THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Opinion No. 5633 (S.C. Ct. App. Filed March 27, 2019)

William Loflin and Leslie Loflin, ... Appellants/Respondents,

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 whom

Chicago Title Insurance Company is ..... Respondent/Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies there was a published opinion of the Court of Appeals in this matter filed March 27, 2019, and the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 19, 2019.

QUESTIONS PRESENTED

A. While the Circuit Court correctly applied North Carolina's pure "race" recording statute, concluding the Unrecorded Plat does not affect the Loflins' fee simple title to Lot 108 as described in their deed and as shown on the Recorded Plat, and the Unrecorded Plat is not a defect, lien or other encumbrance on the Loflins' title, did the Court of Appeals misapply that statute in reversing the Circuit Court's grant of summary judgment?

B. Did the Court of Appeals err when it struck the post-policy-event exclusion from the Policy and rewrite the Policy to include post-policy trespass claims, matters excluded under the unambiguous terms of the Policy?

C. Did the Court of Appeals err in holding that Chicago Title was bound by the default of Balsam regarding the Loflins' "fraud" claims against Balsam?

D. Did the Court of Appeals misconstrue the Policy's coverage provisions regarding the invalidity of certain instruments due to "incompetency," and rewrite the Policy to provide a wholly different and nonsensical meaning to that Policy term?

E. Because there was no justiciable controversy as to whether the Policy covered both recorded and unrecorded matters affecting real property, did the Court of Appeals err in ruling on that non-issue?

F. In reversing the Circuit Court's grant of summary judgment in favor of Chicago Title, did the Court of Appeals misapply SCRCP, Rule 56 and this Court's case law regarding summary judgment?

I. INTRODUCTION

The Court of Appeals' decision reversing the Circuit Court's grant of summary judgment in favor of Petitioner misapplied the applicable North Carolina recording statute, ignored the plain and unambiguous language of the title insurance policy in question, construing it in a fashion contrary to this Court's long standing rules of construction, applied the default of one party to the

non-defaulting Petitioner, ruled on an issue regarding which there was no controversy, and found a "scintilla" of evidence where there was none.

For the reasons set forth below, Petitioner respectfully requests the Court grant this Petition, reverse the Court of Appeals' decision, and reinstate the Circuit Court's grant of summary judgment in favor of the Petitioner.

II. STATEMENT OF THE CASE

A. Procedural History.

Respondents, William Loflin and Leslie Loflin (the "Loflins"), filed their Complaint, Amended Complaint, Second Amended Complaint, and Third Amended Complaint on, respectively, July 18, 2013, April 14, 2014, January 6, 2015, and August 5, 2015 (App. pp. 50, 78, 145 and 209). The Loflins' Third Amended Complaint, as did their Complaint, Amended Complaint, and Second Amended Complaint, asserted Chicago Title breached an owners' title insurance policy ("Policy") issued to the Loflins.[1]

Chicago Title denied the material allegations of all versions of the Loflins' Complaints. (App. pp. 134, 188 and 255[2]).

On July 17, 2017, the Loflins moved to hold Defendant, BMP Development, LP, f/k/a Balsam Mountain Preserve, Limited Partnership (Balsam), in default. (App. p. 121).

Chicago Title moved for Summary Judgment on July 9, 2015, and filed a Memorandum in Support of the Motion on June 10, 2016. (App. pp. 202, 316). Chicago Title's Summary Judgment

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[1] The Loflins' Complaints also asserted a negligence cause of action against Chicago Title which was dismissed by the Circuit Court on summary judgment. The Loflins did not challenge the grant of summary judgment on their negligence claim before the Court of Appeals. *Loflin v. BMP Dev., LP, et al,* ___ S.C. ___, 832 S.E.2d 294, n. 7.

[2] Chicago Title filed a Motion to Dismiss the Loflins' original Complaint, that motion being denied. (App. pp. 56 and 9).

Motion was heard on June 13, 2016, and the Circuit Court granted Chicago Title summary judgment by Order entered August 15, 2016. (App. p. 19).

The Loflins appealed the Circuit Court's grant of summary judgment and the South Carolina Court of Appeals reversed. (*Loflin v. BMP Development, LP,* ___ S.C. ___, 832 S.E.2d 294 (Ct. App. 2019), App. p. 779). Chicago Title timely filed a Petition for Rehearing, which the South Carolina Court of Appeals denied. (App. pp. 797 and 818).

B. Factual Background.

On February 15, 2002, the Loflins bought Lot 108 from Balsam. Lot 108 is a vacant residential lot in North Carolina. The Loflins' deed described Lot 108 by reference to a plat (Recorded Plat) dated December 10, 2001, recorded February 19, 2002, in the public land records of Jackson County, North Carolina, in Book 1227, Page 202. (App. pp. 20 and 219).

The Recorded Plat describes Lot 108 as containing 1.837 acres and shows "Preserve Road" running near Lot 108's eastern, northern and western boundaries, with the lot's southern boundary shown as a "Conservation Area." *Id.*

In conjunction with the Loflins' purchase of Lot 108, Chicago Title issued the Loflins the Policy. (App. pp. 635-640). Subject to the Policy's exclusions, exceptions and conditions, the Policy insures the Loflins' title to Lot 108 as it is described in their deed and shown on the Recorded Plat.

In 2006, Craig Lehman, Balsam's then President and CEO, told the Loflins there was an encroachment on Lot 108, that the property contained only 1.4 acres, and that a road went through the property. (App. p. 653). Mr. Lehman told the Loflins that the road on Lot 108 had been constructed after their purchase of the lot. (*Id.*). (App. pp. 653-654).

In 2012, the Loflins learned there was a second, unrecorded plat of Lot 108 ("Unrecorded Plat"). (Loflin Supplemental Affidavit, Loflin Third Amended Compliant, and Unrecorded Plat, App. pp. 653-654 and 601). The Unrecorded Plat, dated February 6, 2002, shows Preserve Road running along Lot 108's eastern boundary, turning west to encroach slightly onto the northeast corner of Lot 108, then traveling west to encroach significantly onto the northwestern portion of Lot 108. Also, the northern and northeastern boundaries of Lot 108 shown on the Unrecorded Plat are located south of Lot 108's Recorded Plat boundaries, reducing acreage lot's acreage. The Unrecorded Plat describes the lot as containing only 1.409 acres, rather than the 1.837 acres shown on the Recorded Plat.

The surveyor who prepared the Unrecorded Plat said he "delivered" the Unrecorded Plat to Balsam on February 6, 2002. (App. p. 495).

III. ARGUMENT

A. The Circuit Court correctly applied North Carolina's pure "race" recording statute, concluding the Unrecorded Plat does not affect the Loflins' fee simple title to Lot 108 as described in their deed and as shown on the Recorded Plat, and the Unrecorded Plat is not a defect, lien or other encumbrance on the Loflins' title. The Court of Appeals misapplied that law in reversing the Circuit Court's grant of summary judgment.

All parties, the Circuit Court, and the Court of Appeals agree North Carolina law applies to any title issue concerning Lot 108.[3]

[3] 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....").

South Carolina is a "race-notice" recording act state[4] - the first to record an instrument affecting real property, without notice of competing interests to the property, prevails as to title. North Carolina, however, is a pure "race" state[5] - the first to record prevails as to title, regardless of any notice or knowledge the recording party may have of competing interests. *Beasley v. Wilson*, 147 S.E.2d 577, 578 (N.C. 1966) ("An unrecorded contract to convey land is not valid as against a subsequent purchaser for value, ... , even though he acquired title with actual notice of the contract."); *Simmons v. Quick-Stop Food Mart, Inc.*, 296 S.E.2d 275, 280 (N.C. 1982) ("Because defendant's lease was not recorded prior to the date on which plaintiff recorded her deed, plaintiff did not take the deed subject to the lease.").

Under North Carolina's recording statutes, N.C.G.S. §§ 47-18, 47-20 (2018), real property purchasers can rely solely on the public record to determine the status of title to land they are purchasing. *Schuman v. Roger Baker & Assoc., Inc.*, 319 S.E.2d 308 (N.C. Ct. App. 1984). 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 (N.C. 1942).

The Policy **"... insures [the Loflins'] *title* to the land described in Schedule A . . . ."** Under the heading, "Covered Title Risks," the Policy provides coverage for various "title risks if they affect [the Loflins'] title on the Policy Date," including, (1) **"[s]omeone else *owns an interest* in your title,"** and (2) against, **"[o]ther defects, liens, or encumbrances."** (Emphasis added). (App. p. 635 and 636).

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[4] *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.").

[5] *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.").

> Insurance policies are subject to the general rules of contract construction. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary, and popular meaning. *Preservation. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013) (quoting *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012)).

Loflin at ___, 832 S.E.2d at 299 – 300.

Under the applicable North Carolina law, the Unrecorded Plat could not impair or affect the Loflins' title to Lot 108. It is not, therefore, a defect, lien or encumbrance on that title.

The Circuit Court recognized this saying,

> 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.

(App. p. 25) (emphasis added).

The Court of Appeals also recognized this legal principle saying, "... the [Unrecorded Plat] itself may not affect [the Loflins'] title due to Balsam's failure to record it....," but then misapplied North Carolina law and strayed from the plain and unambiguous meaning of the Policy concluding, "[the Loflins'] ownership interest in the land on the date of the Policy's issuance was *affected* by what the [Unrecorded Plat] *reflected* on the ground, i.e., the Preserve Road encroachment and the diminished acreage." *Loflin,* at ___, 832 S.E. 2d at 303. (Emphasis added).

The Policy insures the Loflins have *title* to Lot 108 as it is described in their deed and shown on the Recorded Plat, which the Loflins have had since they purchased Lot 108 in 2002. Under North Carolina law, the Unrecorded Plat has no impact on and cannot effect the Loflins' fee simple title to Lot 108. Under North Carolina law, no one other than the Loflins own or have an interest in Lot 108 as it is shown on the Recorded Plat, and the Unrecorded Plat is not a defect, lien or encumbrance on the Loflins' title to Lot 108. The Unrecorded Plat has the same effect on

the Loflins' title to Lot 108 as the unrecorded contract did in *Beasley,* and the unrecorded lease did in *Simmons* – none.

The Loflins' deed and the Recorded Plat reflect the Policy-covered reality that the Loflins own Lot 108 as described in their deed and shown on the Recorded Plat. Under North Carolina law, Balsam, clearly and conclusively, holds no title or interest in any portion of Lot 108 shown on the Recorded Plat.

The Circuit Court correctly concluded the Unrecorded Plat does not affect the Loflins' title to Lot 108 as insured by the Policy. In concluding otherwise, the Court of Appeals misapplied North Carolina law and transgressed this Court's admonition that courts "must enforce, not write, contracts of insurance...." *Preservation. Capital Consultants, LLC,* 406 S.C. at 316, 751 S.E.2d at 259 (quoting *Whitlock* 399 S.C. at 614, 732 S.E.2d at 628). This Court should grant this petition, reverse the Court of Appeals, and reinstate the Circuit Court's grant of summary judgment to Chicago Title.

B. The Court of Appeals struck the post-policy-event exclusion from the Policy and rewrote the Policy to include post-policy trespass claims, matters excluded under the unambiguous terms of the Policy.

The Policy excludes matters occurring after the issuance of the Policy:

Exclusions

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

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3. Title Risks:

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• that first affect your title after the Policy Date . . . .

The post-policy event exclusion is at the heart of title insurance coverage, a principle recognized by this Court thirty-eight years ago:

> 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.
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> *Firstland Villiage Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981).

The Policy defines the Policy Date as April 19, 2002. The Court of Appeals concluded the Loflins' " ... ownership interest in the land on the date of the Policy's issuance was affected by what the [Unrecorded Plat] *reflected* on the ground, i.e., the Preserve Road encroachment and the diminished acreage." *Loflin* at ___, 832 S.E. 2d at 303.

As set forth above, as a matter of law, the Loflins' title to Lot 108 is as insured and as described in their deed and shown on the Recorded Plat. The Unrecorded Plat does not affect the Loflins' title to Lot 108.

Further, there is no evidence to show that the version of Preserve Road shown on the Unrecorded Plat existed "on the ground" on the Policy Date.

Balsam's President and CEO, Craig Lehman, testified he understood that Preserve Road was constructed "from scratch sometime after [the Loflins] purchased Lot 108." (App. pp. 484-485). He could not confirm if there "was some sort of trail there previously" and whether "the road was constructed as overlay of the trail." (App. p. 484).

Mr. Loflin provided two affidavits to the Court. (App. pp. 651-654). In neither affidavit did he provide evidence the road existed on Lot 108 or ran through Lot 108 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." (App. pp. 653-654). The only evidence submitted, therefore, was of Balsam's post-policy trespass onto Lot 108.

Further, the Loflins' Third Amended Complaint alleges that "***at some point after conveying Lot 108*** to [the Loflins], 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 [the Loflins'] property." (App. p. 223) (emphasis added).[6]

Parties are 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) and *Postal v. Mann,* 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992).

There is no evidence of anything "on the ground" at Policy date and the Loflins admitted as much in their pleadings.

The Court of Appeals also asserted the following as "on the ground" evidence related to the road:

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

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

(3) Balsam's disregard of Loflins' requests to leave Preserve Road unpaved.

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[6] The Loflins' opening brief before the Court of Appeals repeats this assertion, saying "Importantly, Mr. Lehman believed and communicated to the Loflins that the [Preserve] road had been constructed on Lot 108 *after* the closing." Loflin Brief, App. p. 708. Emphasis in the original. Regardless, as pointed out above, the Loflins own the "ground" described in their deed and shown on the Recorded Plat.

There is no evidence that prior to the Policy Date, Balsam "asserted" an ownership interest to the portions of Preserve Road which encroach on Lot 108. It was only in 2006 that Craig Lehman, Balsam's then President and CEO, told the Loflins there was an encroachment on Lot 108, that the property contained only 1.4 acres, and that a road encroached on the lot. (App. p. 653). The destruction of the steel posts clearly occurred after the Loflins acquired title to Lot 108, as did Balsam's "disregard" of the Loflin's request that Preserve Road remain unpaved.

Neither the Recorded Plat nor the Unrecorded Plat show the width of Preserve Road, neither say whether the road is dirt, gravel or paved, and neither are marked with any pins or irons, other monuments, or metes or bounds, to show where Preserve Road, if it actually existed on the ground on the date of either plat, is actually located. In short, there is no evidence that either the Recorded or the Unrecorded Plat show Preserve Road actually existed "on the ground" on the Policy Date.

There is no indication Balsam, or anyone, ever claimed a *legal* right to the area in dispute. By requesting the Loflins execute a quit claim deed to the area where Preserve Road assertedly encroaches onto Lot 108, Balsam admitted it does not hold title or claim to hold title to that portion of Lot 108. *Loflin* at ___, 832 S.E.2d at 297. The Loflins may have allowed or agreed to the development of a road on their property at some point after the Policy Date, but that does not affect their ownership of the property under North Carolina law. The Loflins still have, as they always have had, legal title to Lot 108 as it is described in their deed and shown on the Recorded Plat. To this very day, title remains as insured by the Policy.

There is no evidence Preserve Road, as it is shown on the Unrecorded Plat, existed at Policy Date. In reversing the Circuit Court's grant of summary judgment in favor of Chicago Title, the Court of Appeals rewrote the Policy to provide coverage for post-policy trespass-like matters

specifically excluded by the Policy. This Court should grant this petition, reverse the Court of Appeals, and reinstate the Circuit Court's order.

C. The Court of Appeals incorrectly held that Chicago Title was bound by the default of Balsam regarding the Loflins' "fraud" claims against Balsam.

Under the heading "Covered Title Risks," the Policy provides coverage for matters affecting the insured title resulting from "[f]orgery, *fraud*, duress, *incompetency,* incapacity or impersonation. (App. p. 633).

The Court of Appeals said,

> As to Item 3 [of the Policy's insuring clauses], "Forgery, fraud, duress, incompetency, incapacity[,] or impersonation," Appellants note that Balsam was held in default for failure to answer the Amended Complaint and, thus, Balsam effectively admitted that it defrauded Appellants.

Loflin at ___, 832 S.E.2d at 301.

The Court of Appeals concluded saying the Preserve Road encroachment and the Loflins' loss of acreage "fall within" the "fraud" Covered Title Risk quoted above. *Id.* at 303.

Balsam failed to file an answer and the Loflins' moved to hold Balsam in default. (App. 121). Chicago Title answered the Loflins' complaints (App. 134, 188 and 255).

Balsam's default cannot bind Chicago Title. While there does not appear to be any South Carolina case law on this issue, numerous other state and federal court have so held. *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 Mgmt., 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.").

Further, the "fraud" the Loflins allege in their Third Amended Complaint is that Balsam represented Lot 108 was as described in their deed and as shown on the Recorded Plat, while the Unrecorded Plat showed a different Lot 108 configuration and acreage. However, as pointed out above, the title the Loflins received in 2002 and insured by the Policy was, by operation of the North Carolina recording statute, the title as shown by the Recorded Plat and as described in the Loflins' deed.

The Court of Appeals erred in attributing Balsam's default to Chicago Title and no fraud affected the title the Loflins received.

D. The Court of Appeals misconstrued the Policy's coverage provisions regarding the invalidity of certain instruments due to "incompetency," and rewrote the Policy to provide a wholly different and nonsensical meaning to that Policy term.

In the same section of its opinion addressing the "fraud" Covered Title Risk, the Court of Appeals also said the Loflins' allegations regarding Balsam's recording of the wrong plat would be covered under the "incompetency" portion of Covered Title Risk number 3. *Loflin* at ___, 832 S.E.2d at 300.

Insurance policies are subject to the general rules of contract construction. *M and 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.*

The Policy is one of title insurance and generally protects against matters affecting *title* to the insured real property. Covered Title Risk number 3 of the Policy's insuring clauses groups the terms forgery, duress, fraud, incompetency, incapacity and impersonation together for a reason – they describe matters which can affect title to real property. For example, "[a] deed which is a mere forgery ... is void." 26A C.J.S. *Deeds* § 153 (2019), "[d]eeds which have been procured by, or executed under, duress or undue influence, are ordinarily regarded as voidable..." *id.*, "...ordinarily a deed procured by fraud is ... voidable," *id.*, "[i]n 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); and "[a] deed will be invalidated by mental incapacity on the part of the grantor [if] he or she lacks sufficient

reason to understand or appreciate his or her act or the reasonableness and consequences thereof"...26A C.J.S. *Deeds* § 98 (2019).

When read in the context of the Policy, the word "incompetency" deals with the mental capacity of the grantor to understand the act of conveyance, not whether the grantor, or someone else, is negligent or careless or lacks the training or acumen to complete a required task.

The Court of Appeals misconstrued the Policy's coverage provisions regarding the invalidity of certain instruments due to "incompetency," and rewrote the Policy to provide a wholly different and nonsensical meaning to this provision. This Court should grant this petition, reverse the Court of Appeals, and reinstate the Circuit Court's grant of summary judgment to Chicago Title.

E. There was no justiciable controversy that the Policy covered both recorded and unrecorded matters affecting real property, and the Court of Appeals erred in ruling on that non-issue.

The Circuit Court did not hold that the Policy only covered matters appearing on the public records. In concluded,"[[T]heLoflins] have no claims for damage due to an unrecorded plat as they have title to the property as insured and conveyed pursuant to the recorded plat in Jackson County, North Carolina." (Circuit Court Order, App. p. 23). In so ruling, the Circuit Court cited North Carolina's recording statutes which, as pointed out above, provide that unrecorded instruments purporting to affect title to real property are invalid as against recorded instruments. Chicago Title's answers to the Loflins' complaints do not assert, as a coverage defense, that the Policy does not cover unrecorded matters purporting to affect title to real property. The Loflins' have no claim under the Policy by operation of North Carolina's recording statutes which render unrecorded documents invalid as to recorded documents, but that is not because the Policy does not cover unrecorded matters.

> Generally, this Court only considers cases presenting a justiciable controversy. *Byrd v. Irmo High School,* 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. *Id* at 431, 468 S.E.2d at 864.
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> *Sloan v. Friends of the Hunley, Inc.,* 369 S.C. 20, 25, 630 S.E.2d 474, 476 (2013).

Although there never was an issue regarding coverage for unrecorded matters, the Court of Appeals spent nearly thirty (30%) of its opinion discussing and deciding this issue.

Although whether the Policy covered matters not on the public record was never an issue and, therefore, the Court of Appeals discussion of the matter can be considered dicta, (... "because the Court's expansive statement was unnecessary to the decision, the statement is dictum ...." *Gordan v. Lancaster,* 425 S.C. 386, 394, 823 S.E. 2d 173, 177 (2019), Few, J., concurring), Chicago Title respectfully submits several statements of the Court of Appeals, although they are dicta, are incorrect statements of the law, and misinterpretations of the Policy.

For example, as pointed out above, the Court of Appeals binds Chicago Title to the default of another party and misconstrues the meaning of the word "incompetency" as used in the context of the Policy. *Loflin* at ___, 832 S.E.2d at 301. The Court of Appeals also misconstrues the defined term of "public records" in its discussion of this non-issue.

The Court of Appeals unnecessarily and in contravention of this Court's long-standing admonition regarding courts adjudicating only justiciable issues, nevertheless opined on matters not at issue. This Court should grant this petition, reverse the Court of Appeals, and reinstate the Circuit Court's grant of summary judgment in favor of Chicago Title.

F. In reversing the Circuit Court's grant of summary judgment in favor of Chicago Title, the Court of Appeals misapplied Rule 56, SCRCP, and this Court's case law regarding summary judgment.

The basis of the Circuit Court's grant of summary judgment was the application of the North Carolina recording act to the material facts that (1) the Loflins' deed describes Lot 108 by reference to the Recorded Plat, and (2) the Unrecorded Plat, which shows different boundaries for Lot 108, with Preserve Road running through or encroaching on portions of Lot 108 as it is shown on the Recorded Plat, was not recorded. Therefore, the Unrecorded Plat did not affect the Loflins' title to Lot 108 and is not a defect, lien or encumbrance. Accordingly, the Loflins hold title to Lot 108 as that title is insured by the Policy.

The Court of Appeals concluded the Loflins had shown "at the very least, a scintilla of evidence showing a defect in the title..." to Lot 108. *Loflin* at 303. In so concluding, the Court of Appeals cited: (1) the preparation and delivery of the Unrecorded Plat "pre-date" the Policy Date; (2) the Unrecorded Plat "represents" Preserve Road encroaching on Lot 108, and diminished the acreage of Lot 108, which impacts the value of Lot 108; and (3) Balsam's aggressive challenge to the Loflins' ownership of, presumably, the portions of Lot 108 shown on the Unrecorded Plat as encroached upon by Preserve Road and not shown as part of Lot 108.

Regarding the preparation and delivery of the Unrecorded Plat as "pre-dating" the Policy Date, the material fact regarding the Unrecorded Plat is that is it unrecorded and thus cannot now and never did affect the Loflins' title to Lot 108 as described in their deed and as shown on the Recorded Plat.

Regarding the Unrecorded Plat representing an encroachment by Preserve Road onto Lot 108, while there is no evidence Preserve Road actually existed on Policy Date, again, the material

fact is that whatever the Unrecorded Plat "represented" regarding the location of Preserve Road does not affect the insured title because, again, the Unrecorded Plat is unrecorded.

Regarding the assertion that the Unrecorded Plat impacted on the value of Lot 108, thus negatively affecting its "marketability," the Court of Appeals confused the concepts of title and marketability with value. In *McMaster v. Strickland,* 305 S.C. 527, 409 S.E.2d 440 (1991), a developer contracted to purchase property for, naturally, development purposes. Before closing, the developer discovered the property was subject to a wetlands designation which, according to the developer, rendered the property "worthless." The developer argued the property's worthlessness for development rendered its title unmarketable and refused to close on the contract. The seller sued, the trial court ruled for the developer, and the South Carolina Supreme Court reversed saying, "[i]t is clear the trial judge confused the concepts of title and marketability with use and value." *Id.* at 442, 409 S.E.2d at 503. The South Carolina Supreme Court concluded "there is no evidence the sellers do not own the property, therefore they have title," and that title was not rendered unmarketable by the wetlands designation which precluded the use of the property for the development purposes intended by the purchaser. *Id.* The material fact is the Unrecorded Plat is unrecorded and the Loflins own Lot 108 as it is described in their deed and shown in the Recorded Plat.

Regarding Balsam's "aggressive assertion" of ownership, as pointed out above, those assertions were a tacit admission that: (1) Balsam did not have title to the areas shown on the Unrecorded Plat where Preserve Road purports to encroach on Lot 108, and (2) Balsam has no legal claim to title to Lot 108 as it is shown on the Recorded Plat.

The Circuit Court correctly concluded there were no material facts in dispute and Chicago Title was entitled to judgment as a matter of law. The Court of Appeals erred in concluding

otherwise. This Court should grant Chicago Title's petition, reverse the decision of the Court of Appeals, and reinstate the Circuit Court's grant of summary judgment to Chicago Title.

IV. CONCLUSION

Chicago Title respectfully requests the Court grant this Petition, reverse the Court of Appeals' decision, and reinstate the Circuit Court's grant of summary judgment in favor of Chicago Title.

Respectfully submitted,

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October 20, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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OCT 21 2019
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Opinion No. 5633 (S.C. Ct. App. Filed March 27, 2019)

William Loflin and Leslie Loflin, ... Appellants/Respondents,

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 Whom

Chicago Title Insurance Company is ..... Respondent/Petitioner.

PROOF OF SERVICE

I certify that I have served a copy of the following as indicated hereinbelow by mailing a copy of same on the date below by First Class United States Mail, postage prepaid, addressed to the following:

Document Served: **Petition for a Writ of Certiorari**

Parties Served: **Daniel A. Speights**
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October 21, 2019
Columbia, South Carolina