

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' INITIAL BRIEF
IN REPLY TO RESPONDENT
REFOSCO**

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REPLY TO STATEMENT OF FACTS

Respondent Refosco seeks to place the blame and the liability - all of the blame and all of the liability - for an allegedly missed mortgage upon the lay person who performed the title search. This is so despite the fact that the "missed mortgage" was one drafted and closed by Refosco for the same client THREE (3) MONTHS EARLIER after a title search by the same abstracter and insurance by the same title insurance company. **(Complaint, Answer & Third Party Complaint, Answer to Third Party Complaint)**

The allegedly missed mortgage - to South Carolina Bank & Trust (SCB&T) - was in attorney Refosco's files when she received the closing package from First Federal for the new loan for the same clients. The title insurance information for the FATIC policy placed by Refosco as agent was also in her file information when she received the closing package from First Federal. **(Complaint, Answer and Third Party Complaint, Refosco Dep. p. 444-449)**

Refosco admits that these clients are of long standing. She had done over 300 closings for the same group of client. **(Refosco Dep. p. 12, l 24-p.13 l 13, p. 15, l. 12-p.17 l 12)** Yet, Refosco never checked her records before assigning the title search, never gave information on the prior mortgage to Schaffner, and never checked her files, even when Schaffner's title abstract returned showing no mortgage. **(Refosco Dep. p. 444-449; Schaffner Dep. p. 27, l. 4-p.40, l.9)** Had she checked her files, Refosco would have missed the SCB&T Mortgage because it was done for the clients for a loan financing work in Red Bluff Subdivision and Refosco's files were by purpose, so she had the mortgage binding lots in Red Bluff and Cedar Woods in the Red Bluff file. **(Refosco Dep. p.48-49)**

Respondent contends that Schaffner erred in not clicking into the computer entry at the Register of Deeds Office which showed a mortgage covering several lots in Red Bluff Subdivision. Schaffner of AmeriSearches performed this search and he testified that he did not pull the mortgage because he was not searching lots in Red Bluff - he was searching lots in Cedar Woods. **(Answer to Third Party Complaint, Schaffner Dep. p. 31, l. 9- p.46 l.21; p. 59, 17-p89, 1.1-15)** Because the ROD description did reference Red Bluff but not Cedar Woods instead of just saying "various lots", Schaffner contends that the mortgage was mis-indexed and his title abstract took exception to any mis-indexed items. **(Schaffner dep, p. 64, 1.8-24; Title Abstract)**

However, it is also true that the mortgage was indexed the way it was drafted - in the subject line it showed the Red Bluff lots and only referred to the Cedar Woods lots at the end as additional collateral. **(Exhibit 6 to Schaffner Dep)** Had Ms. Refosco drafted the mortgage as applying to "Various lots in Red Bluff and Cedar Woods" then it would have been so indexed. And only the attorney decided how to draft the mortgage - AmeriSearches had no control over that. In fact, because attorney Refosco was the closing attorney and was in charge, she controlled all matters relative to the loan closings of both mortgages.

Yet Ms. Refosco, the licensed attorney, disclaims all negligence and seeks to hold the layperson, Schaffner/AmeriSearches, responsible and solely responsible for a "missed" mortgage even though Refosco drafted the "missed" mortgage, completed the loan package, met with the clients and closed the "missed" mortgage loan. She could have chosen to do every act relative to both loan closings herself, but she chose to delegate some of the tasks. Schaffner contends that in South Carolina performing a title search is a part of the practice of law such that attorney Refosco could delegate the task, but she retained the duty, the responsibility and the liability.

**REPLY TO ARGUMENT(S) RE THE UNAUTHORIZED
PRACTICE OF LAW**

The Respondent states that "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." **(Respondent Schaffner's Initial Brief, p.21)** That is an incorrect analogy.

Appellants' argue that "examining titles and preparing title abstracts constitute practicing law." Ex Parte Watson, 356 SC 432, 589SE2d 760 (2003) Because examining and abstracting titles is part of the practice of law, and Refosco is a licensed attorney, Refosco is bound, absolutely to examine and abstract the title. She cannot shirk her duties and responsibilities by assigning them to someone else. Attorney Refosco was legally obligated to examine and abstract the title and if she does it by delegating the task to another, the law treats her as though she examined and abstracted the title. Hence, whether Refosco examined the title herself or examined it by virtue of assigning the search to Appellants, REFOSCO EXAMINED AND ABSTRACTED THE TITLE. Carson v. Vance, 326 SC 543, 485 SE2d 126 (Ct. App. 1997)

Although Carson v. Vance construed NC law, the Court of Appeals noted that it is in accord with South Carolina law on the subject. Durkin v. Hanson, 313 SC 343, 437 SE2d 550 (Ct. App. 1993)

Further, Respondent contends that Refosco properly supervised Schaffner, and Appellants deny that, especially since the Respondent did not even give Schaffner all information in her possession about this property - including the existence of the SCB&T mortgage.

Therefore, as noted above, Respondent's "driver" analogy is not suitable. However, if the injured driver went into a medical office where the receptionist took his history and forgot to tell the doctor that the driver was allergic to "drug A" and the driver took "drug A," had a reaction and died -- that analogy would be similar. Like lawyers, doctors by virtue of their calling have special duties and obligations that they cannot shirk by passing a task off to an independent contractor or an employee.

The "special calling" is part of the reason that lawyers cannot sue their secretary for failing to calendar a statute of limitations correctly. Lawyers can't sue their paralegal for leaving a cause of action out of a pleading or failing to Answer timely so that a case goes into default. AND lawyers can't sue title abstractors even if they miss a mortgage. Ms. Refosco was obligated to do the title search. If she assigned it to a layperson and it is done improperly, then the lawyer did the title search improperly. That's where issues of "unauthorized practice of law" enter the picture.

Ms. Refosco sued the Appellants, seeking indemnity for Appellant's alleged negligence in failing to search a title properly. This means that Ms. Refosco sued Appellants for the unauthorized practice of law even though she assigned this title search and was charged with supervising the title search.

The trial court's grant of Summary Judgment to Refosco allows her to shirk her responsibilities, and under Carson v. Vance, *supra*, and under Durkin v. Hanson, *supra*, the law regards Ms. Refosco as having performed this title search. Therefore, the judgment of the Trial Court should be reversed. Because Schaffner/AmeriSearches is or are not licensed attorneys, and for all the reasons stated in the Initial Brief, which is incorporated herein by reference,

Appellants' motion for Summary Judgment should be granted. Further, this Court should hold that title abstracters cannot be held liable to licensed attorneys either in contract or in tort for any alleged errors arising out of the performance of a title search.

**REPLY TO ARGUMENT(S) RE THE ATTORNEY'S
DUTY & THE TITLE SEARCHER'S LACK OF LIABILITY
TO THE ATTORNEY**

Respondent Refosco insists that Appellants "misunderstand the theory of non-delegable duty" in contending that the Attorney has a non-delegable duty to the client AND the attorney cannot then sue the abstractor. On the contrary, it is Refosco who fails to understand that an attorney's duty arises out of the nature of her "special calling."

Refosco insists that having a non-delegable duty means that she can't escape liability to her client or to FATIC but that she can then hold the title abstracter liable. If she were speaking of a non-delegable duty that did not arise from a "special calling" then she might be correct. For example, an insurance company may be liable for the act or failure to act by one of its agents and then the insurance company could turn around and successfully sue the agent to recoup its losses. But the business of insurance differs from the practice of law.

In the insurance company example, the agent was licensed to perform the act he performed. The insurance carrier in suing its agent is not seeking to hold the agent liable for failing to meet industry standards for an industry in which the agent is not licensed. If the licensed insurance sales agent asked a courier to go and tell an insured that he needed a different type of coverage, and the courier misunderstood and advised the insured incorrectly - the courier could not be held liable to the agent for failing to give the insured the correct coverage advice. After all, the agent had the duty to the insured and it was a duty he was licensed to perform. The

courier was not licensed to perform the duty and the agent knew the courier was not licensed to perform the duty. The courier can't be held to be legally liable or responsible in damages for failing to properly practice the business of insurance agency when he is not a licensed insurance agent.

What Ms. Refosco misunderstands is that as an attorney she is responsible and liable for every part of her practice of law, including all tasks she does herself and all of those she delegates - unless they happen to be delegated to a licensed attorney. If Ms. Refosco had hired a licensed attorney to perform this title search, she would be liable to the client and FATIC and the licensed attorney who did the search could possibly be liable to her in equitable indemnity or for negligence. However, when a busy attorney avails herself of using employees, paralegals or independent contractors to perform part of the attorney's law practice, neither the responsibility nor the liability shifts.

Therefore, the judgment of the Trial Court should be reversed, summary judgment should be awarded to Appellants and this Court should hold that title abstracters cannot be held liable to licensed attorneys either in contract or in tort for any alleged errors arising out of the performance of a title search.

**REPLY TO ARGUMENT(S) RE REFOSCO'S
NEGLIGENCE AND THE ERRONEOUS GRANT OF
SUMMARY JUDGMENT ORDERING THAT
AMERISEARCHES INDEMNIFY REFOSCO**

In reply to Respondent Refosco's argument that "the record is void" of any evidence of Refosco's negligence, Appellants incorporate herein their brief, specifically including pages 29-

31, which specifies thirteen (13) areas in which Refosco was negligent - or, at a minimum, in which there are genuine issues of material fact or inferences to be drawn from those facts.

Ms. Refosco's negligence in this case, as detailed above and in pages 29-31 of Appellants' incorporated Initial Brief, is direct and not imputed negligence, despite Ms. Refosco's attempts to claim otherwise in her brief. And Ms. Refosco's negligence means that she is not entitled to indemnity. Ady v. Bolton, 257 SC 28, 183 SE2d 708 (1971) Even if her negligence were entirely "passive" - which it was not- South Carolina law does not recognize a right to indemnity by one whose negligence contributed to the injury. McCain Manufacturing Corp. v. Rockwell International Corp., 528 F.Supp. 524 (D.S.C. 1981)

To determine whether triable issues of fact exist such that Summary Judgment must be denied, the evidence and all reasonable inferences to be drawn from it must be construed most favorably to the non-moving party. Summary Judgment should not be used to deny a party of a trial on disputed facts or reasonable inferences arising from those facts. Turner v. Millman, 381 SC 101, 671 SE2d 636 (Ct. App. 2009)

Given the numerous facts showing or inferring Ms. Refosco's negligence, at a minimum, her Motion for Summary Judgment as to indemnity should have been denied and the case submitted for trial to a jury. However, because as a matter of law Appellants could not be held liable for this title search, their Motion for Summary Judgment should have been granted and the case against Appellants dismissed. Appellants ask that this Court reverse the trial court and so hold.

**REPLY TO ARGUMENT(S) RE THE STANDARD OF
CARE & HOW REFOSCO'S NEGLIGENCE CAUSED
OR CONTRIBUTED TO THE DAMAGES**

Despite Respondent Refosco's untenable contention that she was not negligent, she replies to the 13-item list wherein Appellants detail her negligence by stating that Appellants had no testimony on the standard of care and failed to show how any of Refosco's negligence "contributed to AmeriSearches and Schaffner missing the mortgage." (See: Page 43 of Respondent Refosco's Initial Brief)

The Appellants did not file action against attorney Refosco. She initiated the action and somehow won Summary Judgment despite her failure to introduce any evidence of the standard of care for attorneys or title searchers. Appellants only raised Refosco's conduct in defense to the negligence action she initiated.

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." (Schaffner Dep., p. 104, 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. (Schaffner Dep. p. 104, l.21 – p. 105, l. 5)

Because Ms. Refosco filed this negligence action, it was her duty to introduce evidence to support it, including evidence of the standard of care. Based on her failure to do so, and for all of the other reasons argued above, Appellants contend that the grant of Summary Judgment to Refosco should be reversed and Summary Judgment should be granted to Appellants - or, at a minimum, the case should be sent back for trial.

CONCLUSION

Fundamentally, Respondent Refosco fails to understand the scope of her duty, responsibility and potential liability as a licensed attorney. The privilege to practice law in South Carolina carries immense benefits, but it also carries immense responsibility. When Ms. Refosco accepted the license to practice law from the South Carolina Supreme Court she also accepted the Court's jurisdiction over her as to that license and she accepted the Supreme Court's power to declare what acts in this state constitute the practice of law.

Our Supreme Court has determined that searching and abstracting titles is part of the practice of law. Ex Parte Watson, *supra* Ms. Refosco could choose to perform all acts constituting the practice of law herself, or she can delegate certain of those acts subject to her supervision. Whether the delegated act is entering a Statute of Limitations on the calendar, drafting a Complaint or Answer or abstracting a title, all acts that are part of her law practice are acts done by the attorney. As it must, the law disregards the delegation to hold that the act that HAD to be performed by a licensed attorney was performed by that attorney.

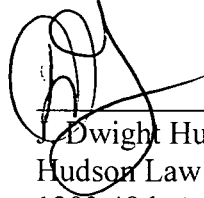
If the person to whom the task was delegated happened to be a licensed attorney, then Ms. Refosco might be entitled to the relief she seeks in this action. However, Ms. Refosco didn't

perform this title search, nor did she delegate it to another attorney - she delegated it to a layperson. Per South Carolina law, the layperson could not have legally performed this title search or abstracted this title for Ms. Refosco's client as part of this loan closing - without that delegation from counsel. Therefore, the law regards that this title search was performed by Ms. Refosco.

Allowing attorneys to hire lay people to abstract titles and then to sue the lay people if they "miss" a mortgage that the attorney drafted incorrectly means that attorneys are allowed to shirk liability and responsibility for an act that according to the law the attorney had to perform. If attorneys can so easily shirk liability and responsibility, then there is no need for them to have "staff" and they can go out and seek independent firms and assign them to draft all of their pleadings, briefs, and Orders. If there is a problem, the attorney simply sues the contractor. What is the problem with that?

The problem is that when the Supreme Court confers upon an attorney the privilege to practice law in this state, it confers upon that attorney the duty to perform their practice professionally and the liability for not so performing. With benefits come burdens and one of those burdens is that Ms. Refosco is fully and completely responsible for this title search, which the law considers that she performed. Because the attorney is, and must be, fully responsible, the judgment of the trial court should be reversed and Summary Judgment should be granted to Appellants.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "D. Hudson", written over a horizontal line.

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