Original

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Certified Question from the United States District Court
for the District of South Carolina, Florence Division

The Honorable R. Bryan Harwell
United States District Judge.

U.S. District Court No. 4:10-CV-01992-RBH

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

v.

Stewart Title Guaranty Co., ... Defendant.

BRIEF OF THE DEFENDANT

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March 6, 2012

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STATEMENT OF THE CASE

This case was filed in the Court of Common Pleas for Horry County on April 6, 2010, and was removed to the United States District Court for the District of South Carolina on July 30, 2010. By order entered October 20, 2011, the district court certified the above question to this Court.[1] This Court accepted the district court's certification by order entered November 17, 2011.

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[1] Plaintiff's statement of the case mistakenly describes the district court's grant of partial summary judgment on the issue of liability by order entered October 3, 2011, as "the law of the case." The grant of partial summary judgment is not a final order for purposes of appeal in federal court. *See e.g. Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 744 (1976) ("where assessment of damages or awarding of other relief remains to be resolved [orders granting partial summary judgment] have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291."). While there is an exception where the assessment of damages involves only a ministerial function, *Parks v. Pavkovic,* 753 F.2d 1397, 1401-02 (7th Cir.), *cert. denied,* 473 U.S. 906 (1985), given the posture of this matter, such is not the case here.

STATEMENT OF FACTS[2]

On October 30, 2006 the plaintiff purchased for cash a residential lot located at 2330 John Henry Lane, Myrtle Beach, South Carolina for $410,000.00. The lot fronts on the Intra-coastal Waterway, and a mobile home and out-building are situated on the property. In 1931, a predecessor-in-interest of the plaintiff conveyed to the State of South Carolina what is generally known as a spoilage easement over the property and adjacent property. This easement is recorded in the land records of Horry County. The spoilage easement was given so as to provide for the construction and maintenance of what became the Intra-Coastal Waterway. Plaintiff purchased an owner's title insurance policy from the defendant at the closing for the face amount of $410,000.00, the amount of the purchase price. The spoilage easement was not included as an exception to coverage in the title policy and the existence of the spoilage easement, and its possible effect on the property, was not known by the plaintiff at the time that she purchased the property.

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 permanent home on the property. Plaintiff learned that Horry County would not issue a building permit for the construction of a permanent home on the property because it was encumbered by the spoilage easement. This was on the basis of Horry County resolution (R-143-02), in effect since 2003. The resolution allowed the issuance of building permits in the area of repair,

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[2] Rule 245(b), SCACR, provides, in pertinent part, a certification order shall set forth ". . . all findings of fact relevant to the questions certified . . . ." The district court's certification order does that in the section entitled "Statement of Facts." Defendant respectfully submits that the facts set forth in the district court's certification order are the facts for this Court to consider. Those facts are, therefore, set forth verbatim herein.

remodeling, and replacement of existing structures but continued the County's previous policy not to otherwise allow building permits due to the existence of the easement. It is undisputed that the easement and resolution were in effect at the time the policy was issued.

ARGUMENT

I.

> 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, the actual loss suffered by the insured as a result of the partial failure of title must be measured by the diminution in value of the insured property as a result of the title defect as of the date of discovery of the covered defect.

A. The title policy.

The title policy (a copy of which is attached to Plaintiff's opening brief) at issue is made up of pre-printed sections and schedules A and B. The pre-printed sections of the policy set out the insuring clauses, the exclusions from coverage and the conditions of coverage. Schedule A provides the face amount of the policy, the effective date of the policy, the name of the insured and a description of the insured property. Schedule B lists the exceptions from coverage under the policy.

The specific portion of the title policy at issue is paragraph 6(a) of the pre-printed conditions-of-coverage section which provides, under the heading "Limitation of the Company's Liability," that the title company will pay its insured "up to" its "actual loss or the Policy Amount in force when the claim is made - whichever is less."

B. The title policy when read as a whole unambiguously provides the insured's actual loss resulting from a covered title defect is measured on the date the defect is discovered.

The certified question asks when to measure the diminution in value of the insured property resulting in a partial loss of title caused by a covered title defect. The district court posited two alternative points in time - when the insured property was purchased or when the defect was discovered. The insured property was purchased in October 2006. The title defect was discovered in January 2010.

A contract of insurance is construed in accordance with general contract principles. *Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). If a contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect. *Beaufort County School District v. United National Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). All contracts must be construed as a whole, and it is improper to construe a contract by focusing on one particular section of the contract without reference to other sections. *Sloan v. Colonial Life & Accident Ins. Co.*, 222 S.C. 248, 72 S.E.2d 446 (1952).

In the pertinent phrase "actual loss," "actual" modifies "loss." "Actual" is defined as "real; substantial; existing presently in fact . . . ."[3] as "in action or existence at the time . . . ,"[4] and "being, existing, or acting at the present moment, current."[5] *See Hutchinson v. Liberty Life Ins. Co.*, 393 S.C. 19, 25, 709 S.E.2d 130, 134 (Ct. App. 2011) ("Dictionaries

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3 BLACK'S LAW DICTIONARY 33 (5th ed. 1979).

4 1 THE OXFORD ENGLISH DICTIONARY 96 (1961).

5 AMERICAN HERITAGE DICTIONARY 77 (2nd ed. 1982).

can be useful starting points for interpreting terms in an insurance policy."); *see also Chicago Title Ins. Co. v. Huntington Nat. Bank,* 719 N.E.2d 955, 960 (Ohio 1999). ("The word 'actual' means something that exists in fact or reality. 'Actual' is not merely possible, but real." citing Webster's Third New International Dictionary 22 (1986)).

Given, therefore, the "plain, ordinary, and popular. . . ." meaning of the word "actual" the phrase "actual loss" points to the date the defect or loss is discovered, *i.e.* becomes "actual." By analogy, the Dow Jones Industrial Average records market value "losses" and "gains" in publicly traded stock on a minute-by-minute basis. However, neither losses nor gains become "actual" to the owner of the stock until the stock is sold.

This reading of the phrase "actual loss"[6] is consistent with other language appearing in the title policy which looks to the future, beyond the date of purchase. As pointed out above, paragraph 6(a) of the pre-printed conditions-of-coverage section of the policy, where the phrase "actual loss" appears, says that the title company will pay the lesser of the insured's actual loss or the policy amount "in force when the claim is made." While the phrase "in force when the claim is made" does not modify the phrase "actual loss," the former phrase clearly looks to a future point in time when the claim is made, which coincides generally with the date the covered defect is discovered. The phrase "in force when the claim is made" is also consistent with other, into-the-future provisions of the policy. Specifically, paragraph 6(d) of the conditions-of-coverage section of the policy provides that the "Policy Amount will be reduced by any amount [the title company] pay[s]" to its insured. Again, this

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[6] Plaintiff argues the district court found a patent ambiguity in the policy related to the issue before this Court. Brief of Plaintiff at 19. That is incorrect. The district court found the term "public record" to be patently ambiguous regarding an issue that is not before this Court.

provision looks to a point in time which could be long after the date the insured property was purchased or the effective date of the policy.

In addition, the title policy can remain in force for many years or even decades into the future. Paragraph 2 of the conditions-of-coverage section entitled "Continuation of Coverage" provides that the insured is covered by the policy for as long as she owns the property and extends to a devisee who takes title on the death of the insured. Accordingly, it makes no sense in reading the policy as a whole to tie the valuation-of-loss date to the date of purchase, as that date could be years or decades in the past, long before the discovery of a covered defect. To require both the insured and the insurer to measure the diminution in value of the insured property based on what could be a decades-old starting point does violence to the plain and ordinary meaning of the phrase "actual loss" as well as the terms and conditions of the title policy when read as a whole.

Further, the date of discovery is a date which, by its very nature, would occur while the title policy is in force. The date of purchase by the insured of the insured property may bear no relationship to the effective date of the policy and could occur long before that date.

In *Fohn v. Title Ins. Corp. of St. Louis,* 529 S.W.2d 1 (Mo. 1975), a case cited by the Plaintiff, the insured purchased the property on May 10, 1966, for $6,400.00. Thereafter, the insured "made application for title insurance" and a title policy was issued on June 1, 1966, for the face amount of $20,000.00. While the time between May 10 and June 1, 1966, is not significant, it illustrates the fact that an owner of property can apply for and receive a title insurance policy at any time it owns the property to be insured and could do so years after the property was purchased. Accordingly, to tie a valuation of loss date to the purchase date

could very well tie the insured and the insurer to a date which bears no relationship to the issuance of the title policy.

In addition, the policy at issue provides the insurer a number of options *when a claim is made.* It can "negotiate a settlement" on the insured's behalf (paragraph 4(b) of the conditions-of-coverage section), it can "prosecute or defend a court case related to the claim" (paragraph 4(c) of the conditions-of-coverage section), it can "take other action" to protect its insured (paragraph 4(e) of the conditions-of-coverage section) or it can "pay [the insured] the amount due under the policy" (paragraph 4(d) of the conditions-of-coverage section). These options, however, arise only after the defect has been discovered and a claim is made. In fact, under some circumstances, even when a defect is discovered, an insurer has no obligation to clear title to insured property unless and until title as insured is actually challenged. *See Manneck v. Lawyers Title Ins. Co.*, 33 Cal. Rptr. 2d 771 (Cal. Ct. App. 1994) and *Eliopoulos v. Nation's Title Ins. of N. Y., Inc.,* 912 F. Supp. 28 (N.D.N.Y 1996). These policy provisions all point to future events, events which could occur well beyond the date of purchase and all center around the point in time when a defect is discovered and the insurer is provided notice of the claim.

Finally, the value of the insured property will appreciate or depreciate during the coverage period provided by the title policy. Prior to the discovery of a covered title defect, this fluctuation in value will occur without regard to that defect. An insured's property could double in value as a result of market forces or could lose three quarters of its value due to market forces, this appreciation or depreciation being unrelated to the undiscovered title

defect. It is only upon the discovery of the title defect that the defect will have an effect on value and thus only at that point will the insured suffer an actual loss.

The plain meaning of "actual loss," as that phrase is used in the title policy, is the loss suffered by the insured at the point the covered defect is discovered and that is the point at which that loss should be measured. While the date of discovery of the defect could be very close to the date the property was purchased, it could be, as in this case, years later. Thus, the date of purchase, as in this instance, bears no logical relationship to valuing the actual loss to the insured resulting from the covered defect. Other relevant provisions of the title policy as discussed above look to the future, beyond the point of purchase, in describing the rights and responsibilities of the insured and insurer. Accordingly, Defendant would respectfully submit that the correct response to the certified question is the diminution in value to the insured's property should be measured as of the date of the discovery of the title defect.

C. Because a title insurance policy is a policy of indemnity and not guarantee, the actual loss resulting from a covered defect must be measured from the date of discovery.

A title insurance policy is a policy of indemnity, not guarantee. *First Fed. Savings Bank v. Stewart Title Guar. Co.,* 317 S.C. 131, 140, 451 S.E.2d 916, 920 (Ct. App. 1995) (citing *Lawyers Title Ins. v. Synergism One Corp.,* 572 So. 2d 517 (Fla. Dist. Ct. App. 1990)); *see generally, TC X, Inc. v. Commonwealth Land Title Ins. Co.*, 928 F. Supp. 618 (D.S.C. 1995); *Falmouth Nat. Bank v. Ticor Title Ins. Co.,* 920 F.2d 1058 (1st Cir. 1990); *Narberth Bldg. and Loan Assn. v. Bryn Mawr Trust Co.,* 190 A. 149 (Pa. Super. 1937); 46 C.J.S. *Insurance* § 1736 ("The actual loss for which indemnity may be received may not

exceed the amount of insurance."); 43 Am. Jur. 2d *Insurance* § 528 ("As a general rule, a title insurer does not guarantee the state of the title, but agrees to indemnify the insured for any loss . . . ."). Title insurance does not guarantee perfect or unencumbered title to the insured property. *Swanson v. Safeco Title Ins. Co.*, 925 P.2d 1354 (Ariz. Ct. App. 1995).

As the United States Court of Appeals for the Tenth Circuit said in *First Fed. Savings and Loan Assn. of Fargo, N.D. v. Transamerican Title Ins. Co.*, 19 F.3d 528 (10th Cir. 1994):

> Title insurance is merely a contract to indemnify the insured for any losses incurred as a result of later found defects in title. *See* 57 George J. Couch & Ronald A. Anderson, *Couch on Ins.* § 189 (2d ed., 1983 & 1993 Supp.); 9 John A. Appleman and Jean Appleman, *Ins. Law and Practice* § 5201 (1981 & Supp. 1993); *Blackhawk Prod. Credit Assn. v. Chicago Title Ins. Co.*, 144 Wis. 2d 68, 423 N.W.2d 521, 524 (1988); *Demopoulos v. Title Ins. Co.*, 61 N.M. 254, 298 P.2d 938, 939 (1956). Title insurance *does not insure the value of the subject property*; it insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value. *Blackhawk Prod.*, 423 N.W.2d at 524.

Id. at 530 (emphasis added).

To value actual loss as of the date the property is purchased rather than the date the covered defect is discovered transforms the title policy from a contract of indemnity to a contract of guarantee and one that insures not only against certain title defects, but also insures the value of the property.[7] "A title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected." *McLaughlin v. Attorneys' Title Guar. Fund, Inc.*, 378 N.E.2d 355, 359 (Ill. Ct. App. 1978). To interpret the title policy as

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[7] This is exactly what the Plaintiff wants the Court to do, establish that the title insurer is the insurer of the value of the property, when she argues that since she "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." Brief of Plaintiff at 18.

the Plaintiff argues does violence not only to the policy's plain and unambiguous terms, but to the very nature of title insurance. *See First Fed. Savings Bank,* 317 S.C. at 140-141, 451 S.E.2d at 921 ("Indeed, to hold otherwise would rob Stewart Title of its right under each policy to institute litigation to cure a defect in a title or lien and thus would convert each policy from one that indemnifies the insured's state of title into one that guarantees it.").

D. The majority of courts in other jurisdictions have concluded that the date of valuation of an actual loss under an owner's title insurance policy is the date the covered defect is discovered.

There is no South Carolina case on point. The Plaintiff cites two South Carolina title insurance cases, *Stanley v. Atlantic Title Ins. Co.,* 377 S.C. 405, 661 S.E.2d 62 (2008) and *Firstland Village Asso. v. Lawyer's Title Ins. Co.,* 277 S.C. 184, 284 S.E.2d 582 (1981), for what the Plaintiff asserts generally to be the purpose of title insurance. Neither of these cases, however, dealt with the issue presented here.

The leading case on the question of when to value an actual loss caused by a covered title defect under an owner's title insurance policy is *Overholtzer v. Northern Counties Title Ins. Co.,* 253 P.2d 116 (Cal. Ct. App. 1953).

The Overholtzers purchased land which at that time was being used for agricultural purposes, but which the Overholtzers intended to develop for an industrial use. *Id.* at 117. The title policy did not take exception to a properly recorded easement located on a portion of the property. *Id.* The trial court found the Overholtzers purchased the property for industrial use and subsequent to their purchase of the property actually devoted the land to that use, but it denied recovery on that basis; rather, the trial court limited damages to the diminution in the value of the property caused by the easement measured by the use to which

the property was being devoted at the date of purchase, which was for agricultural purposes. *Id.* at 129-30.

The appellate court reversed saying, ". . . liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted." *Id.* at 130.

The rule set out in *Overholtzer* has been adopted and applied by numerous courts. *See, e.g., Hartman v. Shambaugh*, 630 P.2d 758, 762 (N.M. 1981) ("We reject the reasoning in those cases which state value should be determined as of the date of purchase."); *Happy Canyon Invest. Co. v. Title Ins. Co. of Minn.*, 560 P.2d 839, 843 (Colo. Ct. App. 1976) ("The rule to be utilized in determining damages recoverable by an insured resulting from a title insurer's failure to discover defects in title is 'the difference between the value of the property with and without the easement on the date of discovery of the easement by the insured.'"); *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 650 (7th Cir. 1990) ("A decline in value of the units between 1972 [date of purchase] and 1985 [date of discovery] cannot be attributed to a problem in *title*.") (emphasis in the original); *Swanson v. Safeco Title Ins. Co.*, 925 P.2d 1354, 1358 (Ariz. Ct. App. 1995) ("We believe that the rule announced in *Overholtzer*, and followed by other jurisdictions, provides the proper measure of damages."); *Miebach v. Safco Title Ins. Corp.*, 743 P.2d 845 (Wash. Ct. App. 1987) (in a case involving a total failure of title, the insured's actual loss is measured by the "fair market value of the property less outstanding encumbrances."); *Miller v. Title, U.S.A., Inc., Ins. Corp. of N.Y.*, 1991 W.L 24537 (Tenn. Ct. App. 1991) (". . . [T]he measure for the assessment of damages,

which is based upon the loss actually sustained . . . is fixed as of the date the defect was discovered and demand made by insured for compensation.").

Even before *Overholtzer* was decided, a number of courts had come to the same conclusion. *See, e.g., Kentucky Title Co. v. Hail,* 292 S.W. 817, 823 (Ky. 1927) ("It [the title company] must make good to Hail the loss or damage he has sustained, and to us it seems that must mean not what he paid for the property, but what he could have sold it for.") and *Narbeth,* 190 A. at 151 ("When the assured asserted its loss and made demand for payment, that loss was required to be determined as of the date of the demand."); *see also* 46 C.J.S. *Insurance* § 1739 (". . . the amount of loss actually sustained by the insured, is fixed as of the date the defect is discovered . . . rather than the date of purchase."), cited in *Stanley,* 377 S.C. at 410, 661 S.E.2d at 65.

The rationale for this rule was clearly stated in *L. Smirlock Realty Corp. v. Title Guar. Co.*, 469 N.Y.S.2d 415 (1983). In that case, the New York Court of Appeals rejected the conclusion of an earlier New York appellate division case, *Glyn v. Title Guar. & Trust Co.*, 117 N.Y.S. 424 (N.Y. App. Div. 1909), a case cited by the Plaintiff, that a title policy is analogous to the covenant of seizin and the calculation of "actual loss" under a title policy should be governed by the same rules. Quoting *Overholtzer* extensively, the *L. Smirlock* court examined the policy language and agreed that the actual loss valuation date should be the date the defect is discovered.

The L. Smirlock policy referred to "all loss or damage . . . which the insured shall sustain . . . ." *L. Smirlock*, 469 N.Y.S.2d at 427. The court viewed this language as looking to the future, past the date of closing. While the title policy here does not contain this precise

language, it does contain language which similarly looks to the future, well past the date of closing or the effective date of the policy. For example, paragraph 12 of the insuring clauses insures against the future possibility that the insured would be "forced to remove . . . [an] existing structure . . . ." As has been noted previously, in the conditions-of-coverage section, paragraph 6(a), the Defendant obligates itself to pay the insured its actual loss up to the "Policy Amount in force when the claim is made . . . ." obviously referring to a point in time which could be well beyond the date of purchase or date of policy.

The *L. Smirlock* court also placed considerable emphasis on the coinsurance and apportionment provision of the policy it was considering which had to do with the amount of insurance provided under the policy for post-policy property improvements.

Again, while the instant policy does not contain this precise provision, it does contain other provisions that look to the future, *e.g.* "if you cannot use 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. . . ." (conditions-of-coverage, paragraph 6(b)).

The court in *Hartman v. Shambaugh,* 630 P.2d 758 (N.M. 1981) similarly rejected the covenant of seizin analogy. Citing, among other policy language, the policy provision to the effect that the insured was required to promptly notify the title company of any claim of title or adverse interest of which the insured becomes aware, so as to provide the company with the opportunity to mitigate its damages (or cure the defect altogether, *First Fed. Savings Bank,* 317 S.C. at 140, 451 S.E.2d at 921), the court said "[i]n order to fulfill the intent of the parties in looking to the future, yet provide certainty as to liability, it is proper to determine

actual value as of the date of discovery of the defects by the owner." *Hartman*, 630 P.2d at 763.

The instant policy contains a similar provision at condition-of-coverage paragraph 3(a) - "If anyone claims a right against your insured title, you must notify us promptly in writing . . . ."

Accordingly, the majority of courts have concluded the date of valuation for a partial loss of title is the date the title defect is discovered.

E. The cases cited by the Plaintiff either lack any significant analysis of the question presented, improperly analogize a title insurance policy to the warranty of seizin or are otherwise inapposite.

In support of her position that the date of purchase should be the valuation date, the Plaintiff cites *Beaullieu v. Atlanta Title & Trust Co.*, 4 S.E.2d 78 (Ga. Ct. App. 1939).

In *Beaullieu,* the insured paid $8,000.00 for property and on March 18, 1937, was issued a title policy by the defendant in the face amount of $7,000.00. The opinion goes on to say that the insured entered into possession of the property and "after proceeding to build thereon a house early in the month of March, 1937, . . . ascertained that Mrs. Hal Padgett had an easement in and over the property." *Id.* at 79. The Georgia Court of Appeals does not say when the property was actually purchased but framed the question before it as follows: whether the measure of loss under a title policy was the "difference between the true market value of the land . . . without the [title defect] . . . and the true market value of the land encumbered with the easement" or "the difference between the purchase price of the land and the market value of the land with the easement upon it." *Id.* at 80. The date of valuation was never mentioned by the court as being an issue and, assuming the property was purchased

at or around the time the title policy was issued, the valuation date would not have been of much significance. Accordingly, *Beaullieu* factually would not appear to lend any support to the view that the date of purchase should be the valuation date. Further, the *Beaullieu* court analogizes a title insurance claim to a breach of deed warranty claim, an analogy which is simply incorrect and which, among other courts, the Tenth Circuit in *First Fed. Savings and Loan Assn. of Fargo, N.D. v. Transamerican Title Ins. Co.*, 19 F.3d 528, 520 (10th Cir. 1994) rejected. Further, and more significantly in light of the *Beaullieu* court's reliance on *Glyn,* the New York court in *L. Smirlock* also explicitly rejected this analogy after a lengthy and thorough analysis.

In *Glyn*, a case on which the Georgia court in *Beaullieu* relies, the plaintiff's complaint was dismissed based on what the court characterized as the grant of a demurrer. The complaint in *Glyn* set out two causes of action - one against the defendant sounding in negligence for a faulty title examination and a second sounding in breach of a title insurance contract. The court reversed the dismissal of the plaintiff's complaint holding that it did state causes of action. The court went on, citing *Kidd v. McCormick,* 83 N.Y. 391 (1881), a New York Court of Appeals case, to say that the plaintiff was entitled to recover, presumably if the facts supported such an award, the difference in value of the property when purchased as it was with the encroachments, and its value as it would have been if there had been no such encroachments. Given this pronouncement, one would assume that *Kidd* involved a question of the measure of actual loss under a title insurance policy. That assumption, however, would be incorrect. *Kidd* involved a question of the measure of damages under a contract to build houses, not a title insurance policy. Accordingly, the authority supporting

the *Glyn* court's damage analysis is inapposite, thus calling into question the *Glyn* court's analysis.

Given the foregoing, Defendant would submit that neither *Beaullieu* nor *Glyn* are persuasive authority for the position taken by the Plaintiff.[8]

Plaintiff also cites *Jalowitz v. Ticor Title Ins. Co.,* 478 N.W. 2d 67 (Wisc. Ct. App. 1991), in support of her position. *Jalowitz,* however, supports Defendant's view of the proper valuation date.

Jalowitz involved the same basic facts as *Allison,* where in 1972 the insured purchased a long term lease in a condominium unit located in a lodge, along with an owner's leasehold title insurance policy. Following the bankruptcy filing of the entity which owned the lodge in 1985, the bankruptcy court declared that the condominium owners did not have a possessory interest in their respective units and, therefore, their interests in their units could be discharged in bankruptcy, the result being a total (as opposed to partial) failure of title. The Jalowitzes brought suit in state court against their title insurer and the lower court awarded them damages equal to the purchase price of their unit lease which also equaled the face amount of their title policy. The Jalowitzes' title insurer argued on appeal that it was only liable to its insureds for their actual loss suffered as a result of the total failure of title, the actual loss being measured by the fair market value of the leasehold at the time of the

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[8] Plaintiff also cites *Security Union Title Ins. Co. v. RC Acres, Inc.,* 604 S.E. 2d 547 (Ga. Ct. App. 2004), which relies on *Beaullieu* and is therefore suspect as persuasive authority, along with *City of N.Y. v. N. Y. & South Brooklyn, etc. Co.,* 131 N.E. 554 (N.Y. Ct.App. 1921), which, while not mentioning *Glyn,* nevertheless analogizes a title insurance policy to deed warranty and is, therefore, equally suspect as persuasive authority. *City of N.Y.* was also cited and criticized by the New York court in *L. Smirlock.*

discovery of the defect - 1985. The Wisconsin court agreed, the only quibble with the title company's analysis being that the fair market value should be measured without taking into consideration the title defect. In doing so, the Wisconsin Court of Appeals cited with approval the related 1990 United States Court of Appeals for the Seventh Circuit decision in *Allison,* in which that federal circuit court, applying Wisconsin law, determined that the insured's actual loss was to be measured by the fair market value of the insured property as of the date of discovery of the defect. The *Allison* court opined that "[a] decline in the value of the units between 1972 [the date of purchase] and 1985 [the date of discovery of the defect] cannot be attributed to the problem of *title.*" *Allison,* 907 F.2d at 651 (emphasis in the original). The court went on to say,

> [an] insurer pays the depreciated, not the original, value of a car destroyed in a collision or a house burned to the ground . . . Similarly, the 'actual loss' for the leaseholders was the depreciated value of the leaseholds, they get no more from Ticor than they would have obtained from their casualty insurer had [the lodge] been the victim of a forest fire.
>
> *Id.* at 652.

The Plaintiff also cites *Securities Service, Inc. v. Transamerica Title Ins. Co.,* 583 P.2d 1217 (Wash. Ct. App. 1978), in support of her position that the date of valuation should be the date of purchase. The Washington Court of Appeals in *Securities Service* uses the same analogy to title warranties as did the courts in *Glyn, Beaullieu* and *City of N.Y. v. N. Y. & South Brooklyn, etc. Co.* and which was rejected by the New York court in *L. Smirlock,* criticized by the New Mexico court in *Hartman* and also rejected by the later Washington State case of *Miebach.* This analysis should be rejected by this Court as well.

Finally, the Plaintiff cites *Southern Title Gaur. Co. v. Prendergast,* 478 S.W.2d 806 (Tex. Ct. App. 1972). The Prendergast property was purchased in early 1964 and the title policy was issued covering the 22-acre tract the Prendergasts had "just bought" on February 17, 1964. In July 1965 it was discovered a third party owned a 10% undivided interest in the 22-acre tract. The title policy had a somewhat unique formula for measuring loss under the policy in the case of a partial failure of title which explicitly provided a valuation date as of the date of policy. The trial court instructed the jury to measure the loss by subtracting the value of the property with the defect from the value of the property without the defect, as of the date of discovery. The Texas Court of Appeals reversed, saying that the measure of damages provided by the trial court awarded the insureds a measure of damages applicable to a suit based on fraud in a real estate transaction, not their damages under the title policy. *Id.* at 809. The court recognized that a title policy was a policy of indemnity, not guarantee, and because the loss was discovered only 18 months after the property was purchased, regardless of the loss formula contained in the title policy, probably made little difference in the outcome. *Id.*[9]

Accordingly, the minority valuation date view is supported by cases which lack significant analysis of the question, incorrectly analogize a title insurance policy to the warranty of seizin and/or are inapposite.

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[9] Plaintiff also cites *Citicorp Savings of Ill. v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir. 1988). *Citicorp* involved a mortgagee or lender's policy, not an owner's policy, the circuit court improperly characterized the title policy as one of "guarantee" rather than indemnity (*id.* at 530), the opinion has been repeatedly criticized, *see, e.g., First Fed. Savings and Loan Assn. of Fargo N.D,* 19 F.3d at 530 and Nielsen, *Title & Escrow Claims Guide* 2d ed. § 3.4.6.1 and, per the almost universal criticism of this case, the court's rational for its decision makes no sense.

F. Actual loss suffered by an insured resulting from a partial failure of title should be measured by the diminution in value of the insured property as of the date of the discovery of the covered defect.

"The [title] policy necessarily looks to the future. It speaks of the future." *Overholtzer*, 253 P.2d at 131.

The phrase "actual loss" clearly looks to the future - beyond the date the property was purchased and to the date the defect was discovered. Other provisions of the title policy equally clearly do the same. All of the title company's options in dealing with a covered claim are activated not when the property is purchased, but when the defect is discovered. Prior to the discovery of a title defect, the value of the insured property will rise, fall, or remain the same, its value being unaffected by the undiscovered title defect.

The title policy is one of indemnity, not guarantee. It insures against certain title defects, it does not insure or guarantee the value of insured property.

The *Overholtzer* line of cases factually favor, rather than disfavor, the insured. Each logically concludes, based on the policy language considered, the indemnity nature of title insurance and the fact that title insurance does not insure property value, that the proper date from which to measure the diminution in value to insured property resulting from a covered defect is the date the defect is discovered.

In an attempt to avoid this well-reasoned authority and majority rule, Plaintiff argues the term "actual loss" as applied is patently ambiguous and therefore should be construed in her favor. For the reasons set forth herein, there is no ambiguity. However, if there was a patent ambiguity, the Court would need to consider the circumstances at the time the title insurance policy was issued - 2006 - to properly construe the title policy. 17A C.J.S.

Contracts § 423 ("In ascertaining the parties' intention to an ambiguous contract, a court should construe the contract in light of the surrounding circumstances at the time it was made."); *see also Breedin v. Smith*, 126 S.C. 346, 120 S.E. 64 (1923) ("the language employed be so construed as to give it such effect, and none other, as the parties intended at the time the contract was made".).

At the time the policy was issued, and for the better half of the last century and until only very recently real property values were rising. As a result, the construction that favors the Plaintiff at the time the policy was issued is that actual loss be measured on the date the defect is discovered.

Plaintiff argues that the *Overholtzer* cases were all decided in an era of ever rising property values. This is true. As is pointed out above, over 50 years prior to 2006, our nation enjoyed, for the most part, an appreciation of real property values and the better reasoned and logically consistent cases dealing with this issue have concluded the date of discovery is the proper date of valuation. However, Plaintiff suggests that in this instance, the majority view is incorrect and that she will be disadvantaged were this Court to agree with this view. That may well be. However, for the Court to agree with Plaintiff, while possibly providing an advantage (some might argue a windfall) to her, measuring actual loss from the date of purchase will disadvantage the thousands of present and future real property owners and insureds who purchase their property and their title insurance in this depressed market when, as we all expect, real property values begin to again appreciate.[10]

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[10] For example, assume that at the bottom of the real estate market, property is purchased for $100,000.00 and an owner's policy, identical to the title policy in this case, is issued in the same amount. Assume as well that in ten years the property value has doubled and at that point, a title defect is discovered which diminishes the value of the insured property by half. If the Plaintiff's valuation date is accepted, the insured would be entitled to $50,000.00. If the Defendant's valuation date is accepted, the insured would be entitled to its policy limits - $100,000.00.

CONCLUSION

For the reasons set forth above, defendant respectfully submits the proper response to the certified question is as follows:

> 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, the actual loss suffered by the insured as a result of the partial failure of title should be measured by the diminution in value of the insured property as a result of the title defect as of the date of the discovery of the covered defect.

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March 6, 2012
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Certified Question from the United States District Court
for the District of South Carolina, Florence Division

The Honorable R. Bryan Hawell
United States District Judge.

U.S. District Court No. 4:10-CV-01992-RBH

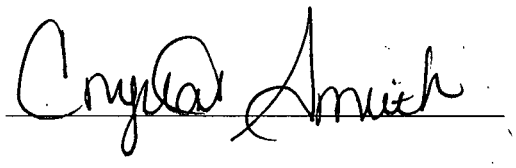
Joetta P. Whitlock, Trustee of the
Joetta P. Whitlock Trust ..... Plaintiff,

v.

Stewart Title Guaranty Co., ... Defendant

CERTIFICATE OF SERVICE

I, Crystal Smith, an employee of Callison Tighe & Robinson LLC, Attorneys for the Appellant, do hereby certify that I have served a copy of the **DEFENDANT'S BRIEF,** on counsel for the Plaintiff by mailing it to him at his last known address, by deposited it in the United States Mail, postage prepaid, addressed to counsel of record at the following addresses:



March 6, 2012
Columbia, South Carolina