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

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.

CHICAGO TITLE INSURANCE COMPANY'S REPLY TO APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

The Respondent Chicago Title Insurance Company ("Chicago Title"), pursuant Rule 240(f), SCACR, respectfully submits this Reply to the Response of the Appellants William Loflin and Leslie Loflin (the "Loflins") to Chicago Title's Petition for Rehearing and rehearing *en banc* regarding Opinion Number 5633 (the "Opinion").

I. INTRODUCTION

The Loflins' title policy ("the Policy") says, "[t]his Policy covers the following *title* risks, if they affect your *title* on the Policy Date." (R. p. 621, emphasis added).

In considering the provisions of the Policy, the Circuit Court said, "the policy is designed to save the insured from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it . . . ." (R. p. 20), correctly concluding that when the Loflins took title to the insured property, there were no defects, liens or encumbrances affecting their title.

Respectfully, the Court misapprehended the nature and extent of coverage provided by the Policy, the effect of North Carolina law on the Policy's coverage provisions, and the Policy's coverage regarding "fraud" and "incompetency" claims.

For the reasons contained in Chicago Title's petition and below, Chicago Title respectfully submits the Opinion should be withdrawn and the Circuit Court's order granting Chicago Title summary judgment affirmed.

II. ARGUMENT IN REPLY

A. The Policy covers both on and off-record risks.

Neither the Loflins nor Chicago Title dispute the Policy covers on and off-record risks. Chicago Title denied the Loflins' title claim not because the 2002 survey was not recorded, but because, under North Carolina law, the unrecorded 2002 survey did not affect the Loflins' title as insured.

B. The two unrecorded surveys do not affect the Loflins' title.

1. North Carolina law applies.

North Carolina law applies to title issues regarding the Loflins' property.

North Carolina is a pure race state. N.C.G.S. §§ 47-18, 47-20 (2018). The party to record first prevails as to title, regardless of notice of other claims regarding title. Under North Carolina's recording statutes, real property purchasers can rely solely on the public record to determine the status of title to land they intend to buy. *Beasley v. Wilson*, 147 S.E.2d 577, 579 (N.C. 1966) ("An unrecorded contract to convey land is not valid as against a subsequent purchaser for value . . .

C. There was not a scintilla of evidence of the alleged Preserve Road encroachment.

The Court found "[the Loflins'] ownership interest in the land on the date of the Policy's issuance was affected by what the unrecorded 2002 plat *reflected* on the ground, i.e., the Preserve Road encroachment and the diminished acreage." *Opinion* at 86.

Foremost, even if the unrecorded 2002 plat actually "reflected" what was present on the Loflin lot at closing, under North Carolina's recording act and case law, the "fact" of what is shown on the unrecorded 2002 plat could not and did not affect the Loflins' title to the 1.837 acre insured property *as it is shown on the recorded 2001 plat.*

Further, there is no evidence in the record to establish that the unrecorded plat accurately showed what was present on the Loflins' property.

Balsam Mountain Group, LLC's President and CEO, Craig Lehman, testified he understood that the road in question was constructed "from scratch sometime after [the Loflins] purchased Lot 108." (R. pp. 469-470). He could not 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).

Finally, the Loflins' 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

."). Only when a search of the public record reveals an encumbrance is a purchaser chargeable with notice of its existence. *Turner v. Glenn*, 18 S.E.2d 197, 200-201 (N.C. 1942). ("It is necessary in the progress of society, under modern conditions, that there be one place where purchasers may look and find the status of title to land. Hence, in applying [North Carolina's recording] act, it has become axiomatic with us that 'no notice, however full and formal, will take the place of [recordation].'").

2. The surveys.

There are three surveys in the Record on Appeal. The *recorded* survey dated December 10, 2001, recorded February 19, 2002, in Plat Book 11, slide 383 (R. p. 585), and the *unrecorded* surveys dated February 8, 2002 (R. p. 586) and April 8, 2014 (R. p. 631).

3. The unrecorded surveys have no effect on Loflins' title.

North Carolina's recording statute controls; it is clearthatunrecorded surveys are invalid and do not affect title to the Loflins' property. Upon the recording of the Loflins' deed, without question, the Loflins owned unencumbered title to Lot 108, as it is shown on the single recorded plat, and as that title is insured by the Policy. The Loflins' title to their property is free and clear of any contrary interests claimed by any other person or entity.

Anyone who was present on the insured property when the Loflins' deed was recorded, or who came onto the Loflins' property, without their permission or acquiescence, after their deed was recorded, was and is a trespasser, having no right to be there. Trespass is not a covered matter under the Policy.

destroying one or more trees, and installing two culverts which drain water onto [Appellants'] property." (R. p. 215) (emphasis added).[1]

A scintilla of material evidence will defeat a summary judgment motion, *Hancock v. Mid-S. Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), and a "scintilla" is defined as the smallest of evidence. *Bethea v. Floyd,* 177 S.C. 521, 181 S.E. 721, 724 (1935). Even if there is no dispute regarding any material fact, but only a controversy about the conclusion(s) to be drawn from those facts, summary judgment should not be granted. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.,* 349 S.C. 356, 362, 563 S.E. 2d 331, 333 (2002).

Here, there is not a scintilla of evidence supporting coverage. Further, even assuming an inference can be drawn that the 2002 unrecorded plat reflected what was present on the insured property at closing, North Carolina law is clear—the Loflins own the insured property, *as it is shown on the recorded 2001 plat* and as the property is insured by the Policy.

The Circuit Court's grant of summary judgment to Chicago Title was correct. The Opinion should be withdrawn, and the Circuit Court's order affirmed.

D. The Policy covers "fraud" and "incompetency" as those matters affect title.

The Policy covers "*title* risks, if they affect your *title* on the Policy Date." (R. p. 621, emphasis added).

Fraud, as it affects title, involves, for example, "a deed procured by fraud is ... voidable." 26A C.J.S. *Deeds* § 153 (2019). Incompetence or incapacity, in the context of title, involves the mental capacity of the grantor, i.e., " a deed is void on the ground of mental incompetency [if] ... the grantor was laboring under such a degree of mental infirmity as to make him incapable of

[1] "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).

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).

The Court misapprehended insuring provision No. 3 (R. p. 621), because that provision, as with all others in the Policy, must be considered in the context of the purpose of the Policy—to insure title. All risks enumerated in insuring provision No. 3—forgery, fraud, duress, incompetency, incapacity, or impersonation—relate to matters that may affect title to the property, nothing more or less.

The Court's conclusion that the Loflins' allegation that Balsam recorded the wrong plat is "incompetence" covered by the Policy is a misapprehension of the Policy and must be corrected. Further, there was no "fraud" in the context of title – the Loflins were conveyed, and have owned since the 2002 closing, the property shown on the 2001 recorded plat.

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

The Loflins asserted a fraud claim against the developer, Balsam Mountain Group, LLC (Balsam), which failed to answer the Loflins' complaint, and was placed in default. The Opinion concluded, based on this default, that "Balsam effectively admitted that it defrauded..." the Loflins. *Opinion* at 83.

It is axiomatic the default of one party cannot be attributed to an answering party. *See e.g. Vale v. Bonnet*, 191 F.2d 334, 337 (D.C. Cir. 1951); *J.M. Wildman, Inc. v. Stults*, 1 Cal. Rptr. 651 (Cal. Ct. App. 1959); *Dade County v. Lambert*, 334 So. 2d 844 (Fla. Dist. Ct. App. 1976); and *Khazaal v. Browning*, 717 So. 2d 1124 (Fla. Dist. Ct. App. 1998).

Further, materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence. *Hall v. Fedor,* 349 S.C. 169, 175, 561 S.E.2d 654, 656 (Ct. App. 2002).

The default of Balsam is not properly considered evidence in opposition to Chicago Title's motion for summary judgment and the Court overlooked and misapprehended the law by applying the default admissions of Balsam to Chicago Title.

CONCLUSION

The Policy covers certain off-record risks, but the fact that the 2002 survey was not recorded was not the basis of Chicago Title's coverage denial. That denial was based on controlling North Carolina law which makes clear the unrecorded 2002 plat did not affect the Loflins' title as shown on the recorded 2001 plat and as described in the Policy. There is, therefore, no defect, lien, or encumbrance on the Loflins' title.

There is no evidence in the record on appeal that the road shown in the 2002 unrecorded plat existed when 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 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.

June 13, 2019
Mt. Pleasant, South Carolina

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I hereby certify that I served the Respondent Chicago Title Insurance Company's Reply to Appellants' Response to Petition for Rehearing and Suggestion for Rehearing *En Banc* via overnight delivery, on June 13, 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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June 13, 2019

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VIA OVERNIGHT DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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P.O. Box 11629
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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 Reply to Appellants' Response to Defendant's Petition for Rehearing and Suggestion for Rehearing *En Banc*; and

2. An original and one (1) copy of the Proof of Service.

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.