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. App. Filed March 27, 2019)

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SC Court of Appeals

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Daniel A. Speights, Esq.
A. Gibson Solomons, III, Esq.
SPEIGHTS & SOLOMONS, LLC
100 Oak Street East
Post Office Box 685
Hampton, South Carolina 29924
Attorneys for Appellants/Respondents

December 5, 2019
Hampton, South Carolina

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

This case poses only one legal question:[1]

I. Are there material issues of fact as to whether a risk of harm covered by Chicago Title's policy issued to the Loflins has in fact occurred?

COUNTER-INTRODUCTION

The Court of Appeals remanded this case to the Trial Court because the record creates at least material issues of fact as to whether risks have manifested which are covered by the effective insurance policy purchased by the Loflins from Chicago Title. The record and the law of South Carolina mandated reversal of the Trial Court. The opinion of the Court of Appeals followed hornbook precedent, was unanimous and is correct. There is no basis for this Court to take up this Petition. Chicago attempts to persuade this Court to accept review of the matter by ignoring the record and distorting the nature of the Plaintiffs claims. The Court of Appeals forcefully found multiple reasons that summary judgment should not have been awarded by the Trial Court due to irrefutable and material issues of fact which support the Plaintiffs' claims.

It has not been refuted that the Loflins were sold a piece of property that does not comport with the metes and bounds of the recorded deed and plat. In fact, Chicago never attempts to argue this point, simply stating in one form or fashion that as long as an owner of real property has recorded a piece of paper, no other fact is material. However, this contradicts the purpose and the plain language of the policy.

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[1] The Court of Appeal identified three separate aspects of its opinion (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). However, all three issues can be boiled down to the one question above.

The record contains testimony creating at least material issues of fact on multiple enumerated risks stated to be covered by the policy. The record contains, and the Order attaches, indisputable proof that the seller of the property knew before the closing that the recorded instruments contained false descriptions which had been called into doubt before selling the property to the Loflins. (App. pp. 794-796). The record contains evidence that this fact was concealed from the Loflins. (App. pp. 651-654). The record contains admissions in explanation of the discrepancy that the wrong plat must have been recorded, which is another event covered by the policy. (App. p. 479, lines 14-15). The record contains admissions that there are encroachments upon the land, yet another covered event under the policy. (App. p. 476, lines 21-24). And as if this is all not enough to establish the existence of material issues of fact in support of the Plaintiffs' claims, the record also contains evidentiary support that the fraud of the seller has been established as a matter of law by default judgment. Fraud is a specifically covered risk under the policy.

The Court of Appeals correctly perceived that Chicago's arguments are a series of circular straw men, claiming the Plaintiff advocates for and their case hinges upon the efficacy of unfiled documents. The Court of Appeals appreciated that Plaintiffs do not present the unfiled plat to enforce the descriptions of an unfiled document (which happens to far more accurately describe the conditions on the ground than the filed document). The unfiled plat, which predates the sale, is proof of the sellers knowledge (fraud) and proof of the road pre-existing the sale.

COUNTER-STATEMENT OF THE CASE

On February 15, 2002, the Loflins purchased Lot 108 in Balsam Mountain Preserve from BMP Development LP ("Balsam"). (Court of Appeals Order p. 1). In connection with this purchase and subsequent refinancing, the Loflins purchased three title insurance policies

[collectively "Policy"] from Chicago with the effective language containing protection for a series of enumerated risks including (1) someone else owns an interest in your land, (3) fraud or forgery, (4) defective recording of any document, (9) others have rights arising out of leases, contracts or options, (10) someone else has an easement on your land, and (14) other defects, liens or encumbrances. This contract of insurance covered the purchased piece of property ("Lot 108") described in the recorded deed as containing 1.87 acres and shown by the recorded plat to have a road circumnavigating the lot. (App. pp. 621-632; App. p.600). The road shown on the plat is Balsam Mountain Preserve Road, one of the two main thoroughfares of the development. (App. p. 484, lines 7-10).

In 2005, Balsam hired a new president and CEO who had no firsthand knowledge of the Lot 108 sale in 2002. (App. p.490, lines 21-24; p.491, lines 2-5, 8-22). In 2006, this new president informed the Loflins that contrary to the recorded deed and plat, there was an encroachment on Lot 108, that the property contained only 1.4 acres, and that a road went through, not around, the property. (App .p.488, lines 15-24). Multiple representations were made that the situation would be rectified in some fashion and Balsam agreed that the Loflins would not be required to pay assessments until the matter was resolved. (App. p. 489, line 12-23; App. pp. 638-639; App. p. 221). The matter was not rectified and a collection action was later filed against the Loflins for the assessments. Most importantly, the Loflins were not told the truth that these conditions were known to the seller and existed at the time of closing.

In early 2012, the Loflins first learned that two weeks before the original closing of the sale, a plat ("Unrecorded Plat") had been prepared for and delivered to (App. p. 502, lines 5-8) the seller, Balsam which showed that Balsam Mountain Preserve Road contains far less than 1.87

acres and Balsam Mountain Preserve Road goes right through the middle of the property. (App. pp. 653-654; App. p. 222).

After denial of the Loflins' claim, which they made against the Policy after this revelation, the Loflins instituted this action on July 28, 2013. (App. pp. 50-55). The Loflins amended the Complaint on April 14, 2014 (App. pp. 78-105) and on January 6, 2015 (App. pp. 145-187), creating the operative Complaint. The seller of the property, Balsam, was adjudged to be in default, establishing its fraud in the sale as a matter of law. (App. pp. 11-12).

On July 9, 2015, Chicago filed a Motion for Summary Judgment based upon identical grounds raised in an earlier Motion to Dismiss which was denied. (App. pp. 202-204; App. pp. 9-10). On August 15, 2016, Judge Mullen granted Chicago summary judgment. (App. p. 29). The Loflins timely appealed that Order. On March 27, 2019, the Court of Appeals issued its unanimous Opinion No. 5633, reversing and remanding the trial court's order granting summary judgment in favor of Chicago. On April 10, 2019, Chicago filed a petition for rehearing to the Court of Appeals and a suggestion for rehearing en banc. On September 19, 2019, stating that there was no material issue of fact or principle of law that had been overlooked, the Court of Appeals denied the petition. Continuing the denial of a claim which began in 2012, Chicago filed its Petition for Certiorari on October 21, 2019.

ARGUMENT

The Order Cites To A Record Replete With Factual Support For The Court Of Appeals Finding That The Trial Court's Granting Of Summary Judgment For Chicago Was Improper.

The Court of Appeals examined the full record and recited an exhaustive chronology in its Order, detailing the factual underpinnings of its finding that at least a mere scintilla of evidence existed to support the Plaintiffs' claims. This chronology included the following:

- Lot 108 was purchased for $495,000.00 on February 15, 2002. On February 19, 2002 Chicago Title issued the Policy, insuring the Loflins title to 1.837 acres as shown on the recorded plot. (App. p. 780)

- Preserve Road was depicted on the recorded plat as circumnavigating Lot 108 (App. p. 780)

- The recorded plat was created before the sale. (App. p. 781)

- Preserve Road was shown on another unrecorded plat to dissect Lot 108. (App. p. 781)

- The unrecorded plat was also created before the sale and delivered to the seller before the sale.

- This makes two different documents which record Preserve Road existing before the sale. This is buttressed by the testimony of those with firsthand knowledge of the sale.

- The seller did not disclose the existence of the unrecorded plat to the Loflins nor did the seller disclose that there were any questions concerning the accuracy of the description of the property.

- Preserve Road does in fact dissect the property and the property does in fact contain less acreage than the filed plat depicts Lot 108 to contain.

- The seller's former CEO acknowledges that the wrong plat must have been recorded and that Preserve Road encroaches upon Plaintiff's land. He lacks knowledge surrounding the actual transaction as the sale predates his involvement.

- The seller's former CEO acknowledged that this sale predated his involvement and he had no firsthand knowledge of the transaction or the status of the property at the time of sale.

- Deposition testimony of the gentleman who surveyed the lot and prepared both recorded and unrecorded plat stated that Lot 108's actual physical dimensions did not match the recorded plat.

- The sellers' former CEO acknowledged that the actual physical condition of Lot 108 and the discrepancy between the recorded description and the reality in the dirt adversely impacted the marketability of the property.

- The Loflins could not sell the property knowing the discrepancy existed.

None of these facts are contingent upon the default of the seller establishing as a matter of law that a fraud has occurred and that this fraud caused substantial damage to the Loflins.

The Court of Appeals Did Not Misconstrue Plain Policy Provisions

The Court of Appeals followed the well-established law of interpretation of insurance contracts and the language of the policy to reach its conclusions. The Court of Appeals confirmed that insurance policies are subject to the general rules of contract construction citing *Pres. Capital Consultants 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).

The Order explains that South Carolina law directs the courts to give words their plain meanings while any ambiguity must be construed liberally in favor of the insured and strictly against the insurer. *Id.*

With the proper rules of interpretation established, the Court of Appeals then listed all of the covered risks which would trigger the obligations of Chicago. Several of these covered risks necessarily require an examination of facts beyond the record title found in the courthouse. Examination of those facts revealed a record, cited to in the Court of Appeals opinion, that was devoid of any testimony or document which controverted the Plaintiffs assertion that the land that was purchased does not match the recorded description. There is nothing to controvert that others exhibited ownership or interest in the land by widening a pre-existing road across Lot 108. There was nothing in the record to controvert that after Chicago asserted that record title somehow solved his problem, Mr. Loflin erected posts in the road and those posts were torn down. The record contains an admission by the seller's former CEO that the road is an encroachment, a risk specifically listed as covered. The record contains The Court of Appeals identified multiple items

in the record which supported reversal of summary judgment. In doing so, the Court of Appeals applied the proper legal analysis when interpreting a contract for insurance.

Chicago's "Incompetency" Argument Ignores What Was Argued To The Court Of Appeals, The Record, And The Contract.

Chicago devotes an entire argument to taking a single sentence out of context and "whistling past" the plain terms of its contract for insurance. Chicago asserts that the Court of Appeal's statement concerning a secondary and buttressing basis for the opinion creates a need for review of the Court of Appeals decision. This is incorrect.

The sentence Chicago pulls out of context is a single sentence where the Court of Appeals states that it also notes "this item covers incompetency, which would fit Appellants' allegation that Balsam recorded the wrong plat." (Order Cite). This is confirmed by the record which contains an admission that the wrong plat must have been recorded. Chicago argues this sentence begs for review because the word incompetence does not have that meaning in Item 3 of the covered risks which include forgery, fraud, duress, incompetency, incapacity, or impersonation. However, Chicago does not and cannot argue that the record does not support a finding of fraud. The record is full of testimony and documents which evidence a seller knowingly passing off a faulty description of property to the detriment of the buyer. Chicago's assertion also ignores the document which includes as the very next covered risk Item 4 "[d]efective recording of any document.

Even if Chicago were correct that the filing of a the wrong document should not have been assigned as a trigger for coverage under Item 3, the filing of the wrong plat is clearly a trigger for coverage under Item 4. This argument ignores context and provides no basis for review.

The Court Of Appeals Did Not Err And Did Not Misapply Any Law As It Relates To Default

Chicago asserts that a co-defendant's default cannot be used to refute the factual and legal defenses of an actor involved in the same claims and whose actions gave rise to the same claim. Without commenting on this assertion, the Court does not need to address this question because the Court of Appeals provided ample basis beyond the default of a party to the transaction to support its finding that at least a mere scintilla exists to support Plaintiffs claims against Chicago. Notwithstanding that Chicago's argument C. does not even need to be reached because the Court did not rely on the default as a pivotal underpinning to any decision, Chicago's argument is misplaced.

Chicago Title is an insurer against risks. Chicago insures against risks associated with real estate transactions. The Loflins engaged in a real estate transaction with Balsam. Chicago sold and accepted consideration to insure against risks flowing from this real estate transaction. One of the explicitly stated risks Chicago insured the Loflins against is fraud. Fraud in this covered real estate transaction has now been established as a matter of law. This is a very different scenario where one co-defendant, whose actions are contemporaneous and co-mingled with another co-defendant, has been found to be in default and there is an assertion that the acts the two were involved in are now established. Chicago fails to appreciate that distinction.

Chicago relies upon a chain of out of state cases in which defendants are intertwined actors, rather than an actor and subsequent insurer, to state that a default cannot be used to establish the negligence of a non-defaulting co-defendant. According to Chicago Title, this matter has not been ruled upon by South Carolina courts and establishment of an insured risk as a matter of law.

However, as stated above, Chicago is an insurer of the transaction, not a party to the transaction. South Carolina law has found in an insurance context that an insurer's actions resulting in default are imputable to an insured *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009)(" [T]he law is clear that an attorney or insurance company's misconduct is imputable to the client."). *See Also Roberts v. Peterson,* 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987) ("The courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant.") It seems apodictic that the opposite would be true. This is the establishment of the very risks for which a premium was paid.

Contrary to Chicago's assertion, there has been no deviation from South Carolina law, nor is there any need to even reach the question. As previous sections have detailed, there is ample basis for the Court of Appeals' opinion without reliance upon the default.

The Court of Appeals Did Not Err When Ruling That Chicago's Obligations Under The Contract Are Not Confined To Defects In Public Record

Chicago asserts that the Court of Appeals should not have addressed whether the Chicago's obligations were confined to merely a flaw in record title but Chicago has as the fundamental tenet of at least three arguments that the record title has not changed. (A. Chicago's emphasis on race statute ignores there is no race and is to emphasize propriety of record title, C. Chicago distorts why the unrecorded plat is relevant, it is not to assert that an unrecorded plat must be followed, D. Chicago asserts that the recorded paper is correct so any assertion of obligation is "re-writing" the terms of contract.) The Court of Appeals recognized that Chicago's argument is circular and properly explained that obligations exist beyond the record title. Chicago continues to assert it has no obligations under the contract because the recorded paper has not changed and has now expanded its position to include the argument that this fact should not be addressed by the Court.

Without this underpinning, there is no basis for Chicago to contest its obligations to the Loflins. The Court of Appeals properly read and gave effect to plain terms. Yet, even in its arguments before this Court, Chicago's assertions continue to pivot on the foundational premise that record title governs any inquiry. Chicago's 30(b)(6) designee Cynthia Baines disagreed. (See App. 495, lines 2-9, "[T}here are possibly circumstances where there would be coverage for things that are not of record title.")

As further evidence of the relevance of the Court of Appeals ruling concerning the obligations not being bound to public record, the Court need look no further than the lengthy and unnecessary discussion of North Carolina's race statute. Consider why a race statute would be relevant. North Carolina's pure "race" statute contemplates two or more parties with divergent interests have documents to record and that the first party has priority. In this case, the seller possessed two plats thirteen days prior to sale. The seller chose to provide as part of the sale the plat which fides the true nature of the property. These allegations do not create a controversy concerning race or recording. The documents establish fraud. Fraud must necessarily be established beyond the record title.

Preserve Road Existed At The Time Of The Sale

Chicago continues to assert that Preserve Road did not exist at the time the Loflins purchased Lot 108. This assertion is contradicted by the existence of the road on the recorded plat, the existence of the road on the unrecorded plat, the testimony of Randy Herron who surveyed Lot 108 and prepared both the recorded and unrecorded plat, and the testimony of the Plaintiff Bill Loflin. The only basis for such an assertion is the testimony of the former CEO of the seller who admitted he was not yet on site at the time of the sale and had no firsthand knowledge of the sale, but he believed the road was not built until after the sale. Notwithstanding the great weight of

evidence to the contrary, Lehman would have no basis to conduct an inquiry as to whether his employer concealed material facts from a buyer on a sale that predates his employment. The law does not impose a duty on a new employee to presume and investigate fraud of a new employer.

All record evidence clearly establishes that this is not a post-sale event, yet Chicago continues to assert that it is freed from its obligations to the Loflins because the sale predates the road that is explicitly recorded in the sale documents. This is certainly not a basis for this Court to review the decision by the Court of Appeals.

CONCLUSION

The Court of Appeals opinion is thorough, considering all arguments provided and the full record. The Court of Appeals opinion follows all established precedent. There is no supporting basis to review the Court of Appeals opinion and the petition filed by Chicago, which continues to prolong its obligations to the Loflins, should be denied.

Respectfully submitted,

SPEIGHTS & SOLOMONS, LLC

/s/ A. Gibson Solomons, III
Daniel A. Speights, SC Bar No. 5027
A. Gibson Solomons, III, SC Bar No. 68291
SPEIGHTS & SOLOMONS, LLC
100 Oak Street East
Post Office Box 685
Hampton, South Carolina 29924
Attorneys for Appellants/Respondents

December 5, 2019
Hampton, South Carolina

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Of whom

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

PROOF OF SERVICE

The undersigned hereby certifies that on December 5, 2019, she served counsel for Respondent/Petitioner with the ***Return to Petition for Writ of Certiorari*** in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

Demetri K. Koutrakos
Louis H. Lang
CALLISON TIGHE & ROBINSON, LLC
P.O. BOX 1390
Columbia, South Carolina 29202-1390

Tammy W. Shaffer

December 5, 2019
Hampton, SC

SPEIGHTS & SOLOMONS, LLC
ATTORNEYS AT LAW
100 OAK STREET EAST
POST OFFICE BOX 685
HAMPTON, SOUTH CAROLINA 29924
(803) 943-4444

A. G. SOLOMONS, III
GSOLOMONS@SPEIGHTSANDSOLOMONS.COM

FACSIMILE (803) 943-4599

December 5, 2019

Via US Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: William and Leslie Loflin v. BMP Development, LP, Balsam Mountain Group, LLC, et al.,
Case No. 2016-001840

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced matter the original and seven (7) copies of Appellants/Respondents' Return to Petition for Writ of Certiorari.

Please file the original and return the stamped copy to me in the enclosed self-addressed envelope. By copy of this letter, opposing counsel has been served.

Sincerely,

A. Gibson Solomons, III

AGS/ts
Enclosures

cc: Demetri K. Koutrakos
Louis H. Lang

first class

Speights & Solomons, LLC
Attorneys At Law
100 Oak Street East, P.O. Box 685
Hampton, South Carolina 29924

TO

Hon. Jenny Kitchings Abbott
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201