

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

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Case No. 10-CP-40-7330

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

v.

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

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REPLY BRIEF OF APPELLANT

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**TABLE OF AUTHORITIES**

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## ARGUMENT

First in reply, both Orders of the lower court and the arguments made by both Respondents fail to see that the issuance of title insurance for the Herlong Company as the buyer of the real property had nothing to do with the closing. The purchase of the title insurance policy was optional for the buyer. Yes, Bufkin as an attorney was in a position to provide advice on title matters, but the Herlong Company could have accepted an opinion of title from him or considered the general warranty deed as sufficient protection as to the status of title in lieu of buying title insurance. The Herlong Company choice to purchase title insurance, and Bufkin was allowed to sell this product because he had passed an examination and obtained a license from the Department of Insurance and had been appointed by Old Republic as an agent.

Bufkin's acts of selling, issuing and receiving a commission for a title insurance product cannot be considered the practice of law. As discussed in Ethics Advisory Opinion No. 92-03, an attorney-agent did not necessarily violate the then Rules of Professional Responsibility considering the Rules about the impermissible sharing of fees, conflicts of interest, and having a business relationship with the buyer-client. For example, this Opinion states that the premium charged for title insurance is not subject to the standard for determining the reasonableness of the fee charged for providing legal services.

That Opinion also dealt with making sufficient disclosures to allow the attorney to be able to represent a client and to sell title insurance. Many of these

disclosures clearly would not be required if all the acts of the closing attorney-agent were considered the practice of law.

Respondents argue that because Bufkin was the closing attorney representing both parties and was responsible for creating title related documents, such as the deed, his acts of selling and issuing title insurance have to be considered the practice of law. But, neither Respondent cites any previous decision of the Supreme Court that deals solely with an owner's title insurance policy. Clearly, the purchase of an owner's title insurance policy is almost always optional as distinguished from a lender title insurance policy that is usually always required for a loan closing.

In Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (S.C. 2002), Stipulated Fact 14 was that the "title insurance company" would issue the final title insurance policy to the lender. Doe, as the fictitious closing attorney, was not an agent of the title insurance company, and the title insurance company was chosen by the lender which required title insurance to refinance a home loan. In Doe, the issuance of title insurance was not included in the list of acts considered to be the practice of law.

Even Respondent Old Republic does not consider agents as being engaged in the practice of law. In the deposition of Ivey Harte, the Rule 30(b)(6), SCRCP witness for Old Republic and the general manager in South Carolina, he stated the following about non attorneys being licensed to act as agents for the issuance of title insurance:

Q. Okay. But is one of the requirements or qualifications that the person be a licensed South Carolina attorney?

A. No, sir, they do not. To be a title insurance agent in South Carolina, you do not have to be an attorney. Now, I will add to that, a majority, a large majority, of them are.

(R. p. 233, lines 10-16).

Even if Bufkin should be dismissed for the failure to file an attorney affidavit, the basis for such a dismissal does not mean that Old Republic should also be dismissed. Old Republic, acting through its agent, cannot deny coverage when the agent collects a premium without issuing the title binder and providing a copy to the prospective buyer at closing.

Secondly in reply, both Respondents base their "no agreement" arguments on what they characterize as undisputed evidence that that there were no discussions between the parties concerning the title exceptions or even the name of the title insurer. (Old Republic Brief p. 6-7; Bufkin Brief p. 21-22). They only refer to the deposition testimony of Stanley Herlong, and they argue that since he does not recall any discussion about "exceptions" or any other matters relating to the title insurance including the name of the insurance company or the fact that Bufkin was selling the Herlong Company a policy of title insurance, no agreement could have been made.

These arguments fail completely because Bufkin in his affidavit admits that he did discuss these matters with the Herlongs at or before the closing. Bufkin states in his affidavit that he discussed the P&K Contract with the

Herlong, and that he “showed the parties” the title commitment and discussed the list of exceptions with them. (R. p. 117, ¶6). So, the admissions of Bufkin create questions of fact and the motion of summary judgment must be reversed on that basis alone.

Respondent Old Republic relies upon the statements of Stanley Herlong that he did not even know the name of the title insurance company or that Bufkin was an agent. However, this argument fails because Old Republic requires that its agents obtain from a prospective buyer the written acknowledgment that the buyer desires an owner’s policy of title insurance and that the buyer selects Old Republic for the purpose of providing such insurance. This written acknowledgment was signed by Stanley Herlong in this case. (R. p. 227).

Moreover, Stanley Herlong provided an affidavit that he had an agreement with Bufkin for insurance coverages against specific adverse claims. Otherwise, why would the Herlong Company have agreed to purchase lots and have a real estate agent ready to list and post for sale signs in the yards knowing that a third party had an enforceable contract to purchase the lots? Why would the Herlong Company have entered into a contract to sell the undeveloped property without specifying that the buyer would be required to submit plans for architectural review and to deal with building restrictions as to size of lots and other matters? Why would Bufkin prepare for both parties a general warranty deed that contained no exceptions to these adverse claims<sup>1</sup>? (R. p. 207). These actions

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<sup>1</sup> See, Estate of Patterson v. Palmetto Bank, 374 S.C. 116, 646 S.E.2d 885, (Ct.App. 2007) (“A South Carolina general warranty deed embraces all of the following five covenants usually inserted in fee simple conveyances by English

clearly support the existence of the oral contract made with Bufkin. The only person in the closing room that had the authority to provide that coverage was Bufkin as agent for Old Republic.

The case of Muckelvaney v. Liberty Life Ins. Co., 261 S.C. 63 (1973), cited by Old Republic, dealt with a written application that had been signed specifying a start date for the insurance coverage. Obviously, in this case, nothing was signed by the Herlong Company, and the evidence most favorable to the non-moving party in this case is that the binder had not been prepared by Bufkin at the time of closing.

### CONCLUSION

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

October 15, 2012

Respectfully submitted,



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conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances.”)

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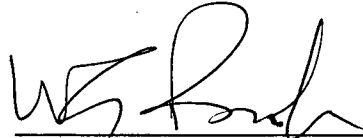
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CERTIFICATE OF COUNSEL

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

November 16, 2012



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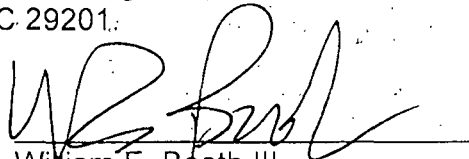
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PROOF OF SERVICE

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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 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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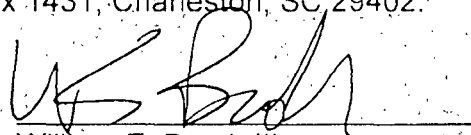
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I certify that I have served the final bound Appellant's Brief and bound Reply Brief of Appellant by causing to be mailed via Priority US Mail with sufficient postage affixed thereto, on October 15, 2012, addressed to the Respondent Henry P. Bufkin 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.

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