

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Richland County
Court of Common Pleas

The Honorable DeAndrea G. Benjamin
Circuit Judge.

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OCT 28 2013

S.C. Supreme Court

Opinion No. 5139 (S.C. Ct. App. filed June 5, 2013)

H&H of Johnston, LLC.....Respondent,

v.

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

Of Whom

Old Republic National Title Ins. Co. is Petitioner.

**PETITION OF OLD REPUBLIC NATIONAL
TITLE INS. CO. FOR WRIT OF CERTIORARI**

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SC Court of Appeals

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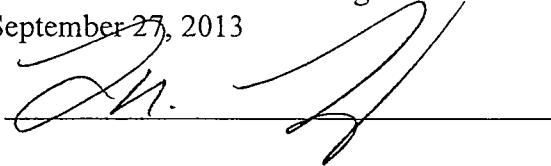
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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 27, 2013



Louis H. Lang
CALLISON TIGHE & ROBINSON, LLC
COUNSEL FOR PETITIONER

Columbia, South Carolina
October 28, 2013

QUESTIONS PRESENTED

1. Were H&H's conclusory statements to the effect there was an oral contract between H&H and Old Republic sufficient to establish a genuine issue of material fact?
2. Was the Court of Appeal's conclusion a genuine issue of material fact existed regarding H&H's oral contract claim against Old Republic, which was based on H&H's receiving legal advice and counsel from defendant Henry P. Bufkin, consistent with the panel majority's conclusion defendant Henry P. Bufkin was acting as an attorney while advising H&H?

STATEMENT OF THE CASE

Respondent, H&H of Johnston, LLC (H&H) filed its summons and complaint on July 7, 2010. (Complaint, ROA 16). H&H contends Petitioner, Old Republic National Title Insurance Company (Old Republic), through its agent, defendant Henry P. Bufkin, d/b/a Bufkin Title (Bufkin) entered into an oral contract to issue a title insurance policy without exception to a right of first refusal contract and certain restrictions and assessments.

Old Republic filed an answer, (Old Republic Answer, ROA 31) and Bufkin moved to dismiss and change venue, (Bufkin Motions to Dismiss and Transfer Venue,

ROA 54 and 58). Bufkin's motion to change venue was granted (Order transferring venue, ROA 12) and his motion to dismiss was granted in part as to any claim regarding Bufkin acting in his capacity as an attorney. (Bufkin's Memorandum in Support of his Amended Motion for Summary Judgment, ROA 72). Bufkin answered the complaint on March 24, 2011. (Bufkin answer, ROA 41).

Old Republic and Bufkin filed motions for summary judgment. (Bufkin motion for summary judgment, ROA 60 and Old Republic's motion for summary judgment, ROA 63). H&H filed a return, affidavits of Stanley Herlong (Herlong) and counsel for H&H and a supplemental affidavit of counsel for H&H. (H&H return to motions for summary judgment, affidavits of Herlong and counsel for H&H and supplemental affidavit of counsel for H&H, ROA, 188, 196, 202, and 231, respectively).

Both summary judgment motions were granted. (Orders granting Bufkin and Old Republic summary judgment, ROA 4 and 7). H&H moved to alter or amend the summary judgment orders, this motion being denied by order entered March 9, 2012. (Order denying motions to alter or amend, ROA 3).

H&H filed a notice of appeal and on June 5, 2013 and the Court of Appeals affirmed the grant of summary judgment to Bufkin and reversed the grant of summary judgment to Old Republic. *H&H of Johnston, Inc. v. Old Republic Nat. Title Ins. Co.*, ___ S.C. ___, 748 S.E.2d 72 (Ct. App. 2013) (Opinion). Old Republic filed a petition for rehearing and a suggestion for rehearing *en banc* both of which were denied on September 27, 2013.

STATEMENT OF THE FACTS

Bufkin is an attorney. (Bufkin affidavit, ROA 116). On July 5, 2007, Bufkin closed a real estate transaction in which Five Star Development, LLC (Five Star) conveyed certain real property to H&H. (*Id.*).

In conjunction with the closing, Bufkin, an Old Republic agent, issued H&H a title insurance commitment and title insurance policy. (Title Ins. Commitment and Policy, ROA 120 and 127, respectively).

The only discussion of title insurance at the closing concerned the premium; no terms or exceptions of the policy were discussed then or ever. (H&H 30(b)(6) deposition excerpt, p. 161 ll. 7 - 19, ROA 173 and H&H brief at 13).

Shortly after the closing, a dispute arose between H&H and P&K Construction over P&K Construction's assertion it had a right of first refusal concerning some of the property Five Star conveyed to H&H. Counsel for H&H provided Old Republic with notice of this claim under the title insurance commitment, which the commitment specifically excepted, by letter dated August 28, 2007. (Exhibit A to Affidavit of W. Ivey Hart, Esq., ROA 184 and Title Ins. Commitment, ROA 126, exception 26). H&H then settled with P&K Construction. Thereafter, H&H was named as a defendant in a suit brought by a homeowners association. (HOA lawsuit). H&H Brief at 9. This suit was settled in December 2008. (Release and Settlement Agreement, ROA 160 - 169). Old Republic received notice of a claim from H&H regarding the HOA lawsuit by letter from counsel for H&H dated March 18, 2009, long after the suit was settled. (Exhibit A to affidavit of W. Ivey Hart, Esq., ROA 184 and Release and Settlement Agreement, ROA

160 - 169).¹ Old Republic denied the P&K Construction and HOA claims and this lawsuit followed.

ARGUMENT

I. H&H's conclusory statements do not establish a genuine issue of material fact.

“When a plaintiff is faced with a defendant’s motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying upon mere allegations in his complaint....” *Shupe v. Settle*, 315 S.C. 510, 516, 445 S.E.2d, 651, 655 (Ct. App. 1994), citing *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). “A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.” *Id.* at 516 - 617. 445 S.E.2d, 655.

The Court of Appeals found there was a genuine issue of fact an oral contract was formed between H&H and Old Republic. It said, “[a]lthough Stanley Herlong asserted at his deposition he did not discuss the terms and conditions of the title insurance policy with Bufkin, he also stated in his affidavit that H&H had an agreement with Bufkin regarding the three coverage exceptions.” *Id.* at ___, 748 S.E.2d, 75.

The Court of Appeals’ majority relied on the following statement in Herlong’s affidavit to find a genuine issue of material fact, “[s]o, at or before the closing, H&H had an agreement with Mr. Bufkin as the title agent to do the following:” (Affidavit of

¹ The March 18, 2009 letter reasserts H&H’s claim regarding the P&K Construction. *Id.*

Stanley Herlong, ROA 198). This statement is preceded by statements in which Mr. Herlong described things he did and said on behalf of H&H.

Paragraphs 41, 43 and 45 of H&H's complaint assert, "[Old Republic] through its agent entered into an oral agreement to sell the Plaintiff a title policy that would not take exception to the contract with P&K Construction [paragraph 41] ... to any restrictions upon the 11.44 acres [paragraph 43] [and] to ... HOA assessments [paragraph 45]." (H&H answer, ROA p. 26).

Herlong's affidavit is a reiteration under oath of the conclusory allegations of paragraphs 41, 43 and 44 of H&H's complaint. It is "[a] conclusory statement as to the ultimate issue..." It is insufficient to withstand Old Republic's properly supported motion for summary judgment and the Court of Appeals erred in concluding otherwise. *Froneberger v. Smith*, Op. No. 5168 (Ct. App. filed August 28, 2013) (Shearouse Adv.Sh. No. 38 at 168) (CJ Few, dissenting).

Old Republic respectfully submits the Court of Appeals erred in concluding there existed a genuine issue of material fact, this Court should grant Old Republic's petition and reverse the Court of Appeals.

II. The Court of Appeal's conclusion there was a genuine issue of material fact regarding H&H's claim against Old Republic contravened the panel majority's conclusion no genuine issue of material fact existed regarding H&H's claim against 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 subject property] constituted the practice of law." *Id.* ____ S.C. at ____, 748 S.E.2d, 74.

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) and *Matrix Fin. Services Corp. v. Frazer, et al.*, 394 S.C. 134, 714 S.E.2d 532 (2011).

Bufkin was acting as an attorney in closing 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. In doing so, he acted as an attorney, not as a title insurance issuing agent.

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 property because 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).

When a lawyer advises and counsels a client regarding title he is acting as an attorney. When he sits down at a closing table to close a real estate transaction, he is practicing law. When he accomplishes or supervises post-closing tasks, he is doing so as an attorney. 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.

Bufkin "... gave his legal opinion when he made the alleged oral contract..." *Id.* "... [A]ny advice Bufkin gave H&H regarding potential adverse claims constituted the practice of law." *Id.* The Court of Appeals correctly concluded Bufkin's actions were

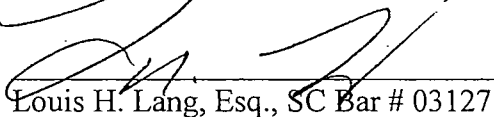
that of a lawyer, not of a title insurance issuing agent. The Court of Appeals' conclusion Bufkin was acting as an attorney in advising H&H regarding title issues is inconsistent with the finding of evidence of an oral contract between Old Republic and H&H for Old Republic to issue a title insurance policy without the questioned exceptions.

Old Republic respectfully submits the Court of Appeals erred in concluding there existed a genuine issue of material fact regarding the alleged oral contract. This Court should grant Old Republic's petition and reverse the Court of Appeals.

CONCLUSION

For the reasons set forth above, Old Republic respectfully requests its petition be granted and the decision of the Court of Appeals reversed.

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October 28, 2013

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The Honorable DeAndrea G. Benjamin
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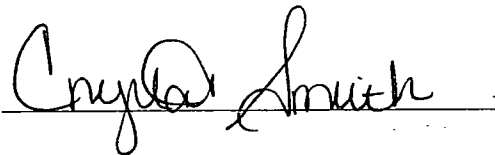
Of Whom

Old Republic National Title Ins. Co. is Petitioner.

PROOF OF SERVICE

I, Crystal Smith, an employee of Callison Tighe & Robinson LLC, Attorneys for the **Petitioner**, do certify I have served a copy of the **Petition for Writ of Certiorari** by mailing it to him at his last known address, by deposited it in the United States Mail, postage prepaid, addressed to counsel of record at the following addresses:

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



October 28, 2013
Columbia, South Carolina

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SC Court of Appeals

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CALLISON  TIGHE

October 28, 2013

Via Hand Delivery

Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

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)
SCCA Opinion No: 5139 (Filed June 5, 2013)
Our File No: 2529.008

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Petition for a Writ of Certiorari filed by Petitioner, Old Republic National Title Ins. Co., in connection with the above-referenced matter. Also, enclosed please find my firm's check in the amount of \$100.00 as the required filing fee.

In addition, enclosed for filing please find two (2) copies of the Appendix (one being unbound). Per Rule 242, SCACR, I am not providing counsel of record with copies of the appendix.

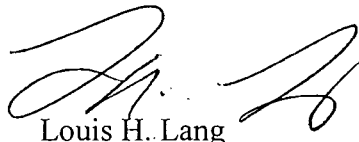
Kindly file all of the above and return clocked-in copies to me via my courier. By copy of this letter, the enclosed Petition for a Writ of Certiorari is being served upon opposing counsel

Thank you for your assistance in this matter.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC


Louis H. Lang

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SC Court of Appeals

LHL/cs
Enclosures

cc: Hon. Tanya Gee, Clerk of Court for S.C. Court of Appeals (w/ encl.)
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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