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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-26-5222
Appellate Case No. 2013-002137

Thomas P. and Desiree J. Lyons, Respondents.

v.

Fidelity National Title Insurance Company as successor by merger to Lawyers Title Insurance Corporation, Bobby Gene Martin, and The Security Title Guarantee Corporation of Baltimore,

Defendants,

Of Whom The Security Title Guarantee Corporation of Baltimore is the

Appellant.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE CASE

Respondents Thomas J. and Desiree Lyons (hereinafter "the Lyons") brought this action against appellant Security Title Guaranty Company (hereinafter "Insurer" or "Security") for breach of a title insurance policy issued by Insurer in the Lyons favor (hereinafter "the Policy") and for bad faith failure to pay. Insurer promised to indemnify title defects on real property owned by the Lyons in Horry County. Though Insurer acknowledges an easement was of record and not excepted when the Policy was issued, it has refused to pay the claim. The issues on appeal result from the trial court's grant of summary judgment in favor of the Lyons on Insurer's obligation to pay under the Policy it issued. The Lyons adopt Insurer's Statement of the Case to the extent it sets forth the timetable of events below.

STATEMENT OF THE FACTS

Below, the Insurer put forth the following set of facts relating to the circumstance by which indemnification is due as being, "undisputed":[1]

"The property subject to this dispute (Subject Property) is located in Horry County, South Carolina, and fronts on the Intra-Coastal Waterway. The Subject Property consists of a residential lot approximately three tenths of an acre in area which was formally located a residence made up of a mobile home onto which a number and additions had been added over the years.

"[The Lyons] purchased the property in two separate transactions. On May 5, 2005, for the stated consideration of $240,000.00, plaintiffs purchased what had been described as lot 1 on a plat of lots 1, 2, and 3 dated August 24, 1970, recorded in the public land records for Horry County. R. at 105-108. The second transaction closed on October 28, 2005, at which time and for the stated consideration of $100,000.00, plaintiffs purchased an approximate 30 by 120 foot strip of property which formerly had been a portion of adjacent lot 2 as shown on the August 24, 1970 plat. R. at 117-120. The entirety of the Subject Property, i.e., lot 1 acquired in May 2005 and the portion of lot 2 acquired in October 2005, is shown as lot 1 on

[1] The trial court's award of partial summary judgment to the respondents was based in large part on the following statement placed in the record by Insurer in support of its Motion for Summary Judgment. R. at 1-3; R. at 229-331.

a plat dated August 24, 2005 and recorded on the public land records for Horry County. R. at 50.

"In conjunction with the first transaction, FNTIC[2] issued the Lyons an owners title insurance policy in the amount of the purchase price and in conjunction with the second transaction, [Insurer] issued the Lyons an owners insurance policy in the amount of the second transaction purchase price.[3] R. at 29-34; 46-52. These policies are substantively identical.

"In 1931, a predecessor-in-title of the plaintiffs conveyed to the State of South Carolina what is generally described as a spoils easement (hereinafter the "Spoils Easement") over the Subject Property and adjacent property. R. at 54-60. This easement is recorded in the land records of Horry County.[4] R. at 56. The Spoils Easement was given so as to provide for the construction and maintenance of what became the Intra-Coastal Waterway.[5] R. at 54-60.

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[2] FNTIC is Fidelity National Title Insurance Company. The trial court also granted the Lyons summary judgment against it. It is not a party to this appeal.

[3] Because the tracts from the first and second transaction were combined in the second transaction and replatted, Insurer's policy covers the entire property and not just the property purchased in the second transaction. R. at 50.

[4] The existence of the Spoilage Easement was missed in the title search and therefore was not included as an exception to coverage in the title policy. The Lyons did not know of the existence of the Spoils Easement when they purchased the property. It is undisputed that the Spoils Easement is not excluded by the Policy. Appellant's Brief 3-4.

[5] Insurer's facts omit that in the early 1980s, the Army Corps of Engineers transferred management of the Spoils Easement to Horry County. It is with that authority that Horry County enacted the "no-build resolution."

"On or about November 4, 2003, the Horry County Council adopted R-143-03, which provides as follows:

> Horry County Council resolves to authorize the issuance of building permits to repair, remodel or replace existing structures within the spoilage easements along the Intracoastal waterway, but to otherwise continue the policy of denying building permits in this area. Mobile homes within the spoil area may only be replaced with mobile homes."

... R. at 238-239.

The Lyons applied for a building permit to build their retirement home on the Subject Property and they were denied because of the "no-build resolution." It was then they learned for the first time of the Spoils Easement. R. at 3.

The Lyons put the Insurer on notice that a non-excluded encumbrance was on their property and demanded indemnification. R. at 239. The Policy provides, among other things, that Insured will pay the "actual loss" suffered as a result of a non-excluded "Covered Title Risk." R. at 127. Those risks include, "10. Someone else has an easement on your land... 13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law. 14. Other defects, liens or encumbrances." R at 129.

Nevertheless, Insurer denied liability on the basis of Exclusion 1 of the Policy. It provides:

> In addition to the exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
- land use
- improvements on the land
- land division
- environmental protection

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at the Policy Date.
This exclusion does not limit the zoning coverage described in Items 12 and 13 of the covered title risks.

R. at 129.

At the same time as the Lyons' claim was being reviewed by the Insurer, its initial lawyer below, Louis Lang, was representing another insurer in a case brought by their neighbor, Joanne Whitlock, involving the identical spoils easement and identical title insurance policy. R. at 240-247. Ms. Whitlock's carrier lost that suit. Nevertheless, Insurer denied the Lyons' pre-suit claim and forced the Lyons to bring this suit. R. at 78-79.

ARGUMENTS

1. The trial court properly interpreted the Insurer-drafted title policy in favor of coverage where the Spoils Easement was admittedly in the public record and was neither located nor excluded.

The trial court granted the Lyons partial summary judgment on their breach of contract claim, finding as a matter of law that the Spoils Easement encumbering the Subject Property was a title defect covered by the Policy. Because the Spoils

Easement was of record when the Policy was issued, not excluded by the Policy and specifically covered by the Policy, the judgment below should be affirmed. Further, the trial court followed a previous interpretation of the identical policy terms and the identical Spoils Easement on a neighbor's property that the Supreme Court favorably followed in determining the date of valuation for damages purposes. *Whitlock v. Stewart Title Guaranty Company*, 399 S.C. 610, 732 S.E.2d 626 (2012). Accordingly, the trial court should be affirmed.

The issue presented by Insurer is not novel and has already now twice been determined favorably in favor of coverage and against the same arguments made by Insurer. In *Whitlock v. Stewart Title Guaranty Company*, 399 S.C. 610, 732 S.E.2d 626 (2012), the Supreme Court accepted a certified question from United States District Court Judge R. Bryan Harwell regarding the date of valuation as to the measure of damages in a case involving one of the Lyons' neighbors, the substantively identical policy, and the same Spoils Easement. Prior to certifying the question, Judge Harwell granted summary judgment to the property owner on liability, rejecting in total the same arguments the Insurer makes here. R. at 240-247. Below, Judge Burch adopted Judge Harwell's rationale.[6] This court should follow Judges Harwell and Birch's interpretation of the contract because 1) the

[6] See Footnote 2 of Judge Burch's order, "In the interest of saving the Court from reinventing the wheel, today's Order restates much of Judge Harwell's summary of the policy terms."

Supreme Court tacitly, if not explicitly, has endorsed this analysis by accepting the certified question;[7] and 2) the manner in which the Supreme Court analyzed the interpretation question in *Whitlock* is identical to the manner in which Judges Harwell and Burch applied.

First, and perhaps most simply, the "Covered Title Risks" explicitly state that among the title risks covered by it are, "10. Someone else has an easement on your land ..." if the same, "affects your title on the Policy Date." R. at 129. An "easement" is defined by the policy as, "the right of someone else to use your land for a special purpose." R. at 130. Insurer acknowledges, as it must that "the easement is recorded in the land records of Horry County and was available for title examination before the policies were issued." Appellant's Brief at 4. Further, the easement is not excluded in the Policy. R. at 313. Accordingly, the Spoils Easement is a Covered Risk and Insurer is liable under the Policy. This Court can affirm the grant of summary judgment on this ground alone.

Appellant has taken the issue further to say there is no coverage because the so-called, "no-build resolution," which prohibits building permits on properties in the Spoils Easement including the Lyons' property, is not the type "public record" anticipated under the Policy. Again, this argument takes the Policy definition

[7] Had the Supreme Court not intended the *Whitlock* summary judgment on liability to be settled law, its valuation decision would be rendered moot or an advisory opinion inasmuch as no damages would be due Ms. Whitlock if the policy was not intended to cover the loss caused by the Spoils Easement.

further than it needs since the Spoils Easement clearly is the type record covered by the Policy because it is, in fact, a public record and no exception is made in the Policy. As the Supreme Court held in *Whitlock*, the purpose of the Spoils Easement is to provide for "construction and maintenance of the Intracoastal Waterway." *Whitlock* at 613, 627.[8] The "no-build resolution" simply effectuates the right of the Army Corp of Engineers to dump sludge, dredge, and spoilage it removes from the Intracoastal Waterway on the Lyons' property.[9] If a stick-built home were present, the Corps' rights would be frustrated.

Nevertheless, if the "no-build resolution" is the applicable public record, even then the trial court was correct in its determination because the Policy reflects a patent ambiguity. As the *Whitlock* court points out:

> Insurance policies are subject to the general rules of contract construction. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning. Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. It is a question of law for the court whether the language of a contract is ambiguous. Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may

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[8] Insurer uses this identical language to describe the rights of the easement holder in its brief. Appellant's Brief at 3-4.

[9] The "no-build resolution" can also rightfully be considered another "defect, lien, or encumbrance" as defined by the Policy's "Covered Title Risk". R. at 129.

> generally be defined as liens and encumbrances that result in a loss in the title's value.

Whitlock at 614, 628 (internal citations omitted). Judge Harwell's reasoning in his *Whitlock* order granting her the same liability relief granted the Lyons, which the Judge Birch adopted, was more direct on the issues here:

> [A] contract is ambiguous only when it may fairly and reasonably be understood in more ways than one... Common sense and good faith are the leading touchstone of the inquiry. Even if an ambiguity exists in a contract, extrinsic evidence may not be considered if the ambiguity is a patent ambiguity. A patent ambiguity is one that arises upon the words of a will, deed, or contract... a latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described to the object or subject described ... Interpretation of an unambiguous policy, or a policy with a patent ambiguity is for the court.

Order granting summary judgment to plaintiff in *Whitlock v. Stewart Title*, C/A 4:10-cv-01992-RBH, pp. 4-5 (internal citations omitted). R. at 243.

The Policy provision relied on by Insurer to deny coverage is Exclusion 1, which provides:

> In addition to the exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees and expenses resulting from:
> 1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws **and regulations** concerning:
> - land use
> - **improvements on the land**
> - land division
> - environmental protection
>
> **This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at the Policy Date.**

> This exclusion does not limit the zoning coverage described in Items 12 and 13 of the covered title risks.

(Emphasis added). R. at 129. The term "public records" is defined as, "title records that give constructive notice of matters affecting your title- according to the state statutes where your land is located." R. at 130. South Carolina defines public records to include "generally all instruments in writing conveying an interest in real estate..." S.C. Code Ann. § 30-7-10. Further, the Policy specifically provides as a "Covered Title Risk," those matters which prohibit use of, "the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law." R. at 129. The exclusion specifically covers "regulations" that concern "land use" and "improvements on the land" in effect on the date the Policy was issued. R. at 129.

It is undisputed that the "no-build resolution" was in force on the date the Lyons purchased the Subject Property. It cannot be argued that the "no-build resolution" is not a regulation that concerns "improvements on the land." Rather, Insurer contends that the "no-build resolution" was not a "public record" and that a mobile home is a single-family residence.

The trial court properly rejected both arguments. It determined the "no-build resolution", which is unquestionably a record available to the public inasmuch as it was enacted by a public body, could be understood in either way. R at 5. As such, applying the recognized standards of interpreting insurance

contracts, the trial court found the term ambiguous and held in favor of coverage. See *Whitlock* at 614, 628. More to the point, the Policy specifically covers use as a single-family home and specifically covers regulations impacting improvements to the insured land. R. at 128-129. Clearly, the intent of the drafter (the Insurer) and parties overall was to insure the use of the property for a stick-built homes. To have held as the Insurer demands would frustrate the intent of the insurance policy it sold as a whole.

The trial court also properly held that a mobile home is not a single-family residence. "Single-family residence" is not a defined term under the policy.[10] Judge Birch, following Judge Harwell's reasoning, found the term patently ambiguous since it is not defined and can be decided in more than one way. R. at 5. As such, it held, as it was required to, in favor of coverage: a mobile home is not the stick-built home intended by the Lyons when they purchased the property. *Whitlock* at 614, 628 ("Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.").

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[10] The apparent intent of the Policy bolsters the trial court's finding. "The Policy insures your title to the land described in Schedule A- if that land is a one-to-four residential lot or condominium unit." R. at 128. A one-to-four residential lot would include a small apartment building or a single-family home. A condominium unit would include a single unit in a building. S.C. Code Ann. §29-7-20 (c) ("Condominium ownership" means the individual ownership of a particular apartment in a building and the common right to a share, with other co-owners, in the general and limited common elements of the property"). Each of these units are stick-built and specifically insured. Hence, it appears the intent of the drafter was to cover stick built structures, lending further credence to the trial court's holding.

Almost by admission, Security Title refers to none of these laws and tenants in its argument. Quite clearly, the trial court was correct in its determination and it should be affirmed.

2. The trial court properly determined the Policy was intended to be a sealed instrument subject to the twenty-year statute of limitations because the document clearly contains Security's seal on it.

The trial court held as a matter of law that Security's policy is a document under seal and, accordingly, the applicable statute of limitations is 20 years. S.C. Code Ann. §15-3-520. Because the face of the Policy drafted by Security clearly has a seal on it, the trial court should be affirmed.

As Insurer notes in its argument, a document will be construed as a sealed instrument, "where the contract clearly evidences an intent to create a sealed instrument." *Carolina Marie Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005); *see also Wallingford v. Western Union Tel. Co.*, 60 S.C. 201, 38 S.E. 443 (1901)(holding that an official seal is not necessary where use of the word "seal" or other indication of a seal is present).[11] Insurer's argument requests the Court ignore the express black-and-white writing of the document it drafted.

[11] While inapplicable because the Policy clearly has a seal on it, the Court's attention is urged to S.C. Code Ann. § 19-1-160 (1975): "Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto." The intent of the parties is the guiding principle for the determination.

R. at 127. The Policy clearly has the corporate seal of Security Title on it; hence, it is explicitly a document under seal entitled to the 20-year statute of limitations.

However, even if the circular imprint next to the Insurer's president's signature were in question, the intent to create a sealed instrument is clearly established. Applying the recognized rules of statutory construction discussed fully above, *supra* pp. 8-9, the court's duty is to determine the intent of the parties. Reading the contract against the Insurer/Drafter and in favor of coverage, the document evidences a clear intent to create a sealed instrument. Such an intention makes sense given the purpose of the Policy, which is to protect purchasers of residential property from unknown title defects. R. at 128. Inasmuch as many people purchase their homes with the intent of staying for many years, having a 20-year statute of limitations for title policies ensures that policyholders can carefully watch situations as they unfold before bringing unnecessary claims or litigation.[12]

For these reasons, the intent of the parties is clearly to create a sealed instrument and the 20-year statute of limitations applies. The Court's order so determining should be affirmed.

[12] The standard residential note and mortgage, for instance, is 30 years.

3. The trial court properly rejected the failure to mitigate defense since mitigation of the Spoils Easement is impossible.

"A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages." *Baril v. Aiken Regional Medical Center*, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002). The trial court correctly held that some evidence of an easement impacting a dock over navigable waters of the United States does not require sale of the entire parcel. R. at 7. However, there are more basic reasons to reject Insurer's arguments.

First, the duty to mitigate is the damage caused by a person from whom a claim is made. *Baril, supra.* Here, the title carrier did not cause the damage; the policy is issued to the Lyons to protect against such damages. *Whitlock v. Stewart Title,* 399 S.C. 610, 732 S.E.2d 626 (2012) citing *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008). ("A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value."). In fact, the Policy provides the Insurer the right to mitigate on its own on behalf of the insured. Among other things, the Insurer can, "pay the claim against you; negotiate a settlement; or take other action which will protect you; [or] cancel this Policy by paying the Policy

Amount then in force and only those costs, attorneys fees, and expenses incurred up to that time which we are obligated to pay." R. at 130. In many ways, the Policy itself is one created to mitigate title damages. Accordingly, there is no duty to mitigate in this incident.

Even assuming there is such a duty, the Insurer's argument fails when taken to its logical conclusion. Security's argument assumes that the Lyons could have provided the buyer with clean title. This is a conclusion even it admits was impossible because the Spoils Easement was of record and sullied the title. Appellant's Brief at 3-4 ("The easement is recorded in the land records of Horry County and was available for title examination before the policies were issued."). As a result, the sale could never have been successfully concluded and the claimed failure to mitigate on the proposed contract to sell would not have been successful.

For these reasons, the trial court correctly rejected the mitigation defense.

4. Because the Policy insures the use of the property as a single-family residence and the property cannot be used for the same, the trial court should have awarded the full amount of the policy to the Lyons.

Insurer argues the trial court erred in determining the date on which damages is calculated should be based on the date on which it received notice of the claim, even though the Supreme Court determined in *Whitlock*, 399 S.C. 610, 732 S.E.2d 626 (2012), that the proper date of valuation is the date of the issuance of the

policy.[13] Appellant's Brief at 23. The trial court applied the holding in the Whitlock case, involving the Lyons' neighbor. Not decided in *Whitlock* was the Insurer's obligation to tender the full amount of the policy where, as here, the Policy insures a specific use. Because the policy insures use as a single-family residence and such a use is not possible, Security should be ordered to pay the face amount of the policy.

"In the context of establishing a method of valuation in a title policy ... '[t]he terms of individual insurance agreements can control the method of valuation.'" *Whitlock* at 615, 628, *quoting Stanley*, 377 S.C. at 411, 661 S.E.2d at 65. The Policy promises to pay the 'actual loss' suffered as a result of a, "title risks, if they affect your title on the Policy Date [including]: 13. You cannot ***use*** the land as a single-family residence because such ***use*** violates a restriction shown on Schedule B or an existing zoning law." (emphasis added). R. at 130. While some policies may not insure use, this Policy, by its very terms, does. As Insurer points out, the normal rules of contract construction applies to this question, as well. Because the Policy unambiguously insures use, and is read against the drafter and in favor of coverage, Security should be ordered to pay the full amount of the policy.

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[13] The Lyons question whether this issue is properly before the court inasmuch as the trial court denied summary judgment to the Lyons on the issue. A denial of summary judgment is generally not directly appealable. *Proctor v. Whitlark & Whitlark, Inc.,* 406 S.C. 225, 750 S.E.2d 93 (Ct. App. 2013). Nevertheless, since Insurer has raised the potential issue of law to the court, the Lyons argue it for the court's consideration of their position.

CONCLUSION

For the reasons stated herein, the trial court's grant of summary judgment should be affirmed and the matter remanded to the trial court with instructions to entered judgment on the Lyons' breach of contract claim in their favor in the amount of $100,000.00 plus prejudgment interest. The Lyons pray for the relief requested herein and such other relief as the court deems just, prudent and proper.

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16th day of April, 2014

Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
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Of Whom The Security Title Guarantee Corporation of Baltimore is the Appellant.

PROOF OF SERVICE

I certify that I have served the RESPONDENT'S FINAL BRIEF on Appellant's counsel at the following address:

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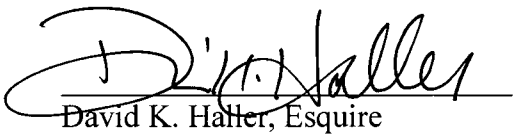

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CERTIFICATION OF COUNSEL

I certify that the forgoing Final Brief of Appellant complies with Rule 211(b), SCACR.

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April 16, 2014

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