

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman
Case No. 2009-CP-26-12046

First American Title Insurance Company Respondent,

v.

Michele Paddy Refosco, Attorney at Law, Defendant and Third Party Plaintiff,

v.

AmeriSearches, LLC and Wade Schaffner, Third Party Defendant,

Of Whom

AmeriSearches, LLC and Wade Schaffner are Appellants.

And

Michelle Paddy Refosco and First American Title
Insurance Company are Respondents.

**INITIAL BRIEF OF RESPONDENT,
FIRST AMERICAN TITLE INSURANCE COMPANY**

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STATEMENT OF ISSUES ON APPEAL

1. Does the circuit court have subject matter jurisdiction over negligence and indemnity claims brought by an attorney against its independent title abstractor?
2. Can a supervising attorney maintain a cause of action for negligence and indemnity against its independent title abstractor for a negligent title search?
3. Did the circuit court properly grant Refosco's Motion for Summary Judgment and deny Appellants' Motion for Summary Judgment?

STATEMENT OF THE CASE

On December 16, 2009, First American Title Insurance Company ("FATIC") commenced this action for breach of title insurance Agency Agreement against Michele Paddy Refosco, Attorney at Law ("Refosco"). (Complaint.) Refosco timely answered the Complaint and filed a Third Party Complaint against AmeriSearches, LLC ("AmeriSearches") and Wade Schaffner ("Schaffner") for performing a deficient title search. (Answer/Third Party Complaint). AmeriSearches and Schaffner timely answered and asserted as defenses the 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. (Answer of Third Party Defendants).

On June 10, 2011, Appellants moved for summary judgment on all issues raised by their defenses against Refosco. (Motion to Dismiss or for Summary Judgment). On June 27, 2011, Refosco cross-moved for summary judgment against the Appellants as to all of Appellants' defenses, and she sought summary judgment on her affirmative claims for negligence or indemnity. (Defendant/Third Party Plaintiff's Motion for Summary Judgment.)

After a hearing and by order filed April 23, 2012, the court granted Refosco's Motion for Summary Judgment and denied Appellants' Motion to Dismiss and Motion for Summary Judgment. ("Summary Judgment Order"). On May 2, 2012, Appellants filed a SCRCP Rule 59(e) motion. By Order filed August 29, 2012, the court denied Appellants' Motion for Reconsideration after a hearing. ("Rule 59(e) Order"). Appellants timely served notice of appeal of the Summary Judgment Order and the Rule 59 Order on September 21, 2012.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.

ARGUMENT

This appeal relates to the claims between Refosco and Appellants. The Summary Judgment Order did not address FATIC's causes of action. Therefore, FATIC only addresses the first two issues on appeals as stated herein in order to respond Appellants' analysis of subject matter jurisdiction and applicable law.

I. THE CIRCUIT COURT HAS SUBJECT JURISDICTION OVER THIS CASE.

The circuit court is the court of general jurisdiction in South Carolina. S.C. Const. art. V, § 11. Appellants contend that the circuit court lacks subject matter jurisdiction over this case and rely on Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (2006). In Hambrick, the mortgagors sued a mortgagee and alleged eight causes of action, each amounting to a claim that the mortgagee engaged in the unauthorized practice of law. Because “[o]nly our supreme court has the constitutional duty to determine what acts constitute the unauthorized practice of law,” this court held the circuit court lacked jurisdiction.

In contrast to Hambrick, neither FATIC nor Refosco have claimed that Appellants engaged in the unauthorized practice of law. Rather, Appellants characterize their own conduct (and profession) as the unauthorized practice of law to divest the circuit court of

jurisdiction over negligence and indemnity claims. Appellants overlook that the Supreme Court has already defined the *authorized* practice of law to include the undisputed facts in this case, i.e., an attorney outsourcing and supervising title searches to a non-lawyer who obtains information from the public record. Watson, Ex parte, 356 S.C. 432, 435, 589 S.E.2d 760, 761 (2003). Because there is no claim based on the unauthorized practice of law nor any dispute about whether the conduct of the parties amounted to the authorized practice of law, Hambrick has no application in this case.

II. THE TRIAL COURT PROPERLY HELD THAT A TITLE ABTRACTOR MAY BE LIABLE TO THE SUPERVISING ATTORNEY FOR AN ERRONEOUS TITLE SEARCH.

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. 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). Attorneys may use independent title abstractors to search titles, but only so long as the attorney supervises the search. Watson, 356 S.C. at 435, 589 S.E.2d at 761. Appellants contend that they, and all title abstractors in South Carolina are immune from liability due to the supervision requirement, and that Refosco, and all attorneys in South Carolina who contract for title searches, should have no right of action against a negligent title abstractor because of the supervision requirement.

Refosco is a licensed South Carolina attorney who performs real estate and other transactional work. (Refosco Depo. p. 5.) To complete the loan transaction involved in this case, Refosco contracted with AmeriSearches to perform the necessary title search;

Schaffner, the sole member of AmeriSearches, personally conducted the title search and prepared the title summary sheet for this transaction. (Refosco Depo. pp. 9, 23.) Appellants acknowledge that they received all necessary information to perform a search on the properties, and they failed to find the prior SCB&T mortgage that should have been located. (Schaffner Depo. pp. 30, 66-67.)

South Carolina law does not and should not provide immunity for negligent title abstractors. As noted, the Appellants' conduct is not the unauthorized practice of law. Watson, 356 S.C. at 435, 589 S.E.2d at 761. Appellants' characterization of their conduct and profession as the unauthorized practice of law does not absolve Appellants of their own negligence. To the contrary, jurisdictions that have found that negligence committed in the course of statutorily prohibited unauthorized practice of law constitutes evidence of negligence *per se*. See Paso Builders, Inc. v. Hebard, 83 Nev. 165, 172, 426 P.2d 731, 736 (1967) (citing Pioneer Title Insurance & Trust Co. v. State Bar, 74 Nev. 186, 326 P.2d 408 (1958); Biakanja v. Irving, 310 P.2d 63 (Cal.App.1957)).

“There is no tenet more fundamental in our law than liability follows the tortious wrongdoer.” M & T Chemicals, Inc. v. Barker Indus., Inc., 296 S.C. 103, 109, 370 S.E.2d 886, 890 (Ct. App. 1988) (further citations omitted). To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). The facts supporting Appellants' breach and the resulting damages are not in material dispute.

As to the element of duty, Appellants assert incorrectly that they are not liable to

Refosco for their negligence because the duty to perform a title search is a non-delegable duty, citing to Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000). Simmons stands for the proposition that “[t]he party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor” to third parties. Id. 1 at 42, 533 S.E.2d at 317 (reversing summary judgment and holding that hospitals owe a non-delegable duty to patients with regard to emergency room physicians). Simmons does not stand for the proposition, however, that the independent contractor is not liable to the party that owes the nondelegable duty. Simmons simply prevents Refosco from shielding herself from liability to FATIC due to Appellants’ negligence.

Finally, Appellants argue that, because the property description in the index failed to fully list all of the property the SCB&T loan, that the property was not properly indexed. However, there is no dispute that the property was correctly indexed in accordance with S.C. Code Ann. § 30-9-10. Liberty Loan Corp. of Darlington, S.C. v. Mumford, 283 S.C. 134, 139, 322 S.E.2d 17, 20 (Ct. App. 1984). South Carolina’s indexing statutes do not require any property description at all. Therefore, Appellants cannot prevail on their affirmative defense of improper indexing.

1 “The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability....The doctrine of nondelegable duty is an exception to the general rule of nonliability for the torts of independent contractors.” Smith v. Reg'l Med. Ctr. of Orangeburg & Calhoun Counties, 394 S.C. 110, 114, 713 S.E.2d 656, 658 (Ct. App. 2011) (quoting Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L.Rev. 431, 452 (1996))

CONCLUSION

The South Carolina Court of Appeals should affirm the Summary Judgment Order and the Rule 59(e) Order to the extent the Order is consistent with the authorities and arguments discussed above.

Respectfully Submitted:



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