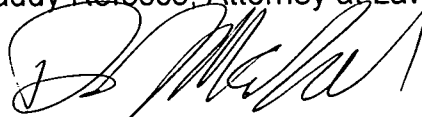
Additionally, AmeriSearches and Schaffner list thirteen (13) alleged incidences of negligence by Refosco. However, AmeriSearches and Schaffner failed to offer any testimony or evidence by an expert that these allegations, if true, would constitute a violation of the standard of care for a licensed South Carolina attorney. See, Harris Teeter, Inc. v. Moore and Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010). Nor did AmeriSearches and Schaffner provide any evidence that alleged negligent acts of Refosco contributed to AmeriSearches and Schaffner missing the mortgage.

CONCLUSION

For the foregoing reasons, Refosco respectfully requests that Court affirm the Trial Court's Order granting summary judgment to Refosco, and remand the case back to the Trial Court for the determination of liability between Refosco and FATIC, and the determination of damages owed by AmeriSearches and Schaffner to Refosco.

Respectfully Submitted,

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