THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2019-001768
Lower Court Case No. 2013-CP-07-01807

William Loflin and Leslie Loflin, ... 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 ..... Petitioner.

BRIEF OF PETITIONER

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II.

Did the Court of Appeals err when it 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?

III.

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 different and nonsensical meaning to that Policy term?

IV.

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

INTRODUCTION

The Court of Appeals' decision reversing the Circuit Court's grant of summary judgment to Petitioner Chicago Title Insurance Company (Chicago Title) 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, and found a genuine issue of material fact where there was none.

Chicago Title respectfully requests the Court reverse the Court of Appeals' decision and reinstate the Circuit Court's grant of summary judgment.

STATEMENT OF THE CASE

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' in their Third Amended Complaint, as they did in 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).

Chicago Title moved for summary judgment on July 9, 2015, filing a Memorandum in Support on June 10, 2016. (App. pp. 202, 316). 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,* 427 S.C. 580, 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). Chicago Title filed a petition for a writ of certiorari to the South Carolina Court of Appeals, which this Court granted on April 24, 2020, on the four issues recited above.

[1] The Loflins' also asserted a negligence cause of action against Chicago Title which the Circuit Court dismissed 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,* 427 S.C. 580, 600, 832 S.E.2d 294, 305 n. 7 (Ct. App. 2019).

STATEMENT OF FACTS

On February 15, 2002, the Loflins bought Lot 108 from Defendant Balsam Mountain Group, LLC (Balsam). Lot 108 is a vacant residential lot in North Carolina. The Loflins' deed describes Lot 108 by reference to a plat ("Recorded Plat") dated December 10, 2001, and 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 shows Lot 108 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." (App. p. 794).

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 that as of the date of the Policy, the Loflins' title to Lot 108 is as it is described in their deed and shown on the Recorded Plat.

In 2006, four years after the Loflins' purchase of Lot 108 and the issuance of the Policy, 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 Preserve 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. (App. pp. 653-654). Mr. Lehman testified at deposition that he understood Preserve Road was "constructed from scratch" after the Loflins' purchase. (App. p. 484).

In 2012, the Loflins learned there was a second, unrecorded plat of Lot 108 ("Unrecorded Plat"). (Loflin Supplemental Affidavit, Loflin Third Amended Complaint, 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 the 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.

In their March 23, 2012 letter to Chicago Title asserting a claim under the Policy, the Loflins say the Unrecorded Plat "reduces Mr. Loflin's acreage and materially alters the layout" of Lot 108. (App. p. 643)

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

ARGUMENT

I. 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 this 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.[2]

[2] The choice of law question was not analyzed by the circuit court or the Court of Appeals. South Carolina courts 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) Choice of Laws* § 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[3] - 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[4] - 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, 579 (N.C. 1966) ("An unrecorded contract to convey land is not valid as against a subsequent purchaser for value, … , even though [the subsequent purchaser for value] acquired title with actual notice of the contract."); *Simmons v. Quick-Stop Food Mart, Inc.*, 296 S.E.2d 275, 281 (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. Gen. Stat. §§ 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, 311 (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, 201 (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. pp. 635 and 636).

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[3] *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.").

[4] *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 590, 832 S.E.2d at 299 – 300.

Under 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 596, 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 affect 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, having no effect on Lot 108's title, 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.[5]

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.

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 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)).

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

II. 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:

*****

[5] *See also Rowe*, 441 S.E.2d at 158, where, in a case in which an easement ran through North Carolina property located in two counties, but the easement grant was recorded in only one county, the North Carolina Court of Appeals held the dominant estate owners' easement was valid only in the county where the easement grant was recorded, and *Dept. of Transp. v. Humphries,* 496 S.E.2d 563, 567 (N.C. 1998), where the North Carolina Supreme Court held the North Carolina Department of Transportation did not have a valid right-of-way across the defendants' property because the right-of-way was not recorded.

3. Title Risks:

*****

• 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-nine 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.
>
> *Firstland Village 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 596, 832 S.E. 2d at 303.

The Unrecorded Plat does not, because it cannot as a matter of law, affect the Loflins' title to Lot 108. The Loflins have title to Lot 108 as conveyed to them by their deed, as Lot 108 is shown on the Recorded Plat and as that title is insured by the Policy.

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 in his 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 in their Third Amended Complaint[6] allege 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).[7]

"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

[6] Mr. Loflin in his supplemental affidavit attested to the factual allegations made by the Loflins in Third Amended Complaint. (Loflin Supp. Aff., App. p. 653).

[7] The Loflins' opening brief before the Court of Appeals repeats this assertion, saying "[i]mportantly, 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.

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.").

There is no evidence of anything "on the ground" at the Policy date which the Loflins' pleadings admitted.

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.

There is no evidence that prior to the Policy Date, Balsam "asserted" an ownership interest to the portions of Preserve Road that encroach on Lot 108. It was only in 2006 that Craig Lehman, Balsam's then President and CEO, told the Loflins Lot 108 contained only 1.4 acres and a road encroached on the lot. (App. p. 653). The destruction of the steel posts occurred after the Loflins acquired title to Lot 108, as did Balsam's "disregard" of the Loflins' 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 586, 832 S.E.2d at 297. In his Circuit Court argument opposing Chicago Title's motion for summary judgment, the Loflins' counsel said, "[t]here is no question that in 2006 Balsam informed Mr. Loflin that there was a problem and they wanted him to execute a quit claim deed and give up part of his property." (App. p. 401). The Loflins may have allowed or agreed to developing a road on their property 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 the Policy Date. In reversing the Circuit Court's grant of summary judgment to 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 reverse the Court of Appeals and reinstate the Circuit Court's order.

III. 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 different and nonsensical meaning to that Policy term.

The Court of Appeals held 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 593, 832 S.E.2d at 301.

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 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 because 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" means 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 different and nonsensical meaning to this provision. This Court should reverse the Court of Appeals and reinstate the Circuit Court's grant of summary judgment to Chicago Title.

IV. In reversing the Circuit Court's grant of summary judgment for 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. 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 it is 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 the 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 Balsam's "aggressive assertion" of ownership, as pointed out above, and as argued by the Loflins' counsel before the Circuit Court, those assertions (e.g., requesting the Loflins execute a Quitclaim Deed, etc.) were admissions by Balsam that: (1) Balsam did not have title to, nor claim an ownership interest in, 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.[8]

Further, neither Balsam, nor any entity or person on its behalf, or otherwise, has ever brought suit, or threatened to bring suit, challenging the Loflins' ownership of Lot 108 as described in their deed and shown on the Recorded Plat.

Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Quail Hill, L.L.C. v. Cnty. of Richland,* 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2010). In opposing summary judgment, it is not sufficient for the non-moving party to create an inference that is not reasonable or an issue of fact that is not genuine. *Evans v. Stewart,* 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006).

The preparation and delivery of the Unrecorded Plat before the Policy Date, what the Unrecorded Plat represents, and Balsam's asserted "challenge" to the Loflins' title, which was, as Loflins' counsel argued, a request the Loflins' "give up" their title to a portion of Lot 108, do not

[8] Balsam's "aggressive assertion" of ownership is also excluded under Policy Exclusion 3, as post-policy date events. *See* Argument II, pp. 7-8 *supra.*

rise to the level of genuine issues of material facts precluding summary judgment. Nor do they lead to any reasonable inferences sufficient to deny Chicago Tile summary judgment.

Finally, regarding the assertion that the Unrecorded Plat affected 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 development. 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 and the trial court ruled for the developer. This Court reversed saying, "[i]t is clear the trial judge confused the concepts of title and marketability with use and value," concluding "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.* at 442, 409 S.E.2d at 503. Here, the material facts are the Unrecorded Plat is unrecorded and the Loflins own Lot 108 as it is described in their deed and 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 reverse the decision of the Court of Appeals and reinstate the Circuit Court's grant of summary judgment to Chicago Title.

CONCLUSION

Chicago Title respectfully requests the Court reverse the Court of Appeals' decision and reinstate the Circuit Court's grant of summary judgment for Chicago Title.

Respectfully submitted,

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