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-26-05222
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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an action for breach of contract and for bad faith failure to pay insurance claims commenced by Plaintiffs, Thomas P. Lyons and Desiree J. Lyons (Lyons), on July 5, 2012 by the filing a Summons and Complaint against Security Title Guarantee Corporation of Baltimore (Security) and Fidelity National Title Insurance Company as successor by merger to Lawyers Title Insurance Corporation (Fidelity). (R. pp. 11 - 93) Plaintiffs filed an Amended Summons and Complaint on July 19, 2012. (R. pp. 94 - 160) Security and Fidelity filed Answers to the Amended Complaint on

October 1, 2012. (R. pp. 223 - 232 and pp. 263 - 272) The Lyons filed a motion for summary judgment solely on the issue of liability for breach of contract against Security and Fidelity on December 20, 2012, and filed an amended motion for partial summary judgment on January 10, 2013. (R. pp. 171 - 189 and pp. 235 - 262) Security and Fidelity filed responses to the Lyons' motion for summary judgment and filed cross-motions for summary judgment on May 7, 2013. (R. pp. 190 - 222 and pp. 273 - 302) A hearing on the plaintiffs' motion for partial summary judgment was conducted on May 15, 2013 before the Hon. Paul M Burch who issued an order dated July 8, 2013 granting partial summary judgment in favor of the Lyons. (R. pp. 393 - 415 and pp. 1 - 8) Security filed and served a motion to reconsider on July 26, 2013 pursuant to SCRCP 59(e). (R. pp. 331 - 380) Judge Burch denied Security's motion to reconsider by order dated August 9, 2013. (R. p. 9) The order denying the motion to reconsider was filed in the office of the Clerk of Court for Horry County on August 12, 2013. (R. p. 9) Security timely filed and served its notice of appeal, and filed and served an amended notice of appeal on October 18, 2013. (R. pp. 381 - 388 and pp. 389 - 392)

FACTUAL BACKGROUND

The real estate (Property) subject to this dispute is located in Horry County, South Carolina and fronts on the Intracoastal Waterway. The Property is a residential lot approximately three tenths of an acre in area upon which was formerly located a residence made up of a mobile home onto which a number of extensions and additions had been added over the years. Plaintiffs purchased the property in two separate transactions. On May 5, 2005, for the stated consideration of $240,000, Plaintiffs purchased what was 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. The second transaction closed on October 28, 2005, when plaintiffs, for the stated consideration of $100,000, purchased an approximate 30 foot by 120 foot strip or sliver of land which was a portion of adjacent lot 2 as shown on the August 24, 1970 plat. A plat of the entire Property, i.e: lot 1 acquired in May 2005 and the portion of lot 2 acquired in October 2005, is designated as lot 1 on a plat dated August 24, 2005, and recorded in the public land records for Horry County.

In conjunction with the first transaction, Fidelity National Title Insurance Company (Fidelity) issued the Lyons an owners' title insurance policy in the amount of the purchase price. In conjunction with the second

transaction, Security Title Guaranty Company of Baltimore (Security) issued the Lyons an owners' title insurance policy in the amount of the second transaction purchase price. (R. pp. 1-2 and Security Policy at R. pp. 248 - 254)

In 1931, a predecessor-in-interest of plaintiffs conveyed to the State of South Carolina what is generally described as a spoils easement over the Property and adjacent property. The easement is recorded in the land records of Horry County and was available for title examination before the policies were issued. The spoils easement was given for the construction and maintenance of what became the Intracoastal Waterway. (R. pp. 2 - 3)

On or about November 4, 2003, the Horry County Council adopted Resolution R-143093, (no-build resolution) which provided:

> "Horry County Council resolves to authorize the issuance of building permits to repair, remodel or replace existing structures within the spoil 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. pp. 2-3)

Plaintiffs wanted to construct a stick-built home on the Property, and assert Horry County refused to issue them a building permit to build a residence on the subject property due to the no-build resolution. (R. pp. 2-3, R. p. 203 (Answer to Int. # 13)) Plaintiffs listed the property for sale,

removed the existing structure from the property, but refused to accept an offer that would have generated them a profit from the sale of the Property. (R. p. 221, R. p. 203 - Answer to Int. # 13, R. p. 221)

Plaintiffs filed claims against Fidelity and Security. Security Title denied the claims. (R. pp. 209-210) Fidelity never responded. (R. p. 338) This suit followed.

STANDARD OF REVIEW

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 619-620, 622 S.E.2d 733, 737 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 269-270, 603 S.E.2d 629, 631 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 213, 609 S.E.2d 565, 267

(Ct. App. 2005). If triable issues are present, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 595, 608 S.E.2d 587, 592 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 338, 611 S.E.2d 485, 487 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 324, 608 S.E.2d 155, 158 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004); see also Schmidt v. Courtney, 357 S.C. 310, 316, 592 S.E.2d 326, 330 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 541, 608 S.E.2d 440, 447 (Ct. App. 2004).

Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991); Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345

S.C. 440, 452, 548 S.E.2d 868, 874 (2001)); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct. App. 2004). Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 289, 594 S.E.2d 557, 561-562 (Ct. App. 2004).

ARGUMENT

1. Did the trial judge err in finding that the Plaintiffs' claims against Security Title were not barred by the statute of limitations?

Security raised an affirmative defense that Plaintiffs' claims were barred by the statute of limitations. (R. p. 231 - Eighth Defense) The circuit court did not address the defense, but held that that policy was a sealed document and therefore subject to the 20-year statute of limitation. (R. pp. 5 - 6) Security argued that the mere affixation of a corporate seal did not make its policy a document under seal. (R. pp. 195 - 196, 342 - 348, 409) The circuit court denied Security's 59(e) SCRCP motion to reconsider the issue. (R. p. 9) Security believes that the circuit court erred in finding that the Plaintiffs' claims were not barred by the statute of limitations.

Documents produced by the United States Army Corps. Of Engineers (COE), in response to a subpoena indicate plaintiffs knew or should have known the property was the subject of the spoils easement as early as October 20, 2006. (R. pp. 208 - 210) Specifically, a document entitled "Joint Public Notice" which was issued in conjunction with plaintiffs' application to construct a dock on their property says " .... [i]t is understood that this work will be conducted on/or adjacent to an area subject to a prism and/or disposal easement held by the United States." (R. p. 211) Further, in a letter dated March 19, 2007, addressed to the Lyons, in the care of the company doing the dock design work, the COE said, " ... [i]t is recognized that this structure is to be constructed on/or adjacent to an area subject to a prism and/or disposal easement held by the United States in perpetuity in conjunction with a Congressionally authorized project for the maintenance and improvement of the Atlantic Intracoastal Waterway . . . ." (R. p. 368)

S.C. Code Ann. § 15-3-530(1) provides a 3-year limitations period for contract actions. This limitations period begins to run when "the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct." Martin v. Companion Healthcare Corp., 357 S.C. 570, 575-576, 593 S.E.2d 624, 627 (Ct. App. 2004) (citations omitted). In any event, plaintiffs knew or should

have known of the spoils easement as early as October 2006, more than 3 years before this action was filed, because any knowledge plaintiffs' agent (the company plaintiffs' engaged for their dock design) had concerning the spoil easement, would be imputed to them. Crystal Ice Co. of Cola., Inc. v. The First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979).

Under section 15-3-530(1), "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520" must be commenced within three years. S.C. Code Ann. § 15-3-530(1). Section 15-3-520(b) provides that, within twenty years, an action must be commenced "upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-530, except that a sealed contract for sale or an offer to buy or sell goods whereon the period of limitation is the same as prescribed in Section 36-2-725." S.C. Code Ann. § 15-3-520(b).

The Policy being litigated in this case is a standard 1987 American Land Title Association ("ALTA") Owners Policy Form. (R. pp. 248 - 254) As is evident from the Policy, the Policy is only valid if the jacket and Schedule B are countersigned by an authorized officer or agent of Security. (R. pp. 248 and 254 - signature lines) Thus, the standard ALTA forms are generated, provided to agents of a title insurance company, and the agents of

the title insurance company complete and sign the policy jacket and Schedule B thereby affording coverage. Here, the Policy appears to contain the seal of Security beside what appears to be pre-printed signatures of the President and Secretary of Security. (R. p. 248) Above the signature of these preprinted signatures, the Policy states it is "not complete without Schedules A and B". (R. p. 248) However, there is no seal on either Schedule as opposed to the pre-printed signatures of the President and Secretary of Security. Cf. O'Cain v. O'Cain, 32 S.C.L. 402, 1 Strob. 402, 1847 WL 2133 (1847) (holding where a note has been signed and sealed by one person, and another signs his name under that of the first signer, but not opposite to his seal, making no seal of his own, and nothing being on the face of the paper sufficiently indicative of the intention to seal, and there being no evidence of an intent to seal, the seal of the second person cannot be inferred from his signature alone.) The purpose of the seal in this instance is to show that it is the act of the corporation. Am. Jur. Corporations § 255 (2009) ("The attachment of the corporate seal to an instrument signed by corporate officers generally shows prima facie that it is the act of the corporation."). Furthermore, the purpose of the seal on the Policy is to show that the company's agent is authorized to complete the policy Schedules to make the Policy valid. In essence, this language confers authority on Security's agent

to complete the blank form ALTA Policy by completing the Schedules. "The mere affixation of a corporate seal to a document does not automatically raise it to the status of an instrument under seal." id. "The seal of a corporation is not, in itself, conclusive of an intent to make a specialty. It is equally appropriate as a means of evidencing the assent of a corporation to be bound by a simple contract as by a specialty." Central Nat. Bank v. Charlotte, C. & A. R. Co., 5 S.C. 156, 1874 WL 5344 (1874). In fact, in Republic Contracting Corp. v. South Carolina Dep't of Highways & Pub. Trans., 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998), the Court found the mere fact that an engineer's seal was attached to plans did not result in a sealed instrument. id; see also Aronow Roofing Company v. Gilbane Building Co., 902 F.2d 1127 (3d Cir. 1990) ("The mere existence of the corporate seal and the use of the word 'seal' in a contract do not make the document a [sealed instrument]....) Consolidated Rail Corp. v. Liberty Mut. Ins., 2002 WL 32080503 (Del. Super. 2002) (finding "the weight of the cases in this area favors the conclusion that the absence of even a symbolic seal precludes invoking the exception to [the general breach of contract limitations period], while the mere presence of a seal and a testimonium clause are not enough to create a sealed instrument. Except where mortgages are concerned, the simple use of formalities and boilerplate unaccompanied

by substantive evidence of the parties' intent to seal it is not enough to turn an ordinary contract into a [sealed instrument]."). Our Court of Appeals in Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005), stated that "[w]e adhere to our general three-year statute of limitations for most contract actions and acknowledge the availability of the twenty-year limitations period where the contract clearly evidences an intent to create a sealed instrument." Id. at 175, 609 S.E.2d at 552. There is no case in South Carolina finding that an insurance contract containing a seal is a sealed instrument for the purposes of section 15-3-520(b). The Maryland Supreme Court, however, has addressed this issue in the context of an insurance policy in GildenHorn v. Columbia Real Estate Title Insurance Company, 271 Md. 387, 317 A.2d 836 (1974). In that particular case, although the court found the policy was a specialty, it did so because there was a recital showing an intention to have it serve the function of a general seal. The court specifically held that the mere presence of a corporate seal without reference to the seal in the instrument is not sufficient in and of itself to show that the instrument is a sealed instrument. Our policy contains no such reference.

If the 20-year time limitations period applicable to sealed instruments applies in this case, then the Lyons could have waited until the year 2026 to

file this action on a policy issued in 2005 when the Lyons knew or had reason to know to file a claim in as far back as the date they purchased the policy, depending on the court's interpretation of the date the Lyons knew they had a cause of action. After all, "statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. See Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956); City of Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004). Significantly, "[s]tatutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims." In re Elkay Indus., Inc., 167 B.R. 404, 408 (D.S.C. 1994), "Moreover, limitations periods discourage plaintiffs from sitting on their rights," id. at 408-09. Statutes of limitations are, indeed, fundamental to our judicial system. Carolina Marine Handling, 363 S.C. at 176, 609 S.E.2d at 552. In that regard, the Court should have rejected plaintiffs' attempt to turn an ordinary breach of contract claim into a claim under a sealed instrument.

2. **Did the trial judge err in holding as a matter of law that a county "no-build" resolution was in the public records as defined under the title insurance policy and available for title examination when the policy was issued?**

Security initially denied coverage in part because of Exclusion 1 of its policy. (R. pp. 78 - 79, 82) Exclusion 1 in the policy provides in pertinent part: "[Y]ou are not insured against loss . . . resulting from: Governmental policy power, and the existence or violation of any law or government regulation. This includes building zoning ordinances and also laws and regulations concerning: land use, improvements on the Land . . . . This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date." (R. p. 82) The circuit court judge held as a matter of law that Security's policy Exclusion 1 did not exclude coverage in this case because the no-build resolution appeared in the public record at the policy date. (R. pp. 4 - 5)

Security disputes whether the no-build resolution was in the "public record" as defined in the policy. The court reasoned that the term "public record" could fairly and reasonably be understood to include a county resolution. (R. p. 5) Security believes that the court erred in its reasoning by failing to take the entire definition of "public records" in the policy into account. The policy defines public records as: "Public records - title records

that give constructive notice of matters affecting your title - according to the state statutes where your land is located." (R. p. 83 - Policy definitions)

Security believes that matters revealed by examination in the office of the Register of Conveyances, the Clerk of Court's office, the County Treasurer, Probate Court, and federal records depositories are the locations title records that give constructive notice of matters affecting title. As a practical matter, South Carolina real estate practitioners are taught to examine the records of these offices. See Claire T. Manning, Esquire, Handbook for South Carolina Dirt Lawyers 13-23 (2d ed. 2008). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655 661 S.E.2d 791, 797 (2008) (quoting Sloan Constr. Co. v. Cent. Nat'l Ins Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). The Horry County resolution is not recorded in the recognized public records, therefore it is not part of the public records as defined in the policy. Title policy provisions are based upon the results of title examinations. If title examination included a review of county resolutions, a title examiner would be confronted with the impracticable (if not impossible) task of searching through the minutes of every meeting of every public body in the county with potential control over real estate. Such

an examination could conceivably require a never-ending search in a plethora of records in a variety of locations, potentially including books and records located in state agencies as well as county and local offices. Security also submits that a council resolution is different from an ordinance, assuming a title examiner or closing attorney researched county ordinances when abstracting title to real estate. Except in the case of nonconformities, the South Carolina Code of Laws requires that zoning regulation be established by ordinance. (See S.C. Code Ann. §§ 6-29-710 et. seq. (Revised 2004)) Ordinances are statements of the law and usually codified. Resolutions are not. In any event, the court should not have rewritten the policy which it did by failing to use the entire language in the policy defining "public record". Finally, since zoning regulations are required to be established by ordinance, the Lyons were already deemed to know the zoning regulations when they purchased the property. "Citizens are charged with knowledge of existing law." Labruce v. City of North Charleston, 234 S.E.2d 866, 268 S.C. 465 (S.C. 1977) It would simply be unconscionable to overwrite Security's exclusion to grant a benefit that the Lyons knew they were not entitled to have when they purchased the property.

3. **Did the trial judge err in holding that a zoning resolution imposing a land use restriction was a defect in title triggering coverage under Security Title Company's title insurance policy and not excluded from coverage as a governmental policy power under Exclusions No. 1 of the title insurance policy?**

Security concedes that its policy does not define "single-family residence". (R. p. 249 - Covered Title Risks) The parties dispute whether a mobile home, a permitted use on this particular property, is a "single-family residence" as the term is used in the policy or if the lack of a definition should trigger coverage because the Lyons cannot construct a site-built house on the property. The circuit court ruled that Covered Title Risk 13 provides coverage because Plaintiffs cannot use the land as a single-family residence due to the existing zoning law preventing them from building a site-built home on the property. (R. pp. 4 - 5) Security respectfully submits that the court's interpretation is too broad since the Lyons could have replaced their existing mobile home with another. Security believes the court erred in determining that the zoning coverage was invoked at all. The Lyons wanted to replace a mobile home with a site-built home. (R. p. 5, p. 395, line 25 - 397, line 1) Nothing prohibited the Lyons from using the property for a single family residence.

Title insurance indemnifies against loss from defects, liens, or encumbrances affecting title. The asserted refusal of Horry County to issue

plaintiff a building permit is not a matter affecting title. Elysian Inv. Group, LLC v. Stewart Title Guar. Co., 105 Cal. App. 4th 315, 129 Cal. Rptr. 2d 372 (2002). In Elysian, recorded on the public land records was a notice from the Department of Building and safety to the effect that the premises located on the property was substandard and subject to forced removal. There was no exception in the title policy for this notice. The court nevertheless granted the title insurance company summary judgment holding the notice did not affect title to the property, only its use. See also Haw River Land & Timber Co., Inc. v. Lawyers Title Ins. Corp., 152 F.3d 275, 278 (4th Cir. 1998) (applying North Carolina law, and cited with approval in Shea Homes, LLC v. Old Republic Nat. Title Ins. Co., 2007 WL 3334210 (W.D. N.C. 2007) ("...[T]itle to property does not characterize the property as valuable, merchantable or even usable...."); McMaster v. Strickland, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991) ("While the purchaser may not be able to use the property for the purpose for which he sought [because of a wetlands determination], such does not mean the sellers cannot deliver marketable title."). The same analysis applies here - the asserted refusal of Horry County to issue plaintiffs a building permit does not affect the Lyons' title to the property, only its use. The circuit court judge left this matter unaddressed and denied Security's 59(e) SCRCP motion to

reconsider the issue. (R. pp. 1-8, 337 - 339 and 12) The Lyons merely had to replace their admittedly existing mobile home with another mobile home, thus there was no defect in their title, merely a restriction on the use of the property.

United States Census records for 2011 indicate that 6.8 percent of all Americans live in mobile homes. (R. pp. 339 - 341, 351) United States Census records for 2008 indicate that 17.9 percent of total housing units in South Carolina are mobile homes. (R. pp. 339 - 340, 366) Our own General Assembly implicitly recognizes that mobile homes are ordinarily used as single-family residences. See S.C. Code Ann. § 27-40-210 (Revised 2007). Empirical data proves that mobile homes are currently being utilized as single-family residences for a significant number of South Carolinians. Thus, the property can indeed be used for a residence. Most importantly, the court's interpretation of the policy opens Pandora's box for every title insurer in the state requiring specific provisions to exclude any type of structure one could imagine, yet ignoring a restriction on land use ordinances which do not affect title to the property. Therefore the method of construction should have no bearing on title to the property and this court should rectify such an overbroad interpretation of the policy terms.

4. Did the trial judge err in finding that the Plaintiffs did not mitigate their loss when they rejected an offer to purchase of the property that would have reaped the Plaintiffs a substantial profit?

In its answer, Security raised a defense that the Lyons failed to mitigate their damages. (R. p. 231 - Fifth Defense) Security's policy contains section 6(a) of the Conditions of the Policy which provides in pertinent part: "We will pay up to your actual loss . . . when the claim is made". (R. p. 376) Security's policy also contains section 6(e) of the Conditions of the Policy which limits the liability of the company by stating: "I f you do anything to affect any right of recovery you may have, we can subtract from our liability the amount by which you reduced the value of that right". (R. p. 376) Security believes that the Plaintiffs' duty to mitigate damages arose both by operation of law and contractually. In this case, Security believes that Plaintiffs' actions invoke the doctrine of avoidable consequences, and they have thus failed to mitigate their damages. "The duty to mitigate losses applies to contracts." Cisson Const., Inc. v. Reynolds & Associates, Inc., 429 S.E.2d 847, 311 S.C. 499 (S.C. Ct. App. 1993) "The reasonableness of a party's actions to mitigate damages is a question of fact which cannot be decided as a matter of law when there is conflicting evidence." McClary v. Massey Ferguson, Inc., 291 S.C. 506, 511, 354 S.E.2d 405, 408 (S.C. Ct. App. 1987).

The Lyons paid a total of $340,000 for the lots. (R. pp. 24 - 27 and 34 - 39 - Deeds) Mr. Lyons gave deposition testimony that the property was "useless", but listed it for sale at $539,000 by "fishing" for a sales price, and was offered $475,000 for the property after listing it on the market. (R. p. 262 - Thomas Lyons deposition lines 4 - 7; R. p. 221, T. Lyons deposition p. 34, lines 1 - 4; R. p. 221, T. Lyons deposition at lines 16 - 17) Had the Lyons accepted the offer, they would not only have recouped their initial investment but would have also reaped a profit from the sale. Security believes that the amount of damages, or lack thereof as a consequence of the Lyons' failure to mitigate, left the issue open for determination by a jury. "[T]he amount of damages is a question for the jury." Perry v. Green, 313 S.C. 250, 255, 437 S.E.2d 150, 153 (S.C. Ct. App. 1993) (citing Bonaparte v. Floyd, 291 S.C. 427, 438, 354 S.E.2d 40, 47 (S.C. Ct. App. 1987)); see also Charles v. Texas Co., 199 S.C. 156, 183, 18 S.E.2d 719, 725 (1942); Weeks v. Carolina Power and Light Co., 156 S.C. 158, 169, 153 S.E. 119, 123 (1930); Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 232, 317 S.E.2d 756 (Ct. App. 1984). While acknowledging the duty to mitigate, the trial court elaborated: "[I]t cannot be said that after the discovery of an easement held by the United States that prevents construction of a dock, the law requires one to sell the entire property or be thwarted from bringing suit

against his title insurance company at a later date; such a requirement would call for a party to exert himself unreasonably". (R. pp. 5 - 6) The court did not analyze how the Lyons would have exerted themselves unreasonably by selling the property at a profit, especially in light of the fact that they wanted to build another house without having to borrow money, and actually removed the pre-existing structure from the property. (R. p. 342 - Argument V)

Finally, the circuit court did not address Security's argument that the matter of damages is excluded from coverage as a matter created, suffered, assumed or agreed to by the insured claimant in that the insured demolished the existing home on the property. (R. p. 342 - Argument V) Although the Lyons have made it clear that they would not want to use the property for a residence, by removing the home from the property, the no build resolution would now prohibit anyone else from replacing the mobile home that was already on the property as a result of the Plaintiffs' actions. (R. p. 2 - no build resolution)

Security believes that there is a genuine issue of material fact as to whether the Lyons acted reasonably in failing to mitigate their damages by way of avoiding consequences and through their own acts in removing the

pre-existing structure, and therefore the trial court erred in granting their motion for summary judgment.

5. Did the trial judge err in his determination when the date of loss was to be calculated?

The circuit court's order, citing Whitlock v. Stewart Title Guaranty Co., 399 S.C. 610, 732 S.E.2d 626 (2012) states that the "damages are to be calculated based on the diminution in value caused by the title defects, measured from the date the property was purchased". (R. p. 7) Security's policy states in paragraph 6(a) that the company "will pay up to your actual loss or the Policy Amount in force when the claim is made - whichever is less." (R. p. 376) Notably, the circuit court did not find that this provision of the policy was ambiguous or that there were conflicting terms in the policy concerning damages. See McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). The trial court merely found that damages were still to be determined and therefore not ripe for summary judgment. (R. p. 7) The court ordered "that damages are to be calculated based on the diminution in value caused by the title defects, measured from the date the property was purchased". (R. p. 7) It did not specify a date on which the calculation should be based, but Security believes that the court decided the issue by implication using the Whitlock standard of calculation. According to the terms of the policy, Security believes that the loss (diminution in value)

should be calculated based on the value of the lot when Security received the Lyons claim. (R. p. 376) Even Whitlock recognized that when a title insurance policy "'unambiguously identifies a date for measuring the diminution in value of the insured property . . . such date . . . . is controlling." Whitlock 399 S.C. 610, 613, 732 S.E.2d 626, 627. Security's interpretation is reasonable and the policy terms are unambiguous. "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). [399 S.C. 615] "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." McGill, 381 S.C. at 185, 672 S.E.2d at 574. "It is a question of law for the court whether the language of a contract is ambiguous." McGill, 381 S.C. at 185, 672 S.E.2d at 574. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." Clegg, 377 S.C. at 655, 661 S.E.2d at 797 (quoting Diamond State Ins. Co. v. Homestead Indust., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995)). In this case, the court did not determine that the policy language was ambiguous and thus was without authority to

enforce the terms stated in the order. Security therefore believes that the circuit court judge first erred by interpreting the policy at all, and that the calculation of loss, if any, should be determined based on actual loss on the date when the claim was made by the insured as per the terms of the policy.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

April 8, 2014

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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-26-05222
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

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CERTIFICATE OF SERVICE

I certify that I am an agent of Ray Coit Yarborough, Jr. and served the Final Brief of Appellant and Final Reply Brief of Appellant to the attorneys for all parties of record in the above captioned action by depositing a copy of them in the United States Mail, postage prepaid, on April 8, 2014, addressed to them as noted below:

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

May 22, 2014

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