RECEIVED

Jun 25 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2019-001768

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 which,

Chicago Title Insurance Company is the..... Petitioner.

BRIEF OF RESPONDENTS

Ranee Saunders
MCGOWAN, HOOD & FELDER, LLC
321 Wingo Way, Suite 103
Mount Pleasant, SC 29464
843-388-7202

Daniel A. Speights
A. Gibson Solomons, III
SPEIGHTS & SOLOMONS, LLC
100 Oak Street East
Post Office Box 685
Hampton, South Carolina 29924
803-943-4444

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

I. **The Court of Appeals properly concluded the content of the Unrecorded Plat provided a scintilla of evidence of a defect in the title that would be covered under the Policy.**

II. **The Court of Appeals never struck the post-policy exclusion, but instead properly concluded evidence existed indicating the road bisecting Lot 108 predated Respondents' purchase.**

III. **The Court of Appeals applied the plain, ordinary, and popular meaning of the word "incompetency" in concluding that Policy coverage provision may apply.**

IV. **The Court of Appeals applied the proper standard of review in determining Respondent had put forth evidence creating a genuine issue of material fact as to whether there was coverage under the Policy, making summary judgment inappropriate.**

STATEMENT OF THE CASE

This appeal arises from the Court of Appeals' reversal of the circuit court's grant of summary judgment in favor of Petitioner. Respondents William Loflin and Leslie Loflin filed their original Complaint on July 18, 2013, App. 42-65, and ultimately filed the operative Third Amended Complaint on August 5, 2015 (App. 209-253). Petitioner moved for summary judgment on July 9, 2015, and a hearing was held before the Honorable Carmen T. Mullen June 13, 2016. App. 316-26; 386-457. By order dated August 25, 2016, Judge Mullen granted summary judgment in favor of Petitioner, concluding that because there was no evidence of "defects, liens, or encumbrances *of record* at the time of the issuance of the policy," there could be no breach of contract. App. 28 (emphasis added). Respondents appealed and the Court of Appeals reversed. *Loflin v. BMP Dev., LP*, 427 S.C. 580, 832 S.E.2d 294 (Ct. App. 2019). After the Court of Appeals denied its Petition for Rehearing, Petitioner filed a Petition for a Writ of Certiorari to the South Carolina Court of Appeals in this Court, which was granted as to four of the six issues raised by Petitioner.

FACTUAL BACKGROUND

On February 15, 2002 William and Leslie Loflin (Respondents) purchased a parcel of land in Balsam Mountain Preserve described as Lot 108 from BMP Development, LP (Balsam), then known as Balsam Mountain Preserve Limited Partnership. They received a duly executed deed to Lot 108 and an individual plat of Lot 108 that was recorded February 19, 2002 (Recorded Plat). App. 621–32, 600. The Recorded Plat indicated Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road circumnavigated the parcel. *Id.* 600. Balsam Mountain Preserve Road is one of two main thoroughfares through the development that allows access to the rest of the community. App. 484.

In conjunction with the sale, Respondents elected to obtain title insurance (the Policy) through Chicago Title Insurance Company (Petitioner). App. 633-40. The Policy insured Lot 108 unencumbered as described on the Recorded Plat, and was designed to protect Respondents from title risks including:

1. Someone else owns an interest in your title.
2. A document is not properly signed, sealed, acknowledged, or delivered.
3. Forgery, fraud, duress, incompetency, incapacity or impersonation.
4. Defective recording of any document.
5. You do not have any legal right of access to and from the land.
6. There are restrictive covenants limiting your use of the land.
7. There is a lien on your title because of:
   - a mortgage or deed of trust
   - a judgment, tax, or special assessment
   - a charge by a homeowner's or condominium association
8. There are liens on your title, arising now or later, for labor or material furnished before the Policy Date-unless you agreed to pay for the labor and material.

9. Others have rights arising out of leases, contracts, or options.

10. Someone else has an easement on your land.

11. Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan.

12. You are forced to remove your existing structure- other than a boundary wall or fence-because:
    - it extends on to adjoining land or on to any easement
    - it violates a restriction shown in Schedule B
    - it violates an existing zoning law

13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.

14. Other defects, liens, or encumbrances.

App. 636.

In 2006, Craig Lehman, Balsam's President and CEO communicated to Respondents that contrary to the Deed and the Recorded Plat they received when they purchased Lot 108, the property actually contained only 1.4 acres and the Balsam Mountain Preserve Road ran through the property, not around it. App. 488. Balsam had been having a number of issues with their previously recorded errors in their previously recorded plats, all springing from the same flawed original master plat. *See* App. 478; 679-694. Although Mr. Lehman had only started working for Balsam in 2005, he nevertheless led Respondents to believe the road was a new encroachment that had not been present when they purchased the lot in 2002. App. 653-54. Respondents refused to simply sign a quit claim deed offered by Balsam, as the lot dimensions on the ground had significantly less value than the configuration represented at the sale and found on the recorded plat. Attempting to resolve the impact of the significant change in the property, Balsam agreed to allow Respondents to stop paying assessments. App. 489.

However, in 2012, Respondents discovered that another, unrecorded plat of Lot 108 (Unrecorded Plat) had been delivered to Balsam prior to their purchase.[1] The Unrecorded Plat was prepared and delivered to Balsam on February 6, 2002—over a week prior to Respondents purchase of Lot 108. App. 502, 654. In light of this evidence, Balsam had known prior to the sale to Respondents that the Balsam Mountain Preserve Road had always existed on their land and was not a new encroachment, Respondents notified Petitioner on March 23, 2012 of the Unrecorded Plat, and the fact that at the time of conveyance Balsam Mountain Preserve Road did not circumnavigate but rather dissected Lot 108. App. 643. However, Petitioner denied coverage on August 21, 2012 stating simply that it had performed a title search and "there appears to be no title defect in this matter." App. 644-45.

Proceeding under this assumption, Respondents attempted to maintain their title interest by placing posts where the Balsam Mountain Preserve Road crosses the property, but those were destroyed, and road was eventually despite their objections. App. 651-52. Respondents conducted another survey which confirmed that, in fact, the Balsam Mountain Preserve Road cuts through, rather than circumnavigates, Lot 108 and reduces their acreage. App. 646.

Respondents originally filed suit against Petitioner on July 18, 2013 alleging, inter alia, breach of contract against Petitioner.[2] App. 42-65. Petitioner moved for summary judgment on July 9, 2015, and a hearing was held before the Honorable Carmen T. Mullen June 13, 2016. App.

[1] Petitioner's positions depend on this Court finding that despite the presence of the road on two separate plats and the affidavits of Mr. Loflin, there is not a mere scintilla of evidence to support that at the time of the sale Balsam Mountain Preserve Road *existed*. As discussed in detail below, although the exact location if the road in relationship to Lot 108 may be unclear, Petitioner has never disputed the existence of the road.

[2] Respondents filed their Third Amended Complaint on August 5, 2015. The allegations against Petitioner as to its breach have remained unchanged. App. 209-253. Respondents' complaints also included a cause of action for negligence, but Respondents have not appealed the circuit court's grant of summary judgment on that count.

316-26; 386-457. By order dated August 25, 2016, Judge Mullen granted summary judgment in favor of Petitioner, concluding that because there was no evidence of "defects, liens, or encumbrances *of record* at the time of the issuance of the policy," there could be no breach of contract. App. 28 (emphasis added).

Respondents appealed and the Court of Appeals reversed. *Loflin v. BMP Dev., LP*, 427 S.C. 580, 832 S.E.2d 294 (Ct. App. 2019) & App. 779-796. Specifically, the Court of Appeals found the circuit court erred[3] in reading the Policy to only cover title defects or encumbrances "of record." After the Court of Appeals denied its Petition for Rehearing, Petitioner filed a Petition for a Writ of Certiorari, which this Court granted as to four of the six issues raised by Petitioner.

[3] In addition to making its own determination of legal error, the Court of Appeals noted in its opinion that Petitioner had conceded at oral argument that the circuit court erred in concluding that the Policy's coverage was limited to defects of record. Oral Argument at 33:17, *Loflin v. BMP Dev., LP*, 427 S.C. 580, 832 S.E.2d 294 (Ct. App. 2019); *Loflin v. BMP Dev., LP*, 427 S.C. 580, 589, 832 S.E.2d 294, 299 (Ct. App. 2019).

STANDARD OF REVIEW

Because it is "a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Accordingly, summary judgment should be granted only where the moving party has shown there is no genuine issue as to any material fact and it is therefore entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). To survive a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence." *Id.* at 330, 673 S.E.2d at 803.

ARGUMENT

At the outset, Respondents emphasize that this is a case about insurance coverage and, because it is on review from a grant of summary judgment, the dispositive question is simply whether Respondents put forth a scintilla of evidence that they are entitled to coverage under the Policy. The Court of Appeals concluded that the evidence in the record revealed a genuine issue of material fact as to whether Respondents were entitled to coverage under the following policy provisions: "'Someone else owns an interest in your title,' 'Forgery, *fraud*, duress, *incompetency*, incapacity[,] or impersonation,' (emphasis added) and 'Other defects, liens, or encumbrances.'" *Loflin v. BMP Dev., LP*, 427 S.C. 580, 596-97, 832 S.E.2d 294, 303 (Ct. App. 2019) (alteration in original).

Petitioner attempts to recast this case with arguments that the Court of Appeals confused the law, rewrote the Policy, and ignored the standard of review. However, Petitioner's tenuous assertions rest on the notion that it is not required to provide coverage because an unrecorded plat depicting an actual encroachment can never have legal effect on title. The Court of Appeals rejected this reasoning as unfounded not merely in the law, but under any rational understanding of what title insurance is designed to do. For this reason, Respondents respectfully request this Court affirm the Court of Appeals and remand the case for trial.

I. The Court of Appeals properly concluded the content of the Unrecorded Plat provided a scintilla of evidence of a defect in the title that would be covered under the Policy.

Petitioner takes issue with the Court of Appeals' conclusion that the Unrecorded Plat, which was prepared and delivered to Balsam prior to Respondents purchasing the Policy, creates a genuine issue of material fact as to coverage. The basis of its assertion is that under North Carolina law, the first recorded deed prevails as to title, so any unrecorded deed would have no

legal effect, regardless of whether it shows a recorded deed is inaccurate. This reductive argument is merely an attempt to reframe the argument that the Policy only covers defects of record.[4] Yet in doing so Petitioner takes the extra step of suggesting that an unrecorded encumbrance simply cannot exist. The Court should reject this convoluted argument.

In reversing the circuit court's grant of summary judgment, the Court of Appeals concluded:

> the recorded deed and plat do not reflect the reality of Appellants' interest in Lot 108 on the date the Policy was issued. While the February 2002 plat itself may not affect Appellant's title due to Balsam's failure to record it, Appellant's ownership interest in the land on the date of the Policy's issuance was affected by what the 2002 plat *reflected* on the ground, i.e., the Preserve Road encroachment and the diminished acreage.

Loflin, 427 S.C. at 596, 832 S.E.2d at 303. The Court of Appeals' opinion clarifies what Petitioner still seems determined to ignore—regardless of what the Recorded Plat shows, there was a road (an encumbrance) on the property when Respondents purchased Lot 108. Despite the admission in the Court of Appeals that the policy is not limited to defects of record, Petitioner nevertheless maintains its argument that it does not have to cover any unrecorded encumbrance.[5] Pet'r's Br. 6.

---

[4] Although this conclusion underpinned the circuit court's summary judgment holding, Petitioner conceded at oral argument that the circuit court erred by concluding that the Policy's coverage was limited to defects of record. *See* Oral Argument at 33:17; *Loflin*, 427 S.C. at 589, 832 S.E.2d at 299. Furthermore, Petitioner's own witness observed in her deposition that the Policy was not limited to defects of record. App. 496.

[5] This argument also ignores the Policy's provisions providing coverage for, inter alia, defective recording, fraud, forgery, incompetence, and other defects, liens, or encumbrances. App. 636. The Policy does not limit any of these risks to risks of record. Petitioner admitted, as it must, that the terms of the Policy are strictly construed against it and nothing in the Policy limits its coverage to defects of record. Oral Argument at 32:15. To the extent Petitioner argues there is some ambiguity as to whether the Policy coverage extends to encumbrances that are inconsistent with recorded title, any ambiguity would be construed in favor of coverage. *See, e.g., Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012) ("Ambiguous or conflicting terms in an

("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."). Essentially, Petitioner contends that because the road is not *recorded* as running through Lot 108, it does *not* run through Lot 108—even if the reality is that the road bisects the property and the record suggests it always has. App. 479, 502, 601, 654.

Petitioner's argument is nonsensical and ignores the basic understanding of what an encumbrance is. Quoting North Carolina's recordings statutes will not erase a thoroughfare encumbering a property. This Court has defined an encumbrance as "a right or interest in the land granted which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee." *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428–29 (2000). Black's Law Dictionary similarly defines encumbrance as "[a] claim of liability that is attached to property or some other right and that may lessen its value, . . .; and property right that is not an ownership interest. *Encumbrance*, Black's Law Dictionary 607 (9th ed. 2009). Respondents claim has never been that they do not own title, but that the value of their title is diminished by this encumbrance.

Perhaps more concerning about Petitioner's perpetual refusal to provide coverage is that the discovery of an unknown and unrecorded encumbrance is the precise situation Respondents sought protection from in purchasing Petitioner's Policy. That is the fundamental purpose of title insurance. *See Jericho State Capital Corp. of Fla. v. Chi. Title Ins. Co.*, No. 2017-001646, 2020 WL 3067564, at *6 (S.C. Ct. App. June 10, 2020) ("Real estate investors buy title insurance to

---

insurance policy must be construed liberally in favor of the insured and strictly against the insurer.").

protect against such unforeseen 'off the record' risks. Old soldiers say it is the bullet you never hear that kills you, and the fundamental idea behind title insurance is to cover rather than exclude unforeseen and unknown risks; otherwise, title insurance would not provide the peace of mind it touts."). If the road had appeared in the public record, it would have been discovered during the title search and Respondents would either have paid less for the parcel due to the encroachment or they would have declined the purchase. Insulating themselves against this lack of choice is why they bought the Policy.[6]

Because the discovery that a road runs through a property, not around it, is a significant defect that lowers the value of land and therefore falls within the ambit of title insurance. *See Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008) ("A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value."). Simply stated, "the purpose of title insurance has been stated as seeking to place the insured in the position that he thought he occupied when the policy was issued." *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628. Respondents also thought they were purchasing land free from encroachments, but the evidence is that they actually bought land encumbered by a main thoroughfare. The Court of Appeals' conclusion that the Unrecorded Plat may more accurately reflect what Respondents received does nothing to offend North Carolina's recording statutes. It merely acknowledges that the public record may be inaccurate, and that is why people purchase title insurance. Accordingly, the Court of Appeals'

[6] Furthermore, if the encroachment had been recorded but not discovered in the title search, Respondents would potentially have a malpractice claim against the attorney who certified unencumbered title. *See Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

consideration of the Unrecorded Plat as evidence tending to support Respondents' claim was sound and should be affirmed.

II. The Court of Appeals never struck the post-policy exclusion, but instead properly concluded evidence existed indicating the road bisecting Lot 108 predated Respondents' purchase.

Petitioner again reveals its misunderstanding of the Court of Appeals' opinion in claiming the court "rewrote the policy to include post-policy trespass claims." Respondents' claim under the Policy has always been grounded in their assertions that the encumbrance of title existed prior to conveyance and the Court of Appeals agreed that the Unrecorded Plat was some evidence of that fact.

Initially, Respondents note that Petitioner's argument that maybe the Balsam Mountain Preserve Road never existed *at all* at the time of conveyance, is inconsistent with its previous position. Throughout proceedings before the circuit court and the Court of Appeals, Petitioner has maintained that because the encumbrance was not of record, it is not covered by the Policy. In both Petitioner's Memorandum in Support of the Motion for Summary Judgment and its brief before the Court of Appeals, it discusses the Balsam Mountain Preserve Road's placement on the plats in the recitation of the facts, but never suggests that the road was not even there. App. 317-18; App. 740-41. Accordingly, that issue is unpreserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Additionally, this argument is entirely inconsistent with the evidence in the record. Petitioner inexplicably contends that "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." Pet'r's Br. 8.

The Unrecorded Plat *is* the evidence. It was prepared and delivered February 6, 2002, over a week before Respondents purchased Lot 108. App. 502. Petitioner acknowledged before the Court of Appeals that the Unrecorded Plat was prepared prior to Respondents' purchase of the property. Oral Argument at 22:18, *Loflin v. BMP Dev., LP*, 427 S.C. 580, 832 S.E.2d 294 (Ct. App. 2019). It reflects an encroachment and therefore, serves as evidence that the road depicted was "on the ground" as of the policy date.[7] App. 601.

Petitioner also mischaracterizes the other evidence in the record in asserting there is no evidence the road existed prior to the policy date. Although, at the start of his deposition, Mr. Lehman indicates he assumed the road was constructed after Respondents purchased the property, he ultimately confirms he "actually do[es] not know whether there was a road there when Mr. and Mrs. Loflin bought the property several years before [he] went to [work for] Balsam." App. 491. Additionally, Mr. Lehman admits that when he began trying to resolve the boundary and encroachment issues with Respondents in 2006, he believed the issues stemmed from the fact that Mr. Loflin had received an inaccurate plat at closing, and he had not purchased what he thought. App. 476 ("What I knew is we had encroached on the property and what they had purchased was wasn't in agreement with the master plan or their plat."); App. 479 ("I was trying to fix the fact that there was an encroachment, . . . and then after the fact, . . . we found out that []when he closed on it, he wasn't delivered the correct plat.").[8]

---

[7] To the extent Petitioner attempts to dispute the *weight* of the evidence indicating the road was constructed prior to purchase, it forgets the posture of its motion. Summary judgment requires the evidence and inferences to be construed in favor of the non-moving party. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

[8] Similarly, Petitioner observed at the Court of Appeals that the concern created over the existence of the Unrecorded Play was that it indicated "what was on file at the Clerk's office in Sylva was different from the way it really was." Oral Argument at 29:48, *Loflin v. BMP Dev., LP*, 427 S.C. 580, 832 S.E.2d 294 (Ct. App. 2019).

Petitioner further mistakes Mr. Loflin's affidavit and the allegations in the Third Amended Complaint in suggesting Respondents have not repeatedly asserted that the encumbrance on the road existed prior to their purchase. Mr. Loflin's statement that he "had no reason to doubt the road . . . was an after purchase encroachment" when it was disclosed to him in 2006 serves only to explain why he did not file a claim with Petitioner earlier. App. 653. As he clarifies in the same affidavit, it was not until 2012 that he learned the road existed prior to closing. App. 654. And the Third Amended Complaint's reference to Balsam's expansion (not creation) of Balsam Mountain Road after conveyance does nothing to undercut these assertions; it merely elaborates on the trespass allegations against Balsam and illustrates the injuries Respondents have endured because of the title defects.

Finally, Petitioner takes the curious position that there is no evidence of Balsam asserting any ownership interest to the Balsam Preserve Road until after the sale. Of course, because title insurance is purchased at conveyance the discovery of a defect must arise after that date, but it does not follow that the claim itself does not precede the sale. The evidence is that the road in question is a main thoroughfare, not an extension built as an afterthought. App. 484. It is the manner of ingress and egress to the rest of the community. *Id.* So its existence, without more, is evidence of some claim of right. Balsam's continual assertion of right over Respondents' property not only supports that conclusion, but also illustrates the injuries Respondents endured while their insurer sat idly by.[9] And the request that Respondents execute a quit claim deed simply evidences Balsam's desire to clean up the public record, which, as Petitioner has frequently pointed out, does

[9] And Petitioner's suggestion that Respondents "may have allowed or agreed to developing a road on their property after the Policy Date" is as unfounded as it is absurd. Pet's' Br. 11. Respondents are not so dense as to simply gift a portion of their property for the encroachment of road for no consideration.

not include the encroachment.[10] As discussed above, although Mr. Lehman may have been unable to pinpoint the date the road was constructed, he nevertheless consistently asserted Respondents had been mistaken in believing that the plat they received accurately depicted what they purchased. The Court of Appeals' opinion is rather clear on its holding: the evidence indicates the road on Lot 108 existed prior to the Policy date, and upon that conclusion it determined coverage may exist. Petitioner's ineffectual argument misstating the opinion's holdings must fail.

III. The Court of Appeals applied the plain, ordinary, and popular meaning of the word "incompetency" in concluding that Policy coverage provision may apply.

Petitioner contends the Court of Appeals rewrote the Policy and applied a "nonsensical" meaning of the word incompetency in concluding Balsam's recording of the wrong plat may be covered under that provision. Instead, Petitioner asserts that when read in the context of the Policy, incompetency would more easily be understood as referring to "mental capacity." This argument is inconsistent with the applicable rules of construction.

Insurance policies are subject to general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). A court must enforce the plain, ordinary, and popular meaning of the policy language within an insurance contract. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 317, 440 S.E.2d 367, 369 (1994). "The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 150, 533 S.E.2d 597, 601

[10] As the quit claim deeds in the record indicate, Balsam was attempting to clean up the errors in the previously filed plats. App. 679-694.

(2000). "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628.

Despite Petitioner's vigorous protestations to the contrary, concluding the word incompetency describes acts where the grantor "is negligent or careless or lacks the training or acumen to complete the required task" is entirely consistent with the plain, ordinary meaning of the word. Merriam-Webster defines incompetent as "lacking the qualities needed for effective action [or] unable to function properly[;] not legally qualified[;] or "inadequate to or unsuitable for a particular purpose." *Incompetent*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/incompetent. Although it may be that courts have used mental incompetency as synonymous with incapacity, the use of the word "incapacity" in the Policy as one of the other covered provisions makes that definition questionable. There would be no reason to include incapacity *and* incompetency if they are to mean the exact same thing. Even within its brief, Petitioner offers the same definition for both terms—they cover the instance where a grantor lacks the mental faculty to understand the nature of his act of conveyance. Pet'r's Br. 12 (defining mental incompetence as where "the grantor was laboring under such a degree of mental infirmity as to make him incapable of understanding the nature of his act" and mental incapacity as where "the grantor [] lacks sufficient reason to understand or appreciate his or her act or the reasonableness and consequences thereof"). A court is bound to construe insurance policies in favor of the insured, which is precisely what the Court of Appeals did in concluding the incompetency provision could encompass the instance where Balsam unartfully and incompetently recorded the wrong plat.[11]

[11] Notably, this Court declined to address Petitioner's challenge to the Court of Appeals' conclusion that Balsam's fraud would be encompassed by the fraud provision in the Policy. *Loflin v. BMP Dev., LP*, S.C. Sup. Ct. Order dated April 24, 2020 (denying petition for certiorari on question of

IV. The Court of Appeals applied the proper standard of review in determining Respondents had put forth evidence creating a genuine issue of material fact as to whether there was coverage under the Policy, making summary judgment inappropriate.

Petitioner's final argument spends most of its time rephrasing its first two issues. It again ignores the evidence in the record that the road encumbering Respondents' property existed prior to closing and clings to the notion that a recording statute can subordinate reality. As discussed above, the Court of Appeals reviewed the evidence and all inferences in the light most favorable to Respondents and concluded a genuine issue of material fact existed and therefore summary judgment was inappropriate. In applying that same standard, this Court should reach the same result.[12]

Throughout its brief, Petitioner focuses myopically on the idea that any other claim of interest revealed in the Unrecorded Plat is without question legally invalid. The trouble with this argument is that Petitioner has done nothing to assist Respondents in wading through the assertions to the contrary. Under the Policy, Petitioner could have chosen to: "Negotiate a settlement," "Prosecute or defend a court case related to the claim," "Pay [Respondents] the amount required

---

relating to fraud). Accordingly, a reversal of this issue is not dispositive and would still result in remand. *See also* Oral Argument at 25:04, *Loflin v. BMP Dev., LP*, 427 S.C. 580, 832 S.E.2d 294 (Ct. App. 2019) (discussion with Petitioner as to how it would cover an insured who was defrauded and did not obtain what he bargained for).

[12] Petitioner also argues the Court of Appeals "confused the concepts of title and marketability with value." Pet'r's Br. 15. In concluding that the existence of the road reduced the value of the land Respondents received, the Court of Appeals held there was evidence that the encroachment "had a negative impact on the lot's marketability." *Loflin*, 427 S.C. at 596, 832 S.E.2d at 303. "[A] marketable title is one free from encumbrances and any reasonable doubt to its validity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). Thus, the Court of Appeals conclusion is sound—Respondents' title is not free of defect or encumbrance based on the existence of a main road running through it. Respondents are not investors who gambled on land usage only to find that the waterfront they sought to develop was a wetland. They bought encumbered title without knowing it.

by [the] Policy," or "Take other action which will protect [Respondents]." But Petitioner has done nothing except indicate it does not *believe* the title issues have legal merit. Respondents welcome this positive outlook as to their title. Yet ignoring even the Policy's humble promise to take "action which will protect" the interests of Respondents, Petitioner has chosen to stand in opposition to its insured even as they have sought to ameliorate the challenges to their title.[13] Respondents' assertion of ownership has continually been met with challenge and instead of supporting what it argues is the actual title, Petitioner has refused to honor its agreement with assertions that border on the absurd. The Court of Appeals refused to allow Petitioner to so easily squirrel out of its contractual obligations and Respondents ask this Court to do the same and affirm.

CONCLUSION

Based on the foregoing, Respondents request this Court affirm the Court of Appeals and remand the case to the circuit court for trial.

Respectfully submitted,

/s/ Ranee Saunders
Ranee Saunders (SC Bar # 100073)
MCGOWAN, HOOD & FELDER, LLC
321 Wingo Way, Suite 103
Mount Pleasant, SC 29464
843-388-7202 (telephone)
843-388-3194 (facsimile)
rsaunders@mcgowanhood.com

Daniel A. Speights (SC Bar # 5027)

[13] As discussed above, Respondents attempted to use their property in conformance with the Recorded Plat, which Petitioner assured them was unassailable. The placed posts (which were destroyed) where the Balsam Preserve Road crosses the property and objected to the paving of that road (which was paved anyway). App. 651-52.

A.G. Solomons, III (SC Bar # 68291)
100 Oak Street, East
Post Office Box 685
Hampton, South Carolina 29924
803-943-4444 (telephone)
803-943-4599 (facsimile)
dspeights@speightsandsolomons.com
gsolomons@speightsandsolomons.com

Attorneys for Respondents

June 25, 2020
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

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

RECEIVED
Jun 25 2020
S.C. SUPREME COURT

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 which
Chicago Title Insurance Company is .....Petitioner.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

Ranee Saunders (SC Bar # 100073)
rsaunders@mcgowanhood.com
MCGOWAN, HOOD & FELDER, LLC
321 Wingo Way, Suite 103
Mount Pleasant, SC 29464
843-388-7202 (telephone)

Daniel A. Speights (SC Bar # 5027)
dspeights@speightsandsolomons.com
A.G. Solomons, III (SC Bar # 68291)
gsolomons@speightsandsolomons.com
SPEIGHTS & SOLOMONS, LLC
100 Oak Street, East
Post Office Box 685

Hampton, South Carolina 29924
803-943-4444 (telephone)
803-943-4599 (fascimile)

By: /s/ Ranee Saunders
Attorneys for Respondents

June 25, 2020