

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-0931
Appellate Case No. 2012-212732

RECEIVED

JUN 07 2013

SC Court of Appeals

Thaddeus F. Segars,

Appellant,

v.

Fidelity National Title
Insurance Company,

Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	3
Statement of Issues on Appeal	4
Statement of Case.....	4
Statement of Facts	5
Argument 1	11
Argument 2	11
Argument 3	13
Argument 4	15
Argument 5	16
Conclusion	19

TABLE OF AUTHORITIES

Black v. Childs, 14 S.C. 312, 321-22 (1880) 14

Doub v. Weathersby-Breeland Ins. Agency, 233 S.E.2d 111, 268 S.C. 319, 327 (S.C. 1977) 18

Hooper v. Ebenezer Senior Services and Rehabilitation Center, 659 S.E.2d 213, 377 S.C. 217 (S.C.App. 2008) 12

Karam v. St. Paul Fire & Marine Ins. Co., 281 So.2d 728, 72 A.L.R.3d 697, at 700 (La.1973) 17

La Tourette v. McMaster, 104 S.C. 501, 89 S.E. 398 (S.C. 1916) 18

Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 317 S.E.2d 748 (S.C. App.1984) 16

Slack v. James, 614 S.E.2d 636; 364 S.C. 609 (S.C. 2005) 14

South Carolina Ins. Co. v. James C. Greene and Co., 348 S.E.2d 617, 290 S.C. 171 (S.C.App. 1986) 16

Spence v. Spence 628 S.E.2d 869, 368 S.C. 106 (S.C. 2006) 13

Reynolds v. Witte, 13 S.C. 5 (1879) 16

Republic Textile Equipment Co. of South Carolina, Inc. v. Aetna Ins. Co., 360 S.E.2d 540, 293 S.C. 381 (S.C.App. 1987) 16

Riddle-Duckworth, Inc. v. Sullivan, 171 S.E.2d 486, 253 S.C. 411 (1969) 17

S.C. Code Ann. § 15-3-530(1) 12

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING A MOTION TO DISMISS, WHERE THE FACTS ALLEGED AND THE INFERENCES REASONABLY DEDUCIBLE THEREFROM ENTITLED THE APPELLANT TO RELIEF ON AT LEAST ONE THEORY OF THE CASE?
2. DID THE TRIAL COURT ERR IN FINDING APPELLANT'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS?
3. DID THE TRIAL COURT ERR IN FINDING THE APPELLANT IS NOT A BONA FIDE PURCHASER?
4. DID THE TRIAL COURT ERR IN FINDING THE APPELLANT DISCOVERED OR SHOULD HAVE DISCOVERED THE FACTS UNDERLYING HIS COMPLAINT AT THE TIME OF THE ISSUANCE OF THE TITLE INSURANCE POLICIES?

STATEMENT OF THE CASE

Prior to commencement of the present action, Thaddeus Segars (hereinafter "Segars" or the "Appellant") filed actions against Fidelity National Title Insurance Company ("Fidelity" or the "Respondent") on July 16, 2008 (Beaufort County Case Number 2008-CP-07-2579) and August 4, 2008 (Beaufort County Case Number 2008-CP-07-2741) (together, the "2008 Cases"). A Stipulation of Dismissal without prejudice was filed as to both of the 2008 Cases on February 19, 2010.

On February 24, 2011, Appellant filed the present action alleging causes of action against Respondent for breach of contract and for vicarious liability, and seeking a declaratory judgment against Respondent. On April 15, 2011, Respondent filed a qualified Answer and a Motion to Dismiss. Appellant filed his Answer to Motion to Dismiss on May 24, 2011.

On April 25, 2012, Respondent's Motion to Dismiss was heard before the Honorable Carmen T. Mullen, Beaufort County Common Pleas Judge. On May 24, 2012, Judge Mullen entered an Order granting Respondent's Motion to Dismiss. Appellant served and filed his Notice of Appeal on July 18, 2012; his subsequent Motion to File Appeal Out of Time was granted by Order of this Court of Appeals filed November 13, 2012.

The undersigned was retained as counsel just prior to the April 25, 2012 hearing, and for this Appeal after Appellant filed his Notice of Appeal.

STATEMENT OF THE FACTS

In early 2004, Segars, a real estate agent and resident of Hilton Head Island, contracted to purchase two oceanfront lots in the Singleton Beach Subdivision on Hilton Head Island. "Lot 2" was contracted at a purchase price of \$1,600,000, with title to be held by Mr. Segars and his wife, and the adjacent "Lot 3" was contracted at a purchase price of \$1,800,000, with title to be held by Mr. Segars, Frederick Cerrato, Steven Cerrato, Ken Oliver and Steven Carb, who together planned to form a holding company to control their collective interest in Lot 3.

Historically, and certainly as of December, 2002, the size of home that an owner could build on undeveloped oceanfront property on the beach side of Hilton Head Island was impacted by ocean-side setback lines as established by the Office of Coastal Resource Management ("OCRM"). When read together with the Town of Hilton Head Island Land Management Ordinance ("LMO"), the OCRM line limited the available building envelope attendant to the Lot 2 and Lot 3 Singleton Beach subdivision to approximately 1,500 square feet.

Prior to 2004, when Segars entered into his contracts, there was ongoing negotiation and discussion between the Town of Hilton Head Island, the OCRM and other interested parties and owners such that it was generally believed that the OCRM line was about to move landward, and thus permit full size residential construction on the Lots. In fact, a Plat entitled "Boundary Reconfiguration of Singleton Beach Place Extension Comprising Parcels 10, 10A (2 Parcels), 10B, 10C, 10 D, 10H, 10N (2 parcels) 350 and 359 dated November 12, 2002" was recorded on January 29, 2003 in Plat Book 91 at Page 90 in the Office of Register of Deeds for Beaufort County (the "January 29 Plat"). The January 29 Plat showed a "proposed OCRM line" moving out towards the ocean on Lots 2 and 3, and thus increasing their potential building envelope.

Segars relied on the January 29 Plat in forming his understanding of the building envelope for Lot 2 and Lot 3. (Complaint p. 3; R. p. 9, line 3-4). As such, and in reliance on the January 29 Plat and general knowledge of events transpiring in the OCRM negotiations, Segars proceeded to contract for Lot 2 and Lot 3 and to ultimately close on those transactions later in 2004 as set forth below.

Unbeknownst to Segars and his various partners, a corrective Plat was filed on November 20, 2003 in Plat Book 96 at Page 90 (the "November 20 Plat"), and then a second corrective Plat entitled "Boundary Reconfiguration of Singleton Beach Place Extension Comprising Parcels 10, 10A (2 Parcels), 10B, 10C, 10 D, 10H, 10N(2 parcels) 350 and 359 dated December 4, 2003" was filed on December 15, 2003 and recorded in Plat Book 96 at Page 160 (the "December 15 Plat"). The November 20 Plat and the December 15 Plat removed the designation of a "proposed OCRM line" and thus kept the OCRM line at its

then current location for Lot 2 and Lot 3. As a result, the building envelope for each Lot remained limited by the historical OCRM line.

Segars and his partners proceeded to close on the two parcels in separate transactions. In June, 2004, Lot 2 closed at a purchase price of \$1,600,000 with a first mortgage loan in amount of \$1,440,000. In August, 2004, Lot 3 closed at a purchase price of \$1,800,000 with a first mortgage loan in amount of \$1,620,000. Segars was a personal guarantor on both loans. In both transactions, the law firm Jones, Patterson Simpson and Newton P.A. acted both as buyer's counsel and as Fidelity's title agent.

At some point after the closings, in or around late 2005, Segars and his partners discovered that the OCRM line had yet to be relocated towards the ocean as proposed on the January 29 Plat. As a result of the various OCRM regulations and Town of Hilton Head Island ordinances, the Lots remained limited in their possible use to construction of a home of between 1500 and 1800 square feet, or possibly for other non-construction related uses such as picnics or parking, unless or until the OCRM line moved landward. Until this discovery, Segars and his partners had assumed the OCRM line had already relocated towards the ocean, such that they could construct a residence of approximately 4,000 square feet and paid a purchase price with that intended use. In fact, because the OCRM line had not moved, any construction would be restricted to a reduced size of 1500 square feet or less. At the same time, the Declaration of Covenants, Conditions, and Restrictions for Singleton Place (the "Covenants") prohibited construction of a residence of less than 2,500 square feet. Thus, at the actual time of purchase, and at the time the title insurance policies in question were issued, Lot 2 and Lot 3 were restricted by competing regulations such that no

conforming residence could be constructed. Thus, the Lots had no practical use due to the conflicting restrictions.

As the ongoing land use restrictions imposed by the OCRM line became known to the general public and the real estate community, market interest in the Lots essentially disappeared. The Lots were no longer saleable at prices that were in the range or level as the prices at which the Lots were purchased, despite the otherwise rapid price appreciation in Hilton Head Island oceanfront real estate through early 2007. Later, in 2007, market prices overall began to decline and in fact did not begin to recover until late 2012, and then only on a location-by-location basis.

The loan for Lot 3 was refinanced in 2006. Both purchase money loans went into default in 2008, resulting in foreclosures against both of the subject Lots. As a result of the foreclosures, Segars lost his entire investment in both Lot 2 and Lot 3, and also suffered residual liability for the deficiency balance due on the loan secured by Lot 3. The value of those losses is the largest component of the damages for which Segars seeks insurance coverage in the instant lawsuit.

In or about September, 2010, the OCRM line officially moved ocean-ward for the purpose of the Singleton Beach development and as a result of the negotiated settlement between OCRM, the Town and the Lot owners at Singleton Beach, the Lots are presently eligible for regular residential development based on their full size. However, this resolution came late for Segars, who had been unable to sell the Lots, or carry their interest, taxes and other costs through the period between 2004 through 2009, and thus had lost his investment. For these reasons, Segars claimed in his lawsuit(s), and claims now, that the Lots were not

marketable during the coverage period.

Appellant is informed and believes that at some point, Final Owner's Title Insurance policies were issued by Fidelity's agent, but Appellant avers that he has never received the original insurance policies for either Lot. Rather, portions of the policies were provided to him during the period after his discovery that the line had moved in late 2005 through the pendency of the 2008 lawsuits, in the form of Policy Numbers, such that Appellant to was able to assert demands for coverage against Fidelity. In or about 2006 or 2007, Appellant sent such demands by letter to Fidelity. Ultimately, Fidelity denied coverage. In July of 2008, Appellant filed and served the abovementioned 2008 Cases against Fidelity seeking title insurance coverage.¹ Appellant is currently in possession of a photocopy of a Final Title Insurance Policy No. 51338-6027 for Lot 2 (the "Lot 2 Policy"), and a photocopy of a Final Policy No. 2008.2730640-75096808 for Lot 3 (the "Lot 3 Policy"), which photocopies he obtained through motion practice in the 2008 Cases. Prior to obtaining those copies, Appellant had a copy of what was part of either a loan or owners policy for Lot 3, and the policy number for Lot 2, but not the full policies. As discussed below, it is unclear whether the Lot 3 Final Policy was actually issued in 2004, as there are indications that the policy documents themselves may have been generated at a later time.

The Lot 2 Policy as produced during the 2008 lawsuit was and is missing the standard coverage page, and is therefore incomplete. The Lot 3 Policy, as attached to Respondent's Motion for Summary Judgment filed in the 2008 cases, was dated June, 2004. However, that

¹ Segars v. Carroll and Fidelity National Title Insurance Company, 2008-CP-07-02579 was brought in connection to losses on Lot 3, and Segars v. Richardson Street Partners, Gaughf and Fidelity National Title Insurance Company, 2008-CP-07-02791 sought recovery for damages stemming from Lot 2.

Lot 3 Policy appears to be written on a form issued by Fidelity and designated, "6/06," which Appellant understands would refer to a form generally circulated by Fidelity on or after June, 2006. Thus, Appellant questions whether the Lot 3 Policy was in fact issued in 2004. Further discovery on this issue was precluded when the lower court entered its Order in the present case.

The Final Policies ultimately produced by Fidelity appear to provide affirmative title insurance coverage for the losses suffered by Appellant. The policies also appear to limit coverage through reference to title-industry standard exceptions from coverage. Ultimately, the issue that spawns the instant litigation is whether the title policies issued to Segars provide insurance coverage for matters which Fidelity apparently excepted in its contracts, but which were neither explained to Segars by Fidelity or Fidelity's agent, nor known to Segars at the time of closing. Fidelity argues that these specific exceptions from coverage override the general grant of coverage set forth in Covered Risks. Segars argues that the stated exceptions from coverage are vague and incomplete, and as such unenforceable when contrasted to the general coverage depicted in the Covered Risks and as expected by an insured when purchasing title insurance. Further, Appellant posits that unless the specific exceptions from coverage were explained by Fidelity or Fidelity's agent, an insured consumer would have no reasonable expectation that his or her coverage was limited by the policy itself, or the nature or extent of such limitations.

After a partial hearing on Fidelity's Motion for Summary Judgment in the 2008 Cases, the parties entered into a stipulation of dismissal, without prejudice, of both actions pursuant to Rule 41(a). Segars re-filed his case pro se on February 24, 2011.

ARGUMENTS

1. THE ORDER GRANTING FIDELITY'S MOTION TO DISMISS WAS PREMATURE IN THIS CASE.

Fidelity's pleadings and argument at hearing sought dismissal of Segar's Complaint pursuant to various sections of Rule 12 of the South Carolina Rules of Civil Procedure, but it is unclear from the text of the Order itself which Section or Section(s) the Court relied upon for its final decision. To the extent that the Order falls under Rule 12 (b)(6), Segars avers that the ruling is premature. It is settled that a motion to dismiss a claim pursuant to Rule 12 (b) (6), SCRPC must be based solely on the allegations set forth on the face of the complaint. Overcash v. S.C. Elect. & Gas Co., 356 S.C. 165, 588 S.E. 2d 116, 118 (Ct. App. 2003). "The motion will not be sustained if the facts alleged and the inferences reasonably deductible therefrom would entitle the plaintiff to relief on any theory of the case." Id. (Internal citations omitted.) "A judgment on the pleadings is to be considered a drastic measure by our courts." Russell v. City of Columbia, 406 S.E.2d 338, 305 S.C. 86 (S.C. 1991). Pleadings in a case should therefore be construed liberally, and the trial court and the Court of Appeals must presume all well pled facts to be true, so that substantial justice is done between the parties." Overcash, S.E. 2d 116, 118 (Ct. App. 2003).

Accepting the facts as Appellant pled them, as argued below, this case would not be barred by any applicable statute of limitations. Further, if those facts were proven at trial, Appellant argues that he could prevail on the merits of his causes of action.

2. THE STATUTE OF LIMITATIONS WAS TOLLED BY THE FILING OF THE 2008 CASES

The Order Granting Defendant's Motion to Dismiss (the "Order") states that

Appellant's claims are barred by the applicable statute of limitations under S.C. Code Ann. § 15-3-530(1). (Order p. 2; R. p. 5, line 13). S.C. Code Ann. § 15-3-530(1) provides a three-year statute of limitation for an action upon a contract, obligation, or liability, express or implied. At the hearing on Respondent's Motion to Dismiss, Respondent argued that the statute began to run in the summer of 2004, when the Policies were allegedly issued. (Transcript pp. 7-8; R. pp. 60-61). However, under the discovery rule, Appellant's causes of action arose either when Fidelity first denied Appellant's claim for coverage, or when Appellant first discovered the terms of the Policies.

Appellant's claim(s) was denied in or about 2006 or 2007. Appellant avers that he did not receive his owner's title insurance policy for Lot 3 until 2008, and for Lot 2 until late 2009, through discovery and motion practice in the 2008 Cases. Indeed, to this date, Appellant has not received complete copies of the Policies, despite repeated requests. As stated above, the Lot 2 Policy that has been produced does not have a standard exceptions page. The Lot 3 Policy appears to have been printed on a form that might not have existed until June, 2006, based on the notations on the form itself. Thus, it might have been impossible for that policy to have existed in that manner in 2004. The events leading to the creation and distribution of the policy can only be discovered if this case is permitted to proceed.

In any event, the statute of limitations begins to run when a cause of action first arises. Here, the cause of action arose when Respondent denied Appellant's claim under the Policies, in 2006 or 2007. Under South Carolina law, although it is rarely employed, equitable tolling is available where a plaintiff actively pursued his remedies by filing a

defective pleading during the statutory period. Hooper v. Ebenezer Senior Services and Rehabilitation Center, 659 S.E.2d 213, 377 S.C. 217, 232 (S.C.App. 2008). Equitable tolling is also available where a plaintiff is unable to obtain vital information bearing on the existence of his claim, despite all due diligence. Id. Both conditions apply to the present action, because the Appellant actively pursued his remedies by filing two actions during the statutory period, and because he was unable to obtain vital information concerning the Policies, despite his due diligence.

Even if Appellant is deemed to have constructive notice of his losses in 2006 or late 2005, Appellant argues that the filing of the 2008 Cases tolled any statute of limitations, and the re-filing of the cases, as re-stated in Case No. 2011-CP-07-00931, relates back to the statute of limitations tolling caused by the 2008 Cases.

3. APPELLANT WAS A BONA FIDE PURCHASER

In its Order, the Court below found that Appellant “is not a bona fide purchaser because sufficient record notice was available as of the date of the issuance of the policies to charge him with a duty to inquire, which if pursued with due diligence, would have supplied him with knowledge of the restrictions and plats.” (Order p. 2; R. p. 5, lines 6-11). In Spence v. Spence 628 S.E.2d 869, 368 S.C. 106, 117 (S.C. 2006), the South Carolina Supreme Court stated:

A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or interest in the property.

(Citations omitted). There are two basic forms of notice by which a purchaser may be

charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. Id. Constructive or inquiry notice in the context of a real estate transaction “often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world.” Spence v. Spence 269 S.C. at 119. “[B]ut constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose.” Black v. Childs, 14 S.C. 312, 321-22 (1880). The South Carolina Supreme Court has found that, given the speedy nature of residential real estate contracts today, it is not feasible to expect a buyer to be able to research the title of the property they are buying before entering into a contract. Slack v. James, 614 S.E.2d 636, 639; 364 S.C. 609 (S.C. 2005).

Instead, purchasers rely on the expertise of real estate attorneys and insurance agents to perform the due diligence that is required prior to the closing of a real estate transaction. As has already been described, Appellant in this case relied on Jones, Patterson Simpson and Newton P.A. to act as buyer’s counsel and as Fidelity’s title agent. It was reasonable for Appellant to expect that the firm would conduct a thorough title search, and report any issues or potential pitfalls to the Appellant prior to closing and prior to issuing title insurance. At the time, Appellant had conducted his own review of the January 23 Plat and determined that the OCRM revisions would enable the development of a suitable residence on the Lots. This was the knowledge to which his due diligence led him. The subsequent November and

December Plats were knowledge falling beyond the range of his inquiry and which his due diligence did not disclose. However, it is knowledge that Fidelity's agent, both as a real estate law firm and as an insurance agency, could have discovered, and possibly did discover if the title policies are in fact contemporaneous statements of the knowledge of the underwriter. Segars' contention is that if the new Plats were discovered as set forth in the policies he ultimately received, then it was the duty of an insurance agent to explain to him the scope and import of the policy exceptions that exclude coverage for losses flowing from those Plats and underlying matters.

4. THE INSURANCE POLICY AS WRITTEN COVERED LOSSES SUCH AS THOSE ALLEGED BY THE APPELLANT

Of the copies of policies that have thus far been produced to Appellant or are in his possession, only the Lot 3 Policy sets forth a complete statement of Covered Risks.² Item 5 of that Covered Risk declaration insures against loss or damage incurred by reason of: "The violation or enforcement of any law, ordinance, permit or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to: (a) the occupancy use or enjoyment of the Land; (b) the character, dimensions or location of any improvement erected on the Land [...] (d) environmental protection." (Lot 3 Policy p. 1; R. p. 73). At the time Appellant purchased an interest in Lot 2 and Lot 3, the Lots were rendered undevelopable due to a convergence of restrictions governed by the ORCM, Town of Hilton Head Island, and Singleton Place Property Owners Association. To wit, it would have been impossible to construct a dwelling of over 1,800 square feet in conformity with the ORCM

² For the present purposes of this Argument, Appellant will suppose that the Covered Risks for the

restrictions and Hilton Head Island LMO, while the Singleton Place Covenants themselves prohibited the construction of any dwelling of less than 2,500 square feet. (Complaint p. 5; R. p. 11, lines 4-11). Therefore, Appellant sustained substantial loss and damage incurred by governmental regulations and restrictions related to the occupancy, use and enjoyment of his land, as well as to the dimension and location of improvements and environmental protection. This is exactly the nature of loss and damage covered by Item 5 of the Covered Risk statement.

Respondent argued in its Motion to Dismiss, and at the hearing on said Motion, that the risks giving rise to Appellant's actions were specifically excluded by the Policies. Even if the Policies' exclusions are construed so as to exclude such risks, Respondent would still be liable to Appellant because said exclusions were not disclosed at the time the Policies were issued. As discussed below in Argument 5, the failure of Respondent or its agent to adequately inform Appellant of the terms of the Policies and how those policies are constructed and interpreted constitutes a breach of the duty of care Respondent owed to Appellant.

5. THE RESPONDENT IS VICARIOUSLY LIABLE FOR ITS AGENT'S NEGLIGENT TITLE SEARCH AND/OR FAILURE TO ADEQUATELY DISCLOSE THE TERMS OF COVERAGE

"The modern doctrine of respondeat superior makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." South Carolina Ins. Co. v. James C. Greene and Co., 348 S.E.2d 617, 290 S.C. 171, 179 (S.C.App. 1986) (Citing Gathers v. Harris Teeter Supermarket, Inc., 282 S.C.

Lot 2 Policy, if anywhere stated, are substantially the same as those set forth in the Lot 3 Policy.

220, 317 S.E.2d 748 (Ct.App.1984)). “[U]nder the doctrine of respondeat superior, the principal is liable in addition to the agent, not by reason of his consent to be liable, but by operation of law.” Id. at 183 (Citing Reynolds v. Witte, 13 S.C. 5 (1879)). To determine whether an insurance company should be held vicariously liable for the acts of an agent, this Honorable Court has looked to the whether the statutory definition provided by South Carolina Code of Laws is applicable. Republic Textile Equipment Co. of South Carolina, Inc. v. Aetna Ins. Co., 360 S.E.2d 540, 293 S.C. 381, 386 (S.C.App. 1987). In the present case, there has been no issue raised as to whether or not Jones, Patterson Simpson and Newton P.A. acted as Fidelity’s title agent.

South Carolina law recognizes an insured's prerogative to rely on the expert knowledge of the agent or broker in cases involving the failure of an insurance agent or broker to maintain or procure insurance. See Riddle-Duckworth, Inc. v. Sullivan, 171 S.E.2d 486, 253 S.C. 411 (1969). An insurance client may recover from the agent the loss sustained as a result of the agent's failure to procure the desired coverage, if the actions of the agent warranted the client’s assumption that he was properly insured by the coverage desired. Republic, 293 S.C. at 389 (Citing Karam v. St. Paul Fire & Marine Ins. Co., 281 So.2d 728, at 730-731, 72 A.L.R.3d 697, at 700 (La.1973)). “The cited authorities state the applicable general principles to be that, where an insurance agent or broker, with a view toward being compensated, undertakes to procure insurance for a member of the public, the law holds the agent or broker to the exercise of good faith, and reasonable skill, care and diligence in performing the obligation.” Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. at 421.

Here, Appellant alleges that had Respondent’s agent exercised due care in explaining

the meaning and effect the exceptions for coverage listed in the Title Policy, and in further explaining the discovery of recently recorded Plats of Record that compromised Appellant's belief and understanding that the OCRM line had moved, then Appellant and the insurance agent would have realized that the Lots were essentially unable to be developed when Appellant purchased them in 2004. Such knowledge would certainly have dissuaded Appellant from purchasing the subject properties for the prices paid. (Complaint p. 6; R. p. 12, lines 7-9). Furthermore, had the agent exercised due care, he would have fully informed Appellant of the policy terms, including all coverages and exceptions. Again, such knowledge would have had a substantial impact on Appellant's decision on whether or not to purchase the Lots or the insurance coverage.

Insurance brokerage has been described by this Court as a business that entails "many complications, requiring, for its safe conduct, not only expert knowledge, but such knowledge as can be acquired only by experience in the business." La Tourette v. McMaster, 104 S.C. 501, 89 S.E. 398 (S.C. 1916). Despite his experience in real estate, Appellant possessed no expert knowledge or experience in the insurance business. Instead, he relied on the knowledge and experience of Respondent's agent. Further, the actions of Respondent's agent warranted Appellant's assumption that he was properly insured by desired coverage. Still, Appellant did not "abandon all care." See Doub v. Weathersby-Breeland Ins. Agency, 233 S.E.2d 111, 268 S.C. 319, 327 (S.C. 1977) ("Riddle-Duckworth recognizes that an insured cannot abandon all care, 253 S.C. at 423, 171 S.E.2d 486, as plaintiff did in this case."). Rather, Appellant undertook to review the January 23 Plat himself prior to contracting to purchase the Lots, and hired an experienced real estate attorney and title

insurance agent prior to closing. (Complaint p. 3; R. p. 9, lines 3-4).

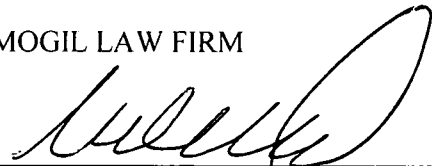
CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, and remit this matter for further trial on the merits.

Dated: May 23, 2013

Respectfully Submitted,

MOGIL LAW FIRM

A handwritten signature in black ink, appearing to read "Michael W. Mogil", is written over a horizontal line.

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RULE 211 CERTIFICATION

I, Michael W. Mogil, undersigned attorney for the Appellant in the above-captioned case, hereby certify that the Final Brief and Final Reply Brief are identical to the briefs previously served under Rule 208, except: (1) references in the initial briefs have been revised to indicate where the material appears in the Record on Appeal; and (2) obvious typographical errors and misspellings which were contained in the initial briefs are corrected. No other changes have been made.



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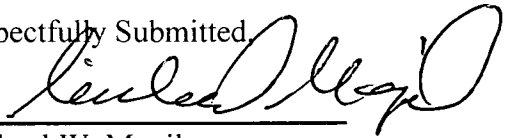
CERTIFICATE OF SERVICE

I, Michael W. Mogil, do hereby certify that on the June 4, 2013, I served true and accurate copies of the Appellant's Final Brief, Final Reply Brief, Record on Appeal and Rule 211 Certification in the above matter, by depositing copies of the same in the U.S. Mail, first class postage prepaid, and addressed to:

Amy P. Hunt
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301 S. College St., Ste. 2600
Charlotte, NC 28202

June 4, 2013

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