THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee

Appellate Case No.: 2017-001646
Supreme Court Case No: 2020-001478

Jericho State Capital Corp. of Florida……..Plaintiff

v.

Chicago Title Insurance Company……...Defendant

AND

Lynx Jericho Partners, LLC…….Plaintiff

v.

Chicago Title Insurance Company……..Defendant

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the …….Respondents,

And Chicago Title Insurance Company is the ……Petitioner.

RESPONDENTS' RETURN
TO MOTION OF PALMETTO LAND TITLE ASSOCIATION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Respondents oppose the motion of Palmetto Land Title Association ("PLTA") for leave to file an Amicus Curiae brief because (i) PLTA has close ties to Petitioner Chicago Title, (ii) PLTA's proposed brief was written by Respondent's former law firm, (iii) its participation is not helpful to this case as PLTA proposes to merely echo Chicago Title's legal arguments and offers only

irrelevant public policy arguments, and (iv) PLTA relies on assertions not found in the record on appeal.

For clarity, this responds to PLTA's motion served on January 20, 2021, as PLTA's same motion previously filed has since been withdrawn. PLTA's current motion should be denied on the following grounds.

PLTA Has Close Ties to Petitioner Chicago Title

Petitioner Chicago Title is a "original sponsor" of PLTA, according to PLTA's website.[1] Moreover, Chicago Title's employees are members of PTLA and serve on several PLTA committees.[2] The law firm representing Chicago Title in this appeal is also a member of PLTA, and its lawyer in this case was previously a Director for PLTA.[3] No doubt, PLTA is an entity with close ties to Petitioner, and it appears Chicago Title is merely using a close ally to double-up on its arguments.

PLTA Seeks to Use a Brief Written by Respondent's Former Law Firm

Respondent Jericho State Capital has filed a Motion to Strike Amicus Curiae Brief that was conditionally filed by PLTA on December 23, 2020. This motion is currently pending. In its motion, Respondent seeks an order striking the brief and prohibiting their former law firm from disseminating any information, documents, work product, legal research and/or briefs related to its file on this matter to any other entity, including Chicago Title, PLTA, or their attorneys. Shortly after Respondent filed its Motion to Strike, PTLA withdrew its motion for leave to file an amicus brief and the conditionally filed brief.

Now, PLTA has filed a new motion for leave to file an amicus curiae brief. However, PLTA has conditionally submitted the same brief that was prepared by Respondent's former law

[1] https://www.scplta.org/site_page.cfm?pk_association_webpage_menu=5363&pk_association_webpage=12247
[2] Palmetto Land Title Association - Powered by AMO (scplta.org)
[3] See, Affidavit of David Ziegler, Jr., Tresurer of PLTA, submitted in response to Respondent's Motion to Strike.

firm, with only minor changes. As set forth in its pending motion to strike, Respondent maintains its objection to PLTA's use of Respondent's former law firm's documents, work product, legal research and/or briefs related to its file.

PLTA's Proposed Participation in this Appeal
Does Not Add Anything New or Helpful to the Issues Before the Court.

As to the legal issues before the Court, PLTA primarily seeks to rehash Chicago Title's insurance coverage arguments already presented in Chicago Title's Petition for Writ of Certiorari. For example, PLTA argues the county ordinance is not an encumbrance on the same grounds as Chicago Title, it follows Chicago Title's lead in arguing that an encumbrance and a taking are one and the same, and it argues, just as Chicago Title does, that the ordinance is not a public record although it is publicly recorded in the Deed Books of Horry County. Almost all of PLTA's proposed brief relates to coverage under Chicago Title's insurance policies. Really, PLTA's proposed legal arguments are no more than a second bite at the same apple, and Respondents believe it is unnecessary for the Court to hear the same legal arguments twice.

As to PLTA's proposed "public policy" position, it appears PTLA misapprehends the issues on appeal and the scope of the Court of Appeals' opinion. PLTA generally contends that South Carolina's customary real estate practice has been upended because the Court of Appeals found an encumbrance that existed outside the parameters of a standard title exam. To this end, PLTA wishes to participate in this case to preserve "long-stablished real estate law and title search procedures" and to protect "purchasers of property in South Carolina, [and the] attorneys who search and certify title and perform real estate closings." [PLTA Motion, p.2; Conditional Brief, page 7]. More dramatically, PLTA asserts that as a result of the Court of Appeals' Opinion, real estate closing attorneys "will be subjected to retroactive liability" for failing to search items outside the chain of title. [Motion, p. 2; Conditional Brief, p. 1]. The Court of Appeal's Opinion, however,

simply does not give rise to these issues, and PLTA's proposed participation in this case is unhelpful to the Court.

First, as to a regular real estate purchase transaction, S.C. Code 30-9-40 already provides protection to title examiners and closing attorneys performing a standard title search from claims by a purchaser ("the recordation of a deed, mortgage, or other written instrument is not notice as to the purport and effect of the deed, mortgage, or other written instrument unless the filing of the instrument for record is entered as required in the indexes"). Nothing in the Court of Appeal's Opinion changes this. PLTA's misdirection from the issues at hand are addressed by the Court of Appeals:

> According to Chicago Title, a ruling that the Ordinance constitutes a defect, lien, or encumbrance will saddle real estate lawyers and title abstractors with the risk of liability for title defects that cannot be found in the chain of title. We are confident real estate practitioners know how to draft explanations of and exceptions to their title opinions. And this appeal is not about the scope of title opinions but the scope of coverage of a title insurance policy. Chicago Title may wish to shift the risk of loss to real estate lawyers or others, but that is not where the policy here places it. Opinion, p. 8.

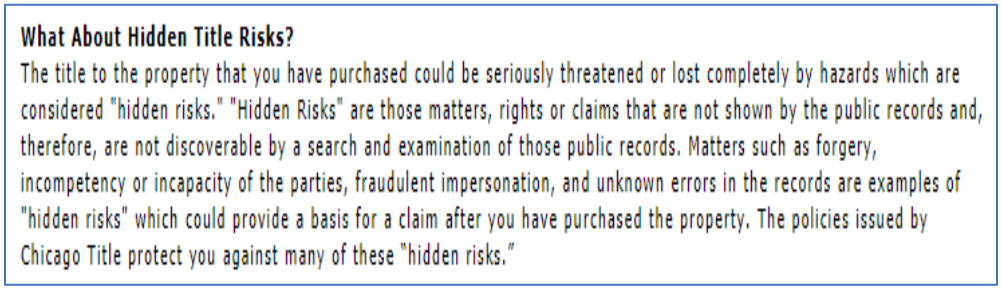
To be sure, this is a title insurance case, and title insurance is designed to protect its insureds from items *outside the standard title examination* (just as occurred in this case). This protection has been explained as follows:

> "As to matters that are outside the public record and not normally discoverable via standard title examination—e.g., wild or stray deeds, instruments filed outside the chain of title, frauds, forgeries, conveyances made under undue influence or by minors or incompetents—**the title insurance policy normally provides coverage,** but will not if an insured has knowledge of these matters outside the public record." *Investors Title Ins. Co. v. Bair*, 2007 WL 678625 (D.S.C. 2007)(emphasis added).

As similarly stated by Professor Barlow Burke in the *Law of Title Insurance*, Third Edition, §2.01[B] (Walters Kluwer Law & Business, Supp. 2013):

> "Title insurance insures not only on-record defects in title, but also covers defects not revealed by an abstractor's search of the public records related to real property. Such defects are known to title insurers as 'off-record risks'. They are interests not of record but nevertheless valid. **Not even the most professional, thorough, and competent title search will identify them**." (emphasis added).

Even Chicago Title concedes on its website that "hidden risks" can be covered under their policies:



What About Hidden Title Risks?

The title to the property that you have purchased could be seriously threatened or lost completely by hazards which are considered "hidden risks." "Hidden Risks" are those matters, rights or claims that are not shown by the public records and, therefore, are not discoverable by a search and examination of those public records. Matters such as forgery, incompetency or incapacity of the parties, fraudulent impersonation, and unknown errors in the records are examples of "hidden risks" which could provide a basis for a claim after you have purchased the property. The policies issued by Chicago Title protect you against many of these "hidden risks."

https://www.ctic.com/whatistitle.aspx

Thus, in effect, PLTA wishes to participate in this case to argue that the sanctity of real estate closings can only be preserved if a title defect found outside the chain of title is excluded from title insurance coverage. This absurdity conflicts with the very nature of title insurance and numerous South Carolina cases[4], and therefore, PLTA's proposed participation is unhelpful to the Court.

Finally, PLTA seems to base nearly all of its public policy position on matters outside the record on appeal. Not only does PLTA contend there are issues that were never raised in this case (there is no claim by a buyer against a seller, nor any claim against any lawyer or title examiner; this case involves a title insurance claim by a *lender*), PLTA also contends the Court of Appeal's Opinion now requires closing attorneys to identify and disclose any planned governmental

[4] *Loflin v. MBP Dev., LP*, 427 S.C. 580 (S.C.App. 2019)(*aff'd*, 2020 WL 7234508) ("the Policy's plain language clearly indicates that it covers certain matters that would not necessarily appear in the public records"); *Whitlock v. Stewart Title Guar. Co*., 2011 U.S. Dist. LEXIS 114006 (title insurance policy covered defect resulting from unrecorded county resolution*); Lyons v. Fid. Nat'l Title Ins. Co*., 415 S.C. 115 (Ct.App. 2015), *vacated pursuant to settlement* (the title insurance company could "easily have defined the term 'public record' to exclude zoning laws and regulations", therefore unrecorded county resolution was a covered loss); *Investors Title Ins. Co. v. Bair*, 2007 WL 678625 (D.S.C. 2007)(title insurance normally covers matters that are outside the public record).

infrastructure projects anywhere in the state. [Conditional Brief, p. 11]. Not only did the Court of Appeals specifically limit its holding to the subject Horry County ordinance, and the particular facts of this case only, there is no evidence in the record of any other similar ordinance, or of any similar ordinance recorded in the deed books of any county. Again, this case does not relate to title examinations or the responsibility of closing attorneys, it relates to the very purpose of title insurance policies – to protect against defects that may not appear in a standard title examination. As such, PLTA's proposed participation on this issue misses the mark and is not helpful in this case.

In sum, PLTA's Motion for Leave to File Amicus Curiae Brief should be denied. PLTA is an entity closely related to Chicago Title utilizing a brief prepared by Respondent's former counsel. Moreover, PLTA offers nothing new to the legal issues already presented by Chicago Title, and its public policy arguments misunderstand the nature of the Court of Appeals' Opinion and are unhelpful and irrelevant to this case.

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