

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 10-CP-40-7330

H&H of Johnston, LLC, Appellant

v.

Old Republic National Title Insurance Company, and
Henry P. Bufkin d/b/a Bufkin Title, Respondents

RETURN TO PETITION FOR REHEARING

Opinion No. 5139
Heard March 5, 2013 - Filed June 5, 2013

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Attorney for Appellant

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This Return is in response to the Petition for Rehearing filed by the Respondent, Old Republic National Title Insurance Company, regarding Opinion No. 5139 issued by this Court on June 5, 2013. For the following reasons, the Petition should be denied:

I. Contrary to the statement in the Petition, the Opinion does not create an inconsistency because the act of Bufkin giving legal advice and the act of Bufkin selling an insurance product as an agent for Old Republic are distinguishable.

There is a distinction between giving legal advice on property matters and making the determination based on underwriting practices of the exceptions to title insurability. This distinction is illustrated by the law in North Carolina where the closing attorney cannot also be the issuing agent. N.C. Gen. Stat. §58-26-1 (2002). In North Carolina, the title insurance company cannot issue title insurance until the company has obtained the opinion of an attorney, who cannot be an employee or agent of the company, based upon the attorney's "reasonable examination of the title". After getting the title opinion, the issuing agent is required to employ sound underwriting practices in connection with the determination of the insurability of title. *id.* It is possible, therefore, that a title insurance company in North Carolina would provide coverage against a potential claim found to exist in the opinion of the attorney.

In South Carolina, there is no law that prohibits a closing attorney from also being the issuing agent as in North Carolina. In this case, Bufkin made an underwriting decision by making the oral contract for coverage as to the three potential claims even though his legal opinion or advice to H&H may have conflicted with the coverages provided.

The discussion in Ethics Advisory Opinion No. 92-03 also illustrates this distinction and supports the Court's reversal of summary judgment as to Old Republic. That Opinion creates a scenario where a cloud on title was found during the title examination but both the lender and buyer want the title insurer to insure the potential problem meaning the insurer would be required to indemnify them against a claim. As Ethics Advisory Opinion No. 92-03 states, if the attorney-agent could not obtain insurance for the potential problem, the attorney-agent would be required to recommend that the client seek coverage from another insurer or pursue negotiations with the insurer as zealously as if the attorney-agent was not also its agent.

Old Republic argues that since it does not employ any policies or procedures requiring its agents to notify or advise a prospective title insurance purchaser of all adverse claims to property, everything done during the closing process is the practice of law. But, Old Republic does authorize and allow its agents to issue commitments and receive payment for such commitments. An attorney cannot issue such a commitment, but as an agent, he can issue as commitment in which the prospective purchaser is notified about claims not being insured. In this case, Bufkin claims he issued the commitment prior to closing and showed it to H&H so that H&H would be aware of the exceptions. (R. p. 116-117). The argument of Old Republic, therefore, cannot be supported from the Record in this case.

II. Contrary to the statement in the Petition, there is sufficient evidence of a meeting of the minds that Old Republic was the issuer and that Bufkin was the agent.

While Stanley Herlong did not recall that he knew at the closing the name of the insurance company or that Bufkin was an agent for a title insurance company, there is

sufficient evidence to establish these facts since he signed forms presented to him at the closing providing this information. Old Republic required Bufkin to furnish H&H for review of, and to obtain execution by H&H, of Combined Form 3601 and 2423. (R. p. 227-230). That Form states that Bufkin is a title insurance agent and that Old Republic is the title insurance company. The caption of the Form itself contains the name of Old Republic, and the name of Old Republic is set forth several times on the Form. Herlong selected on the Form to purchase an owner's title insurance policy from Old Republic.

The Affidavit of Bufkin also provides evidence that H&H was aware that title insurance was being issued by Bufkin as an agent and by Old Republic. (R. p. 116-117). His affidavit states that he furnished the title commitment to H&H and the form of the commitment has the name of Old Republic clearly shown on the first page¹.

III. Neither the application of exclusion 3(a) nor the application of conditions and stipulations paragraph 9(c) of the Title Policy prove as a matter of law Old Republic's right to deny coverage of the adverse claims.

While Stanley Herlong stated that he was aware of a contract with P&K for the purchase of lots, he also testified that he was never given a copy of the contract and was not aware that the right of P&K to purchase lots was still in effect. Moreover, the fact that he was a member of Five Star cannot be used to impute any knowledge to H&H as a matter of law. Thus, the jury will need to decide if paragraph 3(a) allows Old Republic to deny coverage.

As for paragraph 9(c), Bufkin had knowledge of the HOA lawsuit as soon as it was filed since he represented Five Star and other defendants in the lawsuit and was

¹ H&H does dispute the statement in the Affidavit of Bufkin that he had issued the commitment prior to closing.

also involved in the negotiation of the settlement. His agency contract with Old Republic requires him to notify the company of any sort of claim.² (R. p. 218-226). In addition, it is undisputed that the issuance of the title insurance policy did not occur until after the litigation with the HOA had been settled. Thus, the jury will need to decide if paragraph 9(c) allows Old Republic to deny coverage.

CONCLUSION

For the preceding reasons, the Petition for Rehearing and Petition for Rehearing En Banc should be denied.

Respectfully submitted,



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July 1, 2013

² Paragraph IX states that "Agent agrees to immediately notify Insurer" if agent becomes aware of any circumstances which may give rise to a claim.

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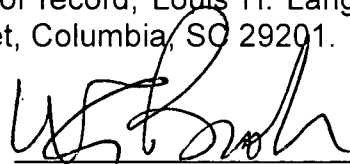
v.

Old Republic National Title Insurance Company, and
Henry P. Bufkin d/b/a Bufkin Title, Respondents

PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing of Old Republic National Title Insurance Company by causing to be hand delivered, on July 1, 2013, at the law office of, and addressed to, the Respondent Old Republic National Title Insurance Company's attorney of record, Louis H. Lang, Esquire, Callison Tighe & Robinson, 1812 Lincoln Street, Columbia, SC 29201.

July 1, 2013



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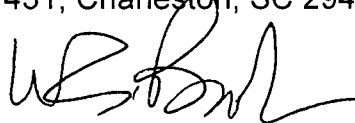
v.

Old Republic National Title Insurance Company, and
Henry P. Bufkin d/b/a Bufkin Title, Respondents

PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing of Old Republic National Title Insurance Company by causing to be mailed via Priority US Mail with sufficient postage affixed thereto, on July 1, 2013, addressed to the Respondent Henry P. Bufkin d/b/a Bufkin Title's attorney of record, Susan Taylor Wall, Esquire, McNair Law Firm, P.A., P.O. Box 1431, Charleston, SC 29402.

July 1, 2013



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July 1, 2013

VIA HAND DELIVERY

Hon. Jenny Abbott Kitchings
Clerk of Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: H&H of Johnston v. Old Republic
Case Tracking #: 2012211167
(Our File No. 4460.1004)

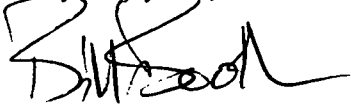
Dear Ms. Kitchings:

I am enclosing for filing with your office the following:

1. The original and six (6) copies of Appellant's Return to Petition for Rehearing of Old Republic Title Insurance Company;
2. Original Proof of Service of Appellant's Return on Respondent Henry P. Bufkin d/b/a Bufkin Title; and
3. Original Proof of Service of Appellant's Return on Respondent Old Republic National Title Insurance Company.

By copy of this letters, I am serving copies of the same on counsel for Respondents. If you have any questions on this, please let me know.

Very truly yours,



William E. Booth III

WEBIII/eje
Enclosure

C: Louis H. Lang, Esquire (w/Enc.)
Susan Taylor Wall, Esquire (w/Enc.)

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