THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 10-CP-40-7330

H&H of Johnston, LLC, ... Appellant

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the actions of Bufkin in making an oral contract, on behalf of Old Republic as the insurer, with the purchaser in a real estate transaction as to title insurance coverage for adverse claims involve professional negligence subject to the requirements of §15-36-100?

II. Did the lower court err in granting the motions for summary judgment on the ground that there was no evidence of an oral contract for the insurance coverage for adverse claims for the purchaser in a real estate transaction?

STATEMENT OF THE CASE

This action involves a title insurance policy that was issued in connection with the purchase by Appellant, H&H of Johnston, LLC (hereinafter referred to as "the Herlong Company"), of real estate[1] located near the Town of Chapin in the County of Lexington. The seller of the real estate was Five Star Development, LLC (hereinafter referred to as "Five Star"), and Five Star was the developer of the Stoney Pointe subdivision where the real estate is located.

The claims of the Herlong Company relate to adverse claims filed by third parties and the payments made in connection with the settlement of those claims along with attorney fees and costs incurred, and relate to payments for assessments issued by the association for the Stoney Pointe subdivision. For the sale of the title insurance policy and for legal representation for the closing, Respondent, Henry P. Bufkin d/b/a Bufkin Title (hereinafter referred to as "Bufkin"), was the insurance agent for the Respondent, Old Republic National Title Insurance (hereinafter referred to as "Old Republic"), and he provided representation to both Five Star and the Herlong Company.

Motions for Summary Judgment were filed by both Respondents (R. p. 63 and R. p. 60), and both Motions were granted by Orders dated February 8, 2012, after a hearing held on January 19, 2012. (R. p. 4 and R. p. 7). The Herlong Company filed a Motion to Alter or Amend on February 17, 2012. (R. p. 248). The Motion was denied by Form 4 Order dated February 27, 2012, and the

[1] The real estate consisted of twenty-six (26) builder ready residential lots and approximately eleven (11) unimproved acres.

Herlong Company received written notice on March 19, 2012. (R. p. 1). The Notice to Appeal was filed on April 12, 2012.

STATEMENT OF THE FACTS

The Herlong Company is a limited liability company organized and existing under the laws of the State of South Carolina and formed on June 26, 2007, for the purpose of taking title to real estate pursuant to an agreement reached with Five Star for the repayment of the debt owed to D.C. Herlong and associated with the Stoney Pointe development. (R. p. 196, ¶1,3). At the time of the formation, the primary goal of the sons of Mr. Herlong, Stanley and Thomas Herlong, was to immediately sell all the land as quickly as possible to provide funds for the estate of their father, D.C. Herlong[2], and their mother who was living in a nursing home. (R. p. 196, ¶1).

The closing took place on July 5, 2007. At the time of the closing, Old Republic was a title insurance company licensed by the State of South Carolina to transact the business of title insurance. Respondent Bufkin was a title insurance agent duly licensed to engage in the issuance of title insurance on behalf of Old Republic in connection with the purchase of real estate on behalf of buyers, and he was also licensed to practice law in the State of South Carolina[3]. (R. p. 241, lines 3-20 and R. p. 218).

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[2] D.C. Herlong died on Sept. 14, 2004, and at time of his death, he was owed a substantial sum of money by Five Star Development.

[3] The practice of a lawyer acting both as attorney for the parties at a real estate closing and as agent for the title insurer is a common practice in South Carolina. *See*, Ethics Advisory Opinion No. 92-03, and Ethics Advisory Opinion No. 91-21.

Bufkin acted as the real estate closing attorney representing both the seller and buyer.[4] (R. p. 116, ¶ 4; R. p. 246, line 1-9). Bufkin also acted as an agent for Old Republic.[5] The Herlong Company agreed to purchase from Bufkin a policy of title insurance for the protection of the interests of the Herlong Company in the lots and the tract of land. (R. p. 197, ¶8).

Based on the HUD-1 Closing Statement, Bufkin Title was paid $1,492.50 for the title insurance premium. (R. p. 174, lines 11-22).

Despite collecting a fee for the issuance of a title insurance commitment[6] at the closing, Bufkin, as the licensed and authorized agent for Old Republic, had not prepared the commitment, and did not provide any documentation or information to the Herlong Company as the perspective purchaser for the terms of the title insurance to be issued relating to the adverse claims. (R. p. 179, line 17-p. 180, line 5).

Prior to and during closing, both brothers asked Bufkin on numerous occasions about the P&K Contract.[7] (R. p. 176, lines 21-25 and R. p. 178, lines 2-14). Stanley Herlong told him that he wanted to make sure that the Herlong Company would not have to sell lots to P&K under any option agreement, and that the Herlong Company could immediately could sell the builder ready lots to a

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[4] Bufkin obtained a Consent to Multiple Representation.

[5] See ORT Combined 3601 and 2423. This form further states: "The applicant (as set out herein), is a buyer, seller or lender who has been referred by the above-named producer of title business or associate of such producer to one or more of the title insurers or title agents identified above." The Herlong Company signed the disclosures in which Bufkin disclosed his relationship as a title insurance agent. (R. p. 227).

[6] (R. p. 120).

[7] (R. p. 151).

third party. He also stated that Bufkin knew the sale of land immediately was part of the agreement for him and his brother to buy the land as repayment for the debt owed their father[8]. The oral contract made with Bufkin at the closing as the title agent for Old Republic contained the following terms for the coverage as to adverse claims:

a. To insure that there was coverage in the event the Herlong Company would not 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 there was coverage in the event the Herlong Company would be required to pay any HOA assessments for the lots; and

c. To insure that there was coverage in the event the Herlong Company would not be able to immediately sell the 11.44 acre tract of land without being subject to restrictions or assessments.

(R. p. 197, ¶8).

Both the commitment and the title policy afforded no coverage for these adverse claims as they were specifically excepted from coverage and listed in Schedule B-2. (R. p. 120 and R. p. 127). The P&K Contract was essentially an option or lot take down schedule for lots within the Stoney Pointe subdivision including the twenty-six builder ready lots sold to the Herlong Company. (R. p.

[8] Bufkin was aware because he prepared both the sales contact and the warranty deed.

151). The P&K Contract and amendments were never seen by or given to either Stanley Herlong or Thomas Herlong prior to the closing, and the P&K Contract was not recorded in the Register of Deed's Office for Lexington County.

Immediately after the closing, the Herlong Company entered into contracts to sell the lots and land using a real estate agent who posted signs in the yards, after which P&K protested. (R. p. 198, ¶12). P&K demonstrated to the Herlong Company that it had an option to purchase the lots and that the Herlong Company could not sell the lots to a third party. The Herlong Company later paid P&K the sum of $25,000 for a release of the option agreement. Prior to entering into the settlement agreement and release, Old Republic denied coverage.

The Herlong Company was later sued by the Stoney Pointe Homeowners Association (the "HOA"). The lawsuit was filed on April 10, 2008, and the issues included the following:

1. Obligation of the Herlong Company to pay assessments for the lots.
2. Declaration that the undeveloped land was subject to assessments and restrictions.
3. Declaration that the deed for the transfer of title was invalid.

The lawsuit was settled and dismissed on December 15, 2008. Bufkin represented Five Star, and other parties, as defendants in the lawsuit, but he did not inform Old Republic of the claims and settlement[9]. The Herlong Company sought reimbursement for the legal fees, assessments paid and damages.

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[9] Failure to report is a violation of the Agency Agreement which provides in Article IX the following:

> If a claim is made to Agent under any of Insurer's title insurance forms which Agent has issued or if Agent becomes aware of any circumstances

ARGUMENT

I. The actions of Bufkin in making an oral contract, on behalf of Old Republic as the insurer, as to title insurance coverages for adverse claims does not involve claims of professional negligence subject to the requirements of §15-36-100.

The issue before this Court is the interpretation and application of S.C. Code §15-36-100 which requires "in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in [subsection] (g) . . . [that] the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." In subsection (g), "attorneys at law" are included in the list of professions, but the writing or issuing of insurance policies of any type by an agent is not listed as a profession for which the affidavit of an expert is required.

Both Respondents argue that an attorney affidavit was required because Bufkin was practicing law for the issuance of the title insurance policy. Both arguments cite case law that involves the issue of unauthorized practice of law in connection with real estate closings for an individual residential house. The first phase of these cases started with State v. Buyers Service Company, Inc. 292 S.C. 426, 357 S.E.2d 15 (1987), involving a company in the Hilton Head area

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which may give rise to a claim under any such exposure, Agent agrees to immediately notify Insurer. . . (R. p. 218).

engaged in the closing business in which there was no attorney involvement in the purchase and sale of residential property. The issuance of title insurance was not involved in the Buyers Service case.

The second phase of cases in which a fictitious John Doe was named as the plaintiff involved the refinancing of home mortgages. Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2002). In the John Doe action, the Supreme Court was provided by stipulation a scenario that included a number of actions involving a residential refinancing closing. The Herlong Company argues that the actions of Bufkin making an oral contract as to coverages for adverse claims to be provided by Old Republic as the insurer do not involve claims of professional negligence subject to the requirements of §15-36-100.

None of the cases cited by Respondents specifically state that only an attorney can issue a title insurance policy. In other words, it is not the unauthorized practice of law for a non-attorney to issue title insurance. *See*, In re Weems, 392 S.C. 70, 708 S.E.2d 742 (2011), *see also* In re Smith, 370 S.C. 343, 535 S.E.2d 87 (2006). The discussion in Ethics Advisory Opinion 92-03 is instructive as to the role of a lawyer as both handling a real estate closing and acting as an agent for the title insurer which is issuing a policy of title insurance. Clearly, Ethics Advisory Opinion 92-03 views the practice of law as separate from acting as an agent and saying that a lawyer's responsibilities to a third person should be considered by the lawyer in agreeing to act in both capacities. The following discussion is found in Ethics Advisory Opinion 92-03:

> For example, when there is a possibility of a cloud on title, but the risk of an actual encumbrance is small, the buyer or lender may

> want the title insurer to insure the potential problem. The insurer, on the other hand, may want to exclude the potential problem from coverage. In that situation, the lawyer's relationship with a particular insurer as its agent could "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." The lawyer might fail to recommend that the client seek coverage from another insurer or fail to pursue negotiations with the insurer as zealously as if the lawyer was not also its agent.
>
> The Opinion further provides as follows:
>
> A lawyer serving as agent for a title insurer clearly has a financial interest in placing title insurance with that insurer, since the lawyer would be paid a commission by the insurer. As agent for the insurer, the lawyer is entering into a transaction with the client for the sale and purchase of insurance.

The Herlong Company seeks payment under a title insurance policy. Bufkin had authority to bind Old Republic on coverages for adverse claims issues. He was not an independent contractor and even if he should not have agreed as to the coverages for the adverse claims for which the Herlong Company seeks payment, he failed to provide, prior to closing, a written commitment that contained these exceptions. The written commitment did not appear until after the P&K dispute started and after Stanley Herlong had to contact Bufkin to obtain the commitment. Old Republic cannot deny coverage if such promises were made. *See*, Koutsogiannis v. BB&T, 365 S.C. 145, 616 S.E.2d 425 (2005).

Bufkin argues that the Herlong Company asserts that he "breached his duties by failing to explain to H&H what title exceptions were included on the title insurance binder, specifically, HOA assessments, development restrictions, and a construction contract with P&K". (R. p. 70). But, the Herlong Company seeks

payment for damages due to adverse claims on the basis of indemnification and not on the basis of failure to disclose by Bufkin as an attorney,

II. The lower court erred in granting the motions for summary judgment on the ground that there was no evidence of an oral contract for the insurance coverage for adverse claims for the purchaser in a real estate transaction.

The grounds asserted by the Respondents are technical in nature requiring an agreement that refers to "exceptions". They argue that since there was no discussion about "exceptions to the title policy", an oral contract could not have been formed. A title policy usually contains a Section B that lists exceptions, reasons that the title insurance company is not required to indemnify the insured. In other words, the protection of interests in the land described in the policy does not include any items contained in Schedule B, the exceptions.

While Stan Herlong does not recall the actual discussion or mention of the term or section called "exceptions" to be items for which the Herlong Company would have no protection in the property, he had an agreement with Bufkin as the title insurance agent to protect the interests of the Herlong Company. Here, there is evidence that the Herlong Company as the purchaser of the land and as the purchaser of the title insurance had an agreement that protected it from the interests of the P&K Contract and interests relating to the payment of assessments and being subject to other types of restrictions.

A review of the recorded declaration would not have specifically stated that a purchaser of multiple lots for the purpose of resale would be subject to the

payment of assessments.[10] Bufkin could have issued a title insurance binder prior to closing that would have set forth in Schedule B all of the exceptions from coverage, but he did not issue such a binder. Bufkin did not issue the final title insurance policy until after the settlement and dismissal of the HOA lawsuit. The agency agreement between Bufkin and Old Republic required him as agent to notify Old Republic in the event he learned of any claim, but he did not notify the company after the filing of the HOA lawsuit.[11]

In Marshall v. King and Morgenstern, 272 Ga.App. 515, 613 S.E.2d 7 (Ga.App. 2005), a homeowner appealed the grant of summary judgment against the closing attorney by the trial court.[12] The Georgia Court of Appeals reversed. The coverage dealt with in Marshall was insurance against title problems in that the homeowner found after the closing that significant percentage of his home encroached upon the neighbor's property. He had not obtained a current survey before the closing that would have shown the encroachment.

The homeowner argued that the title company, First American Title Insurance Company and the closing attorney acting as a title agent for FATIC, breached a contract by failing to provide him with title insurance that would protect against the title problems even though he had not obtained a survey. He

[10] The HOA lawsuit asserted that there was no exclusion for the developer for the payment of annual assessments, and the HOA lawsuit also asserted that the undeveloped land was subject to building restrictions and assessments.

[11] Bufkin did represent all of the Defendants in that case other than the Herlong Company and Stanley Herlong.

[12] Although the State of Georgia did not have the type of statute involved in this case requiring an expert affidavit, this case did involve whether or not an oral contract had been formed due to statements made by the attorney/agent. The court in that case reversed a summary judgment on behalf of the attorney/agent.

also alleged claims for "equitable estoppel" and attorney fees. The evidence indicated that the homeowner had received an oral agreement with the closing attorney to sell him a title insurance policy that would protect his "interests in the property, despite his decision to forego a survey." The policy issued by FATIC did not provide such coverage unless a new survey had been obtained. The Court held that "where there is a conflict in the evidence as to the existence of an oral contract or as to its terms, the matter must be submitted to a jury for resolution."

Old Republic argues that there is no disputed fact that policy provisions 9(c) and 3(a) require the granting of summary judgment. The title insurance policy issued by Old Republic was delivered to the Herlong Company in January of 2009, after the conclusion of the litigation involving the Stoney Point subdivision in December of 2008. The right of Old Republic to deny coverage based on policy exclusions should be decided by the jury.

CONCLUSION

In conclusion, this Court should reverse the lower court's granting of summary judgment.

Respectfully submitted,

October 15, 2012

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant complies with Rule 211(b), SCACR.

November 16, 2012

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PROOF OF SERVICE

I certify that I have served the final bound Appellant's Brief and bound Reply Brief of Appellant by causing to be hand delivered, on October 15, 2012, at the law office of, and addressed to, the Respondent Old Republic National Title Insurance Company's attorney of record, Louis H. Lang, Esquire, Callison Tighe & Robinson, 1812 Lincoln Street, Columbia, SC 29201.

October 15, 2012

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I certify that I have served the final bound Appellant's Brief and bound Reply Brief of Appellant by causing to be mailed via Priority US Mail with sufficient postage affixed thereto, on October 15, 2012, addressed to the Respondent Henry P. Bufkin d/b/a Bufkin Title's attorney of record, Susan Taylor Wall, Esquire, McNair Law Firm, P.A., P.O. Box 1431, Charleston, SC 29402.

October 15, 2012

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