THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable DeAndrea G. Benjamin
Circuit Judge

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.

FINAL BRIEF OF RESPONDENT
OLD REPUBLIC NATIONAL TITLE INS. CO.

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October 2, 2012

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STATEMENT OF ISSUES ON APPEAL

I.

Did the circuit court properly grant summary judgment on the claim of H&H to the effect that Old Republic entered into an oral contract to issue a title insurance policy without exception to the unrecorded P&K Construction contract and the recorded restrictive covenants when there were no discussions, let alone agreements, oral or otherwise, between Old Republic and H&H regarding the issuance of such a policy?

II.

Did the circuit court properly grant Old Republic summary judgment when in closing the subject real estate transaction, Bufkin was acting as an attorney not as a title insurance issuing agent?

III.

Did the circuit court correctly grant Old Republic summary judgment when H&H's claims are excluded from coverage by Exclusion 3(a) and Conditions and Stipulations paragraph 9(c) of the title insurance policy?

STATEMENT OF THE CASE

This action was commenced on July 7, 2010, with the filing of a summons and complaint in the Lexington County Court of Common Pleas by the Appellant, H&H of Johnston, LLC (H&H). (Complaint, ROA 16). Respondent, Old Republic National Title Insurance Company (Old Republic) filed an answer on August 5, 2010, denying the material allegations of the H&H complaint and asserting certain affirmative defenses. (Old Republic Answer, ROA 31). Respondent, Henry P. Bufkin, d/b/a Bufkin Title (Bufkin) filed a motion to dismiss and transfer venue on September 3, 2010. (Bufkin Motions to Dismiss and Transfer Venue, ROA 54 and 58). Bufkin's motion to transfer venue was granted by order entered November 8, 2010 (Order transferring venue, ROA 12). Thereafter, Bufkin's motion to dismiss was granted in part as to any claim regarding Bufkin acting in his capacity as an attorney and Bufkin filed an answer. (Bufkin's Memorandum in Support of his

Amended Motion for Summary Judgment and Bufkin Answer dated March 24, 2011, ROA 72 and 41, respectively).

On October 31, 2011, Bufkin filed an amended motion for summary judgment. (Bufkin motion for summary judgment, ROA 60). On November 11, 2011, Old Republic filed its motion for summary judgment. (Old Republic motion for summary judgment, ROA 63). On January 12, 2012, Bufkin and Old Republic filed, respectively, his memorandum in support of his motion for summary judgment (Bufkin memorandum in support of motion for summary judgment, ROA 70), and its exhibits in support of its motion for summary judgment (Old Republic exhibits submitted in support of its motion for summary judgment, ROA 118). In response, H&H filed a return to the motions for summary judgment, affidavits of Stanley 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 Stanley Herlong and counsel for H&H and a supplemental affidavit of counsel for H&H, ROA, 188, 196, 202, and 231, respectively).

The summary judgment motions were heard on January 19, 2012, and both motions were granted in separate orders entered on February 8, 2012. (Orders granting Bufkin and Old Republic summary judgment, ROA 4 and 7). On February 17, 2012, H&H filed a motion to alter or amend the summary judgment orders granting Bufkin and Old Republic summary judgment, this motion being denied by order entered March 9, 2012. (Order denying motions to alter or amend, ROA 3).

This appeal followed.

STATEMENT OF FACTS

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

In conjunction with this closing, and as a duly authorized and licensed title insurance issuing agent of Old Republic, Bufkin issued a title insurance commitment and title insurance policy to H&H. (Title Ins. Commitment and Policy, ROA 120 and 127, respectively).

The title insurance commitment, which had an effective date of June 28, 2007, provided, in pertinent part, as follows:

> AGREEMENT TO ISSUE POLICY
>
> We [Old Republic] agree to issue a policy to you [H&H] according to the terms of this Commitment. ... Our obligation under this Commitment is limited by the following: ... The Exceptions in Schedule B-II.
>
> ...
>
> Schedule B — Section II
>
> COMMITMENT - Continued[1]
>
> ...
>
> 19. Covenants, conditions and restrictions as recorded in said ROD/Clerk's office in deed book 4726 at page 206, 5998 at page 9, Book 5823 at page 127, Book 7759 at page 167, Book 7775 at page 249, Book 7919 at page 181, Book 7010 at page 184, Book 6317 at page 255, Book 6373 at page 104, Book 8693 at page 21, Deed Book 9165 at page 26, Deed Book 10544 at page 316.
>
> ...
>
> 26. Unrecorded contract dated April 30, 2002 between Five Star Development and P&K Construction for the sale of 43 lots, as modified.

The title insurance policy which Bufkin issued and which had an effective date of July 6, 2007, provided, in pertinent part, as follows:

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[1] It is the inclusion of these exceptions (exceptions 19 and 26) in the commitment, and the mirror exceptions 17 and 24 in the issued title insurance policy concerning which H&H complains.

EXCLUSIONS FROM COVERAGE[2]

...

3. Defects, liens, encumbrances, adverse claims or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;

...

CONDITIONS AND STIPULATIONS[3]

9. **Limitation of Liability**

...

(c) The Company [Old Republic] shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

...

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

...

17. Covenants, conditions and restrictions as recorded in said ROD/Clerk's office in deed book 4726 at page 206, 5998 at page 9, Book 5823 at page 127, Book 7759 at page 167, Book 7775 at page 249, Book 7919 at page 181, Book 7010 at page 184, Book 6317 at page 255, Book 6373 at page 104, Book 8693 at page 21, Deed Book 9165 at page 26, Deed Book 10544 at page 316.

...

24. Unrecorded contract dated April 30, 2002 between Five Star Development and P&K Construction for the sale of 43 lots, as modified.

Title insurance commitment and policy (ROA 120 and 127, respectively).

Prior to bringing this action, H&H had never heard of Old Republic. (H&H 30(b)(6) deposition excerpt, page 150, ll. 13 - 16, ROA 171). It knew nothing of Bufkin's relationship with Old Republic. (H&H 30(b)(6) deposition excerpt, page 150, l. 23 - 151, l. 1, ROA 171 - 172). At the closing of the transaction, the name Old Republic was never mentioned. (H&H 30(b)(6)

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[2] H&H does not complain of this exclusion being in the issued title insurance policy.

[3] Nor does H&H complain of the inclusion of this conditions and stipulations paragraph in the issued title insurance policy.

deposition excerpt, page 151, ll. 2 - 6, ROA 172). Finally, at the closing, the only discussion concerning title insurance was the amount of the premium, no terms of the policy or exceptions to the title insurance policy were discussed. (H&H 30(b)(6) deposition excerpt, p. 161 ll. 7 - 19, ROA 173 and H&H brief at 13).

There was, however, some discussion of the P&K Construction contract at closing, (Bufkin affidavit, ROA 116, 117). Further, the existence of the P&K Construction contract was known to H&H long before the July 5, 2007, closing, (H&H 30(b)(6) deposition excerpt, p. 165, ll. 13 - p. 166, l. 5, ROA 175 - 176). In fact, the P&K Construction contract had been entered into in 2003 (P&K contract, ROA 151) and was signed a member of Five Star, a limited liability company which had, as one of its members, the Rule 30(b)(6) deposition designee of H&H (excerpts from Five Star operating agreement, ROA 150 and H&H 30(b)(6) deposition, deposition cover page, ROA 170).

Shortly after the July 5, 2007 closing, a dispute arose between H&H and P&K Construction regarding the enforceability of the P&K Construction contract. H&H brief at 8. H&H, through counsel, provided Old Republic with notice of a claim under the title insurance commitment by letter dated August 28, 2007. (Exhibit A to Affidavit of W. Ivey Hart, Esq., ROA 184). Old Republic did not formally deny this claim when it was first presented. Nevertheless H&H proceeded to settle this claim without the prior written consent of Old Republic.

Thereafter, H&H was named as a defendant in a suit brought by a homeowners association which was filed on April 10, 2008 (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 without the prior written consent of Old Republic.

(Exhibit A to affidavit of W. Ivey Hart, Esq., ROA 184 and Release and Settlement Agreement, ROA 160 - 169).[4] Old Republic denied both claims and this lawsuit followed. As part of that settlement, H&H agreed to impose certain restrictive covenants on the theretofore unencumbered by restrictive covenants 11.44 acre tract. "At the closing [of the settlement] HH shall execute and deliver a Declaration of Covenants and Restrictions that will impose certain restrictive covenants within..." the 11.44 acre tract. (Release and Settlement Agreement, ROA 162).

ARGUMENT

I.

> The circuit court properly granted summary judgment on the claim of H&H to the effect that Old Republic entered into an oral contract to issue a title insurance policy without exception to the unrecorded P&K Construction contract and the recorded restrictive covenants because there were no discussions, let alone agreements, oral or otherwise, between Old Republic and H&H regarding the issuance of such a policy.
>
> 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, and an assent or acceptance by the agent to insure, without more, 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).

There is no dispute that there were no discussions between the parties concerning the exceptions in the title insurance commitment and policy in regard to the P&K Construction contract and the restrictive covenants. H&H Brief at 13. There is further no dispute that the exceptions to coverage in a title insurance commitment and a title insurance policy are material parts of each.

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[4] The March 18, 2009 letter also reasserts the H&H claim regarding the P&K contract. *Id.*

(Affidavit of W. Ivey Hart, Esq., ROA 182 - 183). Accordingly, based on the undisputed evidence, H&H's claim that it entered into an oral contract with Old Republic for the latter to issue the former a title insurance policy which did not include these two exceptions is completely without merit and the circuit court properly granted Old Republic summary judgment.[5]

Further, Bufkin issued a title insurance commitment and a title insurance policy both of which contained exceptions to the P&K Contract and the restrictive covenants. Even assuming there were discussions of these two exceptions prior to the issuance of the title insurance policy (and there is no dispute that there were none), such prior negotiations and/or agreements would merge into the title insurance commitment and policy and evidence as to those prior discussions would be inadmissable under the parol evidence rule to alter or change the express terms of the title commitment and/or insurance policy. *Muckelvaney v. Liberty Life Ins. Co.*, 261 S.C. 63, 198 S.E.2d 278 (1973).

H&H cites only one out-of-state case in support of its assertion that Old Republic entered into an oral contract to issue a title insurance policy without the two complained-of exceptions. In *Marshall v. King and Morgenstern,* 272 Ga. App. 515, 614, S.E.2d 7 (Ga. App. 2005), during the closing of a residential real estate transaction, the purchaser asked the closing attorney if he needed

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[5] In addition to its oral contract cause of action, H&H's complaint asserted causes of action alleging the inclusion in the title insurance policy of P&K Construction contract and restrictive covenants exceptions was a mutual mistake and the title insurance policy should be reformed to delete these exceptions, that Old Republic should be estopped from asserting these exceptions as a basis for denial of H&H's title claims and that Old Republic breached the "reformed" title policy because it has refused to pay the H&H claims based, in part, these of exceptions. To the extent these claims are separate from the oral contract claim, H&H's opening brief does not argue the circuit court erred in granting summary judgment on these claims and, accordingly, the grant of summary judgment on these claims is the law of the case. *Allen v. Pinnacle Healthcare Systems, LLC,* 394 S.C. 268, 715 S.E.2d 362 (Ct. App. 2011).

to obtain a survey of his property. The answer given was no. The purchaser than asked the closing attorney how he could protect his interest in his soon to be property and the attorney told him he could purchase title insurance, which the purchaser did. The policy the closing attorney issued was a "standard owner's policy" which included a survey exception which excepted from coverage any title matters which would be shown by an accurate survey of the property. The attorney could have, but did not, provide the purchaser with an available "Eagle" owner's policy which did not contain this survey exception. Shortly after the closing, the purchaser was informed by his neighbor that the purchaser's house encroached onto the neighbor's property, a fact unknown to the purchaser prior to closing but which would have been revealed by an accurate survey of the property and thus was excluded from coverage by the "standard owner's policy." The issue on appeal was whether the lower court properly denied the title company's motion for summary judgment. The Georgia Court of Appeals determined that the title company's motion was properly denied.

The facts in this case are clearly distinguishable. The property at issue here is development property, not a private residence. There is no evidence of any discussion of the restrictive covenants, one of the two exceptions concerning which H&H complains. Accordingly, *Marshall* is no help to H&H in regard to this portion of its claims against Old Republic.

Further, while there was discussion of the P&K Construction contract at closing, there was no inquiry from H&H at closing as to how H&H could "protect" its interest in the property against the enforcement of the P&K Construction contract nor any evidence of a response from Bufkin to the effect that H&H could do so by way of title insurance. In addition, there is no evidence to the effect that Bufkin was authorized to issue two types of title policies - one with the P&K Construction contract exception and a second without the exception. In fact, the undisputed evidence is to the

contrary. "If an Old Republic ... issuing agent has knowledge of an adverse claim to title to property ... whether or not the adverse claim appears on the public land records, the adverse claim should be noted as an exception to the title insurance commitment or policy...." (Affidavit of W. Ivey Hart, Esq. ROA 182 - 183).

Given the foregoing, the circuit court properly granted Old Republic summary judgment on H&H's claim that Bufkin entered into an oral contract to issue a title insurance commitment and policy without the two exceptions in question.

II.

The circuit court properly granted Old Republic summary judgment because in closing the subject real estate transaction, Bufkin was acting as an attorney.

The order entered March 10, 2011, in response to Bufkin's motion to dismiss, provided "... insofar as the Complaint attempts to assert any claim against Bufkin in his capacity as an attorney, the same is dismissed for failure to state a claim pursuant to S.C. Code Ann. § 15-26-100...." No appeal was taken from this order and, therefore, it is the law of this case. *Bakala v. Bakala,* 352 S.C. 612, 576 S.E.2d 156 (2003).

H&H's only claim is the assertion of the "oral" contract to the effect that Bufkin would issue a title insurance commitment and policy without the two exceptions to coverage in question.

H&H's complaint does not allege Bufkin, while acting as a duly authorized title insurance issuing agent for Old Republic, committed insurance agent malpractice by including the complained of exceptions in the title insurance commitment and policy. It does not allege that as a title insurance agent, Bufkin provided H&H with negligent advice as to what type or extent of title insurance H&H needed.

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) and *Wachovia Bank, N.A. v. Coffey,* 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010).

During the closing of the transaction in question, Bufkin unquestionably was acting as an attorney and only as an attorney. In fact, Old Republic has no policies or procedures requiring its agents to notify or advise a prospective title insurance purchaser of all adverse claims or encumbrances affecting title to property whether those adverse claims or encumbrances are recorded or not. This is so (and is also undisputed) 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).

H&H cites Ethics Advisory Op. 92-03 for the proposition that the practice of law is separate from a lawyer acting as a title insurance issuing agent. While this may be the case, it is also beside the point. When a lawyer sits down at a closing table to close a real estate transaction, he is providing his clients with legal advice and counsel, as a lawyer, in regard to that real estate transaction. He is acting as an attorney, period. While in certain circumstances and with full disclosure he can issue title insurance in conjunction with that closing, he can never be shed of his role and function as an attorney. *Cf. Linder v. Ins. Claims Consultants, Inc.,* 348 S.C. 477, 492, 560 S.E.2d 612, 621 (2002) ("[adjusters] shall not [a]dvise clients of their rights, duties, or privileges

under an insurance policy regarding matters requiring legal skill or knowledge, i.e., interpret the policy for clients...."

Even the most cursory review of H&H's complaint shows that what it is really complaining of is the legal advice and conduct of Bufkin acting in his capacity as a closing attorney, not as a title insurance issuing agent. Accordingly, the circuit court correctly granted summary judgement to Old Republic.

III.

The circuit court correctly granted Old Republic summary judgment because H&H's claims are excluded from coverage by Exclusion 3(a) and Conditions and Stipulations paragraph 9(c).

This Court can affirm the lower court on any grounds appearing in the Record on Appeal. SCACR, Rules 208(b)(2) and 221(c) and *I'On, LLC v. Town of Mt. Pleasant,* 339 S.C. 406, 626 S.E.2d 716 (2000).

In addition to the foregoing, which clearly defeat H&H's claims, exclusion 3(a) of the title policy Bufkin issued excludes from coverage matters created, suffered, assumed or agreed to by the insured. (Title Ins. Policy, ROA 127). The P&K Construction 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 Construction contract, excerpts from Five Star operating agreement and affidavit of Stanley Herlong, ROA, respectively, 151, 139 - 150 and 196). In addition, the existence of the P&K Construction 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). Given the foregoing undisputed facts, Old Republic would respectfully submit the claims of H&H are excluded by paragraph 3(a) of the title policy. *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 that he knew was previously under contract to a different purchaser, the insured has 'created' a defect.).

Accordingly, at a minimum the P&K Construction contract was created, suffered, assumed or agreed to by H&H and therefore, any claim concerning it is not covered under the title policy.

Further, paragraph 3 of the pre-printed conditions and stipulations section of the title policy requires an insured provide Old Republic with prompt notice of any litigation concerning which Old Republic may have a duty to defend under the title policy. As is set forth above, Old Republic received no notice of the HOA lawsuit in regard to the restrictive covenants until after the lawsuit was settled.

In conjunction with paragraph 3, 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. There is no dispute that H&H settled the P&K Construction 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).

In what appears an attempt to avoid the plain language of paragraph 9 (c), H&H argues that Bufkin did not report the HOA lawsuit to Old Republic asserting this is a violation of Bufkin's agency agreement with Old Republic. H&H Brief at 9, fn. 9. Whether there was a breach of the completely separate agency contract between Bufkin and Old Republic to which H&H is not a party is irrelevant. It is clear that H&H understood its obligations under the title insurance commitment and policy to provide Old Republic notice of any claim or litigation. H&H wrote Old Republic two

letters - the first asserting the P&K Construction contract claim and the second asserting claims for both the P&K Construction contract and the HOA lawsuit. (Letters from H&H counsel dated August 28, 2007 and March 18, 2009, attached to affidavit of W. Ivey Hart, Esq., ROA 184 and 185). However, in violation of its clear and unambiguous obligations under the title insurance policy, H&H failed to timely notify Old Republic of the HOA lawsuit and proceeded to settle both it and the P&K Construction contract claim, thereby voluntarily assuming a liability in settling both these claims without the prior written consent of Old Republic.

Finally, the exclusion contained in paragraph 3(d) of the title insurance policy excludes from coverage matters "attaching or created subsequent to Date of Policy."

The HOA lawsuit settlement agreement entered into by H&H without the prior written consent of Old Republic actually imposed restrictive covenants on the otherwise unencumbered 11.44 acre tract. ("At the closing [of the settlement],. H&H shall execute and deliver a Declaration of Covenants and Restrictions that will impose certain restrictive covenants within the parcel of land designated as 11.94 (sic) acres.... The imposition and recording of the Declaration ... shall be the only restrictions and covenants applicable....") to the 11.44 acre tract. (Release and Settlement Agreement, ROA 162 - 163). Accordingly and once again, even if Old Republic had issued a title insurance policy as H&H desires, H&H's claims would not be covered matters. *Firstland Village Asso. v. Lawyer's Title Ins. Co.,* 277 S.C. 184, 284, S.E.2d 582 (1981).

CONCLUSION

The circuit court was correct in granting Old Republic summary judgment on H&H's claim of an oral contract to issue a title insurance policy without exception to the P&K Construction contract or the restrictive covenants because there was no evidence of any such oral contract.

Further, Bufkin, in closing the real estate transaction in question, was acting as an attorney and the unappealed from order entered November 8, 2011 dismissing any portion of H&H's complaint which asserted a legal malpractice claim Bufkin precludes any recovery by H&H on its remaining claim against Old Republic. Finally, even if Old Republic had issued a title policy as H&H, without any factual basis asserts it should, the exclusion in paragraph 3(a) and the conditions and stipulations paragraph 9(c) would nevertheless preclude coverage.

H&H's claims are without merit. The circuit court was correct in granting Old Republic summary judgment and, therefore, the circuit court should be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Defendant complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

I, Crystal Smith, an employee of Callison Tighe & Robinson LLC, Attorneys for the Appellant, do hereby certify that I have served a copy of the **FINAL BRIEF of the Respondent, Old Republic National Title Insurance Company,** 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:

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October 2, 2012
Columbia, South Carolina

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SECOND AMENDED PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent, Old Republic Nat. Title Ins. Co.,** on H&H of Johnston, LLC and Henry P. Bufkin, d/b/a Bufkin Title, by depositing a copy of them in the United States Mail, postage prepaid, on October 2, 2012, addressed to their attorneys of record at the following addresses:

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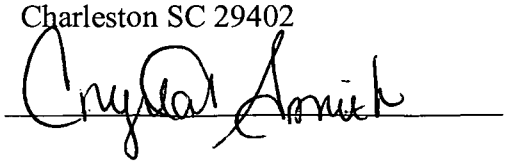

November 28, 2012
Columbia, South Carolina