THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Appeal No. 2016-001840
Case No. 2013-CP-07-1807

William Loflin and Leslie Loflin,

Appellants,

v.

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

Defendants,

OF WHICH
Chicago Title Insurance Company,

Respondent.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Brief of Respondent ("**Response**") does not refer to the Brief of Appellants ("**Brief**") anywhere in the Argument (except to identify where the Loflins cited one case), and the one time Chicago cites the Loflins' Brief in its Statement of Facts is in support of a misstatement of fact.[1] Consequently, the Loflins limit this Reply to a brief discussion of the central issues in this appeal, and, simply for reference, list the points which Chicago does not contest ("**Addendum**"). The Loflins also respond to a new argument Chicago makes which did not form the basis of Judge Mullen's decision (the specific provisions of the Policy). The Loflins will not repeat their unrefuted arguments which are fully set forth in their Brief.

SUMMARY OF REPLY

Chicago does not dispute the core facts, makes assertions wholly unsupported by the record, and ignores the Loflins' legal arguments. Chicago simply cuts and pastes the same

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[1]Chicago cites the Loflins' Brief for what it apparently believes is a fact that is necessary to support its motion: "the parties agree that the Recorded Plat is the only plat of record" [Response at 5]. The Loflins did *not* say that. Had Chicago served the Loflins with a request to admit (or inquired in a letter), they would have denied the truth of that statement. The Loflins did not and do not dispute that the Recorded Plat was the only plat of record *at the time of the closing, and in 2012 when Chicago conducted a title search* (after the Loflins put Chicago on notice of their claim). The Loflins subsequently had a new plat prepared on April 8, 2014 ("**2014 Plat**"), which they produced to Chicago during discovery, and which Mr. Loflin referenced in his affidavit [Loflin Affidavit]. The Loflins deny that this 2014 Plat – which, like the Unrecorded Plat, demonstrates the defect – is not of record for a subsequent purchaser to review. As the Loflins pointed out, unlike Chicago, they believe they have an ethical and legal duty to inform a subsequent purchaser of the defect [Brief at 17].

unsupported arguments it made in its motion and later submitted to Judge Mullen in its proposed Order without making any effort to address the Loflins' factual record or legal points.

The core issue in this appeal is whether or not coverage under the Policy is limited, as a matter of law, to defects on the public record. The Loflins challenged Chicago in their Brief to produce one case in America holding that title insurance is limited, as a matter of law, to matters of record [Brief at 15]. Given modern technology, Chicago had the ability to check millions of reported cases. The fact that Chicago could not produce one decision in support of Judge Mullen's finding on this core issue underscores the impropriety of summary judgment.

Additionally, in their Brief, the Loflins set forth seven distinct reasons why the specific Policy in this case is not limited to matters of public record [Brief at 12-23]. Chicago does not address, much less contest, any of these seven reasons. The evidence stands undisputed.

Neither does Chicago address, much less contest, the Loflins' argument that the record is undisputed that the defect existed at the time of the Closing [Brief at 24]. Chicago simply pretends that the undisputed evidence on this point does not exist.

Chicago's separate argument that Judge Mullen properly dismissed the Loflins' negligence claim is puzzling, to say the least, inasmuch as the Loflins told this Court and Chicago that they were not appealing Judge Mullen's Order dismissing that count [Brief at 2, n. 4].

Finally, Chicago's argument that this Court should not apply the twenty year statute of limitations because, "The Loflins knew some seven (7) years before filing suit that they knew of an issue regarding their property," is nonsensical. In any event, the record is undisputed that the Loflins timely instituted this lawsuit after Chicago breached the Contract of Insurance (which Chicago concedes is a pre-requisite for recovery) [Addendum ¶¶ 5, 6; *see* Brief at 26].

ARGUMENT

A. THE LOFLINS' BREACH OF CONTRACT CAUSE OF ACTION

1. The Policy Is Not Limited To Matters Of Public Record

Chicago's argument is based on a single proposition: that the Loflins have no claims for damage under the Policy based upon Chicago's erroneous view that coverage is limited, as a matter of law, to matters of public record [Response at 9-10]. In turn, that argument is based upon a house made of one card: that a North Carolina statute protecting subsequent purchasers from defects not of record somehow trumps the parties' Contract of Insurance. The Loflins are not subsequent purchasers, and the statute does not address the dilemma that the Loflins will face with a subsequent purchaser. *See Infra* pp. 5-6. As previously set forth by the Loflins' in their Brief, which Chicago does not address, Chicago's position fails as a matter of law, as a matter of procedure, and as a matter of fact.

As a matter of law, the burden is on Chicago to prove that it is entitled to judgment as a matter of law. The Loflins challenged Chicago to find one case in America in support of its sole foundational position [Brief at 15-16]. Chicago has cited no case. Neither did

Judge Mullen.[2]

As a matter of procedure, Chicago ignores the Loflins' argument that summary judgment is barred under the law of the case doctrine. The exact same issue based upon the exact same record was decided by Judge Kinard in denying Chicago's motion to dismiss. Chicago sought dismissal and later summary judgment based upon the identical facts set forth in the Loflins' operative Complaint. Nothing changed between the hearing before Judge Kinard and the hearing before Judge Mullen. The bottom line is that Judge Mullen disagreed with Judge Kinard's rejection of the precise argument that Chicago made on both occasions. The law of the case doctrine forbade her from reversing Judge Kinard.[3]

As a matter of fact, Chicago does not address, much less contest, a myriad of facts which prove that Judge Mullen committed reversible error when she held Chicago could not be responsible under its Contract of Insurance absent a defect on the public record [Brief at 12 - 21; Addendum ¶¶ 12-15, 17-27].

In addition, the Loflins noted that their counsel (the Coward Defendants) told the

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[2]Even before the Loflins submitted their Memorandum in Opposition below, Judge Mullen told the parties that – unlike Chicago's representative – she had a "problem" with holding a title insurance company "responsible for something that isn't recorded," even where the seller had committed a fraud expressly covered by the Contract of Insurance [Hearing (June 13, 2016) at 56-57].

[3]Chicago suggests in its Standard of Review that the Loflins are confused over the standard of review [Response at 8]. The Loflins disagree [Brief at 21-23], but the important point is that Chicago did nothing to change the scope of review when it again relied on the operative complaint in support of the identical argument it made to Judge Kinard.

Loflins and Chicago that they limited their certification to "an examination of the title to the real estate" [Brief at 19]. The Loflins then challenged Chicago to explain why it did not likewise make such a statement in its Policy [Brief at 19]. Again, Chicago simply ignores the Loflins' challenge. It knows that there is nothing in its Policy – which must be read in the light most favorable to the Loflins – suggesting that coverage is limited to matters of public record.[4]

The only legal authority Chicago cites, and the only legal authority relied upon by Judge Mullen in her Order, for the proposition that as a matter of law, coverage is limited to matters of public record, is a North Carolina statute providing that prospective purchasers should be able to rely on the public record. As the Loflins showed in their Brief [Brief at 15-17] – which once again Chicago ignores – the North Carolina statute affords Chicago no protection. Again, Chicago's own witness testified that the Policy governs, and no where in the Policy does it suggest that coverage is limited to matters of public record.

Chicago does not explain to this Court what it would have the Loflins tell a subsequent purchaser. The Loflins argued that in good faith they would have to point out that the Recorded Plat, unlike the Unrecorded Plat and the 2014 Plat, does not reflect what is on the ground, and that if they did not disclose this problem, "they would subject

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[4]Nor did Chicago address the footnote to this challenge in which the Loflins pointed out that, unlike their counsel (the Coward Defendants), Chicago has never asserted that it exercised the necessary degree of care and skill "because, unlike a professional, such a defense is not available to a company that insures risks. There is a fundamental distinction between an insurance company and a lawyer" [Brief at 19, n. 16].

themselves to a lawsuit for fraud and deceit" [Brief at 20-21]. Surely this is not behavior the lower Court intended to enable or even encourage.

Finally, Chicago does not address the Loflins' third challenge:

> The Loflins acknowledge that if they sold the property, the subsequent purchaser would have good title. Despite the public record, however, the subsequent purchaser would also have less acreage and a road going through the property. If the Loflins did not disclose these problems, they would be subject to a lawsuit for fraud and misrepresentation. **The Loflins challenge Chicago (again) to tell this Court if it will defend such a lawsuit in accordance with the terms of the Policy it issued in exchange for the Loflins' premium.**

[Brief at 17 (emphasis supplied)]. If Chicago will defend such a lawsuit, that is unmistakable evidence that the Policy affords coverage. If Chicago will not defend such a lawsuit, it confirms that the Policy the Loflins paid for is essentially worthless because the Loflins already had coverage for defects of record through their counsel's certification. By granting summary judgment, the Court ignored the incongruity of the facts and Chicago's position.

2. <u>The Defects Existed As Of The Closing</u>

Chicago argues again that it is not responsible under the Policy for defects which did not arise until after the Closing [Response at 13]. However, Chicago does not dispute that "the record is absolutely undisputed that all risks covered by the Policy existed prior to the Closing [Brief at 24; Addendum ¶29].

3. <u>There Are, At A Minimum, Material Issues Of Fact As To Whether Events Triggered Coverage</u>[5]

Chicago argues that, "None of the Title Risks set forth in the Owner's statement of

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[5]The Loflins reserve the right to seek summary judgment upon remand.

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" [Response at 12-13 (emphasis in original)].

The Loflins understand and have addressed above Chicago's point that the Policy only covers defects which existed at the time of the Closing. The Loflins do not understand what other point Chicago is trying to make, if any.

The Loflins previously told the Court that, "Because Judge Mullen did not analyze the Contract, the Loflins will not brief the particular risks covered or the liberal rules of construction in favor of an insured" [Brief at 14, citing Memorandum in Opposition at 24-27 (footnote omitted)]. This conclusion is buttressed by the fact that Chicago does not analyze any of the provisions of the Policy in its Response.

In addition, if Chicago contends that the Policy terms prevent coverage even if the Policy (and the parties' ability to contract) is not limited as a matter of law to matters found in the public record, the proper course would be for this Court to remand the matter for discovery, if necessary, whereupon the Circuit Court could make factual findings on the specific terms. Again, the Circuit Court did not analyze the Policy, much less in light of the presumptions in favor of the insured.

Notwithstanding these views, however, Chicago did list certain provisions and exclusions in the Policy [Response at 11-12]. Although Chicago does not discuss any of these provisions or exclusions, out of an abundance of caution, the Loflins will briefly show

that at a minimum, there are issues of fact as to whether or not the Policy provides coverage, particularly given the presumptions in favor of the insured.

a. Uncontroverted Facts

The following are uncontroverted facts:

- The Loflins have a road going through their Lot 108.
- The road appears adjacent to Lot 108 on the recorded plat which predates the sale of his property and dissects the property on an unrecorded plat which also predates the sale of their property.
- Randy Herron testified that Balsam received the unrecorded plat on the day it was created (9 days before the Closing) [Ex. 25 (Herron deposition at 44)].
- The Loflins did not know that the road went through their property prior to the Closing.
- The Loflins purchased an insurance Policy from Chicago Title.
- Chicago Title drafted the insurance Policy.
- Upon discovery of the fraud perpetrated by the seller coupled with the fact that someone claimed ownership on a portion of their land, the Loflins filed a claim with Chicago on March 23, 2012.
- Chicago refused to honor the contract, denying the claim on August 21, 2012.
- The Loflins have attempted to shut the road and the steel posts were pulled up and the road paved.
- In the numbered risks, the contract specifically provides coverage for (1) someone else owning an interest in your land, (3) fraud, (4) defective recording of any document, (9) others having rights arising out of leases, contracts or options, (10) someone else having an easement and (14) other defects liens or encumbrances.
- The Definitions section of the Policy defines easement as "the right of someone else to use your land for a special purpose."

- The Definitions section of the Policy defines Title as "the ownership of your interest in the land, as shown in Schedule A."

b. ***<u>The Policy</u>***

i. Drafted by Chicago Title

The Court ignored an axiom of contract law. Chicago Title is the drafter of the contract. "Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007); *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. *Contracts* § 324). Chicago could have very easily put in a simple sentence that stated clearly that the only covered risks are deficiencies in the public record. Instead Chicago provided numbered risks that, by necessity, must be discovered outside the public record. Fraud, adverse possession,[6] mistaken recordings, encroachments, easements by necessity, as well as many common easements are not issues of public record.

ii. The Context of the Transaction

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[6]North Carolina recognizes adverse possession of land. *Rushing v. Aldridge*, 214 N.C. App. 23, 713 S.E.2d 566 (2011). Adverse possession of land is not on public record. Adverse possession would certainly qualify as someone else owning an interest in the land. Strong argument can be made that the road meets the requirements of adverse possession.

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80–81, 562 S.E.2d 482, 484–85 (Ct.App.2002); accord *D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). The intention of the parties in the transaction was to provide insurance for the landowner for the unknown risks of ownership beyond the risks that can be ascertained by a simple title opinion. The contract language extends beyond and does not confine itself to merely those matters of record title. If it was Chicago Title's secret understanding of the contract that Chicago is only obligated to matters of public record, Chicago certainly did not convey that to the Loflins through their agent (who also had served as the Loflin's attorney, the agent of Balsam Mountain and fiduciary to the Loflins, and as attorney for Balsam Mountain) or in writing. However, parties are governed by their outward expressions not their secret intentions. *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93–94, 594 S.E.2d 485, 493–94 (Ct.App.2004). Chicago's attempt to relegate its liability to merely a redundant insurance provider with coverage that is secondary to a real estate attorney's E & O coverage is not an expressed intention to homeowners and contradicts the plain language of the Policy. Further, our Courts have been consistent that if there is any question about the intent of the parties, the determination of the parties' intent is then a question of fact for the jury to determine. *South Carolina Dep't of Natural Resources*, 345 S.C. at 623, 550 S.E.2d at 303.

iii. The Specific Policy Provisions

Whether the Court agrees that the plain reading leads one to the conclusion that title means ownership, or the Court construes the ambiguities in the Policy against the drafter, even examination of the first sentence and the defined term used in the first sentence reveals that this Policy covers risks beyond the public record.

- The covered risk explicitly named and listed first in the Policy is that "someone else owns an interest in your land." Notwithstanding the reality that according to every subsequent survey that has been done on the property since the survey resulting in the recorded plat, Lot 108 is not shaped and does not contain what the Loflins insured, the Loflins have to deal with Balsam and its successors exerting ownership of the land covered by the road. Mr. Loflin submitted an affidavit that he took steps consistent with ownership of property, planting steel posts. Inconsistent with that ownership, those steel posts were destroyed and a road paved over his objection.

- The third covered risk is fraud or forgery. The documents show that the seller knew of a plat that showed the road dissecting his property before the sale and did not record the plat, but rather went forward with the sale. Then years later, the seller tried to slip one past the goalie by asking the Loflins to execute quit claim deeds. This is fraud. It is specifically covered by the Policy. The Defendant who committed the fraud is in default. Those allegations are established as a matter of law.

- The fourth covered risk is defective recording of any document. Craig Lehman, the former President of Balsam stated that the reason the recorded plat was wrong was that the correct plat was not delivered [Ex. 11 (Lehman deposition at 55)]. If the wrong plat was filed, this is specifically covered.

- The ninth covered risk is if "other have rights arising out of leases, contracts or options." To the extent that the HOA at Balsam exerts rights to the road and the other excluded property rightfully belonging to the Loflins through contracts of succession with the original owners, those rights are rights arising out of a contract or option and impact the ownership of Lot 108.

- The tenth covered risk is that "someone else has an easement on your land." Chicago elected to define easement as "the right of someone else to use your land for a special purpose." Chicago's loose definition does not require any impact on record title. The right to use a road crossing Lot 108 meets this

definition.

- The fourteenth covered risk is for "other defects, liens or encumbrances." First this description is unclear by nature. ("A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear.") It is not knowable to a purchaser what other encumbrances or defects Chicago may cover. Second, Craig Lehman stated that, "I knew we (Balsam) had encroached on the property and what they (the Loflins) purchased wasn't in agreement with the master plan or their plat" [Ex. 11 (Lehman deposition at 31)].

None of this was addressed by the lower Court or by Chicago in it's brief. It is clear that the harm done to the Loflins triggers at least one of these provisions. Even if the Court does not feel it is clear, there is an issue of material fact concerning the conclusions to be drawn from the known facts. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014), *reh'g denied* (June 13, 2014)(emphasis supplied)("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "**should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts**.").

iv. The Testimony of Chicago Avers Exactly The Opposite of the Court's Ruling

In response to Plaintiffs' request to depose a company representative, Chicago produced Cynthia Baines. Ms. Baines is senior claims counsel for Fidelity National, the owner of Chicago. While the Court ruled that Chicago's Policy coverage is confined to only matters of record title, senior counsel produced as Chicago's representative testified to the

exact opposite.

> Q. Is Chicago's position that it does not provide coverage so long as the record title is correct?
>
> A. I would say that the coverage is governed by the terms and conditions of the policy so there are possibly circumstances where there would be coverage for things that are not of record title.

[Ex. 24 (Baines Deposition at 12)].

B. NEGLIGENCE

Chicago devotes an entire section to arguing that the Loflins' Negligence Cause of Action should be stricken [Response at 15-16]. Elsewhere, Chicago argues against certain statements contained in the Loflins' negligence allegations [Response at 6]. As stated above, the Loflins expressly told Chicago and this Court in their Brief that they are not pursuing the Negligence Count [Brief at 2, n. 4].

C. STATUTE OF LIMITATIONS

Chicago does not contest that, "Judge Mullen held that the statute of limitations begins to run 'on the date the party first knew or should have known by the exercise of reasonable diligence that a cause of action has arisen. At the time a party should realize his injury is attributable to someone else's actions, the statute begins to run'" [Brief at 25].

Chicago does not dispute that it "refused to perform under the Contract of Insurance on August 21, 2012," and that "it was not until 2012 that the Loflins knew that the encumbrance (as well as the fraud) predated the Closing [Brief at 25-26; Addendum ¶39-41]. Neither does Chicago dispute that, "The Loflins had twenty years (not three years) to bring

their lawsuit" [Brief at 28; Addendum ¶42]. In summary, Chicago does not attempt to refute that it does not show, as a matter of law, that this lawsuit is time barred.

The Loflins had twenty years (not three years) to bring their lawsuit. Not only did the Court examine extraneous matters beyond when the triggering breach of an insurance contract occurred to determine when the statute of limitations begins to run, the Court applied the wrong statute. In this matter, the particular facts of the case would lead to an expansion of the rights of the Loflins, not diminution. Because the formation of the title Policy was a required part of the transaction selling real property secured by a mortgage, S.C. Code Ann. §15-3-520 which provides for a twenty year statute of limitations in that exact scenario. See *Suttles v. Wood* (S.C.App. 1984) 280 S.C. 272, 312 S.E.2d 574.

This Court has answered the question of which statute of limitations to apply on actions concerning title insurance and applied §15-3-520. The Court stated in *Lyons v. Fid. Nat. Title Ins. Co*, 415 S.C. 115, 129, 781 S.E.2d 126, 133 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016) that:

> A twenty-year statute of limitations allows policyholders to carefully monitor situations as they unfold, ultimately preventing the bringing of unnecessary claims or litigation. Thus, we agree with the circuit court that "the policies are indeed sealed instruments and that the twenty-year statute of limitations applies."

The Order applies the wrong statute.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Loflins' Brief, the Order and Judgment below should be reversed.

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ADDENDUM

FACTS AND ARGUMENTS WHICH CHICAGO DOES NOT DISPUTE

1. When Mr. Lehman informed the Loflins that there was an encroachment on Lot 108, that the property contained only 1.4 acres, and that a road went through the property, "Mr. Lehman believed and communicated to the Loflins that the road had been constructed on Lot 108 *after* the closing" [Brief at 8 (emphasis in original)].

2. "Mr. Lehman specifically denied that he ever saw a plat that was dated before the Closing, other than the Recorded Plat," and that he "was not even aware of a predated plat until several years after he left Balsam in late 2009" [Brief at 8].

3. "*Contrary to the assumptions made by Chicago and Judge Mullen, there is nothing in the record suggesting that Mr. Lehman ever saw the Unrecorded Plat, much less provided the Loflins with a copy in 2006*" [Brief at 8 (emphasis in original)].

4. "At no time did Balsam tell the Loflins that it knew before the Closing that Lot 108 contained only 1.4 acres with a road through it" [Brief at 8-9].

5. "In early 2012, the Loflins first learned that two weeks before the original Closing, a plat had been prepared for Balsam, which showed that Balsam Mountain Preserve Road went through their property and reflected that Lot 108 had less acreage than in their Deed and Recorded Plat" [Brief at 9 (internal citation omitted)].

6. "*Based upon this fact, for the very first time, not only did the Loflins believe that they had been defrauded, or at a minimum were entitled to recision, but they recognized for the first time that Chicago's Policy was applicable to the transaction because the encroachment existed at the time of the closing*" [Brief at 9 (emphasis in original)].

7. "Since the foreclosure, Balsam's successors have exercised control over Balsam Mountain Preserve Road through the Loflins' property and .437 acres owned by the Loflins," and that, "The Loflins have objected to this encroachment, but Balsam and its successors have refused to remedy this situation, and have continued to encroach and continuously trespass upon Lot 108" [Brief at 10].

8. "The Association informed the Loflins that if they attempted to close the road encroaching through their property, it would not defend the Loflins from potential lawsuits filed by other Balsam property owners for limiting access to their property" [Brief at 10].

9. "On January 23, 2015, the Loflins took the deposition of Randy Herron, the

surveyor who prepared both the Recorded Plat and Unrecorded Plat," and "Mr. Herron testified that he had provided the Unrecorded Plat to Balsam *before* the closing" [Brief at 10 (emphasis in original)].

10. After taking Mr. Herron's deposition, "the Loflins conducted another survey which confirmed that, in fact, the road actually cuts through Lot 108 and reduces their acreage" [Brief at 10-11].

11. "In 2016, the Association paved the road through Lot 108" [Brief at 11].

12. Chicago's representative testified that "the coverage is governed by the terms and conditions of the policy so there are possibly circumstances where there would be coverage for things that are not of record title" [Brief at 12].

13. "The language of the Policy itself demonstrates the error of Judge Mullen's finding that liability is limited to what is a matter of record" [Brief at 13].

14. "If Chicago wanted to limit coverage to matters of public record, it could have clearly stated that limitation in the Policy" [Brief at 14-15].

15. "There is simply no evidence in the record suggesting that any consumer should know (much less actually knows) that title insurance is limited to risks already covered by an attorney's title opinion," and, "It is undisputed that the Loflins did not have that expectation when they paid for their Policy" [Brief at 15].

16. "Judge Mullen cited no case from anywhere in the nation supporting the proposition that a title insurance company is protected, as a matter of law, despite the policy terms to the contrary. The absence of such authority demonstrates the extremeness of Judge Mullen's core ruling" [Brief at 15-16].

17. "The Unrecorded Plat did not ***create*** the encumbrance. The Unrecorded Plat ***revealed*** the encumbrance" [Brief at 16].

18. "It is undisputed that the Loflins were defrauded" [Brief at 16].

19. "It is undisputed there is an encumbrance on the Loflins' property, i.e. there is a paved road going through their home site" [Brief at 16-17].

20. "If the Loflins did not disclose these problems, they would be subject to a lawsuit for fraud and misrepresentation" [Brief at 17].

21. "The insurance policy covers fraud," and, "The Loflins do not have to prove that Chicago committed fraud in order to recover for fraud committed by Balsam, which is an insured risk" [Brief at 17-18].

22. "There is a fundamental difference between an insurance company that insures risks and a lawyer who must perform an examination of the Courthouse records in a reasonable manner" [Brief at 19].

23. "If, in fact, Chicago's position is that its Contract of Insurance does not cover any defects which are not as of record, it could have easily said that in one unambiguous sentence. Nowhere in the Contract of Insurance, however, does Chicago, even stretching the English language to its outer limits, suggest that" [Brief at 19].

24. "It is self-evident that a lot containing 1.4 acres with a road going through it is worth less than a lot containing 1.85 acres without a road dissecting it" [Brief at 20].

25. "Judge Mullen's conclusion is not only refuted by common sense (no one would want a home site with a paved road running through it), but the undisputed testimony of Balsam's former General Manager (Mr. Lehman) that the encroachment had a 'negative impact on the property'" [Brief at 20].

26. "If the Loflins could find a purchaser for the subject property, and pointed out that the Recorded Plat does not reflect what is on the ground – as they in good faith would be required to do – they would get far less for the property" [Brief at 20].

27. "If the Loflins did not disclose this problem, they would subject themselves to a lawsuit for fraud and deceit" [Brief at 20-21].

28. Judge Mullen's substantive rulings were barred by the law of the case doctrine [Brief at 21-23].

29. "As set forth above, however, the record is absolutely undisputed that all risks covered by the Policy existed prior to the Closing" [Brief at 24].

30. "Judge Mullen did not discuss, much less attempt to distinguish, the evidentiary record the Loflins submitted on this fundamental point" [Brief at 24].

31. "The encumbrance (the road through the Loflins' property) existed before the Closing. On its face, the Unrecorded Plat itself is dated before the closing [Unrecorded Plat (February 6, 2002)]" [Brief at 24].

32. "Balsam's fraud (a risk covered by the Policy), which Balsam did not contest, existed before the Closing. The policy also explicitly covers mistakes in recording" [Brief at 24-25].

33. "Judge Mullen held that the statute of limitations begins to run 'on the date the party first knew or should have known by the exercise of reasonable diligence that a cause of action has arisen. At the time a party should realize his injury is attributable to someone else's actions, the statute begins to run'" [Brief at 25].

34. "Chicago refused to perform under the Contract of Insurance on August 21, 2012" [Brief at 25].

35. "There was no breach to discover until August 21, 2012. The action was timely filed on July 18, 2013" [Brief at 26].

36. "Assuming *arguendo* that the statute of limitations on a breach of contract action begins to run prior to the date of the breach, it is undisputed that it was not until 2012 that the Loflins knew that the encumbrance (as well as the fraud) predated the Closing" [Brief at 26].

37. Judge Mullen did not address Mr. Loflin's Affidavit [Brief at 26-27].

38. Mr. Loflin's Affidavit states that, "In 2006, Craig Lehman informed me that there was an encroachment on Lot 108, that the property contained only 1.4 acres, and that Balsam Mountain Preserve Road went through the property. Mr. Lehman suggested that the road had been constructed through Lot 108 after the Closing. Because I knew the Recorded Plat showed no road through my property, I had no reason to doubt that the road Mr. Lehman was now disclosing was an after purchase encroachment." [Brief at 27].

39. Mr. Loflin's Affidavit states at Paragraph 5 that, "In early 2012, I first learned that Balsam Mountain Preserve Road went through my property before the Closing, which also resulted in less acreage as set forth in my Deed and Plat, as reflected in an Unrecorded Plat that had been prepared for Balsam before the Closing" [Brief at 27].

40. "The Loflins, who have their life savings tied up in this real estate investment certainly would have looked to their insurance company if they had thought it had responsibility for their loss. Instead, believing Balsam – that the road had been constructed after the closing – they worked with Balsam for several years trying to resolve this situation (while their membership dues were suspended)" [Brief at 27-28].

41. "To their shock and dismay, they [the Loflins] discovered in 2012 that Balsam

knew before the Closing that a road went through their property. That is what triggered the statute of limitations against Chicago. There is no reason to believe that the Loflins slept on their rights when the Court below held that they had no rights until that happened" [Brief at 28].

42. "The Loflins had twenty years (not three years) to bring their lawsuit" [Brief at 28].

43. "Not only did the Court examine extraneous matters beyond when the triggering breach of an insurance contract occurred to determine when the statute of limitations begins to run, the Court applied the wrong statute" [Brief at 28].

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF HAMPTON)

Re: William Loflin and Leslie Loflin v. BMP Development, LP,
Appellate Case No. 2016-001840

PERSONALLY APPEARED before me Rhonda L. Bowers, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Appellants in the above-referenced action; that she served **Reply Brief of Appellants** this 15th day of February, 2017, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

G. Hamlin O'Kelley, III, Esquire
BUIST, BYARS & TAYLOR, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464

Rhonda L. Bowers
RHONDA L. BOWERS

SWORN TO before me this

15th day of February, 2017

Susan J. Murdaugh (L.S.)
Notary Public for South Carolina
My Commission Expires: June 5, 2025

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February 15, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: William Loflin v. BMP Development, LP
Appellate Case No. 2016-001840

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced matter are the following: (1) Reply Brief of Appellants; and (2) Appellants' Supplemental Designation of Matter to be Included in the Record on Appeal.

Please accept my kind regards.

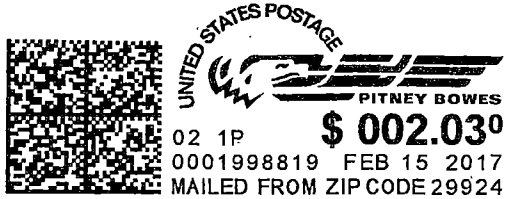
Sincerely yours,

Daniel A. Speights

DAS/rb

Enclosures

cc G. Hamlin O'Kelley, III, Esquire



FIRST CLASS MAIL

FROM:

SPEIGHTS & RUNYAN
ATTORNEYS AT LAW
100 OAK STREET EAST, P.O. BOX 685
HAMPTON, SOUTH CAROLINA 29924

TO:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201