

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. 2010-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.

RESPONDENT HENRY P. BUFKIN D/B/A BUFKIN TITLE'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER APPELLANT WAS REQUIRED TO FILE AN AFFIDAVIT OF AN EXPERT WITNESS PURSUANT TO S.C. CODE ANN. § 15-36-100 WHEN APPELLANT ADMITS IT HIRED ITS ATTORNEY BUFKIN FOR HIS LEGAL SERVICES AND ALLEGES THAT ATTORNEY BUFKIN BREACHED HIS DUTIES TO APPELLANT WHILE CLOSING A REAL ESTATE TRANSACTION.
2. WHETHER AN ORAL CONTRACT OR PROMISE WAS CREATED BETWEEN APPELLANT AND ATTORNEY BUFKIN WHEN APPELLANT ADMITS THAT IT DID NOT DISCUSS WITH ATTORNEY BUFKIN THE TERMS OF THE ALLEGED ORAL CONTRACT OR PROMISE.

STATEMENT OF THE CASE

This action arises out of a real estate transaction involving property purchased by H&H of Johnston, LLC (“H&H”) from Five Star Development, LLC (“Five Star”) within the Stoney Pointe subdivision in Chapin, South Carolina. Henry P. Bufkin (“Bufkin”), an attorney who practices in Prosperity, South Carolina, represented both Five Star and H&H, with written acknowledgement, in the subject loan closing transaction which took place on July 5, 2007.

On July 1, 2010, H&H filed a lawsuit against Henry P. Bufkin d/b/a Bufkin Title and Old Republic National Title Insurance Company (“Old Republic”), the company that issued the title insurance policy on the subject property. (R. pp. 16-30, Complaint.) In the Complaint, H&H asserted breach of contract and promissory estoppel claims against Bufkin and Old Republic, contending that Bufkin breached his duties to H&H by failing to explain to H&H what title exceptions were included on the title insurance binder, specifically, homeowners association (“HOA”) restrictions and assessments, and a right of first refusal contract with P&K Construction (“P&K”). (R. p. 22, Complaint ¶ 22.)

On September 8, 2010, in response to the Complaint, Bufkin filed a Motion to Dismiss the Complaint on the grounds that H&H failed to comply with the requirements of S.C. Code Ann. § 15-36-100(E), which requires that when a plaintiff asserts a professional negligence action against an attorney, the plaintiff must file an affidavit of an expert witness specifying particular negligent acts or omissions of the attorney. On February 23, 2011, a hearing was held and on March 20, 2011, the court issued an Order holding that “the Complaint includes allegations concerning Bufkin’s services as an attorney” and “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. § 15-36-100.” (R. p. 78, 3/10/11 Order Granting Mot. to Dismiss.) Thereafter, Bufkin filed an Answer to the Complaint on March 25, 2011 (R. pp. 41-53, Answer of Bufkin), and the parties engaged in extensive discovery to determine if any of Plaintiff’s remaining claims against Bufkin were asserted against him in any capacity other than his capacity as an attorney.

At the conclusion of discovery, Bufkin filed a Motion for Summary Judgment and on November 1, 2011, filed an Amended Motion for Summary Judgment. (R. pp. 60-62, Bufkin’s Amended Mot. for Summ. J.) The grounds for Bufkin’s summary judgment included: (1) failure to comply with the requirements of S.C. Code Ann. § 15-36-100; (2) no mutual understanding and intent between the parties sufficient to form a contract; (3) no promise made by Bufkin to H&H regarding the title exceptions; and (4) no proximate cause because even if the title exceptions at issue had not been listed as exceptions, the title policy would not have covered H&H’s claims. (R. pp. 60-62, Bufkin’s Amended Mot. for Summ. J.)

On January 19, 2012, the Court heard Bufkin’s Motion for Summary Judgment, as well as Old Republic’s Motion for Summary Judgment and granted both Motions by two Orders dated February 8, 2012. (R. pp. 4-6, Order Granting Bufkin’s Mot. for Summ. J.; R. pp. 7-11, Order Granting Old Republic’s Mot. for Summ. J.) On February 17, 2012, H&H moved to alter or amend the Orders granting Motions for Summary Judgment. (R. pp. 248-265, Motion to Alter or Amend.) The Court denied the Motion to Alter or Amend by Order dated February 27, 2012, and this appeal followed. (R. p. 3, Order of Feb. 27, 2012.)

STATEMENT OF FACTS

H&H's case against Bufkin and Old Republic concerns a real estate closing that took place on July 5, 2007 at Bufkin's law office in Prosperity, South Carolina. (R. p. 21, Complaint ¶ 18.) H&H contends that Bufkin failed to explain what title exceptions were included on the title insurance binder. (R. p. 22, Complaint ¶¶ 21, 22.) H&H claims it did not know that the title insurance binder included certain exceptions relating to HOA restrictions and assessments and the P&K Construction contract, which gave P&K a right of first refusal to purchase certain lots. (R. p. 22, Complaint ¶¶ 21, 22.) Though H&H claims the lawsuit was brought against Bufkin in his capacity as a title agent of Old Republic, both the undisputed evidence and the law prove that the claims asserted by H&H are, in fact, legal malpractice claims. The attorney-client relationship among Bufkin, H&H, and Five Star, and the history of the Stoney Pointe development support the conclusion that H&H dealt with Bufkin in his capacity as an attorney only.

I. The Development of the Stoney Pointe Subdivision.

The development of the Stoney Pointe subdivision in Chapin, South Carolina was a project conceived in 1995 and executed thereafter, in large part, by the members of the Herlong family. The developer was Five Star Development, LLC ("Five Star"), whose members included Ralph McLendon and John Stanley Herlong, along with two other individuals, Richard and David Mikell. (R. pp. 146, 149-50, Five Star Operating Agreement pp. 8, 25-26.) D.C. Herlong, the father of Stanley Herlong and father-in-law of Ralph McLendon, also assisted in the development of Stoney Pointe by purchasing land and loaning money to Five Star, the developer. (R. pp. 196-97, Aff. of Stanley Herlong, ¶ 3.)

By 2007, Five Star faced financial difficulties and the company's lender-banks threatened to execute on the personal guarantees given by Five Star's members, including Stanley Herlong ("Stanley"). (R. p. 276, lines 6-15, 1/19/12 Hearing Tr. p. 11.) As a result, Stanley conceived an idea to rescue Five Star, its members, and Stoney Pointe from financial ruin. (R. p. 276, lines 6-15, 1/19/12 Hearing Tr. p. 11.) Stanley proposed the formation of H&H of Johnston, LLC for the purpose of paying off the remaining loans of Five Star, thus avoiding a call on the personal guarantees. (R. p. 276, lines 6-15, 1/19/12 Hearing Tr. p. 11.)

II. The Formation of H&H of Johnston, LLC and Its Subsequent Purchase of Property in Stoney Pointe From Five Star Development.

Pursuant to Stanley Herlong's plan, H&H of Johnston, LLC was formed for the specific purpose of purchasing certain property in the Stoney Pointe subdivision. (R. p. 196, Aff. of Stanley Herlong ¶ 1.) Its members were Stanley Herlong and his brother, Thomas Herlong. (R. p. 196, Aff. of Stanley Herlong ¶ 1.) After the formation of H&H, the Herlong brothers asked Bufkin to serve as closing attorney for H&H's purchase of Stoney Pointe land from Five Star¹, a company in which Stanley Herlong was also a member. (R. p. 116, Aff. of Henry P. Bufkin ¶¶ 4, 5; R. p. 87, lines 3-15, Dep. of Stanley Herlong, p. 173.)

The transaction closed on July 5, 2007 at Bufkin's law office. (R. p. 21, Complaint ¶ 18.) All parties were present, including Stanley Herlong and his brother. At the closing, it is undisputed that H&H did not ask Bufkin to provide a title policy with no exceptions, nor did Bufkin promise or offer to do so. (R. p. 117, Aff. of Henry P. Bufkin

¹ Bufkin obtained the necessary written waiver to represent both H&H and Five Star.

¶ 6.) H&H admits that it only requested a title policy for which it agreed to pay approximately \$1,400.00; H&H asserts that no other terms of the title policy were discussed before or at the time of closing. (R. p. 173, lines 7-19; p. 174, lines 18-25, Dep. of Stanley Herlong pp. 161, 163.) H&H never asked Bufkin to insure that H&H would not be subject to HOA assessments or covenants and restrictions on the subject property. In fact, there were no covenants and restrictions on the 11.44 acre tract at issue at the time of the closing. Restrictions were not imposed until later as part of H&H's settlement with the Stoney Pointe homeowners. (R. pp. 162-63, Release & Settlement Agr. pp. 3-4; R. p. 81, lines 7-13; p. 173, lines 20-25, Dep. of Stanley Herlong pp. 143, 161.) As to the P&K contract, H&H admits being told by Bufkin at closing that the P&K contract might be a problem. (R. p. 86, lines 10-24, Dep. of Stanley Herlong p. 172.) Nevertheless, in order to avoid execution on the personal guarantees made by the members of Five Star, including Stanley Herlong, H&H went forward with the closing.

III. P&K Construction and the Stoney Pointe Homeowners Association Assert Claims against H&H.

When H&H listed the newly purchased property for sale, P&K Construction sought to enforce the terms of its contract with Five Star concerning a right of first refusal. H&H retained attorney William Booth for representation. (R. p. 184, Letter from Booth Law Firm dated 8/28/07; R. pp. 185-87, Letter from Booth Law Firm dated 3/18/09.) Although P&K's rights were in dispute, H&H agreed to pay P&K \$25,000 to cancel the contract. (R. pp. 185-87, Letter from Booth Law Firm dated 3/18/09.)

In April 2008, the Stoney Pointe Homeowners Association ("HOA") brought a lawsuit against H&H, Five Star, and its members claiming violations of certain restrictions and covenants and failure to pay assessments. (R. p. 160, Release &

Settlement Agr. p. 1.) H&H, represented by attorney William Booth, settled with the HOA and paid \$16,300, representing unpaid assessments for twenty-six lots owned by H&H in Stoney Pointe; and agreed to the imposition of certain restrictive covenants on the 11.44 acre tract. (R. pp. 162-63, Release & Settlement Agr. pp. 3-4)

H&H then sued Bufkin and Old Republic claiming as damages those monies H&H paid in the P&K dispute and the HOA lawsuit. (R. pp. 16-30, Complaint.) Although H&H claims it is suing Bufkin in his capacity as a title agent, the allegations of error or omission concern those of an attorney. Because H&H did not file an expert affidavit, the trial court properly dismissed the action against Bufkin.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, this Court applies the same standard as the court below. *Boyd v. Bellsouth Tel. Tel. Co., Inc.*, 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). Summary judgment is appropriate when there is no genuine issue as to any material fact such that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *see also Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). “Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *Boyd*, 369 at 415, 633 S.E.2d at 138. “When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860 (2002).

ARGUMENT

This matter rests on the absence of two essential elements in H&H's case: (1) the absence of an expert affidavit necessary for the assertion of a legal malpractice action against an attorney, and (2) the absence of a meeting of the minds necessary to form a contract between two parties. For these two reasons, H&H's case against Bufkin and Old Republic was properly dismissed.

Despite the simplicity of this case, H&H attempts to mischaracterize its lawsuit as one against Bufkin in his capacity as a title insurance agent rather than in his capacity as an attorney. In so doing, H&H contradicts its own pleadings and misstates the record as follows:

- H&H asserts in its Initial Brief that this case is not about Bufkin's "failure to disclose," but rather is an indemnification lawsuit to recover payment for damages due to adverse claims. (Initial Brief of Appellant p. 12.) However, the allegations in the Complaint assert to the contrary. First, H&H did not plead an indemnification claim against any of the parties. H&H's claims against Bufkin are for breach of oral contract and promissory estoppel. (R. pp. 16-30, Complaint.) Second, the allegations in the Complaint include, among other things, assertions that the alleged oral contract between Bufkin and H&H included a duty on the part of Bufkin "[t]o inform the Plaintiff of any title exceptions that would be included in the title insurance binder." (R. pp. 20-21, Complaint ¶ 15.) Thus, contrary to its Initial Brief, H&H does assert in its Complaint that Bufkin had a duty to advise regarding title exceptions, which advice can only be given by an attorney.

- H&H asserts that no title commitment was prepared at the time of the closing. (Initial Brief of Appellant p. 6.) However, a title commitment, dated one week prior to closing, was prepared by Bufkin. (R. p. 122, Title Commitment p. 3; R. p. 117, Aff. of Bufkin ¶ 6.)
- H&H asserts that neither Stanley Herlong nor Thomas Herlong saw or were given a copy of the P&K contract and amendments. (Initial Brief of Appellant p. 8.) However, the P&K contract was a contract between P&K and Five Star, the company in which Stanley Herlong was a member. Pursuant to the Operating Agreement for Five Star, Stanley Herlong, as a member of Five Star, is imputed with the knowledge of the P&K Contract. (R. p. 147, Five Star Operating Agr. p. 9.) Thus, H&H cannot claim it had no knowledge of its terms. Stanley Herlong was a principal in and was designated the representative of H&H in the instant lawsuit.
- H&H contends that Bufkin failed to notify Old Republic of the HOA lawsuit (Initial Brief of Appellant p. 14.) However, Bufkin did not represent H&H in the HOA lawsuit. Rather, William Booth, who was counsel for H&H in filing the instant Complaint, represented H&H in the HOA lawsuit, and as such, had the alleged duty to report the HOA claim to Old Republic, which Mr. Booth did. (R. pp. 185-87, Letter from Booth Law Firm dated 3/18/09.)
- Throughout its Initial Brief, H&H refers to Bufkin's alleged failure to include in the title insurance policy "coverages for adverse claims." (Initial Brief of Appellant pp. 3, 4, 7, 8, 9, 12.) Under South Carolina law, only an attorney can

determine what constitutes adverse claims, and thus, H&H must acknowledge this lawsuit is against Bufkin in his capacity as an attorney.

Finally, in H&H's attempt to frame this lawsuit as one against Bufkin in his capacity as a title insurance agent and not as an attorney, H&H contradicts the factual evidence in the record wherein H&H admits that it viewed Bufkin as a lawyer, not as a title insurance agent. (R. p. 171, lines 13-25; p. 172, lines 1-6; p. 87, lines 3-15; p. 88, lines 7-12, Dep. of Stanley Herlong pp. 150, 151, 173, 174.) Accordingly, because H&H did not file an expert affidavit as required by S.C. Code Ann. § 15-36-100 and because H&H asserts there was no discussion between H&H and Bufkin concerning the title exceptions that form the alleged oral contract with Bufkin, the trial court properly dismissed this lawsuit, and its Orders should be affirmed.

I. H&H FAILED TO FILE AN AFFIDAVIT OF AN EXPERT WITNESS AS REQUIRED BY S.C. CODE ANN. § 15-36-100 IN AN ACTION AGAINST AN ATTORNEY.

Pursuant to S.C. Code Ann. § 15-36-100, when a plaintiff asserts a professional negligence action against an attorney, the plaintiff must file an affidavit of an expert witness in support of the complaint specifying particular negligent acts or omissions of the attorney. The purpose of the statute, which falls under the Frivolous Proceedings Sanctions Act, is to prevent the filing of frivolous claims against professionals, including attorneys. When a plaintiff fails to file an affidavit contemporaneously with its complaint, the complaint is subject to dismissal for failure to state a claim. S.C. Code Ann. § 15-36-100.

H&H attempts to characterize this lawsuit as one against a title insurance agent as opposed to an attorney in order to circumvent the requirements of S.C. Code Ann. § 15-36-100. In this attempt, however, H&H ignores the fundamental requirements of South

Carolina law regarding the necessity of attorney supervision in a real estate closing, as well as the undisputed fact that H&H considered Bufkin only as an attorney, and not as a title insurance agent.

A. South Carolina Law Provides that Only An Attorney Can Advise a Client as to Matters Affecting Real Estate; thus, the Duties Allegedly Breached by Bufkin Could Only be Performed by an Attorney.

In the seminal case, *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987), the South Carolina Supreme Court held that the following activities constitute the practice of law: (1) preparation of deeds, mortgages, notes and other legal instruments related to mortgage loans and transfers of real property; (2) examination of title and preparation of title abstracts; (3) handling of real estate closings and mortgage loan closings; and (4) physical transportation or mailing of documents to the courthouse for recording when occurring as part of a real estate transfer. *See also Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138-39, 714 S.E.2d 532, 534 (2011). Later, in *Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003), the Supreme Court reaffirmed its opinion in *Buyers Service* and held that a title company's title search and preparation of title documents, including the title commitment, constituted the unauthorized practice of law. *See also Ex Parte Watson*, 356 S.C. 432, 589 S.E.2d 760 (2003) (holding examining titles and preparing title abstracts constitutes the practice of law).

In its Complaint, H&H asserts the following:

In connection with the contemplated real estate transaction, the Plaintiff contracted with Defendant Bufkin as a title agent for the company to perform all acts necessary to protect the property interest of the Plaintiff in connection with the transaction....[T]he terms of the oral contract would have included the following:

- a. To perform a title examination;

- b. To review his files and make any necessary inquiry to determine if the P&K Contract was still in effect;
- c. To issue a title insurance binder;
- d. To inform the Plaintiff of any title exceptions that would be included in the title insurance binder;
- e. To insure that the Plaintiff would be able to immediately sell the builder ready lots through a listing agreement to be entered into with Russell and Jeffcoat Realtors;
- f. To insure that the Plaintiff would not be required to pay any HOA assessments for the lots; and
- g. To insure that the Plaintiff would be able to immediately sell the 11.44 acre tract of land without being subject to restrictions or assessments.

(R. pp. 20-21, Complaint ¶ 15.)

H&H attempts to characterize this case as a “failure to insure.” This case is not, however, about a failure to insure because a title insurance policy was issued to H&H. The complaint, as set forth in the allegations above, is that Bufkin failed to advise regarding title issues. Under *Buyers Service*, Bufkin could only advise H&H regarding title to the property in Stoney Pointe in his capacity as an attorney. Because H&H’s allegations in the Complaint center around Bufkin’s alleged failure to advise H&H regarding title issues, this action against Bufkin is necessarily an action against him in his capacity as an attorney.

Old Republic’s 30(b)(6) representative, W. Ivey Hart, Esq., stated in his affidavit that Old Republic’s title insurance agents are not required to notify or advise prospective title insurance purchasers of all adverse claims to property because such activity would constitute the practice of law in which Old Republic cannot engage. (R. p. 182, Aff. of

Hart ¶ 4.) Thus, under Old Republic's own policies and procedures, the actions H&H complains of constitute the practice of law.

Accordingly, because H&H contends Bufkin failed to inform the company of the title exceptions or include them in the title work, tasks that may only be performed by an attorney in South Carolina, the trial court properly dismissed H&H's claims for failure to file an expert affidavit pursuant to S.C. Code Ann. § 15-36-100 and its Orders should be affirmed.

B. The Undisputed Evidence Demonstrates that H&H Only Considered Bufkin as an Attorney, Not as a Title Insurance Agent.

Not only does South Carolina law bar the claims against Bufkin, H&H has admitted that it considered Bufkin an attorney and not a title insurance agent. Indeed, H&H claims it did not even know Bufkin was a title agent.

On March 10, 2011, Judge James R. Barber, III issued an Order, pursuant to Bufkin's Motion to Dismiss, wherein he held that H&H's Complaint "includes allegations concerning Bufkin's services as an attorney" and "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. § 15-36-100." (R. pp. 77-78, 3/10/11 Order Granting Mot. to Dismiss.) The Judge then instructed the parties to engage in additional discovery to determine if any of the remaining allegations in the Complaint were asserted against Bufkin in any capacity other than as an attorney. Pursuant to the Court's Order, the parties engaged in extensive written discovery and took depositions, including a 30(b)(6) deposition of H&H, represented by Stanley Herlong. The following undisputed evidence in the record proves that H&H hired Bufkin for his legal services and only considered him an attorney:

Q. And you relied on Mr. Bufkin as a lawyer, correct?

A. Yes.

(R. p. 82, lines 20-22, Dep. of Stanley Herlong p. 144.)

Q. All right. Did you look or did you view Mr. Bufkin as a lawyer closing a real estate transaction?

A. Yeah.

(R. p. 87, lines 3-6, Dep. of Stanley Herlong p. 173.)

Q. And you went to him for this closing, the H&H closing, as a lawyer?

A. Yes.

(R. p. 88, lines 7-9, Dep. of Stanley Herlong p. 174.)

H&H further admits that it was unaware that Bufkin was a title insurance agent, that it was unaware of his relationship with Old Republic, that it did not recall the name of Old Republic being mentioned at the closing, and in fact, never heard of Old Republic before this litigation. (R. p. 83, lines 13-25; p. 84, lines 1-6, Dep. of Stanley Herlong pp. 150, 151.)

Accordingly, because H&H hired Bufkin as an attorney, considered his actions at the closing as those of an attorney, and was unaware Bufkin was a title insurance agent, H&H cannot claim it is asserting this lawsuit against Bufkin in his capacity as a title insurance agent.² The trial court properly dismissed H&H's claims because the company did not file an affidavit of an expert witness as required by S.C. Code Ann. § 15-36-100.

² Stanley Herlong, the representative of H&H, attempted to assert in his affidavit opposing Bufkin's Amended Motion for Summary Judgment that he "never considered the role of Bufkin selling title insurance as an act of practicing law" and "knew H&H would receive a policy of title insurance through the company represented by [Bufkin]." This affidavit, which is an attempt to contradict Stanley Herlong's deposition testimony as the 30(b)(6) representative of H&H, must be disregarded. South Carolina law prevents a party from submitting a subsequent affidavit that contradicts prior sworn testimony in

C. H&H Cannot Thwart the Requirements of S.C. Code Ann. § 15-36-100 by Attempting to Re-characterize Its Claims as Something Other Than a Professional Malpractice Action Against an Attorney.

H&H attempts to characterize its lawsuit against Bufkin as something other than a professional malpractice action in order to circumvent the requirements of S.C. Code Ann. § 15-36-100. First, in its Initial Brief, H&H asserts that its Complaint is not about Bufkin's alleged failure to explain the title exceptions to H&H, but rather is an indemnification claim wherein "the Herlong Company seeks payment for damages due to adverse claims...." (Initial Brief of Appellant p. 12.) H&H's Complaint, however, asserts to the contrary and includes, not a claim for indemnity, but rather claims for breach of contract and promissory estoppel against Bufkin. Under the breach of oral contract and promissory estoppel claims, H&H contends that Bufkin breached an oral agreement or promise made to H&H regarding title exceptions. (R. pp. 26-28, Complaint pp. 11-13.) Any issues regarding title to the property purchased by H&H are issues that can only be explained by an attorney. *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 432-33, 357 S.E.2d 15, 18-19 (1987).

Second, H&H tries to make this case solely about the act of issuing a title insurance policy. It does so by citing to a South Carolina ethics opinion that addresses the potential conflicts that may arise where the closing attorney is an agent for a particular insurer. (Initial Brief of Appellant p. 11.) This opinion, however, is inapplicable to the instant case: there is no claim of conflict, rather, the allegations in the

order to create an issue of fact to defeat summary judgment. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (finding "a court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement.")

Complaint, and the basis for the causes of action against Bufkin, are that the attorney allegedly failed to produce for inspection a title insurance binder and failed to explain to H&H what title exceptions would be included on the title insurance binder. (R. p. 22, Complaint ¶ 21.) Again, this is an alleged failure to explain that only an attorney can perform at a closing.

Pursuant to the Supreme Court's ruling in *Doe v. McMaster*, 355 S.C. at 312-313, 585 S.E.2d at 776, the preparation of the title commitment is part of the title search process, which must be supervised by a licensed attorney. The explanation of the title commitment is part of the closing process, which also requires the supervision of an attorney. *Id.* at 310, 314-15, 585 S.E.2d at 775, 777-78. Thus, as evidenced by the Complaint, H&H is not complaining about the issuance of the title insurance policy (which was issued), rather, it is complaining about the issuance of a title policy that H&H assumed would have no exceptions and that H&H claims should have been explained by Bufkin. (R. p. 22, Complaint ¶¶ 21, 22.) As set forth in *Buyers Service* and *Doe*, the preparation and explanation of the title commitment are both steps that require an attorney.

The gravamen of H&H's Complaint is a failure to advise at or before closing of exceptions in a title policy that did not cover claims later made by P&K and the HOA. Such advice can only be given by an attorney under South Carolina law. *See Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003); *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 432-33, 357 S.E.2d 15, 18-19 (1987). Thus, H&H was required to file an affidavit of an expert witness with its Complaint. The trial court properly dismissed H&H's Complaint for failure to file an expert affidavit and its Orders should be affirmed.

II. H&H ADMITS NO REQUEST WAS MADE TO BUFKIN TO ISSUE A TITLE POLICY WITHOUT EXCEPTIONS, AND THUS, THERE IS NO EVIDENCE OF AN ORAL CONTRACT OR PROMISE.

H&H has failed to prove there was a meeting of the minds necessary for the formation of a contract. In fact, H&H admits it did not discuss the terms of the alleged oral contract with Bufkin. If the parties did not discuss the terms of the contract, then no promise was made and no contract could be formed as a matter of law, and the trial court properly dismissed the breach of contract and promissory estoppel causes of action.

A. H&H Admits There was No Discussion of the Terms of the Alleged Oral Contract with Bufkin, Which Terms are Necessary for the Formation of a Contractual Relationship.

“A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.” *Carolina Amusement Co., Inc. v. Connecticut Nat’l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (quoting *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984)). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

The undisputed evidence in the record is that there was no agreement between H&H and Bufkin, and thus, no meeting of the minds regarding the essential elements of a contract. In its Initial Brief and in the affidavit filed in an attempt to defeat summary judgment, H&H claims that there was an oral contract which included the following terms:

- a. To insure that H&H would be able to immediately sell the builder ready lots through a listing agreement to be entered into with Russell and Jeffcoat Realtors;

- b. To insure that H&H would not be required to pay any HOA assessments for the lots; and
- c. To insure that H&H would be able to immediately sell the 11.44 acre tract of land without being subject to restrictions or assessments.

(Initial Brief of Appellant p. 7; R. pp. 198-99, Aff. of Stanley Herlong ¶ 14; R. pp. 20-21, Complaint ¶ 15.)

H&H, however, has admitted that these terms were never discussed and never agreed to by Bufkin.

- a. As to the immediate sale of the builder ready lots, H&H admits Bufkin told everyone at closing that the P&K contract might be a problem and despite this discussion, H&H did not ask Bufkin to issue a title insurance policy that did not take exception to the P&K contract or otherwise “insure” the immediate sale of lots. (R. p. 86, lines 10-24, Dep. of Stanley Herlong p. 172.) Thus, no contract was formed between H&H and Bufkin.
- b. As to HOA assessments, H&H admits it never asked Bufkin to insure that H&H would not have to pay HOA assessments. (R. p. 81, lines 7-10, Dep. of Stanley Herlong p. 143.) Thus, no contract was formed between H&H and Bufkin.
- c. As to restrictions and covenants on the 11.44 acre tract at issue, these were not imposed until after the closing, and thus, Bufkin could not have agreed to exclude this item from the exceptions on the title insurance policy when they were not even in existence. (R. pp. 162-63, Release & Settlement Agr. pp. 3-4.) Thus, no contract was formed between H&H and Bufkin.

H&H further admits that the only conversation that took place between H&H and Bufkin regarding title insurance was that Bufkin would issue a title insurance policy for approximately \$1,400. (R. p. 85, lines 16-23; p. 173, lines 11-15; p. 174, lines 18-22, Dep. of Stanley Herlong pp. 159, 161, 163.)

Q. So the terms of the oral contract as you understood them at the time of the closing was you were going to get a title policy for \$1,400.00 and some odd dollars and 50 cents, correct?

A. Yes.

Q. No other terms or conditions were discussed at the closing; is that right?

A. Yes.

(R. p. 174, lines 18-25, Dep. of Stanley Herlong p. 163.) H&H admits in its own Initial Brief that it “does not recall the actual discussion or mention of the term or section called ‘exceptions....’” (Initial Brief of Appellant p. 13.) Because H&H admits that the only agreement and discussion between H&H and Bufkin was that Bufkin would issue a title insurance policy for approximately \$1,400, the oral contract was satisfied. Bufkin issued a title insurance policy with a cost of \$1,492.50. (R. p. 122, Title Insurance Policy Sch. A.)

H&H cites to the case of *Marshall v. King & Morgenstern*, 272 Ga. App. 515, 613 S.E.2d 7 (Ga. Ct. App. 2005), for the proposition that the trial court’s grant of summary judgment should be reversed because there is “a conflict in the evidence as to the existence of an oral contract....” (Initial Brief of Appellant pp. 14-15.) First, there is no conflict in the evidence. Second, this Georgia case, which has no precedential value, is inapposite.

In the instant case, there is no conflict in the evidence as to the non-existence of a contract. By H&H's own admission, as discussed above, there was no discussion of the exceptions which form the material terms of the alleged oral contract, thus no oral contract existed. Furthermore, there is no evidence that Bufkin agreed to issue a title policy without any exceptions or otherwise "insure" immediate sale of the lots. The only agreement was to issue a title policy at a certain price, which agreement was satisfied.

Marshall v. King & Morgenstern is factually distinguishable from the instant case. In *Marshall*, a home purchaser discovered a significant title problem relating to his property that could have been prevented if he had obtained a survey. He sued his attorney and title insurance company because his attorney: (1) specifically told the homeowner he did not need to obtain a survey prior to closing, (2) told the homeowner to obtain title insurance to protect his interests, (3) and failed to advise the homeowner he could purchase a title insurance policy that provided coverage even if no survey was obtained. 272 Ga. App. at 516-17, 613 S.E.2d at 9.

In the instant case, H&H admits there was no discussion of the title exceptions at issue in the alleged oral contract. Moreover, it is undisputed that Bufkin did not tell H&H that purchasing a title insurance policy would protect it with respect to the P&K contract, HOA assessments, or restrictions. (R. p. 81, lines 7-10; p. 173, lines 20-25; p. 86, lines 10-24, Dep. of Stanley Herlong pp. 143, 161, 172.) Finally, there is no evidence in the record that Bufkin could have eliminated the exceptions regarding HOA assessments, restrictions, and the P&K contract when he issued the title insurance policy. In fact, the evidence is to the contrary. Thus, the *Marshall* case is fully distinguishable from the subject action.

Because the undisputed evidence proves there was no agreement between H&H and Bufkin regarding the elimination of exceptions from the title insurance policy, and thus, no meeting of the minds, an oral contract was never created. The trial court properly dismissed H&H's Complaint and its Orders should be affirmed.

B. No Promise was Made by Bufkin to H&H, and Thus, There is no Basis for a Promissory Estoppel Claim.

To recover under a claim of promissory estoppel, a claimant must prove: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain an injury in reliance on the promise. *Satcher v. Satcher*, 351 S.C. 477, 483-84, 570 S.E.2d 535, 538 (Ct. App. 2002).

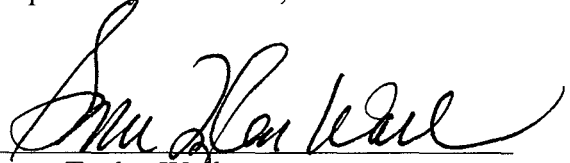
For the same reasons discussed above, H&H's promissory estoppel claim fails because there is no evidence that Bufkin promised H&H that it would issue a title insurance policy without exceptions. Because no promise was made, the trial court properly dismissed H&H's action against Bufkin and Old Republic and its Orders should be affirmed.

CONCLUSION

The allegations against Bufkin upon which H&H seeks to recover may only be performed by an attorney. Because H&H failed to file an expert affidavit as required by S.C. Code Ann. § 15-36-100 and because H&H admits there was no discussion of the title exceptions that allegedly formed the oral contract/promise between H&H and Bufkin, the trial court properly dismissed this lawsuit against Bufkin and Old Republic, and its Orders should be affirmed.

For these and all of the foregoing reasons discussed herein, and any other reason supported by the Record, the trial court's Orders granting Summary Judgment in favor of Bufkin and Old Republic on all of H&H's claims should be AFFIRMED.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan Taylor Wall", written over a horizontal line.

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October 11, 2012

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. 2010-CP-40-7330

H & H of Johnston, LLC,Appellant

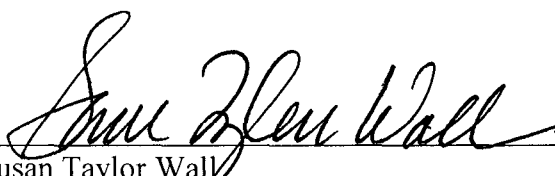
v.

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

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that Respondent Henry P. Bufkin d/b/a Bufkin Title's Final Brief complies with Rule 211(b), SCACR.

October 11, 2012



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OCT 15 2012

SC COURT OF APPEALS

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PROOF OF SERVICE

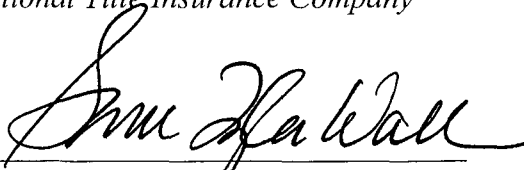
The undersigned hereby certifies that on October 11, 2012, the foregoing
RESPONDENT HENRY P. BUFKIN D/B/A BUFKIN TITLE'S FINAL BRIEF was
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