IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

Paul M. Burch, Circuit Court Judge

Case No. 2012-CP-26-5222
Appellate Case No. 2016-000304

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.~~ Petitioner.

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a county no-build resolution appeared in the "public record" and was available for title examination when a policy of title insurance was issued by Security Title Guarantee Corporation of Baltimore.
2. Did the Court of Appeals err in holding a zoning resolution imposing a land restriction was a defect in title triggering coverage under the Petitioner's title insurance policy?
3. Did the Court of Appeals err in finding that the Respondents did not fail to mitigate their damages thus negating coverage under Petitioner's title insurance policy?

STATEMENT OF THE FACTS

Before the trial court, 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

[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.

which was formerly 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. 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. 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 a plat dated August 24, 2005 and recorded on the public land records for Horry County.

"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] These policies are substantively identical.

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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.

"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. This easement is recorded in the land records of Horry County.[4] The Spoils Easement was given so as to provide for the construction and maintenance of what became the Intra-Coastal Waterway."[5] To that end, the easement gives the Army Corp of Engineers the unrestricted and:

> [T] perpetual right and easement to enter upon, excavate, cut away and remove any and all tracts hereinafter described as composing a part of the canal prism, as may be required at any time for construction and maintenance of the said Inland Waterway ... and ... to enter upon, occupy, and use any portion of ... the spoil disposal area ... [and] to deposit on the ... spoil disposal area, or any portion thereof, any and all spoil or other material excavated in construction and maintenance of the aforesaid waterway and its appurtenances.

Appendix at 136-137.

"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

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[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.

[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."

policy of denying building permits in this area. Mobile homes within the spoil area may only be replaced with mobile homes."

...

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

The Lyons put the Insurer on notice that a non-excluded encumbrance was on their property and demanded indemnification. The Policy provides, among other things, that it will pay the "actual loss" suffered as a result of a non-excluded "Covered Title Risk." 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." Appendix 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 Police Date.

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

Appendix 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. Ms. Whitlock's carrier lost that suit. *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C. Oct. 3, 2011); *see also* 399 S.C. 610, 732 S.E.2d 626 (2012). Nevertheless, Insurer denied the Lyons' pre-suit claim and forced the Lyons to bring this suit. The Lyons then brought this action.

In the circuit court, the Lyons moved for summary judgment and a hearing was held before the Honorable Paul M. Burch, who granted summary judgment on liability. The Court of Appeals, with a panel consisting of Judges Williams, Geathers, and McDonald unanimously affirmed. The Petitioner seeks certiorari.

ARGUMENT

1. The trial court and Court of Appeals 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 and where the term "pubic record" was ambiguous.

Initially, Respondents note that this action does not fit within the considerations governing review of an opinion from the Court of Appeals

established in Rule 242, SCRAP. The issue presented by Insurer is not novel and has already now twice been determined in favor of coverage and against the same arguments made by Insurer. Rule 242(b)(1), SCRAP. In *Whitlock v. Stewart Title Guaranty Company*, 399 S.C. 610, 732 S.E.2d 626 (2012), this 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. Below, Judge Burch adopted Judge Harwell's rationale.[6] In accepting the certified question from Judge Harwell, this Court tacitly, if not explicitly, has endorsed the analysis here and the Court analyzed the interpretation question in *Whitlock* identically to the manner in which Judges Harwell, Burch, and the Court of Appeals did here.

Likewise, the opinion below was unanimous. Rule 242(b)(2), SCRAP. As mentioned above, the opinion does not in conflict, but is consistent, with recent and identical jurisprudence from this Court. Rule 242(b)(3), SCRAP. There are no constitutional issues involved and no federal questions. Rule 242(b)(4) and (b)(5),

[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." Appendix at 4.

SCRAP. If anything, the Court of Appeals has unanimously followed the direction of this Court and granting certiorari is unnecessary.

On the merits, the trial court granted the Lyons partial summary judgment, and the Court of Appeals unanimously affirmed, on their breach of contract claim, finding as a matter of law that the Spoils Easement encumbering the Subject Property was a covered title defect. 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 this Court favorably followed in determining the date of valuation for damages purposes. Granting certiorari is unnecessary.

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." Appendix at 48-49. An 'easement' is defined by the policy as, "the right of someone else to use your land for a special purpose." Appendix at 49. 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." Appendix at 428-429. As the Court of Appeals held, the easement grants the U.S. Army Corp of Engineers:

> [T] perpetual right and easement to ***enter upon, excavate, cut away and remove any and all tracts*** hereinafter described as composing a part of the

> canal prism, as may be required at any time for construction and maintenance of the said Inland Waterway ... and ... ***to enter upon, occupy, and use*** any portion of ... the spoil disposal area ... [and] to deposit on the ... spoil disposal area, or any portion thereof, any and all spoil or other material excavated in construction and maintenance of the aforesaid waterway and its appurtenances.

Appendix at 136-137. In essence, without anything more, the U.S. Army Corp of Engineers, may enter and use the Lyons' property for any reason related to the Intracoastal Waterway. The easement grants the Army Corp the right to expand the Waterway into the Lyons' property or, if the Army Corp chooses, to dump spoil and sludge from the Waterway on the Lyons' property. The easement is not excluded in the Policy. Accordingly, the Spoils Easement, which is not excluded, is a Covered Risk and Insurer is liable under the policies.

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. Insurer alleges that the no-build resolution is not the type "public record" anticipated under the Policy. Again, this argument takes the Policy definition further than it needs since the Spoils Easement clearly is the type record covered by the Policy. As this 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.[7] The "no-build resolution"

[7] Insurer uses this identical language to describe the rights of the easement holder in its brief to the Court of Appeals. Appendix at 428-429.

simply effectuates the right of the Army Corp of Engineers to expand or dump sludge, dredge, and spoilage it removes from the Intracoastal Waterway on the Lyons' property.[8] If a stick-built home were present, the Corps' rights would be frustrated.

Nevertheless, even 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* opinion 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 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 the same liability relief granted the Lyons, which the Judge Burch 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,

[8] The "no-build resolution" can also rightfully be considered another "defect, lien, or encumbrance" as defined by the Policy's "Covered Title Risk". Appendix at 48.

> 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.

Whitlock v. Stewart Title Guar. Co., 2011 WL 4549367 (D.S.C. Oct. 3, 2011) (internal citations omitted).

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

Appendix at 48 (Emphasis added). 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." Appendix at 49. South Carolina defines public records as, "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." The exclusion specifically covers "regulations" that concern "land use" and "improvements on the land" in effect on the date the Policy was issued. Appendix at 48.

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.

Both the trial court and Court of Appeals properly rejected both arguments. They 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. Appendix at 5, 462, relying on *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011)(finding that zoning regulations were public records). As such, applying the recognized standards of interpreting insurance contracts, the lower courts found the term ambiguous and held in favor of coverage. More to the point, the policy specifically covers use as a single-family home and specifically covers regulations impacting improves to the insured land. 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 hold as the Insurer demands would frustrate the intent of the insurance policy it sold as a whole.

Moreover, 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." Appendix at 49 (emphasis added). While some policies may not insure use, this Policy, by its very terms, does. As Security 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, the application of the "no-build" resolution is proper.

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. Judge Burch, following Judge Harwell's reasoning, found the term patently ambiguous since it is not defined and can be decided in more than one way. According, both the trial court and Court of Appeal held, as they were required to, in favor of coverage: a mobile home is not the stick-built home intended by the Lyons when they purchased the property.

Security Title complains[9] that the definition of "public record" used by Judges Harwell and Burch, and the Court of Appeals and tacitly adopted by this Court in *Whitlock*, "renders it virtually impossible for a real estate attorney to rely on long established title examination practices to write title insurance on real estate." Petition at 7-8. Insurer ignores is this undeniable truth: as the drafter of the contract, it can control its alleged problem by simply rewriting the policy. If there is a problem with the scope of the coverage it promised to pay because of an ambiguity in the text of the contract, that problem is one of its own making with a solution in its own control.

There is no basis for granting certiorari to the Petitioners on the "public records" and "land use" questions and certiorari may easily be denied.

2. 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 a him to exert himself unreasonably or incur substantial expense to avoid damages."

[9] American Land Title Association has filed an amicus brief joining primarily in this argument. ALTA is the drafter of the title contract at issue. ALTA's argument essentially is that the public is better served by fewer public records being relied. Inasmuch as ALTA drafted the contracts at issue here, this position can only be seen as self-serving and contrary to South Carolina's public policy of open records and encouraging filing of property documents. See S.C. Code Ann. §30-4-10, et seq. ("The General Assembly finds it is vital in a democratic society that public business be performed in an open and public manner...").

Baril v. Aiken Regional Medical Center, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002). The trial court and Court of Appeals 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. Appendix at 7, 463-464.

Moreover, Insurer's argument is based on a misstatement of fact. Insurer represents to the Court the following facts:

> The Lyons ***applied for a building permit in 2011***, but it was denied due to the "no-build" resolution. The ***Lyons then removed*** existing mobile home from the Property and listed it for sale for $539,000.00. A potential purchaser offered the Lyons $475,000.00 for the property in ***September 2006***, but the Lyons did not accept the offer.

Petition at 3. By this alleged timeline, the Lyons first learned of the "no-build" resolution five years after they received a contract offer.

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."). Accordingly, there is no duty to mitigate in this instance.

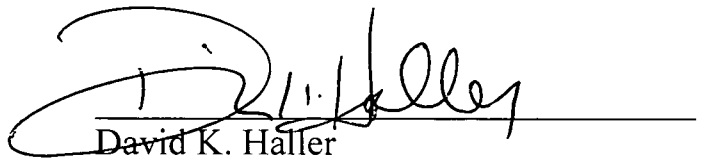
Even assuming there is such a duty, though, the Insurer's argument fails when taken to its logical conclusion. Security's argument assumes that the Lyons could have provided the buyer with clean title. This is a conclusion even it admits was impossible because the Spoils Easement was of record and sullied the title. Appendix at 428-429 ("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 lower courts correctly rejected the mitigation defense and certiorari is unnecessary.

CONCLUSION

For the reasons stated above, the Respondents pray the Court deny certiorari and for such other relief as the court deems just, prudent and proper.

HALLER LAW FIRM, P.C.



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17th day of March, 2016

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PROOF OF SERVICE

I certify that I mailed the forging Response to Petition for Writ of Certiorari to all counsel of record at the addresses below on March 17, 2016.

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