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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Appellate Case No: 2026-000090

Jericho State Capital Corp. of Florida, Appellant,

v.

Chicago Title Insurance Company, Respondent, AND Lynx Jerico Partners, LLC, Appellant, v. Chicago Title Insurance Company, Respondent.

REPLY BRIEF OF APPELLANTS

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A. EQUITY CANNOT CURE AMBIGUITY.

Respondent Chicago Title echoes the Special Referee's conclusion that Section 7(a) unambiguously requires damages to be calculated using the foreclosure date, not because that is what the Policies actually say (because they don't), but rather because it contends, based on case law from foreign jurisdictions, the foreclosure date establishes a more proper, fair and equitable result. It focuses first on theory and then employs some extraordinary interpretive gymnastics to circumvent the absence of any such date in the Policies. This is contrary to South Carolina's fundamental rules of contract construction.

The Supreme Court in Whitlock tells us a court must first evaluate whether a contract of insurance unambiguously defines, or identifies with clear language, critical terms, and if it does not, then the contract must be construed liberally in favor of the insured and strictly against the insurer. Whitlock v. Stewart Title, 399 S.C. 610 (2012). Resolving an ambiguity "is not a matter of equity." Id. at 616. When construing a contract, the Court is "not attempting to fashion an equitable remedy", even if the Court appreciates the equity and inherent logic of an opposing view. Id.

1. The Valuation Date is Still Missing.

Despite lengthy, well written legal argument, Chicago Title still cannot quote or specifically identify any Policy language that defines the valuation date or otherwise unambiguously says the date to calculate damages is the foreclosure date. This critical date must be identified, but it simply does not exist in the plain language of the Policies. Nonetheless, relying on the words of Whitlock, Chicago Title argues the Policies provide "clear language" that unambiguously identifies the foreclosure date.

To this end, Chicago Title emphasizes that Section 7(a) establishes a "clear method of valuation." *Respondent's Brief*, p. 15. Without question, it does. Section 7(a)(iii)'s formula to calculate damages is very clear: "the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy." [R.p. 734, 736]. However, this formula or method of valuation, as clear as it is, cannot be implemented without a date, and the applicable date is nowhere to be found. Indeed, Section 7(a)'s method of valuation provides no clear language, or any language at all, that supports Chicago Title's position.

2. Actual Monetary Loss or Damage.

Despite the absence of a specified valuation date, Chicago Title argues Section 7's use of the phrase "actual monetary loss or damage" serves as clear language that requires use of the foreclosure date because that is the only time a lender "realizes upon the value of its collateral." *Respondent's Brief*, p. 15. However, the Policies don't say this either, as there is no Policy language requiring the borrower to default on the loan, requiring foreclosure as a condition precedent, or even requiring a lender to "realize on its collateral" before implementing Section 7(a)'s formula.

Notably, in Whitlock, the insurance company pressed the Court with a similar argument, asserting the insured could only "realize" upon its loss on a certain date. In that case, the majority view, as described by Justice Pleicones in his dissent, reasoned that the insured's loss is "unrealized", and does not become an "actual loss", until the defect is discovered. 399 S.C. at 617 (2012). Just as in this case, imposing some type of realized loss requirement was the insurance company's attempt to leverage equity to give meaning to an undefined term. Because the Whitlock policy failed to define "actual loss" and did not otherwise provide clear language that the valuation date was the insurance company's preferred date, the Court interpreted the policy as written and concluded that a contractual ambiguity cannot be resolved with equity. Id. at 616.

The Policy terms in this case are even more ambiguous than those analyzed in Whitlock. Under Section 7, liability extends to "actual monetary loss **or** damage" sustained or incurred by the insured claimant. Neither term is defined in the Policy. To steer around this, Chicago Title argues that "actual monetary loss" is the same as "damage" because the Policies do not distinguish between the terms. This suggests Section 7 is intentionally redundant and the word "damage" is deliberately pointless.

Chicago Title seeks to validate this unnecessary redundancy by quoting Martin v. Carolina Water Serv., Inc., 280 S.C. 235 (Ct. App. 1984), for the proposition that the word "or" may be used as a particle to connect two words meaning the same thing. *Respondent's Brief*, p. 24. This may be true, but it is an atypical construction. Notably, the Martin Court begins its discussion on this topic by saying, "[a]s used in its ordinary sense, the word 'or' is a disjunctive particle that denotes an alternative." Id. at 238. *See also*, Huckabee Transport Corporation v. Western Assurance Co., 238 S.C. 565 (1961)("The word "or" as it is used in the insuring agreement, is a co-ordinating conjunction introducing an alternative"); Brewer v. Brewer, 242 S.C. 9 (1963)("'Or' generally indicates an alternative corresponding to 'either', as 'either this or that'; that is to say either one or another").

In fact, throughout the Policies, the word "or" is used to reflect alternatives, not same or similar words. For example, just on page one, Chicago Title "insures, as of the Date of Policy… against loss **or** damage…sustained **or** incurred by reason of…[2] Any defect **or** lien **or** encumbrance on the title…[5] The invalidity **or** unenforceability of the lien…[7] Lack of priority…over any statutory lien for services, labor **or** material…arising from an improvement **or** work related to the land which is contracted for **<u>or</u>** commenced prior to the Date of Policy…." [R.p. 734] (emphasis added).

Moreover, incredibly, the Policies use the phrase "loss **<u>or</u>** damage" on at least 29 occasions without an inkling that "damage" somehow means realizing on collateral. For example:

- On page one, Chicago Title insures "against <u>loss or damage</u>";
- Section 1 of the Conditions and Stipulations, entitled "Definition of Terms", defines an insured claimant to be "an insured claiming <u>loss or damage</u>."
- Section 5 of the Conditions and Stipulations is entitled "Proof of Loss or Damage" and requires "the proof of <u>loss or damage</u> shall describe the defect … or other matter insured against by this policy which constitutes the basis of <u>loss or damage</u> and shall state to the extent possible the basis of calculating the amount of the <u>loss or damage</u>."
- Section 8 of the Conditions and Stipulations states Chicago Title shall not be liable for any <u>loss or damage</u> if it removes the defect, or until litigation is complete, or if the insured assumes liability and settles a claim without consent of the insurer.

[R.p. 734-737] (emphasis added).

Despite a Policy section dedicated to definitions, Chicago Title opted to not define the words "loss" or "damage". As to the two long paragraphs describing a "Proof of Loss or Damage", the Policy imposes detailed and comprehensive requirements, but it never suggests these two words are synonymous or that "damage" can only occur following a default by the borrower, foreclosure by the lender, and the lender's realization on its collateral. Finally, the Policy contains an entire section dedicated solely to describing events for which Chicago Title shall not be liable for loss or damage, but it fails to state that the lack of foreclosure is such an event.

"A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation." <u>Pee Dee Stores, Inc., v. Doyle</u>, 381 S.C. 234 (Ct. App. 2009). In this case, the phrase "actual monetary loss or damage" is susceptible to multiple meanings and is not "clear language" of any particular date. On the one hand, according to Chicago Title, the meanings of "actual monetary loss" and "damage" are the same and unambiguously set the foreclosure date as the contractual valuation date. However, this interpretation requires defining undefined terms inconsistent with their plain meanings, using the word "or" in an atypical manner that is inconsistent with its use throughout the Policies, and disregarding the repeated use of the phrase "loss or damage" in contexts inconsistent with Chicago Title's preferred meaning of "damage."

On the other hand, as argued by the Appellants, "actual monetary loss" and "damage" have different meanings and either can trigger liability under Section 7. Both terms are undefined. The word "damage" is used throughout the Policies with no hint that it exists only upon a borrower's default, a lender's foreclosure, and the realization of the lender's collateral. The word "damage" is broad and can mean injury or deterioration, which is what the Appellants' security for the loans suffered due to the defect.[1] The Policies expressly provide that Chicago Title insures for loss or damage "as of the Policy Date", and absent clear language of an unambiguous contrary date, the Policies should be interpreted in favor of the insureds and place them in the position that they thought they occupied when the policy was issued.

No doubt, Chicago Title is concerned the lender could be compensated for a defect resulting in lost security as of the Policy Date while potentially also receiving some or all payments from the borrower. This is an equitable argument that should have been addressed in the Policies. The Policies and Promissory Note are different contracts, each for a separate purpose and each with their own remedies. As Chicago Title will readily admit, the Policies do not insure that the borrower will make payments. The Policies also do not say the lender is insured only if the borrower does not make payments. Instead, Sections 2 and 9 of the Policies says the coverage is *reduced* by the amount of payments received by the lender.[2]

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[1] Deterioration is a very broad term. See, Carter v. Anderson Memorial Hospital, 284 S.C. 299 (Ct.App. 1985) (relating to deterioration of a patient's condition); Pulliam v. Travelers Indem. Co., 403 S.C. 332 (Ct.App. 2013) (relating to deterioration of common elements due to faulty construction); Mickle v. Blackmon, 252 S.C. 202 (1969) (sunlight caused deterioration of plastic knobs).

[2] See Section B of this Argument below.

"The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Nichols Holding, LLC v. Divine Capital Grp., LLC, 416 S.C. 327 (Ct.App. 2016). "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234 (Ct.App. 2009).

These are a Loan Policies. Chicago Title could have unambiguously identified the foreclosure date as the applicable valuation date, but it did not. It could have defined "loss" or "actual monetary loss", but it did not. It could have defined "damage" but elected not to do so. It could have defined the phrase "loss or damage", but it did not. It could have said there is no liability for a title defect unless the borrow defaults on its repayment obligation, but the Policies say no such thing. It could have required that the lender "must realize on its collateral" before damages can be calculated, but that too is absent. Chicago Title is relying on equity and a majority rule to plug the holes, but that is not enough to overcome the absence of a valuation date and the ambiguity that absence creates.

3. Preservation Capital.

Appellants' understanding of the Preservation Capital case is at odds with that of Chicago Title. Nonetheless, the following should not be in dispute: (1) The King Street Parcel suffered a title defect that was a covered loss under the loan policy; (2) due to the defect, the lender was no longer secured by the value of the King Street Parcel; (3) the lender did not foreclose, nor was it required to foreclose, on the King Street Parcel; (4) the lender was entitled to damages under the title policy due to the title defect; (4) the damages were calculated by subtracting the value of the King Street Parcel subject to the defect from its value without the defect, and (5) the date used to calculate those damages under the policy was not the foreclosure date but a different date. Pres. Capital Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309 (2013).

Appellants cite to this case to show that lost security is a valid measure of damages under the Policies and that the damages for lost security can be measured and calculated under Section 7(a) using a date other than the foreclosure date.

4. Foreign Jurisdictions.

Chicago Title urges this Court to adopt the holdings of cases from other states to conclude that Section 7(a)'s damage calculation is only applicable as of the foreclosure date. As described above, a similar landslide of cases from foreign jurisdictions were presented by the insurer to the Whitlock Court to argue only one date can measure a realized loss, but the equity and inherent logic contained in those cases did not change the fact that the Court was tasked with construing an insurance policy and not attempting to fashion an equitable remedy.

Of the many cases cited by Chicago Title, it relies most heavily on two of them. The first, Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 788 S.E.2d 542 (Ga. Ct. App. 2016), reiterates the majority view, but it does not provide actionable guidance. In that case, the appellate court did not evaluate whether the phrase "actual monetary loss or damage" was ambiguous, nor did it discuss whether critical terms were defined, nor whether the subject policy unambiguously set forth clear language that specifically set a valuation date. Instead, the Georgia court seems to have summarily adopted the holdings from other jurisdictions and found them to be persuasive. Given the issues in the instant case, this Court should not adopt the RM Kids holding and its conclusory analysis and should instead construe the Polices under South Carolina law and as described in Whitlock.

The other case is Hodus v. First Am. Title ins. Co., 696 A.2d 1095 (Me. 1997). Similar to RM Kids, the Maine court does not engage in contract interpretation on this issue, nor does it discuss whether the terms actual loss or damage (or any other similar term) were defined or ambiguous, or whether there was any clear policy language setting the valuation date. This case also provides no guidance to the interpretive issues at hand.

At most, the cases cited in the Order and by Chicago Title support the equitable argument that damages can be calculated on the foreclosure date, but these cases, even reflecting the majority view, do not serve as a substitute to construe the Polices under South Carolina law and as described in Whitlock.

5. Policy Sections 2 and 9.

Chicago Title argues that if the Policy Date is used to calculate damages, then Sections 2 and 9 of the Conditions and Stipulations are meaningless. Appellants are unsure how this could be true. If the lender knew of the defect on the Date of Policy, then any claim would be excluded under Policy Exclusion 3.[3] In all other situations, the defect is discovered later. If it is discovered after foreclosure, then Section 2 would apply. If the defect is discovered after the borrower has made payments, then Section 9 would apply.

B. UNDER SECTION 2(c), "PAYMENT" SHOULD MEAN A REAL PAYMENT.

Jericho State did not know of the title defect at the time of foreclosure. Its $9 million bid was based on facts proven to be false, and due to the unknown defect, the Property it received did not have the value to satisfy the debt. Chicago Title essentially argues that according to Section 2(c), this is just tough luck and that any ignorance of the defect is Jericho State's problem, not Chicago Title's.

This is a stunning argument and suggests that the equity urged by Chicago Title may not be so equitable after all. On the one hand, Chicago Title steadfastly maintains that a lender must

[3] This excludes defects "assumed or agreed to" by the insured claimant, as well as those known by the insured and not disclosed to Chicago Title. [R. p. 745].

foreclose to calculate its damages due to a defect, even when the defect is unknown at the time, and if it fails to do so, Chicago Title will pay nothing. At the same time, it contends that when the lender does foreclose and makes a bid that fails to reflect the unknown defect, Chicago Title will still pay nothing.

A contract interpretation leading to an absurd result should be avoided. Koon v. Fares, 379 S.C. 150 (2008). To avoid an absurd result, Section 2(c) of the Conditions and Stipulations should be interpreted to mean that a "payment" is a real payment made for something of real value, not a bid that is rendered meaningless and valueless due to an undiscovered defect.

If the Property was not subject to a defect, then Jericho State's foreclosure bid would act as a "payment" as contemplated in Section 2(c). This is true because Jericho State believed the Property to be free of any defect and that the Property valued at an amount that justified a bid to obtain or purchase it at equal or greater value. This is the very same as was intended and effectuated by the lender in Preservation Capital: the lender bid or made payment of $3,250,000, and in return it received property of that value free from any defect. In other words, the Preservation Capital lender got what it paid for, but in this case, Jericho State did not.[4]

The ambiguities of an insurance contract should be construed liberally in favor of the insured and strictly against the insurer. Whitlock v. Stewart Title, 399 S.C. 610 (2012). Chicago Title "insures as of the Date of Policy…against loss or damage", and since the Polices do not set forth a valuation date, nor otherwise provide clear language that would require any particular valuation date, the Policies should be construed to place the Appellants in the position they thought

[4]On this issue, Chicago Title also cites to Hodas v. First Am. Title Ins. Co., 696 A.2d 1095 (1997). This case, however, involved different facts and a different analysis, as the lender sought damages for a later discovered defect based on the reduced *resale value* evidenced by two subsequent purchase offers, not whether its prior foreclosure bid was a payment. The Maine Supreme Court did not even address whether the foreclosure bid constituted a "payment", and it is unclear whether the policy at issue in that case included the "payment" language that is present in this case.

they occupied when the policy was issued. This does not render Section 2 meaningless. A foreclosure bid that serves as a real payment for the property still reduces the damages otherwise payable under the Policies.

C. SECTION 9(c) SHOULD BE INTERPRETED REASONABLY.

Lynx Jericho contends it is improper to construe Section 9(c) of the Conditions and Stipulations to mean that its claim, which has been pending for 13 years, simply evaporated when it released its mortgage. A more reasonable interpretation is that Chicago Title's liability is extinguished for claims made and/or damages incurred *after* the mortgage was released. This provides certainty and protection to Chicago Title from claims for damages arising after the mortgage is released, while protecting an insured's claim that was timely made and preserved in litigation. This makes sense because according to Section 9(c), it is the act of satisfying the mortgage that terminates liability. In other words, a satisfied mortgage *initiates* application of this section. It is prospective, not retroactive.

Lynx Jericho and Chicago Title disagree as to the relevance of Chicago Title Ins. Co. v. 100 Inv. Ltd. Partnership, 355 F.3d 759 (4th Cir. 2004), and while the case is not offered as binding precedent on the facts at hand, it does reflect a reasonable interpretation of a similar contract provision. The case involved an owner's title insurance policy that stated coverage continued only "as long as [the] insured retains an estate or interest in the land." Id at. 763. Approximately 6 years after conveying the land to a third party, the insured made two claims under the policy: (i) a claim for defense to an alleged trespass that occurred *prior* to the sale, and (ii) a claim for costs incurred six years *after* the sale to reacquire the property. The Fourth Circuit concluded the insurer had a duty to defend the trespass claim under the policy because the events triggering the claim arose prior to the sale, but it found the policy did not cover the reacquisition costs since those were incurred after the sale. This was a fair and reasonable interpretation. Although the policy terminated coverage upon sale of the property, the Court reasonably distinguished a claim arising during the policy period from one that does not.

This reasonable interpretation is also consistent with other provisions in the Policy. For example, on the first page, Chicago Title "insures as of the Date of Policy", meaning it covers claims arising thereafter during the policy period; Section 5 requires that a Proof of Loss or Damage must be furnished within 90 days, suggesting the claim is initiated during the policy period; Section 8(b) states that in the event of litigation, Chicago Title is not liable for loss or damage until there has been a final determination by a court of competent jurisdiction, which suggests a claim remains pending through the end of litigation. These provisions and others are consistent with a very reasonable interpretation that a claim continues to exist if timely made during the policy period, while a mortgage satisfaction ends the policy period with Section 9(c) barring claims made thereafter.

CONCLUSION

Whether Section 7(a) is ambiguous should be evaluated by looking at the four corners of the Policies, not by incorporating equitable theories found only in distant, external sources. Despite many pages of dense policy verbiage, all meticulously written by Chicago Title, the Special Referee could only point to a single undefined, 5-word phrase: "actual monetary loss or damage". That is the *only* policy language actually cited in the Order or by Chicago Title in support of using the foreclosure date to calculate damages. This phrase alone is not clear language that unambiguously means, and can only mean, that (1) before a lender is eligible to calculate damages under Section 7(a), several conditions must be met, including (2) the borrower must default on its repayment obligation, (3) the lender must foreclose on the property, and (4) the lender must realize on the value of its collateral. This Court should find that while all of these detailed requirements may have some equitable appeal, not a single one appears in the Policies, and as such, the Court cannot rewrite the Policy to add new words and fashion an equitable remedy. As written, the Policies are ambiguous as to the valuation date and should therefore be construed in favor of the Appellants.

Section 2(c) should be interpreted to mean that a “payment” is a real payment for something real in return. Chicago Title’s preferred interpretation absurdly results in it never having to pay for any defects covered by the Policy if those defects are unknown to the lender. Like flipping a bad coin, heads it doesn’t pay if the lender doesn’t foreclose, and tails it still doesn’t pay if the lender does foreclose and makes its bid unaware of the defect. Section 9(c) should be interpreted to provide that a mortgage satisfaction triggers its application and all claims made and damages incurred after that date are barred as occurring outside the policy period.

For the reasons set forth in the Appellants’ Brief and as argued above, the Order should be reversed and the case remanded to calculate the Appellants’ damages as of the Policy Date.

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