THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFIED QUESTION FROM
UNITED STATES DISTRICT COURT
FLORENCE DIVISION

The Honorable R. Bryan Harwell
United States District Judge
For the District of South Carolina
Florence Division

CASE NO. 4:10-CV-01992-RBH

Joetta P. Whitlock, Trustee of the Joetta P. Whitlock Trust ..... Plaintiff

vs.

Stewart Title Guaranty Company ..... Defendant

BRIEF OF PLAINTIFF

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STATEMENT OF THE ISSUE

I. **Certified Question:** In the case of a partial failure of title which is covered by an owner's title insurance policy, where the title defect cannot be removed, should the actual loss suffered by the insured as a result of the partial failure of title be measured by the diminution in value of the insured property as a result of the title defect as of the date of the purchase of the insured property, or as of the date of the discovery of the title defect?

STATEMENT OF THE CASE

The Plaintiff purchased a lot on the Intercoastal Waterway near Myrtle Beach for $410,000.00 to build her home. After she went to Horry County to obtain a building permit, she learned that the United States had a spoilage easement on the property, thus she could not build her home. Since Plaintiff had purchased owners' title insurance, she brought suit against the Defendant. The Defendant removed the case to the United States District Court and the parties moved for summary judgment. The District Court Judge granted summary judgment as to liability to the Plaintiff and found the Defendant's title insurance policy "patently ambiguous". (See Order of United States District Court dated October 3, 2011. Attached as Exhibit 1.) This Order was not appealed and is the law of the case. Thereafter, the United States District Court Judge certified a question as to the measure of damages to this Court. The Court accepted the certified question on November 17, 2011 and ordered the parties to brief the question.

STANDARD OF REVIEW

According to Rule SCACR, 244(a), "the Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court."

ARGUMENT

I. The owner of real property who purchases title insurance and suffers a failure of title should be entitled to damages as of the date of purchase.

On November 17, 2011, this Court directed the parties to brief the following certified question:

> In the case of a partial failure of title which is covered by an owner's title insurance policy, where the title defect cannot be removed, should the actual loss suffered by the insured as a result of that partial failure of title be measured by the diminution in value of the insured property as a result of the title defect as of the date of the purchase of the insured property, or as of the date of the discovery of the title defect?

I. STATEMENT OF FACTS

The undisputed facts show that the Plaintiff, Joetta P. Whitlock, Trustee of the Joetta P. Whitlock Trust, purchased a residential lot for cash on October 30, 2006, located at 2330 John Henry Lane, Myrtle Beach, South Carolina in the amount of $410,000.00. The lot borders the Intracoastal Waterway in the Socastee area of Myrtle Beach, South Carolina. When the Plaintiff bought the land, it was her intention to build a primary residence on the property. On October 30, 2006, Plaintiff appeared at the closing of the property and she purchased an owner's title insurance policy from Stewart Title Guaranty Company for the amount of her purchase, $410,000.00. When the Plaintiff decided to build a single family home on the aforementioned property, she went to the Horry County Building Department to obtain a building permit, when she was informed that Horry County would not issue her a building permit. She then learned for the first time that the property was encumbered by a spoilage easement held by the United States Army Corps of Engineers (since the 1930's) to dredge and maintain the Intracoastal Waterway. (A spoilage easement allows the Army

Corps to place the dredged materials on Whitlock's lot at anytime, which is why the county would not allow Plaintiff's home to be built.)

Thereafter, the Plaintiff brought this lawsuit against Stewart Title Guaranty Company for the face amount of the policy of $410,000.00. The case was removed to the United States District Court. The District Court Judge (Judge Brian Harwell) granted Plaintiff Whitlock summary judgment as to liability and found a patent ambiguity in the Defendant's title insurance contract, but referred to this Court the issue of the measure of damages. In Judge Harwell's Order dated October 3, 2011, it states,

> "The Court finds that the term "single family residence" is patently ambiguous and must be construed against the drafter so as not to include a mobile home...The Court has carefully examined the record in the case at bar and has determined that no genuine issue of material fact exists as to liability, and judgment as a matter of law for the plaintiff as to liability is appropriate...The Court reserves ruling on the defendant's Motion for Summary Judgment insofar as it relates to damages, as the Court is certifying a question to the South Carolina Supreme Court."

II. NATURE OF THE CERTIFIED QUESTION

The essence of the certified question is to determine the appropriate date to measure the diminution in value of the property from the title defect. The title policy provides:

> "we will insure you against actual loss resulting from any title risks covered by this Policy-up to the policy amount." Additionally, the policy provides, "we will pay up to your *actual loss* or the Policy Amount in force when the claim is made-whichever is less."

The policy does not define the term "actual loss" or the date used to determine the loss. (The title policy at issue is attached as Exhibit #2.)

The Defendant asserts that because the title defect was not discovered until January 2010, Stewart Title is only liable for the current market value of the property based on their appraiser's estimate of $65,000.00. Plaintiff asserts that the proper valuation date is the date

the policy was issued in October 2006. Significantly, the title insurance policy is silent as to the date to be used in determining damages or any date which under South Carolina law must be construed in favor of the insured. Further, when Whitlock paid the entire premium at the closing, the face amount of the policy she purchased was $410,000.00.

III. SOUTH CAROLINA CASE LAW

South Carolina has yet to rule on this issue, however, South Carolina title insurance case law provides a clear road map that this Court should use the date most favorable to the insured. ("The purpose of title insurance is seeking to put the insured in the position that he thought he occupied when the policy was issued." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 661 S.E.2d 63 (2008).) According to the case supra, "damages should be measured by the value of the title (the Plaintiff) thought he was getting versus the value of the title he received." *Id.* at 66. It is clear that South Carolina public policy encourages people to buy title insurance in order to protect them if an unknown easement or defect encumbers the property, thus "seeking to put the insured in the position that he thought he occupied when the policy was issued". *Stanley*, 377 S.C. 405. This language strongly suggests the court would use the date of purchase for the determination of damages. *Id.* Therefore, the Plaintiff should be entitled to the amount of the policy, $410,000.00, because this is the value of the title which she thought she received. Here the Plaintiff is unable to achieve her primary purpose in buying the property, which is to build a single family residence; and accordingly, the property has no value to the Plaintiff.

Further, as mentioned in the Supreme Court's Certification Order, this Court ruled in *Firstland Village Associate v. Lawyer's Title Insurance Co.*, 277 S.C. 184, 284 S.E.2d 582 (1981), that title insurance "is designed to save (the insured) harmless from *any loss* through

defects, liens, or encumbrances that may affect or burden his title when he takes it." Again, this language suggests the Court should use the date of purchase to determine damages. Thus, the clear public policy of regular title insurance in this state favors the insured collecting for "the loss he or she sustains". See *Stanley* and *Firstland Village Associate* case. 377 S.C. 405; 277 S.C. 184.

Additionally, the policy in issue does not define the term "actual loss". Since this term is not defined, South Carolina case law directs this to be a patent ambiguity, thereby requiring the policy to be construed in favor of the insured. When this Court construes an undefined term in the policy, it must use the plain, ordinary and popular meaning of actual loss. *Reynolds v. Wabash Life Ins.*, 251 S.C. 165, 161 S.e.2d 168 (1968). "Any insurance contract which is in any respect ambiguous or capable of two meanings must be construed in favor of the insured". *Id.* "Liberal construction should be in favor of the insured with any doubt to his benefit."*Hann v. Carolina Casualty Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420 (1969). This Court has been echoing this logic in construing insurance policies for decades through a long line of cases.

The most recent South Carolina Supreme Court case involving patent ambiguities can be found *in Beaufort County School District v. United National Insurance*, 392 S.C. 506, 709 S.E.2d 85 (2011). This Court held in *Beaufort County School District* that if an insurance policy had a term which was not defined in the policy, it was defined in the usual understanding of the ordinary person. *Id.* This Court also held in *Gaskins v. Blue Cross Blue Shield*, 271 S.E. 101, 245 S.E.2d 598 (1978), that if there is a patent ambiguity in a policy and there are two interpretations possible, the one which is most favorable to the insured

must be adopted. Here the most favorable interpretation is to use the purchase price ($410,000.00), not the date of discovery to measure damages.

Since the policy in issue does not define the term "actual loss", this is referred to as a patent ambiguity and the court is to resolve the question in favor of the insured. *See Gaskins*, 271 S.E.2d 598, supra. Further, the date of determining the loss is not defined thus requiring any interpretation to be resolved in favor of the insured. The Plaintiff should be able to depend on the notion that the date of loss is the date on which she purchased the policy in October 2006. The Court should be guided by the reoccurring principle in South Carolina law that the insured receives all benefit of the doubt in the construction of an insurance policy and that title insurance is to protect the insured. (See *Stanley*, 377 S.C. 405, supra.)

IV. CASE LAW OUTSIDE OF SOUTH CAROLINA

This Court has not yet addressed the issue of the appropriate date to measure the diminution in value of the real property from the title defect, thus the Court may wish to look at approaches taken by other courts across the country. Plaintiff does not believe that this Court needs to review other cases outside this state in light of this Court's pronouncements in *Stanley*; however, Plaintiff is ethically obligated to provide the other approaches with the intent of full disclosure to this Court. 377 S.C. 405. Generally, there have been three points in time that courts throughout the country have used to measure damages within a title policy's limits in connection with an owner's loss of title: 1) the date of the purchase of the property, 2) the date the title defect was created, and 3) the date the defect was first discovered. Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance.* 85 Florida Bar Journal10 (2011).

a. Georgia and New York Approach (The Date of Purchase[1])

The Court may examine both *Glyn v. Title Guarantee & Trust Co.*, 117 N.Y.S. 424 (1909) and *Beaullieu v. Atlanta Title Trust Co.*, 4 S.E.2d 78 (Ct. App. Ga. 1939), both of which came to the same conclusion in regard to the measure of damages. These courts both found that the plaintiff is entitled to recover the difference between the value of the property **when purchased**, as it was with the encroachment or easement, and its value as it would have been if there had been no encroachment or easement. *Id.* The *Glyn* court went on to hold, "whether or not there was any such difference is, of course, a matter of proof; but, if it should be established that there was a difference, the allegations of the complaint are sufficient to permit its recovery." *Glyn*, 117 N.Y.S. 424. The *Beaullieu* court noted that "the law aims to place the injured party, so far as money can do it, in the position he would have occupied if the contract had been fulfilled." 4 S.E.2d at 79. (This approach is similar to the language this Court used in *Stanley*, 377 S.C. 405.) Therefore, the Plaintiff in this case believes that the Court should use this approach, as it is the most favorable to the insured. Thus, she is entitled to recover the difference between the value of the property when purchased, which is $410,000.00, and the value it would have been with the spoilage easement on the property. If it is established that there is a difference between what the property would be worth with the encroachment and without the encroachment, then the jury would have to make the ultimate determination on how much to award the Plaintiff.

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[1] Courts that have used the **Date of Purchase Approach:** *Citicorp. Sav. Of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir. 1988); *Security Union Title Ins. Co. v. RC Acres, Inc.*, 604 S.E. 2d 547, 551 (Ga. Ct. App. 2004); *Securities Service, Inc. v. Transamerica Title Ins. Co.*, 583 P.2d 1217 (Wash. Ct. App. 1978); *Southern Title Guaranty Co. v. Prendergast*, 478 S.W.2d 806 (Tex. App. 1972); *City of New York v. New York & South Brooklyn etc. Co.*, 231 N.Y. 18 (NY. Ct. App. 1921).

b. Wisconsin Approach (Variation on the Date the Defect Was First Discovered)

The Plaintiff directs the Court to review the case of *Jalowitz v. Ticor Title Ins.*, 478 N.W.2d 67 (Wisc. App. 1991). The court in *Jalowitz* held that the actual loss should be measured by the property's fair market value just *prior* to discovery of the title defect. *Id.* Further, the Wisconsin Court of Appeals held that the title company should not be allowed to take advantage of a lower fair market value if such value was lowered by the existence of a defect that it insured against. *Id.* And if the measurement of the fair market value just prior to discovery is in dispute, it is a factual matter to be determined at trial and is not an appropriate matter for summary judgment. *Id.* The Plaintiff in the case sub judice would assert that if the Court chooses to use this approach, the Court should note that the Defendant should not be allowed to take advantage of a lower fair market value of the Plaintiff's property because such value was partly lowered by the existence of a defect that it insured against. If the Defendant is able to only measure the damages by the property's fair market value just prior to discovery, it would create a severe hardship on the Plaintiff, as that value is much lower than the original purchase price. This approach would also rewrite the title insurance policy to the date most favorable to the insurer-something this Court's public policy would not allow and would be contra to this Court's opinion in *Stanley*. 377 S.C. 405.

c. California Approach (The Date the Defect Was First Discovered[2])

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[2] Courts that have applied the **Date of Discovery Approach**: *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990); *Kentucky Title Co. v. Hail*, 292 S.W. 817 (Ky. 1927); *Swanson v. Safeco Title Ins. Co*, 925 P.2d 1354 (Ari. Ct. App. 1995); *Miller v. Title, U.S.A., Inc. Ins. Corp of N.Y.*, 1991 WL 24537 (Tenn. Ct. App. 1991) (unpublished); *Miebach v. Safeco Title Ins. Co.*, 743 P.2d 845 (Wash Ct. App. 1987); *Happy Canyon Inv. Co. v. Title Ins. Co. of Minnesota*, 560 P.2d 839 (Colo. Ct. App. 1976); *Narberth Bldg. & Loan Ass'n v. Bryn Mawr Trust Co.*, 190 A. 149 (Pa. Super Ct. 1937)

The Court may look to *Overholtzer v. Northern Counties Title Ins. Co.,* 116 Cal App. 2d 113, 253 P.2d 116 (1953), in which the plaintiff maintained an action against a title insurance company for damages caused by the existence of a recorded easement of a water pipeline, which the policy failed to disclose. In *Overholtzer*, the plaintiff actually purchased an adjoining parcel and developed the two parcels as a unit for industrial use (different from when the plaintiffs originally bought the property for agricultural purposes). *Id.* After the title insurance policy was purchased, the plaintiffs expended over $53,000 in improvements to the land. *Id.* The trial court fixed the damages as of the date the title insurance policy was issued, but the appellate court found that the damages should be measured as of the date of discovery of the defect. *Id.* The court reasoned that damages were to be calculated as of the date of discovery because when the insured purchased the policy, he did not know then that the title was defective, but discovered the defect after he *improved* the property. *Id.* Therefore, the court reasoned that the plaintiffs should be reimbursed up to the face amount of the policy and for the loss they suffered in reliance on the policy, and that includes the diminution in value of the property as it then existed. The court held that any other rule would not give the insured the protection for which he bargained and for which he paid. *Id.*

The *Overholtzer* case is markedly different than the case at hand. The plaintiffs in the *Overholtzer* case made substantial improvements to the land after purchasing the policy and if the court used the date of the policy to determine liability, then the plaintiffs would not be given protection for the diminution of the property after the improvements were made to the land. *Id.* In the immediate case, the Plaintiff has not made any improvements to the land, and therefore by calculating her damages from the date of the policy issuance, she would be reimbursed for the loss she suffered in reliance of the policy. By calculating her

damages from the date of the policy issuance, she would be given the full protection for which she bargained for and which she paid. This approach follows the decision of this Court which is to give the insured the benefit of the bargain. (See *Stanley*, 377 S.C. 405).

d. New Mexico Approach (The Date the Defect Was First Discovered)

The New Mexico court also adopted the date the insured owner first discovered or became aware of the title defect as the operative time period to measure damages. In *Hartman v. Shambaugh,* 630 p.2d 758 (N.M. 1981), the New Mexico Supreme Court had to decide how to measure an owner's claim of loss of an acre of insured property. The *Hartman* court decided that using the date the defect was discovered as a baseline for valuating property provided a proper balance between the expectations of the parties (insurer and insured) and the terms of the owner's policy. *Id.* The court reasoned that under this measurement, an insured who sits idly by after discovering the defect should not be able to gain any profits from the value of the property appreciating. *Id.* The court was specifically discussing those insured property owners that discover the title defect and subsequently do nothing after its discovery and all the while the property value continues to rise. The court does not want the insured "to reap any benefit by his inactivity". *Id.* This is not the case here as Plaintiff Whitlock tried to get a building permit within two years of the purchase date.

It is apparent that one of the reasons the Hartman court decided to use the "date the defect was discovered" in measuring damages is that the court wanted to encourage the public policy of insured property owners immediately letting the insurers know about the title defect as soon as the defect is discovered. The court did not want lazy insured property owners to wait to let the insurance company know of the defect in fear that in the end the insured property owner would receive more than he otherwise bargained for. This thought

process cannot rationally be applied to the case at hand because Whitlock let the Defendant know as soon as she found out that she could not build a single family residence on her property. Further, she would have never purchased the property had she known of the title defect. Allowing the measure of damages to be the date the defect was discovered when the title policy is silent would actually hinder the Plaintiff's efforts as the Plaintiff's property greatly depreciated from the time it was purchased to the time the Plaintiff discovered the title defect.

e. Title Insurance Treatise on Measuring Damages.

The Plaintiff asserts that Barlow Burke, an expert on title insurance law, has espoused a view as it relates to determining damages. His approach is found in his treatise, *The Law of Title Insurance* §§7.03-7.05, where he explains:

> In falling markets, the insured owner may have undertaken financial obligations such as a mortgage or a mortgage guaranty based on a higher property value that exists at the date of discovery of the defect. Thereafter, without using the approach of the *Jalowitz* case, the use of the discovery date works as a hardship on the insured. Rigid rules should be avoided with the overall purpose of measuring damages is to compensate one for an actual loss however and whenever it is measured.

Since the Plaintiff paid in cash $410,000.00 for this property located at 2330 John Henry Lane, Myrtle Beach, and the property has depreciated substantially since that time, using the discovery date of January 2010 as opposed to the purchase date of October 2006, does not create a fair remedy to compensate the Plaintiff for her actual loss. Plaintiff cannot construct a primary residence on this property, as she set out to do when she originally purchased the real estate. Compensating the Plaintiff for the value of the real property on the date she discovered the easement would be unjust and would defeat the public policy of the Plaintiff purchasing the title insurance to insure her for this particular type of loss. In sum,

the Plaintiff would have never purchased this property had she known this title defect existed. Further, the Plaintiff paid a premium for title insurance coverage based on the purchase price of $410,000.00, not a lesser amount.

f. Missouri Approach (The Date the Title Defect Was First Created)

The approach of measuring "the date the title defect was first created" does have multiple definitions; however, the most commonly defined date a title defect is deemed created is the date that a tribunal declares its existence or extent. *Beaullieu*, 4 S.E.2d 78. This approach is discussed in *Fohn v. Title Insurance Corp of St. Louis*, 529 S.W. 2d 1 (Mo. 1975), in which out of town developers were sued for a vacant parcel of land they had purchased. While the developers were in the process of removing commercial signage from the property they had purchased, the developers discovered that two sign owners held a deed to half an acre of the tract's valuable frontage. *Id.* The sign owners enforced their right to the tract by bringing a lawsuit against the landowners and subsequently prevailing at trial. *Id.* After the trial was over, the developers sued their title insurer, and the main issue in this suit was the value of the lost frontage tract of land. *Id.* From the purchase date of the property to the current date at which the developers sued the title insurer, the value of frontage property had increased substantially. *Id.*

The general rule established by the *Fohn* court is as follows: "Recovery is generally limited to the amount necessary to remove the title defect or the difference between the fair market value of the property conveyed and its fair market value had it been as described in the title policy." *Id* at 4. (In this case, the fair market value disclosed in the title insurance policy is $410,000.00—the agreed upon value of real property by the insurer.) The *Fohn* court had to decide whether to value the property at the date of the original purchase or at

the date of the adjudication of the lawsuit, and the court chose the date of the adjudication because the frontage property was then valued substantially higher. *Id.* The court explained that the value of the land may be determined by the purchase price in the proper situation, but where a party maintains the value is different than that amount, the trial court should consider additional evidence. *Id.* The court further explained that restricting evidence on this issue of how much money was paid for the property could eliminate any beneficial bargain one of the parties might have made at the time of the purchase. *Id.* Ultimately, the *Fohn* court decided to measure the value of the property by using the date which favored the insured. *Id.*

This approach is similar to this Court's pronouncements in *Stanley* that "title insurance is to put the insured in the position he thought he occupied." 377 S.C. 405.

In assessing the different state theories, the Court should be reminded of the essence of South Carolina title insurance law: "seeking to put the insured in the position that he thought he occupied when the policy was issued". *Stanley*, 377 S.C. 405. When distinguishing each state's different theories on the matter presented, there are underlining public policy's which are effectuated through each court opinion. These state policies' can be summed in the following way:

1) Georgia: The *Beaullieu* court held that the date in which the damages would be measured is the date the property was purchased because the "law aims to place the injured party, so far as money can do it, in the position he would have occupied if the contract had been fulfilled." 4 S.E.2d 78.
2) Wisconsin: The *Jalowitz* court held that the actual loss would be measured by the property's fair market value just prior to discovery of the title defect;

however, the title company should not be allowed to take advantage of a lower fair market value if such value was lowered by the existence of a defect that it insured against. 478 N.W.2d 67.

3) California: The *Overholtzer* court held that the date the defect was discovered would be the damage measuring test because improvements had been made to the property since the original purchase and "any other rule would not give the insured the protection for which he bargained and for which he paid." 116 Cal App.2d 113.

4) New Mexico: The *Hartman* court held that the damage measuring test would be the date in which the defect was first discovered. 630 P.2d 758. The reasoning behind such test is the New Mexico Supreme Court did not want idle insured's to reap the benefit of not apprising the title insurance company of the title defect and thereby allowing the property to appreciate over time after the defect was discovered. *Id.*

5) Missouri: The *Fohn* court decided to use the date in which the title defect was first "created", and the *Fohn* court named such date as the time of the case adjudication. 529 S.W.2d 1. This court decided to use this date over the date the property was purchased because the property value grew substantially since the time of purchase and the court ultimately decided to use the date that favored the insured. *Id.*

All of the decisions discussed above, with the exception of the Supreme Court of New Mexico, decided its damages measuring test in the light most favorable to the insured.

The measuring test that benefited the insured in each circumstance is the path which the majority of the state Supreme Court decisions decided to follow.

V. PLAINTIFF'S PROPOSED RULE ON DAMAGES

The Court should hold that the measure of damages must be based on the purchase price of the property. South Carolina law and policy dictates that "the purpose of title insurance is to place the insured in the position that he thought he occupied when the policy was issued". *Stanley*, 661 S.E.2d at 63. Whitlock believes that in order to be made whole after she paid for this property with an irremovable title defect, the damages must be measured by the diminution in value of the insured property as of the date she purchased the property. Moreover, if the Court decides that the date in which to measure the damages is that of the discovery date of the defect, it could monumentally affect the purpose behind purchasing title insurance. Further, using the discovery date gives the title insurer every benefit of the doubt; despite the fact the policy is silent as to the loss date. For example, the title insurer would never have to pay the limits of the policy in a failing real estate market. If the market value of the property rises above the limits of the policy, the title insurer is only liable for the policy limit-not any loss above the limit. The insurer gets the benefit instead of the insured, which violates the rule that the insured gets the benefit when an insurance policy is patently ambiguous. Indeed using the discovery date to measure the damages is contra to this Court's pronouncements in *Stanley* and *Firstland Village Associate*. 377 S.C. 405; 277 S.C. 184, supra.

Here, Whitlock promptly contacted the Defendant and yet the short time span between the issuance of the policy and the discovery of the title defect has allowed for the property to depreciate. Therefore, the Plaintiff is penalized for her own property

depreciating as a result of an economic crisis as opposed to her own lack of resolve, especially since she promptly notified the Defendant of the title defect.

As iterated by the Florida Bar Journal Article, "Using the purchase date of valuation imbues a degree of certainty toward resolving what can be, at times, the somewhat ethereal issue of property valuation. It is easily understood and just as easily applied. Moreover, both insured and insurer stand on more or less equal footing with respect to a risk of market fluctuation under this approach." Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance.* 85 Florida Bar Journal 10 (2011). Also, the same article points out that unless real estate values remain static, either the insured or the insurer will also gain or lose something beyond the allocation of costs and risks that title insurance is supposed to cover for an insured's actual loss. *Id.* However, since the Plaintiff has chosen to purchase the insurer's services, it is only proper that the insurer take the economic downfall as a result of the risks that come along with operating a business.

If the Court decides to measure the damages at the discovery date of the defect, it would chill the affect of purchasing title insurance for fear that if the insured's property depreciates after purchasing title insurance, then the insured has lost the ability to protect oneself against unknown past defects, the sole reason for purchasing the title insurance in the first place. Also, if the insured had a mortgage and a title defect was discovered in a failing market, the Plaintiff could actually lose money. (For example, Whitlock purchased the lot for $410,000.00, but instead of paying cash, she finances it 100%. The defect is discovered three years later and the property is worth $100,000.00. As a result, the Plaintiff not only lost money, but owes the mortgage company $310,000.00.) The Plaintiff purchased this title insurance for the specific reason of protecting herself from past defects

in her title, relying on the amount in which she purchased her real property on October 30, 2006. (Plaintiff bought the title insurance policy in the amount of $410,000.00, which was the purchase price of the property.) Plaintiff Whitlock's sole reason behind purchasing this real estate is destroyed because of this title defect. Therefore, the Plaintiff asserts that the Court should use the date to measure damages in the light most favorable to the Plaintiff; as she practiced the prudence and forethought to purchase title insurance, thus she should be compensated the full value she paid as a result of this title defect. This is especially true since the District Court has already defined this to be a patent ambiguity in the Defendant's title insurance policy.

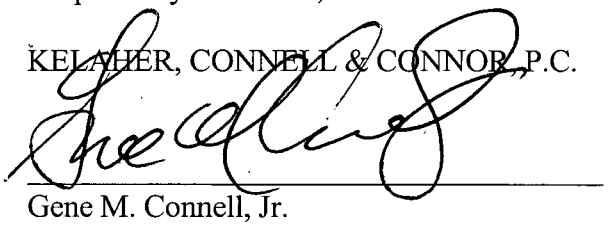
VI. CONCLUSION

In light of the circumstances, Plaintiff prays for this Honorable Court to find that the measure of damages to be as follows: any loss suffered by the owner of the title insurance policy should be construed as of the date of the purchase of the property; or in the alternative, the most favorable date for the insured. (See *Stanley* Supra. 377 S.C. 405.) Any other conclusion rewards the insurer for a patently ambiguous title insurance policy.

SIGNATURE PAGE TO FOLLOW

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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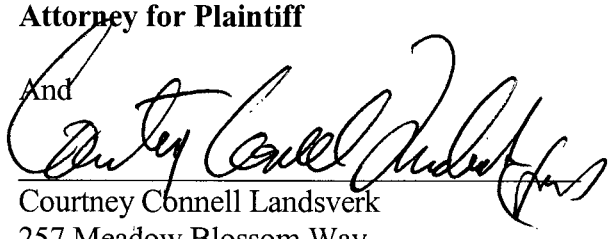

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January 20, 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFIED QUESTION FROM
UNITED STATES DISTRICT COURT
FLORENCE DIVISION

The Honorable R. Bryan Harwell
United States District Judge
For the District of South Carolina
Florence Division

CASE NO. 4:10-CV-01992-RBH

Joetta P. Whitlock, Trustee of the Joetta P. Whitlock Trust ..... Plaintiff

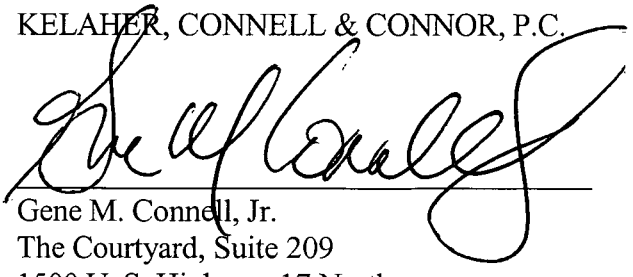
vs.

Stewart Title Guaranty Company ..... Defendant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Plaintiff complies with Rule 211(b), SCACR.

KELAHER, CONNELL & CONNOR, P.C.



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Attorney for Plaintiff

January 20, 2011

EXHIBIT #1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joetta P. Whitlock, Trustee of the Joetta P. Whitlock Trust, Plaintiff, vs. Stewart Title Guaranty Company, Defendant.	Civil Action No.: 4:10-cv-01992-RBH **ORDER**

This is an action in which Plaintiff, Joetta P. Whitlock, Trustee of the Joetta P. Whitlock Trust, seeks damages against the defendant, Stewart Title Guaranty Company, for breach of contract based on an owner's title insurance policy issued by the defendant to the plaintiff. The case is before the Court on cross motions for summary judgment. A hearing was held on July 26, 2011, with appearances by Gene Connell, Jr., counsel for the plaintiff, and Louis Lang, counsel for the defendant.

The undisputed facts show that on October 30 2006 the plaintiff purchased for cash a lot located at 2330 John Henry Lane, Myrtle Beach, South Carolina for $410,000.00. The lot borders on the Intra-coastal Waterway. Plaintiff purchased an owner's title insurance policy from the defendant at closing for the face amount of $410,000, the amount of the purchase price. In January of 2010, the plaintiff went to the Horry County Building Department to begin the process of obtaining a building permit to construct a home on the property. Plaintiff learned that the United States Army Corps of Engineers had a spoilage easement on the property for dredging the Intracoastal Waterway and that the easement had been on the property since the 1930s. (*See* copy of easement at Docket Entry # 29-1). Plaintiff also learned about the existence of a county resolution (R-143-03, Docket Entry # 18-3) which had been in effect since 2003. The resolution allowed the issuance of building

permits in the area for repair, remodeling, and replacement of existing structures but continued the County's previous policy not to otherwise allow building permits. The resolution allowed mobile homes to be replaced only by mobile homes. (Docket Entry # 15-2). It is undisputed that the easement and resolution were in effect at the time the title policy was issued.

Plaintiff filed this action in state court on April 6, 2010. The defendant removed the case to this court on the basis of diversity of citizenship.

In its motion for summary judgment, Defendant Stewart Title Guaranty Company contends that the lawsuit should be dismissed because the plaintiff failed to give proper notice to the defendant of the claim[1]; that Exclusion 1 of the policy, which excludes losses from the exercise of governmental police power, bars the claim; and that the value of any loss should be measured as of the date of discovery of the title defect. Plaintiff has moved for summary judgment on liability only and contends the case presents jury issues regarding damages.

At the hearing, the Court requested additional briefing on the issue of damages. Therefore, this order pertains only to liability. An issue relating to damages will be certified to the South Carolina Supreme Court by separate order.

Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (2010). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . .; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce

[1] At the hearing on the cross motions for summary judgment, the defendant withdrew its motion on the basis of notice, so the Court will not discuss that ground in this order.

admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

When no genuine issue of any material fact exists, summary judgment is appropriate. *See Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

"[O]nce the moving party has met [its] burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show that there is a genuine issue for trial." *Baber v. Hospital Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir. 1992). The nonmoving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *See id.* Rather, the nonmoving party is required to submit evidence of specific facts by way of affidavits, depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Celotex Corp.*, 477 U.S. at 322.

ISSUE: **Does Policy Exclusion 1 exclude coverage?**

Defendant asserts that Exclusion 1 bars coverage in this case. That exclusion 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 Policy Date.**
> **This exclusion does not limit the zoning coverage described in Items 12 and 13 of**

the covered title risks. (Emphasis added).

The "Covered Title Risks" of the policy state that the policy covers "the following title risks, if they affect your title on the Policy Date":

> "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."

The policy defines "easement" as "the right of someone else to use your land for a special purpose." It defines "public records" as title records that give constructive notice of matters affecting your title-according to the state statutes where your land is located." The policy does not define "single-family residence".

"As with contracts generally, the cardinal principle in construing insurance contracts is that the intention of the parties controls." *Poston v. National Fidelity Ins. Co.*, 303 S.C. 182, 185, 399 S.E.2d 770 (1990). Where the terms of a contract are clear and unambiguous and capable of only one reasonable interpretation, the court should construe the contract. *Hansen ex rel. Hansen v. United Services Automobile Ass'n*, 350 S.C. 62, 565 S.E.2d 114 (S.C.App. 2002). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract. . . 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 touchstones of the inquiry." *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975). "Even if an ambiguity exists in a contract, extrinsic evidence may not be considered if the ambiguity is a patent ambiguity." *Beaufort County School Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 709 S.E.2d 85, 95 (Ct. App. 2011). "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 to the object or subject described . . .Interpretation of an

unambiguous policy, or a policy with a patent ambiguity is for the court." *Id.*

A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who (1) has examined the context of the entire integrated agreement and (2) is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business. *Laser Supply and Services, Inc. v. Orchard Park Associates*, 676 S.E.2d 139 (S.C. App. 2009).

Insurance contracts are construed against the drafter, and in favor of coverage for the insured. *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63, 443 S.E. 2d 813 (Ct. App. 1994). Insurance policy exclusions are construed "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611, 614 (2005). The rule that insurance contracts must be construed against the insurer applies to title insurance contracts. *First Carolinas Joint Stock Land Bank of Columbia v. New York Title*, 172 S.C. 435, 174 S.E. 402 (1934). Title insurance "is designed to save (the insured) harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Firstland Village Associates v. Lawyer's Title Insurance Co.*, 277 S.C.184, 284 S.E.2d 582 (1981).

Exclusion Number 1 does not apply, by its specific terms, to the situation in the case at bar. First, the exclusion provides that it does not apply to "violations or the enforcement of these matters which appear in the public records at Policy Date." It is uncontroverted that, as shown by the affidavits of the real estate attorney (Exhibit F to Docket Entry # 18) and title examiner (Exhibit E to Docket Entry # 18), the spoilage easement was of record and available for title examination in South Carolina before the issuance of this policy. *See* Docket Entry # 29-1, Deed from Julia R. Sessions to State of South Carolina, recorded November 9, 1931. Defendant argues that the Horry

County resolution, although in existence at the time of the closing, does not constitute a "public record" under state statute, citing S.C. Code Ann. § 30-7-10 (1976). Section 30-7-10 provides that all deeds, mortgages, liens, and "generally *all instruments in writing conveying an interest in real estate* required by law to be recorded in the office of the register of deeds . . .are valid so as to affect the rights of subsequent creditors . . . or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds. . . where the real property affected is situated." (Emphasis added). Plaintiff contends that a government regulation is inherently a public record and that, as a result, the policy provides coverage.

The court must construe the policy exclusion against the drafter and must also consider the purpose of the policy, read as a whole. The title policy provides broad coverage for title problems caused by zoning laws and for laws and regulations concerning land use and improvements on the land. Zoning designations are part of the "public records." *See Carolina Chloride, Inc. v. Richland County*, No. 27013, 2011 WL 3206901, at * 4 (S.C. July 25, 2011), rehearing granted, September 22, 2011 . Here, the insurance company was the drafter of the contract. It could have easily defined the term "public record" as not covering zoning laws. *See also, New England Federal Credit Union v. Stewart Title Guarantee Co.*, 171 Vt. 326, 765 A.2d 450, 456 (2000) ("Finally, we note that Stewart Title could have readily achieved the more narrow definition of public records that it seeks here simply by excluding from the definition certain locations where public records containing information about matters relating to land are maintained. . . Unlike the Stewart Title policy, however, the title insurer in [another case] added language explaining that, "without limitation, such records shall not be construed to include records in any of the offices of federal, state or local environmental protection, zoning, building, health or public safety authorities.") Therefore, the exclusion does not apply as a matter of law because the term "public record", although defined, is

patently ambiguous and should be construed as covering local zoning regulations.[2]

Additionally, Exclusion 1 states that it does not limit the zoning coverage described in Items 12 and 13 of the covered title risks. Item 13 of the covered title risks refers to zoning laws that prohibit use of the property as a single-family residence. Again, "single family residence" is not defined in the policy. Plaintiff argues that "single family residence" ordinarily means site-built homes, while Defendant argues that it also includes mobile homes. The undisputed facts are that Horry County will not allow the plaintiff to obtain a permit to build a site-built home on the property and that she has a mobile home on the property. The Court finds that the term "single-family residence" is patently ambiguous and must be construed against the drafter so as not to include a mobile home. Therefore, the plaintiff cannot use the land for a single-family residence because of the zoning law, and Exclusion 1 does not apply.

On the basis of the above, the Court finds that Exclusion Number 1 does not apply as a matter of law.

Conclusion

The Court has carefully examined the record in the case at bar and has determined that no genuine issue of material fact exists as to liability, and judgment as a matter of law for the plaintiff as to liability is appropriate. For the foregoing reasons, the undersigned grants the plaintiff's [25] Motion for Summary Judgment as to liability and denies the defendant's [15] Motion for Summary Judgment, as it pertains to liability. The Court reserves ruling on the defendant's [15] Motion for

[2] Interestingly, the exceptions contained in Schedule B of the title policy exclude coverage for several matters that are not listed in the recording statute. The policy lists "2. increase or decrease in area due to rise and fall of tidewaters of the Intracoastal Waterway." It also lists rights of the State of South Carolina and the South Carolina Coastal Council as provided by statute or regulation. (Exception Numbers 3, 4, 5, and 6). It also refers to rights of the public to use the property as a public beach. (Exception 8).

Summary Judgment insofar as it relates to damages, as the Court is certifying a question to the South Carolina Supreme Court. The defendant's motion in limine (Docket Entry # 35) is taken under advisement.

AND IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Court Judge

October 3, 2011
Florence, South Carolina

EXHIBIT #2

If you want information about coverage or need assistance to resolve complaints, please call our toll free number, 1-800-729-1902. If you make a claim under your polic you must furnish written notice in accordance with Section 3 of the Conditions and Stipulations.
Visit our World-Wide Web site at: http://www.stewart.com

STEWART TITLE

GUARANTY COMPANY

OWNER'S COVERAGE STATEMENT

This Policy insures your title to the land described in Schedule A--if that land is a one-to-four family residential lot or condominium unit. Your insurance, as described in this Coverage Statement, is effective on the Policy Date shown in Schedule A.

Your insurance is limited by the following:

- EXCLUSIONS on page 2
- EXCEPTIONS in Schedule B
- CONDITIONS on pages 2 and 5.

We insure you against actual loss resulting from:

- any title risks covered by this Policy--up to the policy Amount and
- any costs, attorneys' fees and expenses we have to pay under this Policy

COVERED TITLE RISKS

This Policy covers the following title risks, if they affect your title on the Policy Date.

1. Someone else owns an interest in your title.
2. A document is not properly signed, sealed, acknowledged, or delivered.
3. Forgery, fraud, duress, incompetency, incapacity, or impersonation.
4. Defective recording of any document.
5. You do not have any legal right of access to and from the land.
6. There are restrictive covenants limiting your use of the land.
7. There is a lien on your title because of:
   - a mortgage or deed of trust
   - a judgment, tax, or special assessment
   - a charge by a homeowner's or condominium association
8. There are liens on your title, arising now or later, for labor and material furnished before the Policy Date--unless you agreed to pay for the labor and material.
9. Others have rights arising out of leases, contracts, or options.
10. Someone else has an easement on your land.
11. Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan.
12. You are forced to remove your existing structure--other than a boundary wall or fence--because:
    - it extends on to adjoining land or on to any easement.
    - it violates a restriction shown in Schedule B.
    - it violates an existing zoning law.
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.

COMPANY'S DUTY TO DEFEND AGAINST COURT CASES

We will defend your title in any court case as to that part of the case that is based on a Covered Title Risk insured against by this Policy. We will pay the costs, attorneys' fees, and expenses we incur in that defense.

We can end this duty to defend your title by exercising any of our options listed in Item 4 of the Conditions.

This policy is not complete without Schedules A and B.

Signed under seal for the Company, but this Policy is to be valid only when it bears an authorized countersignature.

STEWART TITLE
GUARANTY COMPANY

Stewart Morris Jr.
Chairman of the Board

Countersigned:

Authorized Countersignature

BRYAN & HAAR, ATTORNEYS
Company
508 Highway 17 South, Ste B
Surfside Beach, SC 29575
City, State
843-238-3461

Malcolm S. Morris
President

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101 (Rev. 6-1-87)

EXCLUSIONS

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 Policy Date.
   This exclusion does not limit the zoning coverage described in Items 12 and 13 of Covered Title Risks.
2. The right to take the land by condemning it, unless:
   - a notice of exercising the right appears in the public records on the Policy Date
   - the taking happened prior to the Policy Date and is binding on you if you bought the land without knowing of the taking
3. Title Risks:
   - that are created, allowed, or agreed to by you
   - that are known to you, but not to us, on the Policy Date--unless they appeared in the public records
   - that result in no loss to you
   - that first affect your title after the Policy Date--this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks
4. Failure to pay value for your title.
5. Lack of a right:
   - to any land outside the area specifically described and referred to in Item 3 of Schedule A
     or
   - In streets, alleys, or waterways that touch your land

   This exclusion does not limit the access coverage in Item 5 of Covered Title Risks.

CONDITIONS

1. **DEFINITIONS**
   a. Easement - the right of someone else to use your land for a special purpose.
   b. Land - the land or condominium unit described in Schedule A and any improvements on the land which are real property.
   c. Mortgage - a mortgage, deed of trust, trust deed or other security instrument.
   d. Public Records - title records that give constructive notice of matters affecting your title--according to the state statutes where your land is located.
   e. Title - the ownership of your interest in the land, as shown in Schedule A.
2. **CONTINUATION OF COVERAGE**

   This Policy protects you as long as you:
   - own your title
     or
   - own a mortgage from anyone who buys your land
     or
   - are liable for any title warranties you make

   This Policy protects anyone who receives your title because of your death.
3. **HOW TO MAKE A CLAIM**

   a. You Must Give The Company Notice Of Your Claim

   If anyone claims a right against your insured title, you must notify us promptly in writing.

   Send the notice to Stewart Title Guaranty Company, P.O. Box 2029, Houston, Texas 77252. Please include the Policy number shown in Schedule A, and the county and state where the land is located.

   Our obligation to you could be reduced if:
   - you fail to give prompt notice
     and
   - your failure affects our ability to dispose of or to defend you against the claim.

   b. Proof Of Your Loss Must Be Given To The Company

   You must give us a written statement to prove your claim of loss. This statement must be given to us not later than 90 days after you know the facts which will let you establish the amount of your loss.

   The statement must have the following facts:
   - the Covered Title Risks which resulted in your loss
   - the dollar amount of your loss
   - the method you used to compute the amount of your loss

   You may want to provide us with an appraisal of your loss by a professional appraiser as a part of your statement of loss.

   We may require you to show us your records, checks, letters, contracts, and other papers which relate to your claim of loss. We may make copies of these papers.

   We may require you to answer questions under oath.

   Our obligation to you could be reduced if you fail or refuse to:
   - provide a statement of loss
     or
   - answer our questions under oath
     or
   - show us the papers we request,
     and
   - your failure or refusal affects our ability to dispose of or to defend you against the claim.

(continued and concluded on last page of this policy)

ALTA OWNER'S POLICY
File No. 16796\WHITLOCK

OWNER'S POLICY SCHEDULE A

Policy No.	O-9917-518827	
Policy Amount:	$410,000.00	Premium: $818.00
Date of Policy:	November 1, 2006 at 3:29 pm	

1. Name of Insured:

Joetta P. Whitlock, Trustee of the Joetta P. Whitlock Trust, UTD 2-20-2001

2. Your Interest in the land covered by this Policy is:

FEE SIMPLE

3. The land referred to in this policy is described as follows:

ALL AND SINGULAR, that certain piece, parcel or lot of land, together with improvements thereon, situate, lying and being on the Northeast side of the Intracoastal Waterway, Socastee Township, Horry County, South Carolina, and being shown and designated as **Lots 5 and 5A of R.C. Bellamy** Subdivision on a map prepared for Lewis W. Collins by S. D. Cox Surveyors, Inc., dated August 29, 1968, and recorded in Deed Book 403 at page 230, Horry County records.

Address of Property (For Identification Purposes Only):

Street: 2330 John Henry Lane
City: Myrtle Beach
State: South Carolina
Unit/Lot: 5& 5A Subdivision/Condo/Section: R C Bellamy

OWNER'S POLICY SCHEDULE B

In addition to the Exclusions, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Taxes for the year 2007, and subsequent years, a lien, but not yet due and payable, plus any special assessments.
2. Increase or decrease in area due to rise and fall of tidewaters of the Intracoastal Waterway.
3. Rights of State of South Carolina as to accretions occurring after July 1, 1977, as provided in Title 48, Chapter 39, (Coastal Tidelands and Wetlands Act) of the South Carolina Code of Laws, 1976, as amended.
4. The rights of control lying in the South Carolina Coastal Council as provided in Title 48, Chapter 39, (Coastal Tidelands, and Wetlands Act), of the South Carolina Code of Laws, 1976, amended.
5. Interests created by, or limitations on use imposed by the Federal Coastal Zone Management Act or other Federal law or South Carolina Code of Laws, 1976, as amended, Chapter 39, Title 48, as amended, or any regulations promulgated pursuant to State or Federal laws.
6. Subject to the permitting authority of the South Carolina Coastal Council, in "critical areas" as defined in Act #123 of the 1977 South Carolina General Assembly and rules and regulations promulgated pursuant to said Act.
7. Title to that portion of the property lying below the high mean water mark of the Intracoastal Waterway.
8. Rights, if any, of the public to use as a public beach or recreation area any part of any of the lands lying between the body of water abutting any of the subject property and the natural line of vegetation, bluff, extreme high water line or other apparent boundary lines separating the publicly used area from the upper land private areas.
9. Perpetual Right-of-Way and Easement granted by Frank Wesley Collins and Cheryl Ann Collins to Grand Strand Water and Sewer Authority dated June 31, 2000, and recorded February 14, 2001, in Deed Book 2341 at page 1231, Horry County records.
10. Conditions shown on that certain Map of Lots 5 and 5A of R.C. Bellamy Subdivision prepared for Lewis W. Collins by S. D. Cox Surveyors, Inc., dated August 29, 1968, and recorded in Deed Book 403 at page 230, Horry County records.
11. Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

4. OUR CHOICES WHEN YOU NOTIFY US OF A CLAIM

After we receive your claim notice or in any other way learn of a matter for which we are liable, we can do one or more of the following:

a. Pay the claim against your title.
b. Negotiate a settlement.
c. Prosecute or defend a court case related to the claim.
d. Pay you the amount required by this Policy.
e. Take other action which will protect you.
f. 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.

5. HANDLING A CLAIM OR COURT CASE

You must cooperate with us in handling any claim or court case and give us all relevant information.

We are required to repay you only for those settlement costs, attorneys' fees and expenses that we approve in advance.

- to settle disputes
  or
- to cover expenses and attorneys' fees.

When we defend your title, we have a right to choose the attorney. We can appeal any decision to the highest court.

We do not have to pay your claim until your case is finally decided.

6. LIMITATION OF THE COMPANY'S LIABILITY

a. We will pay up to your actual loss or the Policy Amount in force when the claim is made--whichever is less.
b. If we remove the claim against your title within a reasonable time after receiving notice of it, we will have no further liability for it.

   If you cannot use any of your land because of a claim against your title, and you rent reasonable substitute land or facilities, we will repay you for your actual rent until:

   - the cause of the claim is removed
     or
   - we settle your claim.

c. The Policy Amount will be reduced by all payments made under this Policy--except for costs, attorneys' fees and expenses.
d. The Policy Amount will be reduced by any amount we pay to our insured holder of any mortgage shown in this Policy or a later mortgage given by you.
e. 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.

7. TRANSFER OF YOUR RIGHTS

When we settle a claim, we have all the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you must not do anything to affect these rights. You must let us use your name in enforcing these rights.

We will not be liable to you if we do not pursue these rights or if we do not recover any amount that might be recoverable.

With the money we recover from enforcing these rights, we will pay whatever part of your loss we have not paid. We have a right to keep what is left.

8. ARBITRATION

If it is permitted in your state, you or the Company may demand arbitration.

The arbitration shall be binding on both you and the Company. The arbitration shall decide any matter in dispute between you and the Company.

The arbitration award may:

- include attorneys' fees if allowed by state law
- be entered as a judgment in the proper court.

The arbitration shall be under the Title Insurance Arbitration Rules of the American Arbitration Association. You may choose current Rules or Rules in existence on Policy Date.

The law used in the arbitration is the law of the place where the property is located.

You can get a copy of the Rules from the Company.

9. OUR LIABILITY IS LIMITED TO THIS POLICY

This Policy, plus any endorsements, is the entire contract between you and the Company. Any title claim you make against us must be made under this Policy and is subject to its terms.

Valid Only If Schedules A and B are Attached.

STEWART TITLE
GUARANTY COMPANY

STEWART TITLE
GUARANTY COMPANY

RESIDENTIAL TITLE INSURANCE POLICY – ONE-TO-FOUR FAMILY RESIDENCES

OWNER'S INFORMATION SHEET

Your Title Insurance Policy is a legal contract between you and Stewart Title Guaranty Company.

It applies only to a one-to-four family residential lot or condominium unit. If your land is not either of these, contact us immediately.

The Policy insures you against certain risks to your land title. These risks are listed on page one of the Policy. The Policy is limited by:

- Exclusions on page 2
- Exceptions in Schedule B
- Conditions on pages 2 and 5

You should keep the Policy even if you transfer the title to your land.

If you want to make a claim, see Item 3 under Conditions on page 2.

You do not owe any more premiums for the Policy.

This sheet is not your insurance Policy. It is only a brief outline of some of the important Policy features. The Policy explains in detail your rights and obligations and our rights and obligations. Since the Policy–and not this sheet–is the legal document:

YOU SHOULD READ THE POLICY VERY CAREFULLY.

If you have any questions about your Policy, contact:

STEWART TITLE
GUARANTY COMPANY

P. O. Box 2029
Houston, Texas 77252

STEWART TITLE
GUARANTY COMPANY

P. O. Box 2029
Houston, Texas 77252

A NAME

RECOGNIZED NATIONALLY AS BEING SYNONYMOUS WITH

QUALITY

ESTABLISHED 1893

INCORPORATED 1908

Sanctity of Contract

POLICY OF TITLE INSURANCE

STEWART TITLE
GUARANTY COMPANY

RESIDENTIAL TITLE INSURANCE POLICY

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFIED QUESTION FROM
UNITED STATES DISTRICT COURT
FLORENCE DIVISION

The Honorable R. Bryan Harwell
United States District Judge
For the District of South Carolina
Florence Division

CASE NO. 4:10-CV-01992-RBH

Joetta P. Whitlock, Trustee of the Joetta P. Whitlock Trust ..... Plaintiff

vs.

Stewart Title Guaranty Company ..... Defendant

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served a copy of the **Brief of Plaintiff** on Defendant, through counsel of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Louis H. Lang
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202-1390

DATE OF MAILING: January 20, 2012

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 20th day of January, 2012.

Notary Public for South Carolina
My Commission Expires: 2-25-19