

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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Case No. 2013-CP-07-1807

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**SC Court of Appeals**

William Loflin and Leslie Loflin, Appellants,

v.

BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Silver,  
P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title  
Agency, Inc., Defendants

Of which

Chicago Title Insurance Company is the Respondent.

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INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES .....ii

STATEMENT OF ISSUES ON APPEAL ..... 1

STATEMENT OF THE CASE .....2

STATEMENT OF FACTS .....5

STANDARD OF REVIEW .....8

ARGUMENT .....9

    I. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS HAVE NO CLAIMS FOR DAMAGE UNDER THEIR TITLE INSURANCE POLICY WHERE THEY RECEIVED TITLE TO THEIR PROPERTY AS INSURED AND AS CONVEYED ACCORDING TO THE PLAT RECORDED IN JACKSON COUNTY, NORTH CAROLINA, AND WHERE THERE ARE NO TITLE DEFENCS AFFECTING THE LOFLINS' TITLE TO THEIR PROPERTY .....9

    II. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS' CAUSE OF ACTION FOR BREACH OF CONTRACT MUST FAIL WHERE THE LOFLINS' CLAIM WAS PROPERTLY DENIED BECAUSE NONE OF THE COVERED RISKS AS SET FORHT IN THE TITLE POLICY WERE TRIGGERED BY THE CLAIM .....10

    III. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS RECEVIED THE BENEFIT OF THEIR TITLE INSURANCE SO THT THEY HAVE NO CAUSE OF ACTION FOR BREACH OF THAT CONTRACT .....13

    IV. THE CIRCUIT COURT PROPERLY RULED THAT THERE IS NO NEGLIGENCE CLAIM WHERE THE LOFLINS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE LOFLINS FROM UNRECORDED MATTERS, NO TITLE SEARCH WOULD REVEAL AND UNRECORDED MATTER, AND NO EXPERT HAS ESTABLISHED ANY BREACH OF DUTY.....15

    V. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATION AS TO ALL CAUSES OF ACTION SO THAT ANY CAUSE OF ACTION BY THE LOFLINS IS BARRED.....16

CONCLUSION .....17

## TABLE OF AUTHORITIES

### CASES

<i>Baird v. Charleston County</i> , 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) .....	8
<i>Christensen v. Mikell</i> , 324 S.C. 70, 476 S.E.2d 692 (1996) .....	14
<i>Citizens &amp; Southern Nat’l Bank of S.C. v. Langford</i> , 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994) .....	8
<i>Dean v. Ruscon</i> , 321 S.C. 360, 468 S.E.2d 645 (1996) .....	16
<i>Hill v. Pinelaw Memorial Park</i> , 292 S.E.2d 779 (N.C. 1981) .....	9
<i>Firstland Village Assoc. v. Lawyers Title Ins. Co.</i> , 277 S.C. 184; 284 S.E. 2d 582 (1981).....	13, 14, 16
<i>Lyons v. Fidelity Nat. Title Ins. Co.</i> , 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015), <i>reh’g denied</i> (2016) .....	17
<i>Moore v. Weinberg</i> , 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), <i>aff’d</i> by 383 S.C. 583, 681 S.E.2d 875 (2009) .....	8
<i>National Mortgage Corp. v. American Title Ins. Co.</i> , 261 S.E.2d 844 (N.C. 1980).....	13
<i>Preservation Capital Consultants, LLC v. First American Title Ins. Co.</i> , 406 S.C. 309, 751, S.E.2d 256 (2013) .....	13, 15, 16
<i>Republic Constr. Corp. v. South Carolina Dep’t of Highways &amp; Pub. Transp.</i> , 332 S.C 197, 503 S.E.2d 761 (1998) .....	17
<i>Schuman v. Roger Baker &amp; Assoc., Inc.</i> , 319 S.E.2d 208 (N.C. Ct. App. 1984) .....	9
<i>Stiles v. Onorato</i> , 318 S.C. 297, 457 S.E.2d 601 (1995) .....	8
<i>Trico Surveying, Inc. v. Godley Auction Co., Inc.</i> , 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993) .....	8
<i>Turner v. Glenn</i> , 18 S.E.2d 197 (N.C. 1942) .....	9, 10
<i>Vermeer Carolina’s Inc. v. Wood/Chuck Chipper Corp.</i> , 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999) .....	8

**STATUTES**

S.C. Code Ann. §15-3-530 (1976, as amended) .....16

N.C.G.S.A. §47-18 .....9

**RULES**

Rule 56(c) SCRCivP .....8

STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS HAVE NO CLAIMS FOR DAMAGE UNDER THEIR TITLE INSURANCE POLICY WHERE THEY RECEIVED TITLE TO THEIR PROPERTY AS INSURED AND AS CONVEYED ACCORDING TO THE PLAT RECORDED IN JACKSON COUNTY, NORTH CAROLINA, AND WHERE THERE ARE NO TITLE DEFECTS AFFECTING THE LOFLINS' TITLE TO THEIR PROPERTY

II. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS' CAUSE OF ACTION FOR BREACH OF CONTRACT MUST FAIL WHERE THE LOFLINS' CLAIM WAS PROPERLY DENIED BECAUSE NONE OF THE COVERED RISKS AS SET FORTH IN THE TITLE POLICY WERE TRIGGERED BY THE CLAIM

III. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS RECEIVED THE BENEFIT OF THEIR TITLE INSURANCE SO THAT THEY HAVE NO CAUSE OF ACTION FOR BREACH OF THAT CONTRACT

IV. THE CIRCUIT COURT PROPERLY RULED THAT THERE IS NO NEGLIGENCE CLAIM WHERE THE LOFLINS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE LOFLINS FROM UNRECORDED MATTERS, NO TITLE SEARCH WOULD REVEAL AN UNRECORDED MATTER, AND NO EXPERT HAS ESTABLISHED ANY BREACH OF THAT DUTY

V. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATION AS TO ALL CAUSES OF ACTION SO THAT ANY CAUSE OF ACTION BY THE LOFLINS IS BARRED

## STATEMENT OF THE CASE

On July 13, 2013, William and Leslie Loflin filed their Summons and Complaint against the Defendants Balsam Mountain Preserve Community Association, Chicago Title Insurance Company, and Counsellor Title Agency, Inc. (Complaint 7/18/2013). In that Complaint, the Loflins set forth causes of action for continuous trespass and encroachment by the Balsam Mountain Community Association and breach of contract by Chicago Title Insurance Company and Counsellor Title Agency, Inc. In response, Chicago Title Insurance Company filed a motion to dismiss on August 9, 2013. (Motion to Dismiss 8/9/13) Counsellor Title Agency, Inc., filed its motion to dismiss on August 12, 2013. (Motion 8/12/2013) Balsam Mountain Preserve Community Association filed its motion to dismiss on September 6, 2013 (Motion 9/6/2013). On September 27, 2013, Balsam Mountain Preserve Community Association filed a motion for protection from discovery. (Motion 9/27/2013). Balsam Mountain Preserve Community Association filed another motion for a protective order on November 18, 2013. (Motion 11/18/2013). The Loflins filed motions to compel discovery on December 16, 2013.

On August 14, 2014, the Plaintiffs filed an Amended Summons and Complaint naming BMP Development LP as a party to the case and removing Balsam Mountain Preserve Community Association as a Defendant. (Amended Complaint 4/4/2014). On April 16, 2014, Chicago Title Insurance Company filed its motion to dismiss the Plaintiffs' Amended Complaint. (Motion 4/16/2014). Counsellor Title Agency, Inc., filed its motion to dismiss the Plaintiffs' Amended Complaint on April 28, 2014 (Motion 4/28/2014).

The Honorable Earnest Kinard denied Chicago Title Insurance Company's Motion to dismiss by Form Order on September 3, 2014. (Order, 9/3/2014) At the hearing, Judge Kinard

reviewed only the Complaint as it was filed by the Plaintiffs in denying the motion. (Order, 9/3/2014). He did not review anything outside of the Complaint itself. (*Id.*)

On September 11, 2014, Chicago Title Insurance Company filed its Answer to the Plaintiffs' Amended Complaint. (Answer 9/11/2014). In its Answer, Chicago Title denied the causes of action against it and asserted numerous affirmative defenses, including the running of the applicable statute of limitations as the Plaintiffs knew or should have known of their alleged causes of action in 2006 as set forth in their Complaint. (*Id.*; Answer, ¶44).

On January 6, 2015, the Plaintiffs were permitted to file a Second Amended Complaint. (Order 1/6/2015). The Plaintiffs filed their Second Amended Complaint on the same day. (Order 1/6/2015). The Second Amended Complaint named Coward, Hicks & Siler, P.A., and J.K. Coward, Jr. as Defendants. (*Id.*) On January 21, 2015, Chicago Title Insurance Company answered the Second Amended Complaint asserting the same denials and affirmative defenses, including, but not limited to, the statute of limitations. (Answer, 1/21/2015).

Discovery continued throughout the entire time the case was pending.

On July 14, 2015, Chicago Title Insurance Company filed its Motion for Summary Judgment (Motion, 7/14/15). Counsellor Title Agency, Inc., also filed its Motion for Summary Judgment on July 31, 2015. (Motion 7/31/2015).

On August 5, 2015, the Plaintiffs filed their Third Amended Complaint. (Third Amended Complaint, 8/5/2015). Chicago Title Insurance Company filed its Answer to the Third Amended Complaint on August 14, 2015, asserting the same denials and affirmative defenses, including the running of the applicable statute of limitations. (*Id.*)

The case was unsuccessfully mediated on December 4, 2016.

The Plaintiffs set forth a Rule 30(b)(6) Notice of Deposition for Chicago Title Insurance Company that Chicago Title Insurance Company moved to quash based upon the Notice. (Notice of Depo and Motion to Quash).

On January 15, 2016, the case was given a Complex Case designation and assigned to the Honorable Carmen T. Mullen. (Order 1/15/2016).

On June 13, 2016, Judge Mullen heard the Defendant Chicago Title Insurance Company's Motion for Summary Judgment. (Transcript, 6/13/2016).

At that hearing, Judge Mullen took the motion under advisement and allowed the Plaintiffs to submit any supplemental matters they desired. (Transcript pp. 70-71).

On August 25, 2016, Judge Mullen entered her Order Granting Chicago Title's Motion for Summary Judgment. (Order 8/25/2016). On September 1, 2016, the Plaintiffs filed their Notice of Appeal, and this appeal follows. (Notice of Appeal 9/1/2016)

## STATEMENT OF FACTS

The underlying facts in this matter are largely undisputed. (Appellants' Brief)

The Loflins are the owners of Lot 108 in the Balsam Mountain Preserve development located in Jackson County, North Carolina. (Third Amended Complaint, ¶ 13) The Plaintiff William Loflin purchased this property in 2002 for \$495,000.00. (*Id.* at ¶ 10) Chicago Title Insurance Company issued Mr. Loflin a title insurance policy (the "Policy") for Lot 108.<sup>1</sup> (Third Amended Complaint at ¶ 5).

At the time of the closing in 2002, Lot 108 was not staked. (*Id.* at ¶ 10) During the closing, the Loflins received a Deed to Lot 108. (*Id.* at ¶13). At that same time, the Loflins received a copy of the only recorded plat reflecting that Lot 108 consisted of 1.837 acres. (*Id.* at ¶ 13). The only Recorded Plat also showed that the Balsam Mountain Preserve Round went around Lot 108. (Third Amended Complaint, *id.* at ¶ 10) The Recorded Plat was recorded in Jackson County, North Carolina, in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Loflins. (*Id.* at ¶13). The deed transferring title to Lot 108 was recorded in Jackson County in Book 1227 at Page 202. (*Id.* at ¶13.) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (the "Recorded Plat")(*Id.* at 13). The deed conveyed Lot 108 as shown on the Recorded Plat. (*Id.*) There is no dispute as to that issue. (*Id.*) The Loflins have always alleged that they purchased Lot 108 as shown on the Recorded Plat. (*Id.*) All the parties agree that the Recorded Plat is the only plat of record in the records in Jackson County, North Carolina. (Appellants' Brief, p. 7)

The Title Insurance Policy issued to the Mr. Loflin by Chicago Title insured the title to Lot 108 containing 1.837 acres as referenced in the Recorded Plat in Jackson County, North

Carolina. (Third Amended Complaint, *Id.* at ¶ 13). The Loflins received title as set forth in their deed based upon the Recorded Plat. (*Id.*)

Four years after the closing, in 2006, the Loflins claim that BMP Development informed them that, contrary to the duly recorded deed and the Recorded Plat, that Lot 108 only contained 1.4 acres and that Balsam Mountain Preserve Road went “through” their property as shown on an unrecorded plat. (*Id.* at ¶ 20)(Appellants’ Brief, p. 8) Although allegedly discovered in 2006, the Loflins did not file suit until 2013. (Complaint, July 18, 2013)(Transcript, p. 15, Transcript pp. 21-22). The Loflins asserted that the unrecorded plat shows both the reduced acreage and the Balsam Mountain Preserve Road going through their Lot 108. (Third Amended Complaint, *id.* at ¶20) According to the Third Amended Complaint, there is no recorded plat or deed showing the reduced acreage or Balsam Mountain Preserve Road going through Lot 108. (*Id.*) (Transcript p. 35) The Loflins also claim that there is a trespass and encroachment upon their property by way of this unrecorded plat, which they discovered in 2006. (Third Amended Complaint, *id.* at ¶ 16)

In 2012, six years after discovering this unrecorded plat, the Loflins informed Chicago Title of the unrecorded plat. (*Id.* at ¶ 20). In response, Chicago Title advised that based upon a title search, the only recorded deed and the Recorded Plat did not show any impairments to the title as received by the Loflins, and, accordingly, denied the Loflins’ claim. (*Id.*)(Letter from Chicago Title).

The Loflins causes of action against Chicago Title are for breach of contract and negligence (*Id.* at ¶¶ 147-151) The Loflins claim they entered into a contract with Chicago Title to “investigate and insure lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances and fraud.” (*Id.* at ¶ 148). In addition, they allege that Lot 108 contains 1.4 rather than 1.837 acres and there is a road dissecting the property as shown on

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<sup>1</sup> Chicago Title issued lenders’ policies of title insurance for refinances of the property at later dates. (*Id.*)

an unrecorded plat, rather than what is shown on the recorded plat. (*Id.* at ¶ 149) There are no specifics alleged as to how Chicago Title in any way breached its contract when the Deed and the Recorded Plat show that the Loflins received the title for which they bargained and for which the Title Insurance Policy was issued. (*Id.*) The claim for negligence states that Chicago Title knew or should have known the risks associated with Lot 108 and either allowed exposure to such risk or negligently failed to ascertain and insure against such risks. (*Id.* at ¶ 153-155). The Loflins claim they are entitled to the full value of their property and consequential damages. (*Id.* at ¶155). These are the only claims against Chicago Title.

## STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCivP 56 (c); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Moore v. Weinberg*, 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), *aff'd* by 383 S.C. 583, 681 S.E.2d 875 (2009).

Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co., Inc.*, 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993). Where there is no dispute over the operative facts, summary judgment is proper as a matter of law. *Citizens & Southern Nat'l Bank of S.C. v. Langford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994). Here, the material facts are not in dispute.

The Loflins confuse the standard of review stating the standard is "virtually identical" to the standard of review of a motion to dismiss. (Appellants' Brief, pp. 21-24) This oversimplification is not the law. *See Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)(a motion for failure to state a cause of action is based solely upon allegations in the complaint). Motions to dismiss only look to the complaint; motions for summary judgment look to the evidence in the record. *Id.* Matters outside of the pleadings require a different standard of review pursuant to Rule 56(c) SRCivP. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999).

## ARGUMENT

I. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS HAVE NO CLAIMS FOR DAMAGE UNDER THEIR TITLE INSURANCE POLICY WHERE THEY RECEIVED TITLE TO THEIR PROPERTY AS INSURED AND AS CONVEYED ACCORDING TO THE PLAT RECORDED IN JACKSON COUNTY, NORTH CAROLINA, AND WHERE THERE ARE NO TITLE DEFECTS AFFECTING THE LOFLINS' TITLE TO THEIR PROPERTY

The Loflins took title to their property based upon the only plat recorded in Jackson County, North Carolina, recorded in in Plat Cabinet 11 at Slide 383. That Recorded Plat was incorporated in the Deed to the Loflins which Deed was recorded in Jackson County in Book 1227 at Page 202. (Third Amended Complaint, *id.* at 10) The plat recorded in Plat Cabinet 11 at Slide 383 is the only Recorded Plat for Lot 108 (*Id.* at 13). That is undisputed. At the hearing of this matter, no one disputed that this is the only plat recorded in Jackson County, North Carolina, surveying the Loflins' property. (Transcript, p. 17; Transcript p. 35; Transcript p. 56, ll. 7-10, ll. 16-23).

As this property is in North Carolina, North Carolina substantive law as to recording must apply. According to North Carolina Code Section 47-18, unrecorded interests in land are invalid against subsequent purchasers of property. *See* N.C.G.S.A. §47-18. Unless an interest is "of record", it cannot be enforced against any subsequent purchaser. *Id.*; *see Hill v. Pinelaw Memorial Park*, 292 S.E.2d 779 (N.C. 1981). By enacting Section 47-18, the intent of the North Carolina General Assembly was that prospective purchasers should be able to rely only on the public record. *Schuman v. Roger Baker & Assoc., Inc.*, 319 S.E.2d 208 (N.C. Ct. App. 1984). It is only when a search of the public records reveals an encumbrance that a purchaser is chargeable with the notice of its existence. *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942). If no

interest is recorded, it is not enforceable against subsequent purchasers. *Id.* In this matter, the unrecorded plat cannot create any encumbrance and cannot create any damages for the Loflins as it has no impact upon the Loflins' title to their property. The Loflins' title is as reflected on their Deed and on the Recorded Plat. Accordingly, Judge Mullen properly granted Chicago Title judgment as a matter of law.

II. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS' CAUSE OF ACTION FOR BREACH OF CONTRACT MUST FAIL WHERE THE LOFLINS' CLAIM WAS PROPERLY DENIED BECAUSE NONE OF THE COVERED RISKS AS SET FORTH IN THE TITLE POLICY WERE TRIGGERED BY THE CLAIM

The Loflins have alleged that the contract at issue is the policy of title insurance issued by Chicago Title through its agent, Counsellor Title Agency, Inc., in 2002 (the "Policy") (*Id.* at ¶ 5) The Loflins have acknowledged that the Policy was issued (*Id.*) The Loflins have acknowledged that their Deed references the Recorded Plat showing the correct acreage and the Balsam Mountain Road going around Lot 108. (*Id.* at ¶¶ 13-14) The Policy complies with both the Deed and the Recorded Plat, insuring that title which the Loflins have and have had since 2002. (*Id.* at ¶ 13-14). There are no allegations stated in the Third Amended Complaint that support any breach of the contract as the Loflins received the benefit of their bargain, have the title for which they bargained, and for which there is title insurance. There are no allegations to support the Loflins' claims that Chicago Title had to "investigate and insure that Lot 108 was protected from all risks." In their lengthy Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment filed after the hearing in this matter, there are no case law or other citations supporting this allegation of investigation and insurance for Lot 108 being protected from "all risks". (Memorandum, July 1, 2016) Further, Chicago Title relies on its agents and does no investigations into title. There has been no evidence or testimony produced to support those

allegations. The Loflins' own allegations state that their Deed referenced the Recorded Plat. They have asserted that allegation again and again and again.

In the deposition of Cynthia Baines, claims counsel for Chicago Title, counsel for the Loflins asked the following questions:

Q. Okay. Do you understand that Mr. and Ms. Loflin claim responsibility of a Chicago title even if there's no problem with record title?

A. That seems to be their allegation.

(Baines Depo, pp. 11, ll. 22-25).

Q. Are you personally familiar with a lawsuit brought by an insured against Fidelity in which the insured claims that there should have been coverage but the record title was good – even though the record title was good?

A. This case.

(Baines Depo; p. 14)(copies of these pages attached).

By this very questioning of the Loflins' counsel, it is acknowledged that the title of record in this matter is good as recorded in Jackson County, North Carolina. To this very day, there is no other plat to search or rely on by Chicago Title or its agents in issuing a title insurance policy. There is simply no breach as the Loflins received the title referenced in both their recorded deed and the Recorded Plat referenced in that deed.

None of the enumerated "Covered Title Risks" in the Policy are triggered by the Loflins' allegations related to the unrecorded plat or by any evidence in presented to this Court at the time of the hearing of this matter or in the Loflins' Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment submitted to this Court after the hearing on June 13, 2016. (Transcript; Memorandum July 1, 2016).

Of note, the applicable Title Insurance Policy states:

*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 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) a mortgage or deed of trust; (b) a judgment, tax or special assessment; (c) 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 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.*

(Policy, Owner's Coverage Statement)(emphasis added).

The Policy also contains Exclusions that states the insured is not insured against loss, costs, attorneys' fees and expenses resulting from the following:

*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 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.*

(Policy, Exclusions)(emphasis added).

None of the Title Risks set forth in the Owner's statement of coverage are triggered, and, perhaps more importantly, the allegations of the unrecorded plat affect title **after** the Policy Date,

meaning they are specifically excluded from coverage under the Policy. As stated above and here again, the Loflins' title is as shown on the Recorded Plat and only on the Recorded Plat. Therefore, Judge Mullen properly ruled that there is no breach of contract where there is no coverage.

### III. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS RECEIVED THE BENEFIT OF THEIR TITLE INSURANCE SO THAT THEY HAVE NO CAUSE OF ACTION FOR BREACH OF THAT CONTRACT

Title insurance is retrospective, not prospective. The Loflins received the benefit of their title insurance; there has been no breach of that contract. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title **which are in existence at the time the insured takes title.** *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013); *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)(citing *National Mortgage Corp. v. American Title Ins. Co.*, 261 S.E.2d 844 (N.C. 1980))(emphasis added). Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc., id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id.* Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save the insured harmless from any loss through defects, liens, or encumbrances that may affect or burden the insured's title when the insured takes it. *Id.*

Here, the Loflins allege that the title Policy insured Lot 108, containing 1.837 acres as described in their Deed and Recorded Plat, which they received title for at their closing in 2002. The Loflins admit that the recorded Deed references the Recorded Plat with the correct acreage and showing the road going around their property. It was not until 2006, four years after the closing, that the Loflins claim to have learned of the alleged unrecorded plat showing a different

acreage and a different configuration of Balsam Mountain Preserve Road. At the time the Loflins took title, there were no encumbrances of record, and the Loflins received good title to their land. Further, there is no reference to the so-called unrecorded plat, meaning there can be no coverage to have been breached. *See Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996) (holding Chicago Title could not have breached a contract where there was no coverage for a fourteen acre tract of land). As in *Christensen*, where there is no coverage, there is no breach.

Neither Chicago Title nor its agents at Counsellor Title Agency, Inc., could have been aware of any unrecorded plat. To the contrary, the Loflins have alleged in Paragraph 10 of their Third Amended Complaint that they received a duly executed deed to Lot 108 referencing a recorded plat showing 1.837 acres transferred and Balsam Mountain Preserve Road going around Lot 108. (Third Amended Complaint, ¶ 13) There was no lien, encumbrance, defect or other matter recorded at the time the Loflins' title insurance policy was issued that could have been discovered at the time of closing. (*Id.* ¶13). There was no trigger of coverage at any time. Instead of protecting the insured against matters that may arise during a stated period *after* the issuance of the policy, a title policy is designed to save the insured from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981) Without a covered risk at the time the policy was issued, there can be no coverage. In this matter, there were no such defects, liens, or encumbrances of record at the time of the issuance of the policy. The Loflins' own allegations make that clear. Judge Mullen made the proper determination of judgment as a matter of law as to Chicago Title on these grounds as well.

IV. THE CIRCUIT COURT PROPERLY RULED THAT THERE IS NO NEGLIGENCE CLAIM WHERE THE LOFLINS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE LOFLINS FROM UNRECORDED MATTERS, NO TITLE SEARCH WOULD REVEAL AN UNRECORDED MATTER, AND NO EXPERT HAS ESTABLISHED ANY BREACH OF THAT DUTY

The Loflins have alleged that Chicago Title is negligent since it “knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge or negligently failed to ascertain and insure against such risks.” (Third Amended Complaint, ¶ 153) By their own allegations, no title search could have revealed that there was an unrecorded plat. No abstractor, attorney, or title researcher could have found any matter of record that would prove the existence of the unrecorded plat. No title search would have revealed an unrecorded plat. There are no allegations that state what risks were known or should have been known at the time the policy of insurance was issued, which is the time at issue as to the coverage under the policy. *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013). There has been no expert witness named nor testimony provided that Chicago Title has been negligent in the denial of any claims. The only allegation in the Third Amended Complaint relating to the time of issuance of the policy is that the deed references the recorded plat and that plat showing Lot 108 containing 1.87 acres and showing Balsam Mountain Road going around the property. (Third Amended Complaint, ¶ 13). There can be no negligence where the allegations fail to show how Chicago Title could have breached any duty to the Loflins at the time the policy was issued as was required by the recorded documents on file in Jackson County, North Carolina.

Chicago Title denied the Loflins' claim regarding the unrecorded plat discovered in 2006, a copy of which is not part of their Amended Complaint. The Loflins' own pleadings make clear that this is an item discovered four years after the policy was issued. There can be no breach of a

duty of care here for a failure to investigate something that was not of public record and issued after the policy. *Preservation Capital Consultants, LLC, id. at*, 406 S.C. 309, 751, S.E.2d 256 (2013) The policy at issue, referenced as the First Insurance Contract, insures Lot 108, with 1.87 acres, without a road going through it based upon the recorded plat from 2002. Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc., id. at* 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id.* There can be no negligence in failing to ascertain and insure risk when those risks arise four years after the policy was issued and remain unrecorded. Judge Mullen properly granted Chicago Title judgment as a matter of law on this issue, too.

V. THE CIRCUIT COURT PROPERLY RULED THAT THE LOFLINS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITAITON AS TO ALL CAUSES OF ACTION SO THAT ANY CAUSE OF ACTION BY THE LOFLINS IS BARRED

Nowhere in their Brief do the Loflins address the dismissal of their negligence claim based upon the applicable statute of limitations. They cannot overcome the statute of limitations for a negligence claim having known of their potential claims well more than three years prior to their filing this action having learned of alleged problems with their property in 2006.

The Loflins' negligence claims are clearly barred by the applicable statute of limitations. The Loflins have asserted claims against Chicago Title for breach of contract and for negligence. (Third Amended Complaint, ¶¶ 147-155). The applicable statute of limitations is three years for the negligence cause of action. S.C. Code Ann. §15-3-530. The "discovery rule" governs and runs on the date the party first knew or should have known by the exercise of reasonable diligence that a cause of action has arisen. *Dean v. Ruscon*, 321 S.C. 360, 468 S.E.2d 645 (1996). At the time a party should realize his injury is attributable to someone else's actions, the statute

begins to run. *Republic Constr. Corp. v. South Carolina Dep't of Highways & Pub. Transp.*, 332 S.C 197, 503 S.E.2d 761 (1998). As established in their Third Amended Complaint, the Loflins learned in 2006 that contrary to their deed and recorded plat there was a potential encroachment on their property, that there was less acreage than they thought they had, and that Balsam Mountain Road went through instead of around their property. (Third Amended Complaint, ¶20). Yet, the Loflins failed to file suit until July, 2013, well beyond the three year statute of limitations. Accordingly, the Chicago Title is entitled to judgment as a matter of law under the applicable statute of limitations for its negligence cause of action.

While this case was pending, this Court ruled that there is a twenty year status of limitations for actions under sealed instruments in the context of title insurance policies. See *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015); *reh'g denied* (2016). The Appellants make this argument for the first time in their Brief. (Appellants' Brief, pp. 28-29). This case is clearly distinguishable for the *Lyons* case. Unlike in the *Lyons* case, the Loflins knew some seven (7) years before filing suit that they knew of an issue regarding their property. This factual distinction differentiates this matter from the *Lyons* case.

#### CONCLUSION

The Circuit Court properly granted Chicago Title's motion for summary judgment where there were no facts in dispute where the title insurance policy provided no coverage for an unrecorded plat so that the Loflins took title to their property as shown in the records filed in Jackson County, North Carolina, and regarding the Loflins' claims being barred by the applicable statute of limitation so that the Loflins' claims were dismissed. For these reasons, the decision of the Circuit Court should be AFFIRMED.

Respectfully submitted,

Mt. Pleasant, South Carolina  
*Jan 16*, 2017

  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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JAN 10 2017

**SC Court of Appeals**

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2013-CP-07-1807

William Loflin and Leslie Loflin, Appellants,

v.

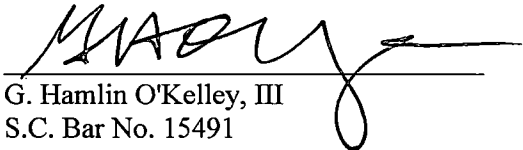
BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Silver,  
P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title  
Agency, Inc., Defendants

Of which  
Chicago Title Insurance Company is the Respondent.

PROOF OF SERVICE

I hereby certify that I served the Respondent's Initial Brief and Designation of Matters to be Included in the Record on Appeal by depositing a copy of same in the U.S. Mail, postage prepaid, on January 16, 2017, addressed to the Appellants' attorneys of record as follows: Daniel A. Speights, Esq., A.G. Solomons, III, Esq., Speights & Runyan, 100 Oak Street, East, P.O. Box 685, Hampton, SC 29924

Mt. Pleasant, SC  
*Jan. 16*, 2017

  
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January 16, 2017

G. HAMLIN O'KELLEY, III  
ATTORNEY AT LAW  
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The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: *William Loflin vs. BMP Development, et al*  
*Appellate Case No. 2016-001840*  
*File No.: 1089.0023*

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SC Court of Appeals

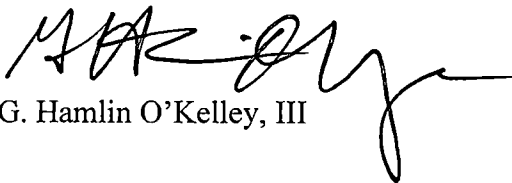
Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are an original and one (1) copy of the following:

1. Respondent's Initial Brief;
2. Respondent's Designation of Matters to be Included in the Record on Appeal; and
3. Proof of Service.

Please file the originals and return a file-stamped copy to me in the enclosed envelope. By copy of this letter, I am serving same upon counsel for the Appellants. Should you have any questions, please feel free to contact me. With kindest regards, I remain

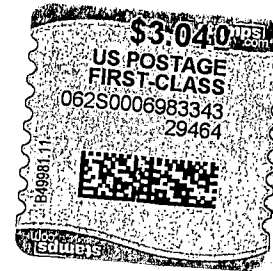
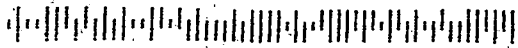
Sincerely,



G. Hamlin O'Kelley, III

Enclosures

cc. (w/enc.): Daniel A. Speights, Esq.  
A.G. Solomons, III, Esq.



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The Honorable Jenny Abbott Kitchings  
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JAN 19 2017

SC Court of Appeals