
The State of South Carolina

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

ORIGINAL

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 REPLY BRIEF OF APPELLANT

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ARGUMENT

1. **The trial judge erred by misinterpreting the policy and Security has no liability to the Respondents.**

While Respondents repeatedly cite Whitlock vs. Stewart Title Guaranty Company, 399 S.C. 610, 732 S.E.2d 626 (2012) case rulings, the issues in this case are substantially different, and most importantly, never raised or addressed in Whitlock. The “it worked there, it should work here” approach simply is not applicable in this case. In Whitlock, our Supreme Court answered a certified question from the federal district court concerning damages, not liability. Respondent cites no authority for the proposition that “the Supreme Court tacitly, if not explicitly, has endorsed...” the district court judge’s analysis by accepting the certified question in Whitlock. (Resp Br at 6) Rather, the analysis here is whether the South Carolina trial court erred by adopting the district court judge’s analysis in determining that Security was liable under the terms of its policy. Security believes that the trial judge and the Respondents have erred in their understanding of the policy by its failure to interpret all of its provisions as a whole.

The first issue missed by both the trial judge in this case, and the district court judge in Whitlock, is the place where the easement, ordinances and resolutions would be discovered. The terms of the policy provisions,

conditions and exclusions, when interpreted in their entirety, illustrate why clarification is needed. These matters lead to a far larger question for the South Carolina real estate practitioner: How far must the title examiner go?

Title companies and their agents, their agents usually being the closing attorney, provide title examination certifications to issue policies. The policy provision defining “public records” is defined, as conceded by Respondents, to be “title records that give constructive notice of matters affecting your title - according to the state statutes where your land is located”. But then respondents go awry; while acknowledging that the South Carolina recording statute controls this policy interpretation, they fail to note that the S.C. Code Ann. § 30-7-10, also says that “[g]enerally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court in those counties where the office of the register of deeds has been abolished” Therefore, the title examiner provides information by examining documents on file in the registry of deeds or clerk’s offices, tax information, if certified, located in the treasurer’s office, and bankruptcy or federal court records, if such a court exists in the county. The Respondents fail to recognize that resolutions regulating land use are not recorded. (Resp Br at 10) As conceded by Respondents, the trial court found the resolution to be

ambiguous and ruled that the “no build resolution” could be found in a record available to the public. (R. pp. 4-5 - Resp Br at 10) However, the trial judge failed to note the policy limitation on where the title examiner was required to go to discover those records. The respondents do not dispute that the “no build resolution” was not recorded in any office where the title examiner would be required to examine records. Respondents also concede that the policy excludes “regulations” that concern “land use” and “improvements to the land” in effect on the date the policy was issued. (R. p. 320 - Exclusions - Resp Br at 10) Security would not make the implausible argument that the “no build resolution” was not a regulation concerning improvement to the land. (Resp Br at 10) Respondents do not dispute that the “no-build resolution” is not filed in the recorder’s office, or that the title examiner would not discover the resolution by examining the public records, and as the Respondents also concede, the exclusion applies. Therefore Security properly denied liability on the Lyons’ claim.

While the policy does not specifically define what a “single family residence” is, Security agrees that the policy says that it insures “title to the land” . . . if that land is a one-to-four residential lot or condominium unit.” (R. p. 319 - Policy at 1) The Respondents argue that “single family residence”, undefined specifically in the policy, would require the policy to

insure use of the property for any type of structure, including stick built homes on property regulated by land use laws for use as mobile homes.¹ Such an interpretation disregards the empirical facts provided to the trial court that mobile homes are used as single family residences; a permitted use on the insured property. (R. pp. 339, 351 and 365 - Motion for reconsideration at 4 - 6 and attachments) “Insurance policies are subject to the general rules of contract construction.” M & M Corp. of S.C. v. Auto-Owners Ins. Co., 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).” By adopting such an interpretation of this policy term the trial court improperly rewrote the policy excepting a mobile home as a single family residence. As Whitlock reiterates, “Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.” Whitlock, 399 S.C. 610, 624, 732 S.E.2d 626, 628 (2012) (citing USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting

¹ Assuming the Respondent’s brief to include every type of housing he proposes the policy to insure based on this so called “ambiguity”, the Appellant has agreed to insure any type of residential development on the property, including condominiums, despite regulations surrounding that use. Indeed, just because a one to four residential lot includes a condo unit, doesn’t mean it does not also include a mobile home.

Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)).

Given the cumulative misinterpretation of the policy terms, conditions and exclusions, the trial judge clearly erred in rewriting the policy as he did in this case.

2. Security should be relieved of liability due to the failure of the Respondents to mitigate their damages.

The Respondents begin their mitigation argument with a correct statement of the law citing Baril v. Aiken Regional Medical Center, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (2002). They also note correctly that the title carrier did not cause them damages, but once again break a leg at the first furlong by simultaneously using the title carrier's "fault" in its failure to find or except to the easement to support their reasoning that that they are under no duty to mitigate their damages. (Resp Br at 14)

On the other hand, the trial judge erred by finding that a sale of the property was an unreasonable exertion to mitigate damages. (R. pp. 5-6)

Despite Respondents' attempted reliance on Baril v. Aiken Regional Medical Center, 352 S.C. 271, 573 S.E.2d 830 (2002) to relieve themselves from any duty to mitigate, the policy contains several provisions requiring the Respondents to mitigate their damages. Condition 6 of the policy says "If 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”, as well as Exclusion 3 and Condition 6(b). (R. pp. 320 - 321 - Policy at 2 and 3) The insurer has only limited rights to mitigate damages. There is no provision allowing the insurer to sell the property at a profit.

Assuming the insured has the duty to mitigate, both by the terms of the policy and as a matter of law, the easement merely affected use of the property, not title. The Respondents have not alleged at any time that the property is not marketable or insurable with the easement. We will never know if the offer to purchase the property at a substantial profit would have been successful after another title examination given the fact that the Respondents refused the offer and never let the proposed purchaser make a decision to buy or not to buy the property. (R. pp. 6-7 - Order) Given that the Respondents were charged with knowledge of the existing law (County Zoning Ordinances) when they purchased the property, their subsequent discovery of the easement which they claim “sullied” their title, their refusal to accept an offer that would more than make them whole, undoubtedly speculating and imagining that the sale would have failed, compels this court to take more than a passing glance at the mitigation issue. (R. pp. 6-7 - Appellant’s brief at 17)

For the reasons stated, Security should be relieved of liability due to the failure of the Respondents to mitigate their damages.

3. The calculation of damages, if any are due, is stated clearly in the Security title policy.

Security believes that the issue of damages is pertinent to this appeal because, as it has argued, the trial judge erred in finding 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. 10 - App Br at 23)

The first error in the Respondents argument is that the property has no value. (Resp Br at 16) The property can, or could have been, used as a single family residence provided that the Respondents replaced the pre-existing mobile home with a mobile home. (Resp Br at 3-4) Therefore the property can be **used!** Based on their erroneous conclusion that the property had no use whatsoever, the trial court erred in interpreting the policy provisions concerning damages, and the Respondents have likewise argued incorrectly, that the property is useless because they cannot use it as they please. (Resp Br at 16) Meanwhile, the Respondents refused an offer to purchase the property at a substantial profit which could have been used to build and live at a different location.


While market conditions may have changed, the property obviously has some value considering there has been a demand for it as evidenced by the offer the Respondents refused to accept.

CONCLUSION

For the reasons stated above, this court should reverse the rulings of the trial court and dismiss or remand this case to the trial court for further proceedings.

Respectfully submitted,

April 8, 2014



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Fidelity National Title Insurance company as successor by merger to Lawyers
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of Baltimore, Defendants,

Of Whom The Security Title Guarantee Corporation of Baltimore is the Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that his Final Reply Brief complies with Rule 211(b), SCACR.

June 4, 2014


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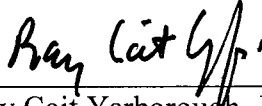
CERTIFICATE OF SERVICE

I certify that I have served the foregoing Certificate of Counsel regarding the Final Reply
Brief to Mr. David K. Haller, attorney of record for Thomas P. and Desiree J. Lyons in the above
captioned action by depositing a copy of them in the United States Mail, postage prepaid, on
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