

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

68812

Appeal from Richland County
Court of Common Pleas

The Honorable DeAndrea G. Benjamin
Circuit Judge.

RECEIVED

JUN 20 2013

SC Court of Appeals

Case Number 10-CP-40-7330

H&H of Johnston, LLC.....Appellant,

v.

Old Republic National Title Ins. Co., and
Henry P. Bufkin, d/b/a Bufkin Title..... Respondents.

Appellate Case No. 2012-211167

**PETITION OF OLD REPUBLIC
NATIONAL TITLE INS. CO.
FOR REHEARING AND SUGGESTION
FOR REHEARING *EN BANC***

In Opinion No. 5139 (“Opinion”), filed June 5, 2013, the Court reversed the circuit court’s grant of summary judgment in favor of Respondent, Old Republic National Title Insurance Company (Old Republic), saying there was some evidence of an oral contract between Old Republic, acting through its agent, Respondent Henry P. Bufkin (Bufkin), and Appellant, H&H of Johnston, LLC (H&H) to issue a title insurance policy without certain exceptions to title to the subject property. Chief Judge Few dissented.

The Opinion affirmed the circuit court's grant of summary judgment in favor of Bufkin holding the advice Bufkin gave H&H regarding potential adverse title claims to the subject property constituted the practice of law and Bufkin gave his legal opinion when he made the alleged oral title insurance contract. The Court concluded H&H's failure to file the statutorily required attorney malpractice affidavit was fatal to H&H's claims against Bufkin.

Old Republic respectfully submits the Court misapprehended or overlooked the inconsistency of its conclusions concerning Bufkin acting as an attorney and its finding of some evidence of an oral contract between Old Republic and H&H.

As the Court concluded, Bufkin provided legal advice when he discussed title issues with H&H and when he discussed the alleged oral contract. Accordingly, to the extent H&H ever had any claim arising from the transaction in question, it was against Bufkin, not against Old Republic, and sounded in attorney malpractice requiring the submission of the statutorily mandated affidavit.

Old Republic also respectfully submits the Court overlooked or misapprehended the lack of a scintilla of evidence to support H&H's contention there was a meeting of the minds between it and Old Republic concerning issuing a title insurance policy without the questioned exceptions. H&H's conclusory affidavit to the effect that it "had an agreement" with Old Republic to issue a title insurance policy without the subject exceptions is insufficient to withstand Old Republic's properly supported summary judgment motion. Finally, Old Republic respectfully submits the Court overlooked its

arguments concerning exclusion 3(a) and conditions and stipulations paragraph 9(c) of the title policy Bufkin issued.

ARGUMENT

I. The Court misapprehended or overlooked Old Republic's argument that in closing the subject real estate transaction, Bufkin acted as an attorney not as a title insurance issuing agent.

For over 100 years, the South Carolina Supreme Court has said providing advice regarding title to real property is the practice of law. *In Re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909), *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E. 2d 15 (1987), *Doe v. McMaster*, 255 S.C. 306, 585 S.E.2d 773 (2003), *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006), *Matrix v. Louis M. Frazer, et al.*, Op. No. 26859 (decided August 16, 2010), modified and reissued *Matrix Financial Services Corp. v. Louis M. Frazer, et al.*, 394 S.C. 134, 714 S.E.2d 532 (2011).

When a lawyer provides advice and counsel to a client regarding title before a real estate closing he is acting in his capacity as an attorney. When he sits down at a closing table to close a real estate transaction, he is practicing law. He cannot act in any other capacity because only lawyers can provide advice regarding real estate title issues and only lawyers can close real estate transactions.

Old Republic has no policies or procedures requiring its agents notify or advise a prospective title insurance purchaser of adverse claims or encumbrances affecting title to real property because under long established South Carolina law such advice is the practice of law in which neither Old Republic nor its agents acting on its behalf as title insurance issuing agents, can engage. (Affidavit of W. Ivey Hart, Esq., ROA 182 - 183).

In affirming the circuit court's grant of summary judgment for Bufkin, the Opinion concluded, "... Bufkin gave his legal opinion when he made the alleged oral contract with H&H..." and "[w]e find any advice Bufkin gave H&H regarding potential adverse claims [to title to the property] constituted the practice of law." (Shearhouse Adv.Sh. No. 25 at 49).

Bufkin was acting as an attorney in the real estate transaction. He provided H&H with his advice and counsel regarding the transaction and particularly regarding potential adverse claims to title to the property, including the adverse claims to title which are the subjects of the complained-of exceptions to the title policy.

The Opinion's conclusions that Bufkin "... gave his legal opinion when he made the alleged oral contract" and "... any advice Bufkin gave H&H regarding potential adverse claims constituted the practice of law" is inconsistent the Opinion's conclusion there was some evidence of an oral contract between Old Republic, acting through Bufkin as its agent, and H&H. "By finding that 'any advice Bufkin gave H&H regarding potential adverse claims constituted the practice of law,' the majority finds – correctly – that Bufkin was providing his legal opinion about the outcome of future disputes, not representing to the insured what the terms of a written policy would be." (Shearhouse Ad.Sh. No. 25 at 52, Few, C.J. dissenting).

The Court misapprehended or overlooked this inconsistency. Therefore, the portion of the Opinion which reversed the circuit court's grant of summary judgment in favor of Old Republic should be vacated the grant of summary judgment in favor of Old Republic should be affirmed.

II. The Court misapprehended or overlooked the lack of even a scintilla of evidence to support H&H's contention there was a meeting of the minds between it and Old Republic concerning issuing a title insurance policy without the questioned exceptions.

The authorities agree that before a contract of insurance, or to insure, is binding, all the essential elements and terms of the contract must be understood and mutually assented to. A mere expression of a desire by one intending to procure insurance, or a proposition made to an insurance agent to insure property, ... would not amount to a contract of insurance or an agreement to insure.

Fulmer v. London, Liverpool & Globe Fire Ins. Co., 172 S.C. 525, 174 S.E.466, 467 (1934), quoting *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34 (1894).

In opposition to Old Republic's summary judgment motion, H&H submitted the affidavit of Stanley Herlong (Herlong), a member of H&H. Herlong says in his affidavit he asked Bufkin for a copy of the P&K contract, he (Herlong) needed to make sure the P&K contract did not prevent H&H from selling a portion of the property, and he needed to make sure H&H would have protection for any claims of P&K or for assessments. (Herlong affidavit, ROA 197 - 198).

Herlong also testified on behalf of H&H at deposition that prior to the filing of this law suit, he had never heard of Old Republic and he knew nothing of Bufkin's relationship with Old Republic. (H&H 30(b)(6) deposition excerpt, pages 150, ll. 13 – 16, ROA 171 and 150, l. 23 – 151, l. 1, ROA 171 – 172).

Herlong's affidavit sets forth neither representation nor act by Bufkin, as a title insurance issuing agent for Old Republic, evidencing a meeting of the minds between it and H&H to issue a title insurance policy without the exceptions at issue. Herlong's "mere expression of a desire ... to procure insurance ... [does] not amount to a contract

of insurance or an agreement to insure.” *Fulmer*. Herlong’s deposition testimony shows there was no meeting of the minds with, or act or representation by, Old Republic, acting through Bufkin, in regard to an essential element of the title insurance contract – the complained-of exceptions. Herlong’s conclusory statement in his affidavit that “H&H had an agreement with Mr. Bufkin” to insure H&H would be able to do certain things and would be protected from P&K’s claims is not evidence of a representation by Bufkin. Further, “[i]t is simply a legal conclusion ... that is insufficient to withstand summary judgment.” (Shearhouse Ad.Sh. No. 25 at 52, Few, C.J. dissenting, citations omitted).

As the majority held, Bufkin was giving his legal opinion when he made the alleged oral contract, thus Bufkin was providing his “legal opinion about the outcome of future disputes, not representing to the insured what the terms of the written policy would be.” (Shearouse Ad.Sh. No. 25 at 52, C.J. Few, dissenting).

The Court misapprehended or overlooked the lack of even a scintilla of evidence in this record to establish a meeting of the minds between H&H and Old Republic concerning the alleged oral contract. Therefore, the portion of the Opinion which reversed the circuit court’s grant of summary judgment in favor of Old Republic should be vacated the grant of summary judgment in favor of Old Republic should be affirmed.

III. The Court overlooked Old Republic’s argument that even had Bufkin issued a title insurance policy without the questioned exceptions, exclusion 3(a) and conditions and stipulations paragraph 9(c) of the title policy Bufkin issued would preclude coverage of H&H’s claims.

Exclusion 3(a) of the title policy Bufkin issued excludes coverage for matters created, suffered, assumed or agreed to by the insured. (Title Ins. Policy, ROA 127). The P&K contract was entered into by H&H's predecessor-in-title, a limited liability company which included, as a member, one of two members of H&H. (P&K contract, excerpts from Five Star operating agreement and affidavit of Stanley Herlong, ROA, respectively, 151, 139 - 150 and 196). The existence of the P&K contract was known to H&H long before the July 5, 2007 closing. (H&H deposition excerpt, p. 165, l. 13 - p. 166, l. 5, ROA 175 - 176). The P&K contract was created, suffered, assumed or agreed to by H&H and therefore, any claim concerning it is not covered under the title policy Bufkin issued. See e.g. *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61 (D.C. 2002) (When the insured executes a contract of sale for a property he knew was previously under contract to a different purchaser, the insured has 'created' a defect.).

Paragraph 9 (c) of the pre-printed conditions and stipulations section of the title policy precludes coverage for any liability voluntarily assumed by the insured in settling a title claim without the prior written consent of Old Republic. H&H settled the P&K contract claim and the HOA lawsuit regarding the restrictive covenants without the prior written consent of Old Republic. (Letters from H&H counsel dated August 28, 2007 and March 18, 2009, attached to affidavit of W. Ivey Hart, Esq., and HOA lawsuit release and settlement agreement, ROA 184, 185 and 160 - 169, respectively).

The Court overlooked Old Republic's argument regarding exclusion 3(a) and stipulations and conditions paragraph 9(c). Therefore, the portion of the Opinion which reversed the circuit court's grant of summary judgment in favor of Old Republic should

be vacated and the grant of summary judgment in favor of Old Republic should be affirmed.

SUGGESTION FOR REHEARING *EN BANC*

Pursuant to SCACR, Rule 219 and in the alternative to the relief requested above, Old Republic respectfully suggests this matter be reheard *en banc*.

Old Republic submits Issue I bears consideration by the full Court as it represents a question of exceptional importance and to secure uniformity of this Court's decisions. Old Republic submits Issue II bears consideration by the full Court to secure uniformity of its decisions.

The majority's decision as to Issue I is contrary to the long line of South Carolina Supreme Court cases holding only attorneys can provide advice regarding real property issues and only attorneys can close real estate transactions. *See also Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010). Old Republic also submits the majority's decision on this issue is contrary to the South Carolina Supreme Court's holding in *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002). Issue I, therefore, is one of exceptional importance and full Court review is necessary to secure uniformity in this Court's decisions.

In regard to Issue II, Old Republic submits the majority's decision is inconsistent with numerous opinions of this Court. *See e.g. Germann v. New York Life Ins. Co.*, 286 S.C. 32, 331 S.E.2d 285 (Ct. App. 1985); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994); *Campion Int'l Corp. v. Ewbanks*, 291 S.C. 395, 353 S.E.2d 880 (Ct. App. 1987) and *Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App.

2004). *Bank of America v. Draper*, Op. No. 5140 (S.C.Ct.App. filed June 5, 2013) (Shearouse Ad.Sh. No. 25, at 53, 56), ("[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact...", quoting *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). Accordingly, rehearing *en banc* is necessary to secure uniformity in this Court's decisions.

CONCLUSION

Old Republic respectfully requests its Petition for Rehearing be granted, the Court vacate the portion of the Opinion which reversed the circuit court's grant of summary judgment in favor of Old Republic and the circuit court's grant of summary judgment in favor of Old Republic be affirmed.

Alternatively, Old Republic suggests as to Old Republic, this matter be reheard *en banc* as Issues I and II are of exceptional importance and consideration of these issues by the full Court is necessary to secure consistency in this Court's decisions.

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June 20, 2013

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PROOF OF SERVICE

I, Crystal Smith, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondent, do certify I have served a copy of the **Petition for Rehearing of Old Republic Nat. Title Ins. Co. and Suggestion for Rehearing *En Banc***: by depositing a copy of it in the United States Mail, postage prepaid, addressed to opposing counsel of record, at the following address:

William E. Booth, III, Esq.
3231 Sunset Blvd., Ste. A
West Columbia SC 29250



June 20, 2013
Columbia, South Carolina

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June 20, 2013

Via Hand Delivery

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JUN 20 2013

SC Court of Appeals

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter St.
PO Box 11629
Columbia SC 29211

Re: H&H of Johnston, LLC v. Old Republic National Title Ins. Co., and Henry P. Bufkin,
d/b/a Bufkin Title (2010-CP-40-7330)
Case Tracking #: 2012-211167
Our File No: 2529.008

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the following document concerning this matter:

1. Petition of Old Republic National Title Ins. Co. for Rehearing and Suggestion for Rehearing *En Banc*, with attached Proof of Service.

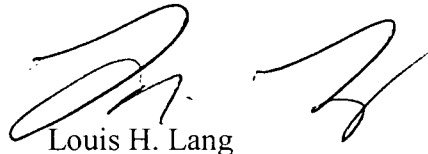
Please file the original and copies, and return a clocked copy to me via my courier.

By copy of this letter, I am hereby serving the same on opposing counsel

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC



Louis H. Lang

LHL/cs

Enclosure

cc: William E. Booth, III, Esq. (w/ encl.)
George Perez, Esq. (w/ encl.)
Susan T. Wall, Esq. & Amanda C. Williams, Esq. (w/ encl.)
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