THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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

William Loflin and Leslie Loflin, Appellants,

v.

BMP Development LP, Balsam Mountain Group, LLC, COWARD HICKS & SILER, P.A., Chicago Title Insurance Company, and Counsellor Title Agency, Defendants,

Of which
Chicago Title Insurance Company is the Respondent.

RETURN TO RESPONDENT'S PETITION FOR REHEARING

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On March 27, 2019, this Court issued Opinion No. 5633, reversing and remanding the trial court's order granting summary judgment in favor of Chicago Title ("Chicago"). On April 10, 2019, Chicago filed its petition for rehearing and suggestion for rehearing en banc. This return is filed pursuant to the Court's request. Respectfully, the petition should be denied.

SUMMARY OF ARGUMENT

This Court correctly recognized the facts established in this case create at least a mere scintilla of evidence that trigger insurance coverage. Respondent's assertions of fact found in the petition are unsupported by the record which is replete with disputed facts. Moreover, Respondent's legal assertions fail to provide a basis for the requested relief.

In the opinion, this Court decided three key issues (Opinion at 4):

1. the title insurance coverage is not limited to defects found in record title (Opinion at 5-11);
2. at least a scintilla of evidence exists that the established facts trigger coverage by Chicago (Opinion at 12-14); and
3. the applicable statute of limitations is twenty years (Order at 14-15).

The petition does not follow the organization of the Opinion but Chicago raises no dispute that the Court was correct in its finding concerning the statute of limitations. This leaves the other two findings of the Order to be discussed. Chicago professes not to contest the premise embodied in the Order's first finding, that title insurance coverage is not limited to defects found in the record title. However, the majority of the petition argues there is no fact triggering coverage because there is no fact which has altered the record title. Contrary to the petition's argument that Chicago's positions were "misapprehended", this Court fully understood the issues before it and

the opinion is a proper and consistent application of the law of insurance in South Carolina. Chicago's filing does not support re-plowing covered ground to argue a factual point (policy not triggered) that is asserted by the use of a premise Chicago claims to have abandoned (no defects in record title is conclusive evidence of no insurance).[1]

ARGUMENT

As stated above, the petition does not track the Order. The Order dealt with three issues. Chicago raises no argument as to one of the issues, professes to not contest another of the issues, but expends much of its argument asserting that coverage could not have been triggered because there has been no alteration of the recorded title. The primary factual assertion in the petition for rehearing, that the road in controversy does not predate the sale, is disputed by the road's existence on the recorded plat (Exhibit 1 to Order), the testimony of Bill Loflin (R. p. 636-637, 639)[2], the testimony of the surveyor explaining that a different depiction of the property was delivered to the owner prior to sale (Herron Deposition at44) (R. p. 487, lines 5-8), the blowup of Lot 108 (Herron deposition Ex.3A) (R, p. 660-661), and the unrecorded plat (Exhibit 2 to Order).[3] The record does not support Chicago's position. At best, Chicago's position attempts to create a material dispute of fact based upon an assumption by a subsequently hired employee with no personal knowledge.

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[1] At argument, Plaintiffs explained that while a dispute to record title is not a necessary part of the breach of contract claims, there is an undeniable reality that the description of record is inaccurate. The seller's actions of seeking a quit claim deed from Plaintiffs was based on this discrepancy and the surveyor acknowledges that the plat of record does not accurately depict conditions on the ground. Mr. Loflin could never represent to a subsequent purchaser that he was selling the property as described in the plat. The property simply does not exist on the ground as described in the plat.

[2] "At that time, I did not know that the road through my property, which also resulted in less acreage than set forth in my Deed and Plat, was the same road that existed prior to the Closing."(R. p. 639).

[3] Chicago states a rehearing is necessary because the "sole evidence of something existing on the Policy date is the unrecorded 2002 plat...". Petition at page 9. Chicago even ignores the inclusion of the same road on the recorded plat.

See Footnote 4 of the Opinion. The Opinion considered all of the facts found in the record including the role of this employee and notes the employee's involvement in attempting to have Plainitffs sign a quit claim deed to try and correct the recording error. Opinion at 2. [4] Simply put, its far-fetched to dispute that a road existed in 2002; to assert that there is no genuine issue of material fact which could establish that a road existed would require the Court to simply ignore the vast majority of evidence. This cannot support a rehearing.

Chicago first contends the "Court focused on whether the Policy's coverage is limited to defects of record, an issue which is not the basis of the trial court's order, and not disputed by Chicago Title." Notwithstanding that this supposition was the basis of the trial court's order[5], if Chicago Title does not dispute the finding, then Chicago's acquiescence is certainly not a valid reason for a rehearing.

However, the concession falters and Chicago expends much of the energy in the brief explaining that the record title is unchanged, a point not in dispute. It is this argument, embodied throughout the petition, the appellate briefing in advance of argument and to the Court below (RR. 15-21), that prompted the Court to address this issue in the Opinion. Furthermore, the Court's finding was necessary to fully address the basis of the trial court's ruling. Analyzing the language of the policy and the law of South Carolina, the Opinion correctly determined that coverage is not limited to defects of record. Chicago, at least in its argument heading, concedes this point.

Chicago's second argument focuses on North Carolina recording statutes. North Carolina law on the recording of a document does not alter any of the claims or duties at issue in this case.

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[4] This attempt to have Plaintiffs sign a quitclaim deed would have been a superfluous exercise if no issue existed with the recording.

[5] The lower court stated in the argument below "I guess my problem is, is that how could a title insurance company, title agency, Counsellor, how can they all be responsible for something that isn't recorded?" (R. 433).

The only reason that the North Carolina law would matter would be if the Court were to be misled by Chicago's mischaracterization of Plaintiffs' claims. The petition continues Chicago's assertion that the Plaintiffs' claims are dependent upon the applicability of an unrecorded plat as if that plat were recorded. This is incorrect. Plaintiffs have established in the record the existence of the unrecorded plat and possession of the unrecorded plat by the seller prior to sale as evidence of fraud by a seller.[6] Plaintiffs do not seek to usurp the record title with an unrecorded document but rather introduce the evidence to show a covered risk has occurred. This Court appreciated the distinction in its Opinion, which recognizes the record contains testimony establishing the owner possessed the unrecorded plat prior to sale. Order at 2.

Chicago feels compelled to discuss North Carolina law because either intentionally or unintentionally, Chicago has mischaracterized the import and impact of the unrecorded plat, who possessed this document at the sale and when it was created. Chicago discusses at length a filing and notice statute to support an argument that it claims in its first enumerated section to have abandoned; if a matter of fact is not found within record title, it has no ability to trigger coverage. However, the Court has properly used both the facts of the case, the language contained in the policy itself, and the law of insurance to determine that events beyond record title may trigger coverage. It is this Court's full understanding of Chicago's distortion of the purpose of the established facts which explains this Court's decision that a choice of law analysis was not needed. The combination of Chicago's bootstrapping position that "there is title because there is title" coupled with the framing of the contents of the unrecorded plat as the basis of Plaintiffs' title created confusion in the lower court. This confusion became a red herring dragged across the path

[6] These facts are established in the record regardless of the default judgment against the seller. See Order pages 2 and 5-11.

of the lower court and now Chicago attempts to do the same after the actual import of the established facts have been clarified by the Order. No additional hearing is necessary to further clarify.

Chicago's next two arguments (3 & 4) both hinge upon whether there is a scintilla of evidence that Preserve Road, the primary access point to the development and the road in question predates the sale. As discussed above on page 3, Preserve Road is the same road that is depicted in both the recorded and unrecorded plats and the same road that the surveyor noted surveying prior to the sale. Chicago asserts this road only existed theoretically at the time of sale. However, the recorded and the unrecorded plat do not mark the road as theoretical. The record is full of evidence establishing Preserve Road's existence prior to sale. As stated earlier, Chicago attempts to create a material dispute of fact based upon an assumption of a subsequently hired employee.

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 Plaintiffs that contrary to the Deed and the Recorded Plat that Balsam delivered to Plaintiffs 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). Mr. Lehman later testified that the wrong plat must have been delivered and recorded. (R, p. 464).

Chicago's fifth argument is that this Court misapprehends what the coverage language actually means when Chicago tells customers it covers the risks associated with someone else

owning an interest in your title, defective recording, fraud, or risks associated with other defects or encumbrances. The Opinion states that "Appellants presented at least a scintilla of evidence showing a defect in the title that Chicago insured in February 2002." (Opinion at 13). The Court's analysis of the policy language and the facts is an exhaustive analysis covering more than ten single spaced pages. The Court did not misapprehend the argument Chicago now presents. It understood the argument and found it lacking. The record supports a finding that a factual issue exists as to whether another owns an interest in the land, a fraud had occurred in the sale, the wrong document had been recorded, or there are other liens or encumbrances.[7] Copious detail is included in the facts as pulled from the record in the Order and rehearing is not necessary to add further unnecessary details.

Chicago's sixth and last enumerated point presents no basis for the relief requested. Chicago asserts that the Court has not only misapprehended what the plain language of the policy means but the Court has also misapprehended the legal effect of a default judgment. Chicago conflates two separate and distinct concepts. Chicago argues that the Opinion has deviated from the law by applying the negligence established by the default of one defendant against a co-defendant engaged in the same act. Petition at 14-17. However, the Opinion does not do what Chicago states. The cases cited and the premise stated have no application in the current scenario. As explained to the lower court (R. p. 430) and as understood in the Opinion, Chicago is an insurer.[8] It insures against certain risks. Chicago does not need to have created the risk to have

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[7] For example, Craig Lehman testified that he knew that the seller was encroaching upon the property of the Plaintiffs and what Plaintiffs purchased "wasn't in agreement with the master plan or their plat".

[8] Chicago is a title insurance company. Chicago is aware that, for years, Plaintiffs have been embroiled in costly litigation in North Carolina surrounding the ownership rights of Lot 108. Chicago is also aware that the facts surrounding the sale of Lot 108 make the parcel unable to be

responsibility for an occurrence under the policy. To require an insurer to have created the risk it insures before coverage is applicable would stand insurance law on its head. One of the stated risks Chicago insured against is fraud in the sale. Fraud is established as a matter of law by the defaulting seller. Plaintiffs do not claim Chicago was a seller. The facts of the fraud that are established are not asserted against Chicago as a co-defendant in a tort but rather presented to an insurer against the risk. Chicago insures against a risk now established as a matter of law. However, even if fraud were not conclusively established as a matter of law, there is ample evidence noted in the facts of the Order to support a finding that fraud has occurred. See Opinion at 2-3.

CONCLUSION

Based on the foregoing discussion, Plaintiffs respectfully request that this Court deny the petition for rehearing *en banc*.

Respectfully submitted,

By: _____

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May 22, 2019

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sold. Despite this knowledge, Chicago has never tendered a defense of the title it defends here. It has attempted to have its cake and eat it too.

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PROOF OF SERVICE

The undersigned hereby certifies that on May 22, 2019 she served counsel for Respondent with the *Return to Respondent's Petition for Rehearing* in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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