

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2013-UP-459 (S.C. Ct. App. Filed December 11, 2013)

Shelby King.....Petitioner.

v.

Amy Bennett and The Amy Bennett Trust, Amy Bennett
Trustee,.....Respondents

PETITION FOR A WRIT OF CERTIORARI

RECEIVED

FEB 21 2014

SC Court of Appeals

T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, South Carolina 29205
(803) 251-4517
Attorney for Petitioner

Todd Raymond Ellis
The Law Office of Todd Ellis, P.A.
7911 Broad River Road
Suite 100
Irmo, South Carolina 29063
(803) 732-0123
Attorney for Respondent

INDEX

Certificate of Counsel..... 2

Questions Presented..... 3

Statement of the Case..... 4

Arguments

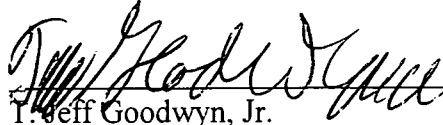
 1. The Court Erred in Finding that S.C. Code §40-57-135(D)(4) Served As a Bar to Plaintiff’s Legal and Equitable Claims for Recovery When a Question of Fact Exists As to Whether Petitioner, a Licensed Real Estate Professional, Can Recover for Services Rendered Pursuant to a Verbal Agreement and In Accordance with Other Provisions in Chapter 57 of Title 40, Specifically S.C. Code Ann. §40-57-130(O)(1)..... 6

 2. Sufficient Evidence Was Below the Lower Court that Respondents Were Unjustly Enriched in Accepting Petitioner’s Professional Services..... 10

Conclusion..... 13

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 22, 2014.



Jeff Goodwyn, Jr.

Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
Attorneys for the Petitioner
(803) 251-4517
JGoodwyn@Goodwynlaw.com

February 21, 2014

QUESTIONS PRESENTED

1. Absent a Written Agreement, Does Sufficient Evidence Exist to Allow a Jury to Consider Whether Petitioner, A Real Estate Licensee, May Be Compensated for Rendering Professional Services to a Buyer Defined as a "Customer" Pursuant to Chapter 57 of Title 40 of the South Carolina Code of Laws ?
2. Absent a Written Agreement, May a Real Estate Licensee Render Services to Customers Pursuant to a Verbal Agreement?
3. May a Real Estate Licensee Rendering Professional Services Ever Recover Under an Unjust Enrichment/Quantum Meruit Claim Where Evidence Is Presented Sufficient to Create a Question of Fact?

STATEMENT OF THE CASE

Petitioner filed this action on October 25, 2010 after Respondents refused to pay her for professional services rendered in connection with Appellant providing real estate expertise, market analysis, and property research to Respondents as they sought to relocate to the Columbia area from Chicago, Illinois.

Respondents engaged the services of Petitioner in November 2009 to locate a house for purchase, as they were moving to Columbia from Chicago. (R. p. 184). Petitioner is a realtor in Columbia, South Carolina and is licensed under the South Carolina Real Estate Commission as a “licensee” under the S.C. Code Ann. 40-57-5, et seq. Respondent Amy Bennett is a licensed attorney (not in South Carolina) (R. p. 163). She has owned multiple homes over the years and is well-versed in the manner in which real estate professionals are paid. (R. p. 154, 1.11-15). Petitioner spent approximately 125 hours of her time researching homes, market values and trends, previewing homes, communicating with the Respondents about homes, school districts, and other desired features, showing Respondents homes, driving them to the airport and performing other activities real estate professionals regularly perform. (R. p. 184).

On multiple occasions, Petitioner asked Amy Bennett to execute a buyer’s agency agreement, appointing Petitioner as Respondent’s agent, which Bennett declined to do. Nevertheless, the undisputed testimony is that Respondents gave Petitioner every indication that she would be fairly compensated for the work they had asked her to do for them in researching and finding them a home in Columbia. (R. pp. 184-185).

On July 5, 2010, a home located at 14 Ashworth Court, Columbia, South Carolina (the “Home”) went on the market. Recognizing that the Home met Respondent’s

specifications, Petitioner sent two e-mails - dated July 9, 2010 and July 12, 2010 - bringing this home to the attention of Amy Bennett. (R. p. 185). Amy Bennett responded to these emails by indicating in an email dated July 13, 2010 that she was interested in viewing the Home and wanted Petitioner to show her the Home over the upcoming weekend. (R. p. 197). In response to Amy Bennett's request, Petitioner previewed the Home and sent Amy Bennett an email dated July 14, 2010 with the information she gained from the preview. (R. p. 199). On that same day, Amy Bennett responded to Petitioner's email and informed her that they were no longer interested in purchasing a home at this time and would contact Petitioner when they became interested again. (R. p. 200).

Unbeknownst to Petitioner, Respondents then proceeded to contact the listing agent for the Home directly and proceeded to view the Home and negotiate a purchase contract. Respondents signed a contract on the Home July 20, 2010 – six days after telling Appellant that she was not in any hurry to buy. (R. pp. 187-191).

In the process of these negotiations, Respondents requested that the listing agent reduce her sales commission in exchange for a proportionate reduction in the purchase price of the Home. This amount was based in part on the real estate commission the Petitioner would have been entitled to had the Respondents executed a buyer's agency agreement. Despite numerous requests, Respondents have refused to compensate Petitioner for the services she provided to them at their request, nor have the Respondents offered to reimburse Appellant for the out of pocket expenses she incurred in working for them.

PROCEDURAL BACKGROUND

Petitioner filed suit, asserting claims for *Quantum Meruit* and Unjustment Enrichment; Constructive Trust; Fraud; and Conversion by False Pretenses.¹ (R. pp. 9-17). Respondents thereafter filed a Motion for Summary Judgment, on the grounds that (1) Petitioner's equitable claims were barred since there was no signed "buyer's agency" agreement as required under South Carolina law; (2) Petitioner's claims were barred by the Statute of Frauds; (3) Petitioner's equitable claims were barred by the doctrine of estoppel; and (4) Petitioner lacked standing to bring the lawsuit. (R. p. 94). The Motion for Summary Judgment was heard by the Honorable DeAndrea G. Benjamin on April 17, 2012, whereupon the Court granted Respondents' Motion for Summary Judgment by Form 4 Order dated April 26, 2012 with a written Order following dated June 18, 2012. (R. pp. 3-5). Petitioner filed a timely Motion to Reconsider which was denied in a Form 4 Order dated May 9, 2012. (R. p. 1). Petitioner filed and served her Notice of Appeal June 6, 2012. The Court of Appeals, by unpublished opinion filed December 11, 2013, affirmed the lower court's ruling.

ARGUMENT

- I. The Court Erred in Finding that S.C. Code §40-57-135(D)(4) Served As a Bar to Plaintiff's Legal and Equitable Claims for Recovery When a Question of Fact Exists As to Whether Petitioner, a Licensed Real Estate Professional, Can Recover for Services Rendered Pursuant to a Verbal Agreement and In Accordance with Other Provisions in Chapter 57 of Title 40, Specifically S.C. Code Ann. §40-57-130(O)(1).**

¹ A claim for civil conspiracy was dismissed by the Petitioner voluntarily once Petitioner voluntarily dismissed Respondent's husband from the suit.

Petitioner in this case is not seeking a commission and did not bring an action against the seller or seller's agent. Petitioner in this case is not, and was not, an agent of Respondents. As a result, Petitioner would contend that this is a case of first impression in the South Carolina courts.

It is undisputed by the parties that Petitioner was retained by the Respondents to provide them with traditional "realtor-type" services in the Columbia area during their relocation from Chicago – i.e., scouting properties, reviewing school and neighborhood information, previewing homes, etc. There was no signed "buyer's agency" agreement, as the Respondents did not wish to sign one. Accordingly, Petitioner contends that the Respondents were "customers" under S.C. Code Ann. §40-57-30(7), which defines a "customer" as "a person with whom a licensee has not established an agency relationship." Respondents did not argue, and the lower court did not rule, that there is not sufficient evidence in the record to support each of the claims Petitioner raised. Rather, the lower court held that S.C. Code Ann. §40-57-135(D)(4) sets forth the exclusive method for a real estate professional to be paid; specifically that a real estate professional providing certain services to a prospective buyer must have a signed buyer's agency agreement in order to successfully bring a claim for failure to pay. (R. pp. 3-5). In short, the lower court held that the facts presented were such that, as a matter of law, the Petitioner could only recover for services rendered if the Respondents had signed a buyer's agency agreement. This finding completely ignores the wealth of evidence, direct and circumstantial, which would tend to show the existence of a verbal contract and Petitioner right to recover under equitable theories such as quantum meruit and unjust enrichment.

Furthermore, this holding is in clear conflict with South Carolina law, which clearly and unambiguously addresses the situation present in the instant case, to wit, when a prospective buyer secures the help of a realtor in “scouting homes” but doesn't want the realtor to be their agent:

(O)(1) Prospective buyers and sellers of unlisted real estate who do not choose to establish an agency relationship with a licensee but who use the services of the licensee are considered customers. A licensee may offer the following services to a customer including, but not limited to:

- (a) identify and show property for sale, lease, or exchange;**
- (b) provide real estate statistics and information on property;**
- (c) provide pre-printed real estate form contracts, leases, and related exhibits and addenda;**
- (d) act as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda;**
- (e) locate a list of architects, engineers, surveyors, inspectors, lenders, insurance agents, attorneys, and other professionals; and**
- (f) identify schools, shopping facilities, places of worship, and other similar facilities on behalf of any of the parties in a real estate transaction.**

(2) A licensee offering services to a customer shall:

- (a) timely present all offers to and from the parties involving the sale, lease, and exchange of property;**
- (b) timely account for all money and property received by the broker on behalf of a party in a real estate transaction;**
- (c) provide a meaningful explanation of agency relationships in real estate transactions;**
- (d) provide an explanation of the scope of services to be provided by the licensee; and**
- (e) be fair and honest and provide accurate information in all dealings.**

(3) Nothing in this section limits the seller's and buyer's responsibility to conduct an inspection of the property.

S.C. Code Ann. §40-57-135(O) (emphasis added).

Thus, a real estate licensee can act either as an agent or as a professional rendering services to a customer. Until a real estate professional becomes the buyer's agent, she is no different than any other service provider who is free to bring a claim under any of the theories raised in the complaint, after providing a valuable service to a customer. To hold otherwise would ignore the plain meaning of the statute, and would

bar real estate professionals from providing expertise and service to members of the public outside the realm of an agency relationship. Such a result would undoubtedly curtail the ability of real estate professionals to maximize their earning potential and grow their business.

“If a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Key Corporate Capital, Inc. v. County of Beaufort, 644 S.E.2d 675, 677, 373 S.C. 55 (2006) (internal citations omitted). “A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.” Hay v. S.C. Tax Comm’n., 255 S.E.2d 837, 840, 273 S.C. 269 (1979) (internal citations omitted). It would simply make no sense for the real estate statutes to illustrate a way for licensees to provide professional services to customers (without an agency relationship), and then for such services to not be compensable because the real estate professional did not obtain a signed agency agreement. Like other professionals, realtors must have the right to offer a smorgasbord of services to members of the public, and the public must be able to utilize the services of a realtor without necessarily having to sign an agency agreement.

Instead of recognizing that Appellant’s verbal agreement² with the Respondents arose from providing a legitimate service to a customer under S.C. Code Ann. §40-57-135(O) (separate and apart from an agency relationship), the lower court relied upon S.C. Code §40-57-135(D)(4), which states in relevant part that a “buyer’s representation agreement must be in writing and must set forth all material terms of the parties agency

² It simply makes no sense to find that there was no evidence of a verbal contract sufficient to create a question of fact for the jury; no professional renders services *pro bono*

relationship including... (b) the amount of compensation to be paid or the method to be used in calculating the amount of compensation to be paid.”

Petitioner would contend that the requirement of a signed buyers agency agreement is predicated on the real estate professional actually *becoming* the buyer’s agent. If the buyer does not want the real estate professional to be his or her agent, the requirement under S.C. Code §40-57-135(D)(4) is not applicable. Instead, the parties may form a contractual relationship (professional rendering services to customer) under Section 40-57-135(O). There is also nothing in the Real Estate Code that prohibits a real estate professional from bringing claims against a “customer” under the theories *quantum meruit*, fraud, unjust enrichment, conversion by false pretenses, and constructive trust. The two statutory provisions are not inconsistent; rather they are complementary. See, e.g., Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000) (holding that statutes dealing with the same subject matter must be construed together, if possible, to produce a single, harmonious result.)

II. Sufficient Evidence Exists to Support a Claim For Quantum Meruit And Unjust Enrichment And The Mere Fact that Petitioner is a Real Estate Licensee Does Not Bar Such a Claim.

Through their words, intentional omissions and deeds, Respondents agreed to pay Petitioner for the work she performed for them and it is inequitable for Respondents to retain the benefits Petitioner conferred upon them. The record below clearly shows that Petitioner is not making a contractual claim for a real estate commission, but rather has brought claims in equity, fraud, quantum meruit, unjust enrichment and constructive trust based on Respondents’ intentional misrepresentations and intentional omission of material information.

The elements of *quantum meruit* are: 1) a benefit was conferred upon the defendant by the Appellant; 2) realization of that benefit by the defendant; and 3) retention by the defendant of the benefit under condition that make it inequitable for him to retain it without paying its value. See Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (1988); See also Myrtle Beach Hospital v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000).

In this case, Petitioner conferred the benefit of over 125 hours of her service to Respondents researching homes, market values and trends, previewing homes, communicating with the Respondents about homes, school districts, and other desired features, showing Respondents homes, driving Respondents to the airport and performing other activities in response to Respondents requests for her services including ultimately introducing Respondents to the home she purchased. (R. pp.184-186, 201-205). Respondents realized the benefit of these services by becoming more knowledgeable on the Columbia, South Carolina real estate market, by being introduced to many potential homes, by being able to view these homes more easily, by having someone else drive her to these homes and to the airport, and by being introduced to the home that they ultimately purchased and currently reside in. It is inequitable for Respondents to retain these benefits for free because Respondents intentionally misled Petitioner into believing that she would be paid for her services.

This testimony and evidence was before the lower court at the summary judgment hearing by way of the Petitioner's affidavit and interrogatory responses, and was sufficient to create a question of fact for the jury. The record on appeal reflects that

Respondents failed to submit any sworn testimony or authenticated documents in support of their motion for summary judgment.

Respondents relied upon the case of Webb v. First Federal Savings and Loan of Anderson, 300 S.C. 507, 388 S.E.2d 823 (S.C. App. 1989), in support of their argument that an agent isn't entitled to a commission for unsuccessful efforts. Petitioner would make two points in response to this argument. First, the evidence shows that Appellant's efforts were not unsuccessful. Petitioner introduced Respondents to the sellers of 14 Ashworth Lane. (R. p. 185). Six days later, Respondents enter into a purchase and sale contract with contracted with the sellers. (R. pp. 187-191). Respondents intentionally misled Petitioner into believing that they were no longer in the market so she would be unaware that Respondents were working behind her back to get a contract on 14 Ashworth. (R. p. 200). Second, Petitioner is not seeking an "agent's commission". Rather, Petitioner is seeking fair compensation for the hourly time she spent performing services that she was asked to perform for Respondents. What distinguishes this case from *Webb* and the other real estate commission cases relied upon by Respondents is that in each of those cases, an agent is seeking a commission and there are no allegations that the buyers behaved unethically, made intentional misrepresentations, or intentionally omitted material information as to how the real estate professional was to be compensated.

The unjust enrichment/quantum meruit claim is clearly a viable claim. There can be little dispute that the first two (2) elements are met under Ellis, 366 S.E.2d 12. Petitioner clearly conferred a benefit on the Respondents, and Respondents clearly accepted and retained the benefit. While there could be some difference of opinion about

whether it is inequitable for the Respondents to retain the benefit *gratis*, there is enough evidence to find a question of fact for the jury.

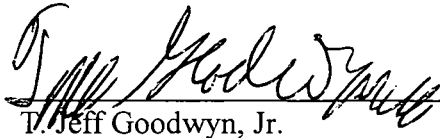
Petitioner would further submit that the instant scenario is no different than an attorney taking a contingent case without a written fee agreement, and the client then firing counsel immediately after closing arguments of the trial. After the client receives a favorable award, the “former” client refuses to pay the attorney. The attorney is unquestionably owed at least a reasonable rate for the time he worked on the case under an unjust enrichment/*quantum meruit* theory.³ Petitioner asserts that having worked on behalf of Respondents for many months – and achieving a similar “favorable result” in the form of a home – she is entitled to fair compensation for her services. The facts before the lower court give rise to at least an inference that Petitioner expected, and the parties contemplated, that Petitioner would be compensated for her time assisting Respondents. Common sense dictates that most people do not work for free; rather, most people expect to be paid for services rendered and most customers expect to pay for such services.

CONCLUSION

The Circuit Court as affirmed by the Court of Appeals clearly erred in relying upon S.C. Code §40-57-135(D)(4) in granting Defendant’s motion for summary judgment. This section is inapplicable to situations such as this where the buyer is categorized as a “Customer” under Chapter 57 of Title 40. Plaintiff has argued from the beginning that S.C. Code §40-57-135(D)(4) is in applicable and that her equitable causes

³ Petitioner recognizes that the “best practice” in forming any professional relationship is to establish such relationship by way of written agreement; however, Petitioner would note that “best practices” do not always reflect business realities, where clients, customers, and other members of the public freely enter into verbal agreements on a day-to-day business.

of action have fact questions that a jury to decide. While other sections of Chapter 57 of Title 40 may be applicable to this situation, it is not necessary that they do. It is only necessary that S.C. Code §40-57-135(D)(4) is found not to apply to this fact situation for Plaintiff's equitable claims to be allowed to proceed to a jury. Based on the foregoing, Petitioner respectfully requests that this Court issue a Writ of Certiorari.


T. Jeff Goodwyn, Jr.
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
Attorneys for the Petitioner
(803) 251-4517
JGoodwyn@Goodwynlaw.com

February 21, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

Opinion NO. 2013-UP-459 (S.C. Ct. App. Filed December 11, 2013)

Amy Bennett and The Amy Bennett Trust, Amy Bennett
Trustee,.....RESPONDENT

v.

Shelby King,.....APPELLANT

PROOF OF SERVICE

I certify that I have served the **Petition for a Writ of Certiorari**, by depositing a copy of same in the United States Mail, postage prepaid, on **February 21, 2014**, addressed to counsel for Respondents, Todd Ellis, at the Law Firm of Todd Ellis, P.A. to 7911 Broad River Road, Suite 100, Irmo, SC 29063 and by filing a copy of same Via Hand Delivery to South Carolina Court of Appeals, to 1015 Sumter Street, Columbia. SC 29201.



Mary S. Bush
Paralegal to T Jeff Goodwyn, Jr.
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, SC 29205
(803) 251-4517 (office)

February 21, 2014

GOODWYN LAW FIRM, LLC

T. Jeff Goodwyn, Jr.*

Special Counsel:
Rachel G. Peavy

*Also Licensed in Georgia

2519 Devine Street
Suite A
Columbia, South Carolina 29205

Tel. (803) 251-4517
Fax (803) 251-4527

Email: JGoodwyn@Goodwynlaw.com
Web: www.Goodwynlaw.com

February 21, 2014

VIA HAND DELIVERY

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

RECEIVED
FEB 21 2014
SC Court of Appeals

RE: ***Shelby King v. Amy Bennett and The Amy D. Bennett Trust, Amy Bennett, trustee***
Opinion No.: 2013-UP-459 (S.C. Ct. App. Filed December 11, 2013)
Appellate Case No.: 2012-212218
C/A No: 2010-CP-40-07333
Our File No.: 3000-0028


Dear Mr. Sharehouse:

Enclosed for filing please find an original and seven (7) copies of a Petition for a Writ of Certiorari, along with an Original unbound copy of the Appendix and two (2) copies of the bound Appendix, as well as an original and one copy of the Proof of Service and filing fee check in the amount of \$100.00 in regard to the above referenced matter. I would appreciate it if you would file same in your office and return a clocked copy to the courier.

By copy of this letter, I am serving a copy of the Petition for a Writ of Certiorari upon Todd Ellis, Esquire, counsel for the Respondents and filing a copy of same with the South Carolina Court of Appeals.

Should you have any questions, please do not hesitate to contact me.

Sincerely,


T. Jeff Goodwyn, Jr.

TJG/msb
Enclosures

cc: Todd R. Ellis, Esquire
 SC Court of Appeals
 Shelby King