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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen
Circuit Court Judge

RECEIVED
APR 11 2019
SC Court of Appeals

Appellate Case No. 2016-001840

William Loflin and Leslie Loflin .... Appellants,

vs.

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.

RESPONDENT CHICAGO TITLE INSURANCE COMPANY'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Respondent Chicago Title Insurance Company ("Chicago Title"), pursuant to Rule 221(a), SCACR, hereby moves and petitions the Court to reconsider and rehear the within appeal and the Court's opinion entered March 27, 2019, as Opinion Number 5633 (the "Opinion"). This Petition is based on the grounds that the Court overlooked or misapprehended certain matters set forth herein, and Chicago Title respectfully requests the Court grant this Petition for Rehearing, vacate the Opinion, and affirm the circuit court's order.

In addition, pursuant to Rule 219(b), SCACR, Chicago Title suggests that such rehearing should be *en banc*.

SUMMARY OF ARGUMENT

The Opinion focuses at length on an issue not in dispute, not the basis of the circuit court's order, and conceded by Chicago Title. As written, the Opinion misapprehends North Carolina's controlling recording statutes, which require instruments affecting title to real property to be recorded in order to have priority over a subsequent purchaser for value, and which establish priority for interests in North Carolina real property from the time an instrument is recorded. The Court misconstrues the terms of the Policy to provide coverage for a road that existed only in theory on an unrecorded plat and was constructed after the Policy Date, thereby improperly transforming an excluded post-policy trespass claim into a matter covered by the Policy. The Court also misconstrues a basic insuring provision of the Policy providing coverage for claims related to the invalidity of certain instruments due to "fraud" or "incompetency" by transposing and expanding those terms to apply to other scenarios contrary to the plain meaning of the Policy. Finally, the Court creates a new procedural rule where a defendant is now bound by allegations made toward a co-defendant because the co-defendant fails to respond to the complaint.

The findings and conclusions of the Court should not be taken lightly. They will, without question, have a negative impact on the title insurance industry in South Carolina and affect how litigation with more than one defendant is conducted in South Carolina.

For these reasons, which are outlined in detail below, Chicago Title requests the Court grant this Petition for Rehearing, vacate the Opinion, and affirm the circuit court's order.

ARGUMENT

In its Opinion, the Court overlooked or misapprehended the following matters:

1. The Court focused on whether the Policy's coverage is limited to defects of record, an issue which was not the basis of the circuit court's order, and not disputed by Chicago Title.

The Policy covers certain risks that are of record and certain risks that are not of record. For example, as the Court noted, subject to the Policy's exceptions, exclusions, and conditions, insuring provision No. 3 of the Policy "covers the following title risks, if they affect [Appellants'] ***title*** on the Policy Date" . . . "3. Forgery, fraud, duress, incompetency, incapacity or impersonation." All these items relate to the validity of instruments that affect title to property that may not be apparent of record. Chicago Title admitted in its deposition and conceded at oral argument that coverage under the Policy is not limited to risks that are of record.

The circuit court's grant of summary judgment to Chicago Title is not based on a general conclusion that coverage is limited to defects of record. The circuit court correctly focused on the unrecorded 2002 plat, which was the basis of Appellants' claim. With that in mind, the circuit court concluded:

> There is simply no breach by Chicago Title as [Appellants] received the title referenced in both their recorded deed and the [r]ecorded [p]lat referenced in that deed.
>
> None of the enumerated "Covered Title Risks" in the Policy are triggered by [Appellants'] allegations related to the unrecorded plat *or by any evidence presented to this [c]ourt* . . . .
>
> (R. at 17) (emphasis added).

The circuit court correctly ruled that none of the Covered Title Risks, all of which must "affect [Appellants'] title on the Policy Date," are triggered by Appellants' allegations related to the unrecorded 2002 plat. The Court agreed the unrecorded 2002 plat "itself may not affect Appellant[s'] title due to Balsam's failure to record it . . ." As noted below, controlling North Carolina law fully supports the conclusion reached by the circuit court and this Court.

As a result, the unrecorded 2002 plat, which by its very nature is an off-record matter, does not affect title to the property and does not invoke coverage under the Policy. Because the Policy does cover certain off-record risks does not mean the Policy provides coverage for the unrecorded plat. Both can be true at the same time.

Off-record coverage under the Policy was not an issue in the circuit court. There was no need for the Court to analyze at length an issue that is not the basis of the circuit's court order.

Chicago Title therefore respectfully submits the Court overlooked and misapprehended the issues in this matter.

2. Under controlling North Carolina law, the road depicted on the unrecorded 2002 plat as traversing through the property created no rights in third persons, is not a defect, lien, or encumbrance, and Appellants own the property as insured by the Policy.

The insured property is located in North Carolina. All parties, the circuit court, and this Court agree North Carolina law applies to title issues regarding the insured property.[1]

Unlike South Carolina, which is a race-notice state,[2] North Carolina is a pure race state.[3] In North Carolina, subject to some limited exceptions that do not apply here, the first to record

[1] The choice of law question was not analyzed by the circuit court or this Court. Nonetheless, South Carolina courts generally follow the traditional choice of law rules in the Restatement of Conflicts of Laws. *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). The First Restatement requires application of the law of the situs to nearly all questions concerning interests in land. This rule applies to conveyances of land (§§ 214-22), adverse possession (§ 224), and mortgages and liens (§§ 225-231). Similarly, while the Restatement (Second) of Choice of Laws contains a balancing test in section 6 regarding state interests, the law of the situs generally controls. *See Restatement (Second)* § 223 cmt b ("Issues falling within the scope of [the Validity and Effect of Conveyance of Interest in Land] will be determined by the law that would be applied by the courts of the situs....").

[2] *See MI Co., Ltd. v. McLean*, 325 S.C. 616, 626, 482 S.E.2d 597, 602 (Ct. App. 1997) ("our recording act is a race-notice act.").

an instrument affecting title to real property has priority over persons holding or claiming an unrecorded interest (such as an unrecorded plat). *Beasley v. Wilson*, 147 S.E.2d 577 (N.C. 1966). Furthermore, North Carolina's recording statutes, known as the Connor Act, provide that any written instrument affecting title to real property must be recorded in order to have priority over a subsequent purchaser for value. N.C.G.S. §§ 47-18, 47-20 (2018); *Simmons v. Quick-Stop Food Mart, Inc.*, 296 S.E.2d 275 (N.C. 1982). It was the intent of the North Carolina General Assembly in enacting North Carolina's recording statutes that prospective purchasers should be able to rely solely on the public record to determine the status of title to land. *Schuman v. Roger Baker & Assoc., Inc.*, 319 S.E.2d 308 (N.C. Ct. App. 1984). It is only when a search of the public record reveals an encumbrance that a purchaser is chargeable with notice of its existence. *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942). Under the law of North Carolina, therefore, the unrecorded 2002 plat could not impair, affect, or achieve priority over the recorded deed to Appellants and the property interests conveyed therein.

Upon the recording of the deed to Appellants, Appellants, without question, owned unencumbered title to Lot 108, free and clear of any contrary interests claimed by Balsam/BMG that may have been shown on the 2002 unrecorded plat. This is true even if Appellants had knowledge of the unrecorded 2002 plat at the time they took title to the property.

There is no dispute Appellants own their property and have legal title to it as insured by the Policy. No other person or entity owns an interest in Appellants' title. No other person or entity has claimed an *ownership* interest in Appellants' property as insured. Indeed, the Balsam Mountain Development group attempted to obtain an ownership interest by requesting, post-

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[3] *See Rowe v. Walker*, 441 S.E.2d 156, 158 (N.C. Ct. App. 1994) ("North Carolina is a "pure race" jurisdiction, in which the first to record an interest in land holds an interest superior to all other purchasers for value, regardless of actual or constructive notice as to other, unrecorded conveyances.").

policy, that Appellants sign a quit-claim deed, which Appellants refused to sign.[4] According to the developer, the road Appellants claim is an encroachment was not constructed until sometime after Appellants purchased the property. (R. pp. 469-470).

North Carolina law, which governs this issue, provides that unrecorded interests in land are invalid against subsequent purchasers and do not create any interest unless they are "of record." N.C.G.S.A. §47-18.

The Policy provides coverage for title risks if they affect title on the Policy Date. In particular, the Policy provides,

> This policy insures your title to the land described in Schedule A . . . .
>
> Your insurance, as described in this Coverage Statement, is effective on the Policy Date shown in Schedule A.
>
> Your insurance is limited by the following:
>
> • Exclusions on page 2
>
> • Exceptions in Schedule B
>
> • Conditions on pages 2 and 3
>
> ****
>
> Covered Title Risks
>
> This Policy covers the following title risks, if they affect your title on the Policy Date.
>
> 1. Someone else owns an interest in your title
> ......
> 14. Other defects, liens, or encumbrances.

(R. pp. 620-621)

[4] Appellants subsequently allowing Balsam/BMG onto the property to build the road despite their lack of legal right to the property does not change ownership of the property.

On the Policy Date, Appellants had legal title to the property as insured. On the day the motions for summary judgment were heard, Appellants had legal title to the property as insured. On the date of this appeal, Appellants had legal title to the property as insured and they continue to have such title. No one else owns an interest in Appellants' title and there are no defects, liens, or encumbrances on their title to the property.

In sum, Appellants own the property as insured by the Policy. Neither item 1 nor item 14 of the Policy's Covered Title Risks is implicated.

The Court overlooked and misapprehended the applicable law and the facts, there is no coverage under the Policy, and the circuit court correctly granted Chicago Title summary judgment.

3. Appellants submitted no evidence that a third party claimed title to the road or the subject property or that the road existed "on the ground" on the Policy Date, but instead merely provided evidence of a secret, unrecorded plat showing where a road might someday exist.

The Court found "Appellant's ownership interest in the land on the date of the Policy's issuance was affected by what the 2002 plat *reflected* on the ground, i.e., the Preserve Road encroachment and the diminished acreage." *Opinion* at 86. However, there is no evidence to support that the road as shown on the unrecorded 2002 plat existed on the ground on the Policy Date.

Balsam's President and CEO, Craig Lehman, testified it was his understanding that the road in question was constructed "from scratch sometime after [Appellants] purchased Lot 108." (R. pp. 469-470). He was not able to confirm if there "was some sort of trail there previously" and whether "the road was constructed as overlay of the trail." (R. p. 470).

Mr. Loflin provided two affidavits to the Court. (R. pp. 636-639). In neither affidavit did he provide evidence the road existed on the property or traversed through the property on the

Policy Date. Instead, Mr. Loflin's supplemental affidavit says when he was told in 2006 that the road was constructed through "lot 108 after the closing...," he "had no reason to doubt that the road Mr. Lehman was now disclosing was an after purchase encroachment." (R. pp. 638-639).

Appellants' Third Amended Complaint alleges that "***at some point after conveying Lot 108*** to [Appellants], Balsam entered lot 108 and added to its trespass and encumbrance ***by expanding Balsam Mountain Preserve Road through Lot 108***, moving dirt and apparently destroying one or more trees, and installing two culverts which drain water onto [Appellants'] property." (R. p. 215) (emphasis added).[5]

As the Court notes, the road was paved in 2016. The Court further points to the following "on the ground" evidence related to the road:

(1) Balsam's and BMG's continued assertion of ownership of the land underlying the Preserve Road encroachment,

(2) the mysterious destruction of steel posts Appellants had placed in the ground to assert their ownership of certain areas in accordance with the recorded plat, and

(3) BMG's disregard of Appellants' requests to leave Preserve Road unpaved.

The issue with the Court relying on these items is they all occurred after the Policy Date and do not reflect what was "on the ground" on the Policy Date. There is no evidence contrary to

[5] "Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions." *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015); *see also Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("[T]he general rule [is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.").

the unrecorded 2002 plat being anything other than a road that solely exists in theory in a place where Balsam wanted to construct it.[6]

Furthermore, there is no indication Balsam or BMG ever claimed a *legal* right to the area in dispute. Indeed, when Balsam requested Appellants execute a quit claim deed whereby Appellants would convey their title to the land under the proposed future road, Appellants refused to do so. Appellants may have allowed or agreed to the development of a road on their property at some point after the Policy Date, but that as a matter of law does not affect Appellants' ownership of the property under North Carolina law. Appellants still have legal title to the property as insured. To this very day, title remains as insured pursuant to the recorded plat in the name of Appellants.

As mentioned above, while there may be circumstances from which a title defect could arise as a result of something that is not of record, that is not the case here. Appellants' sole evidence of something existing on the Policy Date is the unrecorded 2002 plat, which, as a matter of the applicable North Carolina law, created no legal interest or right in the land insured by the Policy.[7]

As a result, the Court overlooked and misapprehended the applicable law and the facts, there is no coverage under the Policy, and the circuit court correctly granted Chicago Title summary judgment.

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[6] The unrecorded 2002 plat does not describe the width of the so-called road, it does not say whether it is a gravel road or a paved road, and no pins or irons are marked to show the exact location of the so-called road.

[7] Even if there was something "on the ground," North Carolina law bars Balsam from having an interest in the property. In any event, the Policy excepts from coverage "easements visible upon ground but not of record."

4. The Court ignored the post-policy exclusion and mistakenly transformed an excluded post-policy trespass claim into a matter covered by Policy.

The Policy contains a clear and unambiguous exclusion related to matters occurring after the issuance of the Policy:

> In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:
>
> *****
>
> 3. Title Risks:
>
> *****
>
> • that first affect your title after the Policy Date . . . .

(R. p. 622)

The post-policy exclusion is at the heart of the nature of title insurance coverage. The title policy remains in effect as long as the insured owns the property. The insured pays no renewal premium. However, anything that happens to affect title after the insured obtains his or her interest in the property is not covered by the title policy, as confirmed by the post-policy exclusion.

Nothing else appearing, 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 his or her title. As the Court correctly notes, title insurance is unique in that it is retrospective, not prospective and

> The risks of title insurance end where the risks of other kinds begin. 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 him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it.
>
> *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981).

The evidence submitted by Appellants, noted by the Court, and restated above, all relate to matters that occurred after the Policy Date, February 19, 2002. The only evidence Appellants submitted that took place before February 19, 2002, is the unrecorded 2002 plat, which, as fully discussed above, cannot create an interest in land, is not a title defect, is not a lien, and is not an encumbrance on title.

If a third party "exercised control" over a portion of the property, and if Appellants allowed or agreed to the development of a road on the property, any dispute over the development of that road falls squarely within the post-policy exclusion. Mr. Loflin's Affidavit contains nothing but a blanket statement that Appellants objected to the road. There was no lawsuit, no injunction, no attempt to stop the road being finalized or built. (R. pp. 636-639). There is no evidence anywhere in the record that the developers asserted they owned title to Appellants' land. As the Court states, even Appellants believed the road was an "after purchase encroachment." *Opinion* at 75. These were all post-policy activities specifically excluded by the Policy.

In essence, the Court misapprehends issues of trespass with those of legal title to land.

The Court focuses on the location of the road vis-à-vis Lot 108 as shown on the unrecorded 2002 plat. The Court morphs the possible or perhaps future location of the road as shown on the unrecorded 2002 Plat into a defect, lien, or encumbrance. However, the actions Appellants complain about that took place "on the ground" were all conducted by Balsam and/or BMG post-policy, they do not relate to title, and they are in the nature of a trespass. (R. pp. 636-639). While Appellants may have or may have had a trespass claim against Balsam and/or BMG for their post-policy activities, trespass is not a covered matter under the Policy.

The elements of a trespass are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff. *Singleton v. Haywood Elec. Membership Corp.*, 588 S.E.2d 871, 871 (N.C. 2003). A trespass, in other words, is possession or use of property without permission or right. A trespass on insured property does not invoke policy coverage. *Chorches v. Stewart Title Guar. Co.*, 48 F.Supp.3d 151 (D. Conn. 2014).

As a result, the Court overlooked and misapprehended the applicable law and the facts, disregarded the retrospective nature of title insurance, and ignored the post-policy exclusion. There is no coverage under the Policy. The circuit court correctly granted Chicago Title summary judgment.

5. The Court misapprehends the insuring provision of the Policy providing coverage for claims related to the invalidity of certain instruments due to "fraud" or "incompetency," contrary to the express provisions of the Policy when read as a whole.

Subject to the Policy's exceptions, exclusions, and conditions, insuring provision No. 3 of the Policy "covers the following title risks, if they affect [Appellants'] title on the Policy Date" . . . "3. Forgery, fraud, duress, incompetency, incapacity or impersonation." All these title risks are grouped together for one essential reason, they all relate to matters that can make an instrument, such as a deed, void or voidable.

For example,

- **Forgery**: "A deed which is a mere forgery or obtained by false pretenses is void." 26A C.J.S. Deeds § 153 (2019).
- **Duress**: "Deeds which have been procured by, or executed under, duress or undue influence, are ordinarily regarded as voidable." *Id.*

- **Fraud**: "Although the[re] is authority to the contrary, ordinarily a deed procured by fraud is not void but is merely voidable." *Id.*
- **Incompetence and Incapacity**: "In order to render a deed void on the ground of mental incompetency, it should appear that the grantor was laboring under such a degree of mental infirmity as to make him incapable of understanding the nature of his act." *Beam v. Almond*, 157 S.E.2d 215, 224 (N.C. 1967) (citing 26 C.J.S. *Deeds* § 54 at 721); 26A C.J.S. *Deeds* § 98 (2019) ("A deed, to be valid, must be made by one having mental capacity to understand its consequences. A deed will be invalidated by mental incapacity on the part of the grantor, as where he or she lacks sufficient reason to understand or appreciate his or her act or the reasonableness and consequences thereof, even though the deed may be supported by a consideration.").

Insurance policies are subject to the general rules of contract construction." *M & M Corp. of S.C. v. Auto–Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). The Court must "interpret insurance policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning." *Id.* "[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 638 S.E.2d 103, 104–05 (Ct. App. 2006). "The court cannot torture the meaning of policy language to extend coverage not intended by the parties." *Id.* at 356, 638 S.E.2d at 105. Thus, "[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999).

In interpreting the Policy, and in particular insuring provision No. 3, the Court must consider the context of the words used. All those risks—forgery, fraud, duress, incompetency, incapacity, or impersonation—relate to matters that may affect the validity of an instrument that affects title to the property. Some examples include a remote or an immediate grantor claiming his or her signature was forged on a deed, he or she was mentally incompetent when a deed was executed, he or she was mentally incapacitated when a deed was executed, he or she signed the deed under fraud or duress, or someone impersonated the grantor such that the grantor did not execute a deed. (R. pp. 480 – 481).

The Court found that Appellants' allegation that Balsam recorded the wrong plat is "incompetence" covered by the Policy. Also, the Court found "fraud" took place and is covered by the Policy because of actions undertaken by the seller to Appellants. By so doing, the Court improperly expanded the scope of coverage provided by the Policy by using the terms "fraud" and "incompetence" and applying them in other contexts clearly not intended by the plain meaning of the Policy.

As a result, the Court overlooked and misapprehended the applicable law and the facts and misinterpreted the Policy. There is no coverage under the Policy. The circuit court correctly granted Chicago Title summary judgment.

6. The Court misapprehended the effect of a default by one party on the litigation position of a non-defaulting, answering party.

The Court incorrectly concludes the default admissions of the developer should be applied against Chicago Title. The Court notes that insuring provision No. 3, covers "Forgery, fraud, duress, incompetency, incapacity [,] or impersonation," and "Balsam was held in default for failure to answer the Amended Complaint, thus, effectively admitting that it defrauded

Appellants." The Court then applies this default admission by another party to the insuring provision No. 3 of the Policy.

The Court cites no authority supporting the conclusion that Balsam's alleged wrongful actions admitted by the operation of Rule 55, SCRCP, can bind or be held against a non-defaulting, answering party such as Chicago Title.

Long-standing conclusions of other courts suggest a default of one defendant does not constitute an admission by a non-defaulting defendant. *See Vale v. Bonnet*, 191 F.2d 334, 337 (D.C. Cir. 1951) (holding that where a default judgment was obtained against the repairmen, the judgment would not foreclose the right of the lessee to contest the issue as to whether the repairmen had been negligent); *J.M. Wildman, Inc. v. Stults*, 1 Cal. Rptr. 651 (Cal. Ct. App. 1959) (admission made by wife under her default judgment could not be used as evidence against the non-defaulting husband); *Dade County v. Lambert*, 334 So. 2d 844 (Fla. Dist. Ct. App. 1976) (default of one defendant cannot operate as an admission of the allegations against a contesting codefendant); *Khazaal v. Browning*, 717 So. 2d 1124 (Fla. Dist. Ct. App. 1998) (while a default against the non-answering defendant established that the non-answering defendant's interest in the collateral was inferior and subordinate to the security interest of the appellees, that default did not affect the answering defendant's own position); *Stokes v. McRae*, 278 S.E.2d 393, 395 (Ga. 1981) (in action for fraudulent transfers, grantor's admission, through its default, of all the well-pled material facts alleged against him, did not bind the non-defaulting grantee); *Chromocolour Labs, Inc. v. Snider Bros. Property Management, Inc.*, 503 A.2d 1365, 1369 (Md. 1986) (explaining that although a default constitutes an admission of the defaulting party, it does not amount to an admission of the contesting parties, even though the defendants may be "inextricably bound"); 46 Am. Jur. 2d *Judgments* § 241 (2019) ("The default of one defendant does not operate as an admission as against a contesting codefendant even though the defendants may be inextricably joined. An answering defendant's defenses remain to be tested by a trial and cannot be disposed of by the nonanswering defendant's default."); 49 C.J.S. *Judgments* § 258 (2019) ("The default of one defendant, although an admission by it of the allegations in the complaint, does not operate as an admission of such allegations as against a contesting codefendant even though the defendants may be inextricably joined.").

Courts have extended a similar limitation on requests for admission to hold that failure to timely respond to requests for admissions are binding only on non-responding parties, not on co-parties. See *Riberglass, Inc. v. Techni–Glass Indus., Inc.*, 811 F.2d 565, 566–67 (11th Cir. 1987) (holding defendant guarantor of company's debt not bound by deemed admission of co-defendants and finding district court improperly granted summary judgment against party on basis of deemed admissions of other non-responding parties); *Becerra v. Asher*, 921 F. Supp. 1538, 1544 (S.D. Tex. 1996), aff'd on other grounds, 105 F.3d 1042 (5th Cir. 1997) (deemed admissions binding only on non-responding party); *United States v. Wheeler*, 161 F. Supp. 193, 198 (W.D. Ark. 1958) (holding that facts deemed admitted as to one defendant because of his failure to respond to the plaintiff's request for admissions are not binding on a codefendant); *Alipour v. State Auto. Mut. Ins. Co.*, 131 F.R.D. 213, 215 (N.D. Ga. 1990) (even though insurance policy loss payee's right to recovery depended on insureds' right to recover, the loss payee was not bound by admission of the insureds which were the result of insureds' failure to respond to discovery request or to a motion for summary judgment); *Kittrick v. GAF Corp.*, 125 F.R.D. 103, 106 (M.D. Pa. 1989) (Plaintiff's admission under Rule 36 cannot bind a third-party plaintiff); *Darnall v. Petersen*, 592 N.W.2d 505, 510 (Neb. Ct. App. 1999) (noting that "[t]he federal courts have almost unanimously concluded that a rule 36 admission is not binding against a codefendant" and holding the same); 8B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2264 (3rd ed) (stating "[t]he admission does not bind the party who requested it.... Nor do the admissions of a party bind a coparty."); 32 C.J.S. *Evidence* § 561 n. 8 (noting "[a]n admission of one party is not binding on, or evidence against, a co-party" and "[d]eclarations of a defaulted defendant are generally inadmissible against his co-defendant.").

As a result, the Court overlooked and misapprehended the applicable law applying the default admissions of Balsam to Chicago Title. There is no coverage under the Policy. The circuit court correctly granted Chicago Title summary judgment.

CONCLUSION

The Policy's coverage for certain off-record risks was not a basis for Chicago Title's denial of coverage and was not a basis for the circuit court's grant of Chicago Title's motion for summary judgment.

Controlling North Carolina law provides the unrecorded 2002 plat could not and did not affect title to the property as insured. There is no defect, lien, or encumbrance.

There is no evidence in the record on appeal that the road shown in the 2002 unrecorded plat existed at the time the Policy was issued.

Nothing in the record implicates the insuring provisions regarding fraud and incompetency.

The default of one party cannot be held against another, answering party.

Chicago Title respectfully submits the Court misapprehended or overlooked the facts and the law as set forth above, and requests the Opinion be withdrawn and the circuit court's grant of summary judgment in favor of Chicago Title be affirmed.

Mount Pleasant, SC
April 10, 2019

Respectfully submitted,

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APPEAL FROM BEAUFORT COUNTY
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The Honorable Carmen T. Mullen
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Of which Chicago Title Insurance Company is the..Respondent.

PROOF OF SERVICE

I hereby certify that I served the Respondent's Petition for Rehearing and Suggestion for Rehearing *En Banc* via overnight delivery, on April 10, 2019, 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.

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April 10, 2019

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APR 11 2019
SC Court of Appeals

Re: *William Loflin and Leslie Loflin vs. BMP Development, LP, Balsam Mountain Group, LLC et al., Case No. 2016-001840 File No.: 1089.0023*

Dear Ms. Kitchings:

Enclosed please for filing please find the following:

1. An original and seven (7) copies of the Respondent's Petition for Rehearing and Suggestion for Rehearing *En Banc* to File Letter Ordering Transcript out of Time;
2. An original and one (1) copy of the Proof of Service.

Also enclosed is the filing fee of Fifty ($50.00) Dollars.

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

Yours very truly,

G. Hamlin O'Kelley, III

cc: (w/Encl.)

Daniel A. Speights, Esq.
A.G. Solomons, III, Esq.

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