THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

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 is the Respondent.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

Did the Court below commit error in ruling, as a matter of law, that title insurance is always limited to defects on the public record at the time of the closing?

Did the Court below commit error in ruling, as a matter fact, that there were no defects or encumbrances which were in existence at the time of the closing?

Did the Court below commit error in ruling, as a matter of law, that the breach of contract cause of action was time-barred?

STATEMENT OF THE CASE

This is an appeal from a August 15, 2016 Order of the Circuit Court (Judge Carmen T. Mullen) ("**Order**"). (R. pp. 11-21). The Order granted summary judgment against Appellants, William Loflin and Leslie Loflin ("**Loflins**"), and in favor of Respondent, Chicago Title Insurance Company ("**Chicago**").

On February 15, 2002, the Loflins, long time residents of Beaufort County, purchased Lot 108 in Balsam Mountain Preserve, a mountain community located in Jackson County, North Carolina, from BMP Development, LP ("**Balsam**").[1] In

[1]Balsam was formed by a Beaufort company, Chaffin/Light Associates, to develop Balsam Mountain Preserve [Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment (July 1, 2016) ("**Memorandum in Opposition**") at 2]. (R. p. 321). Chaffin/Light previously had formed and managed three community developments in Beaufort County: Spring Island, Callawassie, and Chechessee Creek Club [Third Amended Complaint at 2]. (R. p. 202).

connection with their purchase and subsequent refinancing, the Loflins purchased three title insurance policies from Chicago [collectively "**Policy**" or "**Contract of Insurance**"],[2] through Chicago's Beaufort County agent, Counsellor Title Agency, Inc. ("**Counsellor**").

On July 18, 2013, the Loflins filed this lawsuit against Chicago and two other defendants in the Court of Common Pleas for Beaufort County.[3] (R. pp. 42 -47). The Loflins included a cause of action for breach of contract against Chicago, which has remained unchanged since the initial Complaint.[4]

On April 14, 2014, before any defendant filed an Answer, the Loflins filed an Amended Complaint as a matter of right in which they named Chicago, Counsellor, and Balsam as defendants.[5] (R. pp. 70-97). Balsam did not answer or otherwise plead, and

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[2]Because Judge Mullen referred to both the "Contract of Insurance" and the "Policy" in the singular throughout her Order, the Loflins will do likewise.

[3]The original Complaint named Chicago, Counsellor, and Balsam Mountain Preserve Community Associations ("**Association**").

[4]The Loflins' Complaints also included a cause of action for negligence, but the Loflins are not appealing Judge Mullen's Order dismissing that count. The Loflins continue to assert that Chicago's agents, Counsellor and the Coward Defendants, were negligent, as will be set forth in later appeals as to those parties.

[5]Although Balsam's property, Balsam Mountain Preserve, was foreclosed, Balsam was never dissolved, and its agent of service resided in Beaufort County at the time the Loflins sued Balsam [North Carolina Statement of Change of Registered Office and/or Registered Agent; Affidavit of Service]. (R. p. 627; R. p.

before Judge Mullen assigned the case to herself as complex, the Circuit Court (Judge John Ernest Kinard, Jr.) adjudged Balsam in default and referred the matter to the Master in Equity for a damages hearing [Order (January 6, 2015)].[6] (R. pp. 3-4). Thus, the facts as to Balsam, including its fraud on the Loflins before the closing, are established.

On April 15, 2014, Chicago filed a Motion to Dismiss the Amended Complaint for failure to state a claim [Chicago's Motion to Dismiss (April 15, 2014)],[7] and on August 20, 2014, Chicago filed a supporting Memorandum [Chicago's Memorandum (August 20, 2014)]. (R. pp. 99-101; R. pp. 117-125). On September 3, 2015, Judge Kinard denied Chicago's Motion to Dismiss [Order (September 3, 2014)]. (R. pp. 1-2).

On January 6, 2015, the Loflins filed a Second Amended Complaint adding three additional defendants: Balsam's alleged successor, Balsam Mountain Group, LLC ("**BMG**"); and the law firm of Coward Hicks & Siler, P.A. and J.K. Coward, Jr. (collectively "**Coward Defendants**"), who represented the Loflins in the purchase and refinancing of Lot 108. (R. pp. 137-179). Thereafter, on August 5, 2015, at the

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98).

[6]The Master in Equity has not yet conducted a damages hearing.

[7]Chicago also asserted lack of subject matter jurisdiction over the property, but it never pursued that ground.

direction of Judge Mullen, the Loflins filed their Third Amended Complaint clarifying certain allegations as to BMG. (R. pp. 201-245).

On July 9, 2015, Chicago filed a Motion for Summary Judgment based upon the identical grounds raised in its earlier Motion to Dismiss [Chicago's Motion for Summary Judgment (July 9, 2015)]. (R. pp. 194-196). Chicago (nor any of its co-defendants) took any depositions or submitted any affidavits.

On June 13, 2016, Judge Mullen conducted a hearing on Chicago's Motion for Summary Judgment [Hearing Transcript]. (R. p. 378). The Friday before the Monday hearing, Chicago filed a supporting Memorandum in which it again made the identical arguments which it had made in support of its prior Motion to Dismiss [Chicago's Memorandum in Support of Motion for Summary Judgment (June 10, 2016) ("**Chicago's Memorandum**")]. (R. pp. 308-319). In addition, although Chicago *never* filed a Motion for Summary Judgment (or any other Motion) based on the statute of limitations, Chicago also argued in its Memorandum that it was entitled to summary judgment on the statute of limitations.

Following argument, Judge Mullen permitted the Loflins to file a Memorandum and factual materials in response to Chicago's Memorandum [Hearing Transcript at 71]. (R. p. 448, lines 2-9). Subsequently, the Loflins filed their Memorandum in Opposition and factual materials, including affidavits, depositions, and documents

produced during discovery [Memorandum in Opposition]. (R. pp. 320-361). Chicago filed another Memorandum in response [Supplemental Memorandum in Support of Motion for Summary Judgment (July 11, 2016) ("**Chicago's Supplemental Memorandum**")]. (R. pp. 362-371).

On August 15, 2016, Judge Mullen granted Chicago summary judgment.[8] (R. p. 21). Judge Mullen did not address the Loflins' legal arguments or refer to any of the factual materials the Loflins submitted.[9]

The Loflins timely appealed the Order.

SUMMARY OF ARGUMENT

Judge Mullen committed reversible error when she ruled, as a matter of law, that the that Chicago's insurance coverage was limited to any defects on the public record at the time of the closing. Judge Mullen did not base this ruling on the language of the

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[8]Judge Mullen issued separate Orders granting summary judgment in favor of Counsellor and the Coward Defendants [Order at1, n. 1]. (R. p. 11). Those decisions, which present separate and distinct issues, are not part of the present appeal.

[9]Judge Mullen did not make any changes to the Order drafted by Chicago's counsel [Law Clerk's email to counsel (August 11, 2016); Chicago's email to Law Clerk (August 15, 2016)]. (R. p. 640; R. pp. 641-653). The Loflins do not make this observation in any way to suggest that it was inappropriate for Judge Mullen to request and sign an Order prepared by the prevailing party. The Loflins' point is that Judge Mullen's Order did not provide any analysis of the Loflins' evidentiary showing and their corresponding legal arguments.

Policy, nor on any findings of fact.

Judge Mullen committed reversible error when she ruled, as a matter of fact, that there were no defects or encumbrances which were in existence at the time the Loflins took title. In fact, Judge Mullen did not refer to or discuss the undisputed evidentiary record submitted by the Loflins – including affidavits, depositions, and documents – proving the exact opposite.

Judge Mullen committed reversible error when she ruled, as a matter of law, that the statute of limitations ran on the Loflins' cause of action for breach of contract because they did not commence a lawsuit within three years of learning in 2006 that there was an encroachment on their property. In fact, regardless of whether the statute is three years, as Chicago argued and Judge Mullen found, or twenty years, as the Loflins assert, it is undisputed that the Loflins instituted this lawsuit less than a year after Chicago breached the Contract of Insurance.[10] Additionally, it is undisputed that the Loflins brought their lawsuit only eighteen months after they discovered in 2012 that the encumbrance (and Balsam's fraud) existed prior to the purchase of the property in question.

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[10]Because Judge Mullen did not analyze the Insurance Policies (and did not base her decision on the language of those policies), the Loflins will not address those issues in this initial brief. Any consideration of such issues, if raised, should be dealt with on remand.

SUMMARY OF FACTS

The material facts are set forth in the evidentiary record the Loflins submitted to Judge Mullen in response to Chicago's Motion for Summary Judgment, which Judge Mullen did not discuss and which Chicago did not dispute; and those factual allegations set forth in the Loflins' Third Amended Complaint which Judge Mullen and Chicago adopted.

In 2002, the Loflins' counsel delivered to them a duly executed deed to Lot 108 ("**Deed**") and an individual plat of Lot 108 ("**Recorded Plat**"). (R. p. 606-617; R. p. 585). The Recorded Plat reflected that Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road went around rather than through Lot 108. Balsam Mountain Preserve Road is one of two main thoroughfares through the development [Lehman Deposition at 63]. (R. p. 469, lines 7-10).

In addition, the Loflins' counsel delivered to them Chicago's Contract of Insurance for Lot 108, containing 1.87 acres without any road going through it, as described in the Deed and the Recorded Plat. The Policy insured the Loflins from a multitude of risks associated with Lot 108, which including fraud, trespass, easements, and encumbrances [Third Amended Complaint ¶14]. (R. pp. 211-212). It is undisputed that encumbrances include encroachments.

The Contract of Insurance did not state that coverage was limited to matters of

public record. If the Loflins had been told that, they would not have purchased insurance from Chicago [Loflin's Supplemental Affidavit at ¶6]. (R. p. 639).

In 2005, Craig Lehman was hired as Balsam's President and CEO [Lehman Deposition at 7, 86]. (R. p. 454, line 5, p. 473, lines 21-24). Mr. Lehman had no first hand knowledge of what occurred in 2002 [Lehman Deposition at 99-100]. (R. p. 475, lines 21-24; p. 476, lines 2-5, 8-22). He was told by Balsam that there were boundary problems with a number of Balsam lots [Lehman Deposition at 20]. (R. p. 460, lines 9-20).

In 2006, Mr. Lehman informed the Loflins that contrary to the Deed and the Recorded Plat that Balsam delivered to the Loflins in connection with the Closing, there was an encroachment on Lot 108, that the property contained only 1.4 acres, and that a road went through the property [Loflin's Supplemental Affidavit at ¶3]. (R. p. 473, lines 15-24). Importantly, Mr. Lehman believed and communicated to the Loflins that the road had been constructed on Lot 108 *after* the closing [Lehman Deposition at 86; Loflin's Supplemental Affidavit at ¶3]. (R. p 473, lines 15-24; R. pp. 638-639).

Mr. Lehman specifically denied that he ever saw a plat that was dated before the Closing, other than the Recorded Plat [Lehman Deposition at 31-32]. (R. p. 461, line 1 - p. 462, line 8). Mr. Lehman was not even aware of a predated plat until several years after he left Balsam in late 2009 and moved to Spring Island [Lehman Deposition

at 37]. (R. p. 462, lines 4-5). *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.*

Following the 2006 meeting with Mr. Lehman, Mr. Loflin had a number of conversations about the problems with Balsam, including discussions with Mr. Chaffin, Mr. Lehman, and Balsam's salesman, Bob Tufts. 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 [Third Amended Complaint at 13]. (R. p. 213). Balsam agreed that the Loflins would not be required to pay their assessments until the matter could be resolved [Lehman Deposition at 98]. (R. p. 474, lines 12-23). Despite multiple representations by Balsam that it would remedy the problem, however, Balsam did not do so before Balsam Mountain Preserve was foreclosed [Loflin Supplemental Affidavit; Third Amended Complaint at ¶20]. (R. p. 638-639; R. p. 213).

In early 2012, the Loflins first learned that two weeks before the original Closing, a plat had been prepared for Balsam ("**Unrecorded Plat**"), 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 [Loflin's Supplemental Affidavit at ¶6; Third Amended Complaint at ¶23]. (R. p. 639; R. p. 214). *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 [Loflin's Supplemental Affidavit].[11] (R. pp. 638-639).

On March 23, 2012, the Loflins' counsel informed Chicago of the Unrecorded Plat – *which again, predated the Closing* – showing that at the time they purchased Lot 108, Balsam Mountain Preserve Road did not circumnavigate but rather dissected Lot 108. [(Memorandum in Opposition at Ex. 20]. (R. p. 628). In response, Chicago denied coverage on August 21, 2012 because "there appears to be no title defect in this matter" [Memorandum in Opposition at Ex. 21]. (R. p. 629). Chicago did not raise a statute of limitations defense although it had all the facts which it later argued to Judge Mullen (without filing a Motion on that ground).

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 [Third Amended Complaint at 14]. (R. p. 214). 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 [*Id.*]. In

[11]As discussed below, the Loflins have never asserted that Chicago's Contract of Insurance would cover their damages if the encumbrance had been constructed *after* the closing.

addition, 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 [Third Amended Complaint at ¶21]. (R. p. 214).

On January 23, 2015, the Loflins took the deposition of Randy Herron, the surveyor who prepared both the Recorded Plat and Unrecorded Plat. Mr. Herron testified that he had provided the Unrecorded Plat to Balsam *before* the closing [Herron Deposition at 44]. (R. p. 487, lines 5-8). Subsequently, the Loflins conducted another survey which confirmed that, in fact, the road actually cuts through Lot 108 and reduces their acreage [Loflin's Affidavit; Unrecorded Plat]. (R. p. 636-637; R. p. 586).

In 2016, the Association paved the road through Lot 108 [Loflin's Affidavit]. (R. p. 636-637).

ARGUMENT

A. JUDGE MULLEN ERRED IN RULING, AS A MATTER OF LAW, THAT CHICAGO'S COVERAGE UNDER THE CONTRACT OF INSURANCE WAS LIMITED TO DEFECTS OF RECORD

Judge Mullen accepted Chicago's argument – made from the beginning of this case (but rejected by Judge Kinard) – that, despite what the Contract of Insurance says, it cannot be sued for any defects in the title that are not a matter of record. Based upon this legal conclusion, Judge Mullen found that:

- "The Plaintiffs have no claims for damage" because "they have title to the property as insured and conveyed . . . " [Order ¶ II. at 5] (R. p. 15);

- "The Plaintiffs claims must fail as a matter of law" because there is "simply no breach by Chicago Title as the Plaintiffs received the title referenced in both their recorded deed and the Recorded Plat referenced in that deed" [Order ¶ III. at 6, 7] (R. pp. 15-17); and,

- "The Plaintiffs received the benefit of their title insurance policy and failed to allege any cause of action for breach of contract" because "there were no such defects, liens, or encumbrances **of record** at the time of the issuance of the policy" [Order ¶ IV. at 9, 10 (emphasis added)]. (R. pp. 18-19).

In sum, this fundamental conclusion was at the heart of each and every decision that Judge Mullen made on the merits.

There are at least seven reasons why Judge Mullen committed reversible error when she held, as a matter of law, that Chicago could not be held responsible under its Contract of Insurance unless there was a defect on the public record:[12]

1. **Reason One: The Testimony Of Chicago's Representative**

Notwithstanding Judge Kinard's denial of Chicago's Motion to Dismiss, Chicago continued to assert the same legal position that it could not be liable for defects which were not on the public record at the time of the conveyance. In response, the Loflins noticed the deposition of Chicago's representative. Chicago produced Cynthia Baines,

[12]One of these reasons – the last one addressed below – precluded Judge Mullen from even considering this argument. Because the Loflins do not want to shy away from the merits, however, they will leave that explanation to the end.

a senior claims counsel for Fidelity National, the owner of Chicago, and identified to Judge Mullen by Chicago's counsel as "my client" [Hearing Transcript at 47]. (R. p. 424, lines 14-15). Ms. Baines testified as follows:

> 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.

[Memorandum in Opposition (Baines Deposition) Ex. 24 at 12)]. (R. p. 480, lines 2-9).

In response to Chicago's Motion for Summary Judgment, the Loflins relied on Ms. Baines' testimony at oral argument and its subsequent supporting memorandum (and attached that portion of the deposition) [Hearing Transcript at 47; Memorandum in Opposition at 30-31]. (R. p. 424, lines 12-15; R. pp. 349-350). However, Judge Mullen did not refer to, much less address or explain, this important testimony in her final Order and, as noted above, based her decision on the merits on Chicago's argument (rejected by Judge Kinard) that it could not be held liable for defects which were not part of the public record.[13]

2. **Reason Two: The Contract Governs**

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[13]Curiously, Judge Mullen, in her only reference to the Baines deposition (which the Loflins submitted in opposition to the Motion for Summary Judgment), cited a *question* by the Loflins' counsel as an acknowledgment that the title of record in this matter is good [Order at 6-7]. (R. pp. 16-17).

Ms. Baines not only admitted that Chicago's responsibility was not limited to record title, but she was spot on when she testified that coverage is governed by the terms and conditions of the Policy. The Loflins argued and briefed the provisions of the Policy which demonstrate liability in this case. Judge Mullen did not discuss much less analyze the Policy terms in her Order.

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. By way of example only, the Policy covers Balsam's fraud (which is alleged and established by Balsam's default), which by definition is not part of the public record. The Policy also provides coverage for adverse possession, which again by definition would not be part of the public record.[14]

A review of the Order reflects that the ruling is devoid of any analysis of the contract. This absence is particularly troublesome because in the summary judgment context, any potential issue of fact, created by either the language of the contract or admissions of the parties, is to be preserved for the trier of fact. 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 [*See* Memorandum in Opposition

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[14]North Carolina recognizes adverse possession of land. *Rushing v. Aldridge*, 214 N.C. App. 23, 713 S.E.2d 566 (2011).

at 24-27].[15] (R. pp. 343-346).

The reality is that despite Ms. Baines' recognition that the Policy governs, the Court below re-wrote the parties' agreement and granted Chicago immunity from any claims not evident from the public record. Chicago had every right to insure matters outside of the public record. If Chicago wanted to limit coverage to matters of public record, it could have clearly stated that limitation in the Policy. Absent reversal, Judge Mullen's acceptance of Chicago's argument that despite the terms which Chicago drafted, the Policy (which in actuality is an adhesion contract) is limited to defects on the public record, not only sanctions a fraud on the Loflins, but grants Chicago a judicial stamp of approval of a great scam on the insurance market.

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. It is undisputed that the Loflins did not have that expectation when they paid for their Policy [Loflin's Supplemental Affidavit]. (R. pp. 638-639). Indeed, the Coward Defendants, whose Motion for Summary was heard and

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[15]For example, an insurance policy must be construed to give effect to the intention of the parties as manifested by the reasonable meaning of the policy terms. Because of the unequal bargaining positions, title insurance policies are viewed as adhesion contracts. A court will strictly construe exceptions to coverage against the insurer. Courts will enforce only the restrictions and the terms in an insurance contract that are consistent with objectively reasonable expectations of the average insured.

briefed at the same time, never refuted the Loflins' unequivocal sworn statement on this point or suggested that they had told their clients (the Loflins) otherwise when they secured the Contract of Insurance.

Finally, even if the law did not impose a duty on an insurance carrier, the parties to a contract certainly could and did provide otherwise.

3. Reason Three: Judge Mullen Cited No Case From Any Jurisdiction In Support Of Her Ruling

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.

The only legal authority which Judge Mullen cited is a North Carolina statute providing that prospective purchasers should be able to rely on the public record. Judge Mullen correctly found that, "It is only when a search of the public records reveals an encumbrance that a purchaser is chargeable with the notice of its existence" [Order at 5]. (R. p. 15). Based on this statute, the Court jumped to the conclusion that "the unrecorded plat cannot create any encumbrance and cannot create any damages for the Plaintiffs by this Defendant as it has no impact upon the Plaintiffs' title to their property" [*Id.*].

Respectfully, Judge Mullen's observation demonstrates a fundamental disconnect between the Loflins' basic position from day one and Judge Mullen's understanding of this case. The Unrecorded Plat did not ***create*** the encumbrance. The Unrecorded Plat ***revealed*** the encumbrance. As explained herein, in 2012, the Loflins first learned that the encumbrance existed at the time of the closing, that they had been defrauded, and, most importantly for this appeal, that the Policy applied to their purchase.

It is undisputed that the Loflins were defrauded [Motion for Default Judgment (July 17, 2014); Judge Kinard's Order (January 6, 2015)]. (R. pp. 113-115; R. pp. 3-4). It is undisputed there is an encumbrance on the Loflins' property, i.e. there is a paved road going through their home site [*See, e.g.* Lehman Deposition at 31, 54, 55]. (R. p. 461, lines 21-24; p. 463, line 20 - p. 464, line 20).

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.

4. **Reason Four: Judge Mullen Erroneously Conflated The Duties of the Parties**

The Defendants in this action included a seller, an insurance company, an insurance agent, and a law firm. Each of these Defendants owed separate and distinct duties to the Loflins. While the actions and relationships of the Defendants may have created overlap of those duties, the duties never the less continue to exist.

For example, the seller committed fraud. The insurance policy covers fraud. The Court seemed to believe that because the fraud did not directly involve the insurance company, the agent, or the law firm, this somehow negated coverage of the policy for fraud. 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.

Examining the distinction of the parties, the Loflins emphasized the basic distinction between the liability of a lawyer who certifies title based upon an examination of the public record and an insurance company that issues a contract of insurance to protect an insured from certain risks [Hearing Transcript at 39-40, 66-67; Memorandum in Opposition at 26]. (R. pp. 416, line 7 - p. 417, line 9; p. 443, line 8 - p. 444, line 4; R. p. 345). The law in this state does not impose a duty on a lawyer checking a title to provide a title opinion which certifies title beyond what is on the public record (although it does not prohibit a lawyer from making that representation

at his or her peril). For that reason, lawyers who certify title typically set forth the limitations on the certification, including language to make it clear that the lawyer is not certifying matters which are not of public record.

It is for this reason that good lawyers recommend that their clients obtain title insurance and that their clients choose to pay this extra amount. In contrast, an insurance company quotes a premium based on actuarial risks. The insured purchases protection from those risks, and the insurance company makes a generous profit. When a house burns down, the insured does not have to prove fault.

Although Judge Mullen did not explicitly address the Loflins' argument that there is a distinction between the duty of a title insurance company and a real estate lawyer, she held that their obligations were identical. She clothed an insurance company which insures risks with the same protections afforded a lawyer who only examines the Courthouse records. Again, however, 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.

The different scopes of liability are brought into clear contrast by a cursory examination of the documents in this lawsuit. The Coward Defendants told Chicago that they limited their certification to "an examination of the title to the real estate" [Counsellor's Answer to Third Amended Complaint and Cross-Claim at Ex. A].

(R. p. 618). *Tellingly, Chicago never made such a straight-forward statement in the Contract of Insurance it drafted.* Why not?[16]

5. Reason Five: The Contract of Insurance Does Not Say That

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. Moreover, it is hornbook law that a policy of insurance must be read in the light most favorable to the insured.

6. Reason Six: Damages

Judge Mullen's conclusion that the Loflins have suffered no damages because the unrecorded plat has no impact upon their title is mind-boggling. 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. Furthermore, Judge Mullen's conclusion is not only refuted by common sense (no one would want a home site with

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[16]The Coward Defendants also asserted in their Answer to Counselor's Cross-Claim that they "exercised the necessary degree of care and skill maintained by other attorneys under similar conditions and like circumstances" [Coward's Answer to Counsellor's Cross-Claim at ¶15]. (R. p. 304). Chicago has never asserted such a defense to the Loflin's breach of contract action 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.

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" [Lehman Deposition at 64-65]. (R. p. 470, line 23 - p. 471, line 2). Despite the fact that the Loflins' lot was particularly good because of its location near the center of activity, as a result of the reduced acreage and a road running through it, no one made an offer on the lot while Balsam was actively selling a number of otherwise inferior lots [Lehman Deposition at 59-61, 67]. (R. p. 466, line 19 - p. 468, line 6; p. 472, lines 5-25).

Finally, 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. If the Loflins did not disclose this problem, they would subject themselves to a lawsuit for fraud and deceit.

7. **Reason Seven: All Substantive Rulings Were Barred By The Law Of The Case Doctrine**

Judge Mullen did not address the Loflins' argument that she had no authority to reverse Judge Kinard. At the hearing on Chicago's Motion, however, when the Loflins began to make this argument, Judge Mullen immediately and emphatically told the Loflins that she did not have to consider Judge Kinard's Order because it was on a

Motion to Dismiss rather than a Motion for Summary Judgment:

- "They were motions to dismiss, Mr. Speights" [Hearing Transcript at 41]. (R. p. 418, line 21).

- "But I can tell you this, on a motion to dismiss, that's exactly what I expect Judge Kinard to do. So that doesn't have all that much significance" [*Id.* at 42]. (R. p. 419, lines 11-13).

- "It's a motion to dismiss, that's all anyone needs to say" [*Id.* at 43]. (R. p. 420, lines 22-23).

While clearly a Motion to Dismiss and a Motion for Summary Judgment can be quite different, in this instance, there was absolutely no difference in the factual record Chicago presented and no difference in the legal argument that Chicago made based upon that record. In both instances, Chicago argued that it was entitled to prevail as a matter of law based on allegations in the Loflins' Complaint. Chicago specifically told Judge Mullen that, "Mr. Speights is exactly right. We did address the exact same issues" [*Id.* at 45]. (R. p. 422, lines 21-22). Chicago also stated that, "So he's exactly right, the motion is the same because nothing has changed, Your Honor" [*Id.* at 46]. (R. p. 423, lines 6-7).

Chicago attempted to distinguish Judge Kinard's Order on the ground that there existed a "different body of law" dealing with a Motion for Summary Judgment as opposed to a Motion to Dismiss [*Id.* at 45]. (R. p. 422, line 5). According to Chicago, the Loflins had to come forward with evidence to defeat a Motion for Summary

Judgment [*Id.* at 45]. (R. p. 422, lines 21-25). The Loflins submitted extensive evidence. Chicago chose not to take any depositions or submit any evidence. Of course, the burden of proof on both motions was on Chicago.

In fact, the standard for a Motion to Dismiss and a Motion for Summary Judgment are virtually the same. *Compare, Benedict College v. National Credit Systems, Inc.* (S.C.App. 2012) 400 S.C. 538, 735 S.E.2d 518 [(South Carolina Rules of Civ.Proc. 12; and *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) and *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006) [South Carolina Rules of Civ.Proc. 56].

In reality, Judge Mullen violated a fundamental holding of this Court: One Circuit Judge cannot overrule another Circuit Judge. *Dinkins v. Robbins*, 203 S.C. 199, 26 S.E.2d 689 (1943). That is essentially what Judge Mullen did when, based upon the identical record, she came to a conclusion of law different from that reached by Judge Kinard.

Based upon and in reliance of Judge Kinard's decision, the Loflins proceeded with discovery, including the taking of nine depositions throughout South Carolina and North Carolina. The depositions only supported Judge Kinard's ruling. Defendants elected not to take any depositions or present any new evidence.

Judge Mullen's decision was not only legally wrong, but it undermined the very purpose of a Motion to Dismiss. If Judge Kinard had denied the Motion to Dismiss, undoubtedly he would have permitted the Loflins to amend their Complaint, if they wanted to do so. Alternatively, the Loflins could have appealed that decision to this Court without investing several years and significant sums in taking depositions. The issues could have been before this Court years ago. The rules must be given effect.

The Loflins recognize that in many (if not most) circumstances, a party who loses a Motion to Dismiss may later file a Motion for Summary Judgment based upon facts. In this instance, Judge Mullen based her decision on the same facts and the same law that Chicago presented to Judge Kinard: the Loflins' factual allegations in their Complaint.

B. JUDGE MULLEN ERRED IN RULING, AS A MATTER OF FACT, THAT ANY DEFECTS OR ENCUMBRANCES WERE NOT IN EXISTENCE AT THE TIME THE LOFLINS TOOK TITLE

Chicago repeatedly argued and Judge Mullen held that the Contract of Insurance only covers those risks which existed at the time of the Closing [Hearing Transcript at 36, 46, 63; Order at 7-10]. (R. p. 413, lines 7-11; p. 423, lines 15-18; p. 440, lines 15-21; R. pp. 17-20). The Loflins agree.

Chicago also argued and Judge Mullen held that none of the defects or encumbrances were in existence at the time of the Closing. As set forth above,

however, the record is absolutely undisputed that all risks covered by the Policy existed prior to the Closing.

In their Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment, the Loflins not only argued this point, but submitted sworn testimony proving that the all risks existed before the closing. For reasons that are unfathomable to the Loflins, however, Judge Mullen did not discuss, much less attempt to distinguish, the evidentiary record the Loflins submitted on this fundamental point.

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)]. (R. p. 586). The surveyor testified that he delivered the Unrecorded Plat to Balsam before the closing [Herron Deposition at 44]. (R. p. 487, lines 5-8). Therefore 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 [*See* Policy, Covered Risk 4, "Defective recording of any document"].

C. <u>JUDGE MULLEN ERRED IN RULING THAT THE LOFLINS' BREACH OF CONTRACT LAWSUIT IS TIME-BARRED</u>

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" [Order at 4 (citations omitted)]. (R. p. 14).

Judge Mullen then ruled, however, that the statute of limitations in this lawsuit expired in 2009, three years after the Loflins learned that there was an encroachment on their property [Order at 4]. (R. p. 14). In making this ruling, Judge Mullen made three fundamental errors.

1. Judge Mullen Erred In Failing To Apply The Applicable Trigger Date In A Breach Of Contract Action

The Loflins made a claim pursuant to the Contract of Insurance. The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). Chicago refused to perform under the Contract of Insurance on August 21, 2012 [Letter from Chicago to Solomons (August 21, 2012)]. (R. p. 628). "Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence." *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007). There was no breach to discover until August 21, 2012. The action was timely filed on July 18, 2013.

2. Judge Mullen Erred In Finding That The Loflins Discovered In 2006 That The Encumbrance Predated The Closing

Judge Mullen held that 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" [Order at 4]. (R. p. 14). In support of this finding, Judge Mullen cited ¶20 of Plaintiff's Third Amended Complaint. In fact, ¶20 states the exact opposite: "Balsam did not disclose to the Loflins that it knew before the Closing that Lot 108 contained only 1.4 acres with a road through it as reflected in the Unrecorded Plat or that the Unrecorded Plat had been prepared before the Closing."

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. As set forth in Mr. Loflins' Affidavit, which Judge Mullen did not address:

> 3. 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.
>
> * * *
>
> 5. 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.

[Loflin Supplemental Affidavit (July 1, 2016)]. (R. pp. 638-639). Chicago offered no contrary evidence.

The Loflins timely instituted this lawsuit after discovering these fundamental facts. Again, if the road did not exist at the Closing, Chicago's argument that the Policy provided no coverage would have been appropriate.

In deciding Chicago's Motion for Summary Judgment, Judge Mullen was not required to suspend common sense. 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). To their shock and dismay, they 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.

3. Judge Mullen Erred In Ruling That, As A Matter Of Law, That The Applicable Statute Of Limitations Is Three Years

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, the Order and Judgment below should be reversed.

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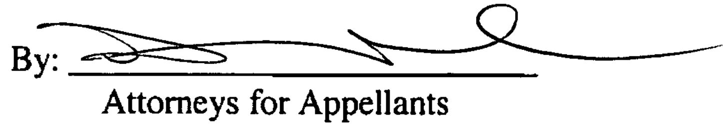

By: ______________________
Attorneys for Appellants

Hampton, South Carolina

March 3, 2017

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SC Court of Appeals

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.

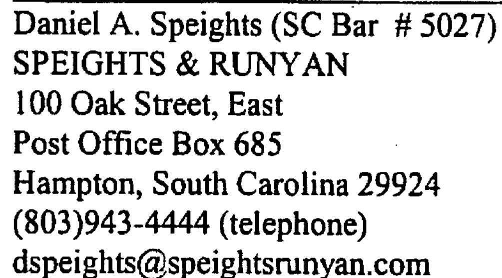
BMP Development LP, Balsam Mountain Group, LLC,
Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants,

Of wich
Chicago Title Insurance Company is the Respondent.

CERTIFICATE OF COUNSEL

Appellants' counsel hereby certifies that this Final Brief is in compliance with Rule 211(b) SCACR in that no changes were made excepting references to the Record on Appeal and correction of typographical erros and misspellings.

March 3, 2017



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