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 FIRST AMERICAN TITLE INSURANCE COMPANY

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REPLY TO STANDARD OF REVIEW:

Respondent Refosco, a licensed attorney, sued the Appellants, a title abstracting service and its lay person owner, for equitable indemnity based upon claims of negligence and the trial court granted the attorney's Motion for Summary Judgment. **(See: Complaint, Answer and Third Party Complaint, Answer to Third Party Complaint, Order Granting Summary Judgment)** Hence, this is a negligence action.

Respondent First American Title Company (FATIC) is correct that an appellate court reviews a grant of summary judgment under the same standard required of the circuit court under Rule 56(c), SCRCP. Edwards v. Lexington County Sheriff's Dep't, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010). The Respondent is also correct that Summary Judgment is proper if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. However, Respondent FATIC fails to note that when determining the existence of a genuine issue of material fact, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

Importantly, the Respondent also fails to note that in a negligence case the burden of proof is "a preponderance of the evidence" and to withstand a motion for summary judgment, the non-moving party is only required to submit "a mere scintilla of evidence." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Based upon the rather substantial evidence of Ms. Refosco's negligence and upon the law which made even the existence of a duty owed by Appellants a question, the trial court's grant of Summary Judgment

to Respondent Refosco, and its denial of Summary Judgment to Appellants were improper and should be reversed.

REPLY TO ARGUMENT I RE THE TRIAL COURT'S JURISDICTION RE THE UNAUTHORIZED PRACTICE OF LAW:

Respondent FATIC contends that the Appellants are incorrect in asserting that the Trial Court lacks jurisdiction of this case because it deals with the unauthorized practice of law and because there is no private cause of action for the unauthorized practice of law. After all, the Respondent says, neither Refosco nor FATIC allege that the Appellants have engaged in the unauthorized practice of law nor made a claim of such and allege that the Appellants raise the claim solely to divest the trial court of jurisdiction.

In making this allegation, Respondent misunderstands the Court of Appeals' holding in the case of Hambrick v. GMAC, 370 SC 118, 634 SE2d 5 (Ct. App., 2006) Respondent states that Hambrick would not be applicable because the Supreme Court has "already defined" the authorized practice of law to include the facts of this case. However, in describing those "undisputed" facts - which are greatly disputed, Respondent claims that the Supreme Court defined the "outsourcing and supervision" of title searches as the practice of law. (See: Respondent FATIC's Initial Brief, p.4)

Appellants contend that the Supreme Court has defined the searching and abstracting of titles as part of the practice of law and that it is not the required supervision but is rather the practice of title searching/abstracting itself that is part of the practice of law. State of SC v. Buyers Service Company, Inc., 292 sc 426, 357 se2D 15 (1987) - as explained by Doe v. Condon, 351 SC 158, 568 SE2d 356 (2002). In Doe v. Condon, the SC Supreme Court said that

in Buyer's Services it held that a title company could only work under the supervision of a licensed attorney because the "examination of titles requires expert legal knowledge and skill" and such title examinations affect the rights of buyers. *Id at p. 432, 18*

The quote in the last sentence is at the core of Appellants' unauthorized practice of law argument. Basically, when a licensed attorney seeks to recover from a layperson for a deficient title search, the licensed attorney is seeking a recovery for the unauthorized practice of law - no matter how the cause of action is labeled (contract, tort, equity, etc) That is so because the attorney has a "special calling" such that he or she had to do the task - whether it was done directly or by delegation - and the law considers that the attorney did perform the task. Carson v. Vance, 326 SC 543, 485 SE2d 126 (Ct. App. 1997); Durkin v. Hanson, 313 SC 343, 437 SE2d 550 (Ct. App. 1993) Thus, the only ways for liability to lie against the abstractor is: (1) if the abstractor performed the title search - or some part of it - outside the scope of authority of the attorney; or (2) the attorney is seeking to hold the abstractor liable for failing to practice law up to the standards governing licensed attorneys. Either of these bases for abstractor liability would involve allegations of the unauthorized practice of law and seek recovery for the same - as does this lawsuit.

Further, what constitutes the unauthorized practice of law is a decision that must be made on the facts of each case. Doe v. McMaster, 355 SC 306, 312, 585 SC2d 773, 776 (2003) And the acts complained of in Hambrick were also of a type that had previously been defined as part of the practice of law -- or, phrased in the contrary fashion -- as acts that if performed by a non-attorney would constitute the unauthorized practice of law. Like the Respondents here, the Appellants in Hambrick thought it important that they were not seeking a determination that Ditech's actions amounted to the unauthorized practice of law. Hambrick v. GMAC, *supra*

The Court of Appeals determined that in Hambrick every action complained of stemmed from the Plaintiffs' assertion that Ditech engaged in the unauthorized practice of law in the loan transactions. *Id* In the present case, every action complained of relates to the title search and Respondent fails to realize that the acts complained of were only the authorized practice of law if they were performed by the attorney. If the attorney did this title search, she can't hold Appellants responsible unless she accuses Appellants of the unauthorized practice of law via either exceeding the scope of her authority or via failing to practice law up to the standard of an attorney.

In this case, as in Hambrick, Respondents are faced with two sides of the same coin. What may be the authorized practice of law for Respondent Refosco is the unauthorized practice of law for Appellants. There is no civil recovery allowed for the unauthorized practice of law. Linder v. Insurance Claims Consultants, Inc., 348 SC 477, 496-497, 560 SE2d 612, 616, 622-623 (2002) To any extent Respondents seek a negligence recovery from the Appellants, as discussed above, that would call upon the SC Supreme Court's power to define the unauthorized practice of law within the context of an attorney/abstractor setting and that may be within the exclusive jurisdiction of the Supreme Court. Hambrick v. GMAC Mortgage, *supra*

In this case, the trial court should have granted Appellants Summary Judgment for a number of reasons, including that there is no recovery in South Carolina for unauthorized practice of law claims. If the trial court felt that there were issues as to the factual boundaries of the attorney/abstractor relationship in this case, those issues would have been for the SC Supreme Court to determine in the context of defining the scope of permissible recovery, if any, by attorneys against title abstractors based upon the included unauthorized practice of law issues. In either or any case, the trial court erred in granting Summary Judgment to the licensed attorney,

Respondent Refosco, and erred in either not granting it to Appellants. Therefore, this Court should reverse the Order of the trial court and either rule in favor of Appellants or remand the case for a jury trial.

REPLY TO ARGUMENT II RE THE TRIAL COURT'S ERRONEOUSLY HOLDING A LAYPERSON LIABLE TO A LICENSED ATTORNEY FOR AN ALLEGED OVERSIGHT IN A TITLE SEARCH:

Respondent FATIC claims that it is the "supervision" - rather than the title search itself - that is part of the practice of law. FATIC states that "because of the supervision requirement" Appellants contend that title abstractors are immune from liability to attorneys. This argument both misconstrues the law and appellants' position.

It is not simply "supervision" that is part of the practice of law - it is the title examination itself. Searching titles "requires expert legal knowledge and skill" and therefore "examining titles and preparing title abstracts constitute practicing law." State v. Buyer's Service at 432 and Ex Parte Watson, 356 SC 432, 435, 589 SE2d 760 (2003) Abstractors can search titles only at the direction and under the supervision of a licensed attorney. Buyer's Service, Doe v. Condon, and Ex Parte Watson, *supra*

By reason of her having been allowed the *privilege* of practicing law in this state, Ms. Refosco works at a profession that is in the nature of a 'calling' which gives her special duties to the public. Respondent Refosco can't shirk her duties simply by committing their performance to another. As a matter of law, Ms. Refosco is bound to perform these special duties herself and even if she performs the duties via an employee or an agent, the law treats her as having performed the duties herself. Carson v. Vance, *supra* In the case of an attorney, those "special

duties" include all parts of the practice of law which are acts that if performed by someone who is not a licensed attorney would constitute the unauthorized practice of law.

By virtue of her "special calling" - Respondent Refosco performed this title search herself, even if she did so by virtue of delegating the task to the Appellants. Respondent seeks to hold the appellants liable for performing an act that the law regards her as having performed. Because Ms. Refosco is regarded as having performed the title search and because despite her theories attempting to shirk her duties by shifting her responsibilities and liability onto Appellants, there is no civil cause of action in this state for the unauthorized practice of law. (See: above)

Despite the special privileges and special burdens that accompany her license to practice law, Respondent Refosco attempts to disclaim her own negligence along with her duties in this case. The facts show that Ms. Refosco closed the SCB&T loan and drafted the "missed" mortgage herself a mere three months prior to the instant loan closing. The mortgage "missed" by the abstractor was improperly indexed because it was improperly drafted by Refosco and it should have been given to Appellants as part of the information for the First Federal title search. It was not given to the title abstracter and was allegedly not "remembered" by Refosco at the time of the First Federal/Cedar Woods title search and loan closing - despite the fact that the "missed" mortgage lay in Refosco's own files - albeit, misindexed as part of the "Red Bluff" file and not cross-indexed. **(See: Complaint, Answer, Answer to Third Party Complaint, Order Granting Summary Judgment, Refosco Dep. p. 44-49; Schaffner Dep. pl 27-40, p. 31, p. 64)**

Despite Respondent's claims, facts relative to Ms. Refosco's negligence, her faulty memory, her filing system, her failure to check her files, her failure to provide the SCB&T

mortgage to the abstractor as a known lien on the property, her failure to properly supervise the title search and her failure to search her files or do more than ask the client to verify the absence of a mortgage on the Cedar Woods are greatly in dispute. Facts relative to the indexing of the mortgage and the standards relative to Horry County title abstractors are in dispute - or would be, save that all of the relevant standards in this case should measure the negligence of the attorney and only the attorney.

Respondent FATIC argues that Appellants incorrectly contend that they had no duty to Refosco in this situation. Appellants do contend that Respondent Refosco had no right to rely upon a non-lawyer to practice law up to the standard of care that Refosco owed FATIC and her clients. Further, since performing a title search is part of the practice of law, there is no applicable standard below that due from a licensed attorney. Respondent Refosco could choose to have this task done by a non-attorney, but she could not rely upon a non-attorney to perform that task up to the standard of care she owed -- which is a big problem with the trial court granting Ms. Refosco summary judgment on her indemnity claim.

As to the duty itself, abstractors, as noted, cannot owe a duty to practice law up to the standard of a licensed attorney. Title searchers might - at most - owe a duty to use his or her "best efforts" to accomplish the task. If a title searcher's qualifications or experience don't suit an attorney or if a title searcher's "best efforts" turn out to be insufficient, then the attorney would either do the title work herself or obtain the services of a different title searcher.

Attorneys often employ or use title searchers, secretaries, paralegals and investigators, amongst others. Rule 5.3 requires a lawyer with direct supervisory responsibility of a non-lawyer to make sure that the non-lawyer's conduct is compatible with the lawyer's professional obligations. Comments to the rule provide that persons tasked by a lawyer with performing

duties that are part of the practice of law "**act for the lawyer in rendition of the lawyer's professional services." (emphasis added)** Rule 5.3, SCACR Additionally, Rule 5.5 forbids attorneys assisting another in the unauthorized practice of law. The comments to Rule 5.5 state that the rule doesn't forbid delegating tasks to non-lawyers "**so long as the lawyer supervises the delegated work and retains responsibility for their work." (emphasis added)** Rule 5.5, Comment (2), SCACR

The word used by the rule allowing delegation to non-lawyers - RESPONSIBILITY - is key to this case. The root of that word, "responsible," is defined as: "Liable; legally accountable or answerable. Able to pay a sum for which he is or may become liable, or to discharge an obligation which he may be under." Black's Law Dictionary 1312 (6th ed. 1990). And the word "responsibility" is defined as: "The state of being answerable for an obligation, and includes judgment, skill, ability and capacity McFarland v. George, 316 S.W. 2d 662, 671 (Mo. App. 1958) [form of cite corrected]. The obligation to answer for an act done, and to repair or otherwise make restitution for any injury it may have caused." Black's Law Dictionary 1312 (6th ed. 1990).

Interestingly, the interplay between the terms "duty" and "responsibility" was addressed by the Missouri Court of Appeals in the case cited by Black's Law Dictionary which construed the term "responsibility" in connection with a state Supreme Court Rule regarding fee-splitting between lawyers. That court, in pertinent part, said as follows:

> In construing Supreme Court Rule 4.34 little difficulty is found in dealing with the word service, but the word "responsibility" on first blush seems to offer more difficulty. The primary meaning of "responsibility" as found in the dictionaries is the state of being answerable for an obligation. Niagara Fire Extinguisher Co. v. Hibbard, 179 F. 844, 848. The term "responsibility" includes judgment, skill, ability and capacity. Ohio Power Co. v. N.L.R.B., 176 F.2d 385, 387. Legal responsibility is the state of one who is bound or obliged in law and justice to do something . Behnke v.

> New Jersey Highway Authority, 97 A.2d 647, 654. In Crockett v. Village of Barre, 29 A. 147, the court said: "One's duty is what one is bound or under obligation to do. One's responsibility is its liability, obligation, bounden duty.
> McFarland v. George at 671.

In the present case, licensed attorney Refosco had the duty to perform this title search - she was bound and under obligation as an attorney to perform the act adjudged by the SC Supreme Court to be part of the practice of law. Attorney Refosco also had the responsibility for this title search - she is answerable for it and liable to repair or make restitution for any injury it may have caused.

For all of the foregoing reasons, this Court should reverse the grant of Summary Judgment to Respondent Refosco and grant Summary Judgment to Appellants.

CONCLUSION:

Respondent FATIC attempts to provoke a response by insisting that the Appellants are wrongdoers seeking immunity from this Court. If FATIC wants to look at the posture of the parties and their culpability, perhaps we should do so.

The Appellants are lay people trained by practice to search and examine titles. Title searchers can only work at their trade when an attorney assigns a search. Title searchers cannot set the boundaries or the scope of the search. They must simply use their best efforts to perform the search assigned and their best efforts are subject to the information provided by the attorney, how the records are indexed and how the deeds and mortgages are drafted.

The Respondents are a title insurance company and its agent, a well-educated lawyer, trained by education, continuing education and practice. Respondent Refosco has the privilege

of possessing a license to practice law in South Carolina, a privilege she received from and keeps according to rules and standards set by the South Carolina Supreme Court. Ms. Refosco's education, training and license to practice allow her to direct and control all matters she takes on as an attorney.

Attorneys are obligated to perform every task that is a part of their practice of law. Some tasks they must perform personally or delegate to other lawyers - arguing motions or appeals, trying a case, entering a plea or taking a deposition. There are other tasks that attorneys can delegate, subject to their supervision, to non-lawyer secretaries, paralegals or title searchers - drafting pleadings, memos or briefs, entering deadlines for Statutes of Limitation or due dates for Answers and searching/abstracting titles. Because of time, billing and business constraints, many attorneys focus on attending to tasks they cannot delegate and delegating those tasks they can. Lawyers delegate title searches for business reasons.

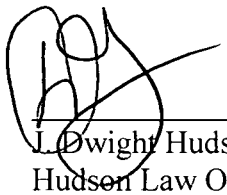
The tasks get delegated, but Ms. Refosco is as responsible and as liable for any missed mortgage as she would be had she physically gone down to the courthouse and searched the records. The law considers that she did search this title and it doesn't allow her to shirk her duty or her responsibilities for this title search. Both FATIC and Ms. Refosco contend that Ms. Refosco is allowed to decide what part of her law practice she will be responsible for by delegating tasks to non-lawyers or title abstracters. That claim flies in the face of the comments to Rule 5.5, SCACR and it totally ignores the "special calling" of the practice of law.

In fact, despite her own personal - active negligence, Ms. Refosco seeks to evade responsibility for the loans she closed and the title insurance she wrote. Respondent FATIC was also involved in both closings, wrote the title insurance for the "missed mortgage" and yet it too seeks to evade all responsibility. As to that responsibility, South Carolina law is quite clear that

the attorney is responsible for all matters constituting the practice of law and the Respondents admit that Respondent Refosco is responsible - but then she seeks to shirk and avoid that responsibility by shifting it to the title abstractor and abstracting company. If the court allows this, then it is likely that no attorney will check his or her own titles because hiring a title abstracter insulates them from ultimate responsibility.

For all of the foregoing reasons, the Summary Judgment granted to Respondent Refosco should be reversed and Summary Judgment should be granted to Appellants.

Respectfully submitted,



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