

2000

# Holmes Development, LLC v. Paul Cook, an individual, Cook Development, LC, a Utah Limited Liability Company, and First American Title Insurance Company, a California Corporation : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Holmes Development v. Cook*, No. 20000745.00 (Utah Supreme Court, 2000).  
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IN THE UTAH SUPREME COURT

HOLMES DEVELOPMENT, LLC,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	
	)	Appeal No. 20000745-SC
PAUL COOK, an individual, COOK	)	
DEVELOPMENT, LC, a Utah	)	Argument Priority 15
Limited Liability Company, and	)	
FIRST AMERICAN TITLE	)	
INSURANCE COMPANY, a	)	
California Corporation,	)	
	)	
Defendants-Appellees.	)	

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BRIEF OF APPELLANT HOLMES DEVELOPMENT, LLC

---

Appeal from the Third Judicial District Court of Salt Lake County  
The Honorable J. Dennis Frederick Presiding

---

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## **I. STATEMENT OF JURISDICTION**

Holmes Development, LLC (“Holmes”) appeals two orders by the trial court that collectively dismiss Holmes’ Complaint with prejudice and grant summary judgment on behalf of defendants First American Title Insurance Company (“First American”), Paul Cook and Cook Development, LC (hereinafter collectively referred to as “Cook”). Judge J. Dennis Frederick of the Third Judicial District Court signed and entered a Summary Judgment order on behalf of First American on May 18, 2000. (R. at 261-265; see also Addendum, Exhibit A.) Thereafter, on August 2, 2000, a Summary Judgment order, signed by Judge Frederick on July 28, 2000, was entered granting summary judgment on behalf of Cook. (R. at 266-269; see also Addendum, Exhibit B.) The August 2, 2000 order disposed of all remaining issues, claims and parties. Therefore, certification pursuant to Rule 54(b) of the Utah Rules of Civil Procedure was not necessary. Holmes timely filed its Notice of Appeal with the trial court on August 24, 2000. (R. at 270-271.) The Utah Supreme Court has jurisdiction over Holmes’ appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1953 as amended) by virtue of the above referenced proceedings.

## **II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW**

As to the trial court's ruling and order granting First American's Motion to Dismiss or in the Alternative for Partial Summary Judgment, Holmes presents the following three issues for review.

1. Did First American's efforts to defend Holmes' title by preparing a faulty Special Warranty Deed that fueled litigation adverse to Holmes' title and that required litigation and a corrective affidavit to validate constitute "appropriate action" under the terms of the Policy of Title Insurance and did the trial court err when it resolved this question of fact in First American's favor through summary judgment? (R. at 85-92; T. at 27-28.)

2. Did the trial court err in rejecting Holmes' arguments that First American assumed additional contractual duties beyond those associated with the issuance of a title insurance policy and that First American's subsequent successful defense of Holmes' title pursuant to First American's title insurance obligations does not immunize First American's breach of those additional contractual duties? (R. at 85-92; T. at 28-29.)

3. Did the trial court err in denying Holmes' Motion to amend its complaint in response to First American's Motion to Dismiss given the fact that

leave should be freely granted pursuant to Rule 15 of the Utah Rules of Civil Procedure. (R. at 92; T. at 27.)

As to the trial court's ruling and order granting Cook's Motion to Dismiss or in the Alternative for Summary Judgment, Holmes presents the following three issues for review.

1. Did the trial court err in ruling that First American's successful defense of Holmes' title rendered the provisions of the Indemnity Agreement signed by Cook moot and inapplicable and that the defense of Holmes' title also retroactively cured Cook's breach of the warranties made in the deeds they signed and released them from their contractual obligations outlined in the Indemnity Agreement? (R. at 235-240; T. at 31.)

2. Did the trial court err in ruling that the economic loss rule bars Holmes' recovery even though the Indemnity Agreement signed by Cook entitles Holmes to recover the damages it sustained as a result of Cook's breach of the warranties and contractual obligations established by the deeds and the Indemnity Agreement signed by Cook? (R. at 240-244; T. at 31-32.)

3. Did the trial court err in denying Holmes' Motion to amend its Complaint in response to Cook's Motion to Dismiss (R. at 245; T. at 27) given the

fact that leave should be freely granted pursuant to Rule 15 of the Utah Rules of Civil Procedure? (R. at 245; T. at 27.)

On appeal, the question of whether or not summary judgment is appropriate is a question of law. Consequently no deference is given to the trial court's decision and legal conclusions are reviewed for correctness. Wilson v. Valley Mental Health, 969 P.2d 416, 418 (Utah 1998); Klinger v. Kightly, 791 P.2d 868 (Utah 1990). The trial court's findings of fact are given deference and reviewed under a clearly erroneous standard keeping in mind that the facts and all inferences reasonably drawn from those facts must be viewed in a light most favorable to Holmes as the non-moving party. Bountiful v. Riley, 784 P.2d 1174 (Utah 1989); see also Owns v. Garfield, 784 P.2d 1187, 1188 (Utah 1989). The question of whether or not the trial court erred in denying Holmes' motion to amend its Complaint is governed by an abuse of discretion standard. Westley v. Farmer's Insurance Exch., 663 P.2d 93 (Utah 1983).

### **III. DETERMINATIVE STATUTES**

There are no statutes, rules, constitutional provisions, regulations or ordinances that are determinative of the issues presented for review. The trial court relied, in part, on the economic loss rule, in dismissing Holmes' claims to the extent Holmes relies on negligence or tort-based causes of action. Also, the

case of Culp Construction Company v. Buildmart Mall, 795 P.2d 650 (Utah 1990) was cited by First American in support of its claims that its successful defense of Holmes' title immunized First American from its own mistakes in failing to discover the defect in Cook Development's title.

#### **IV. STATEMENT OF THE CASE**

##### **Nature of the Case, the Course of Proceedings, and its**

##### **Disposition in the Trial Court**

On October 20, 1999 Holmes filed a Complaint against defendants Paul Cook, Cook Development and First American. (R. at 1-20.) Holmes sued these defendants for negligence, breach of contract, breach of warranty, negligent misrepresentation and indemnification.<sup>1</sup> (R. at 1-20.) Holmes' claims against First American arise out of First American's unquestionable malpractice and errors in first creating and then failing to properly discover, disclose and remedy a serious defect in title to land Holmes purchased from Cook Development. Holmes sued Cook for breach of warranty and for indemnification pursuant to an Indemnity Agreement signed by Cook at the time the transaction was consummated. (R. at 1-20.)

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<sup>1</sup>The indemnification claim applies only to Cook. (R. at 17.)

Defendants each responded to Holmes' Complaint by filing motions to dismiss. (R. at 23-77; 159-213.) Defendants' arguments focused primarily on First American's successful defense of Holmes' title in litigation hostile to Holmes and the economic loss rule. Judge J. Dennis Frederick of the Third Judicial District Court treated each motion to dismiss as a motion for summary judgment because matters outside the pleadings were considered. By a Minute Entry Ruling dated April 11, 2000, Judge Frederick granted summary judgment on all claims against all defendants. (R. at 255-256.) A Summary Judgment order on behalf of First American was entered by the trial court on May 18, 2000. (R. at 261-265; see also Addendum, Exhibit A.) A second Summary Judgment order granting summary judgment on behalf of Cook was entered by the trial court on August 2, 2000. (R. at 266-269; see also Addendum, Exhibit B.) Holmes timely filed its Notice of Appeal with the trial court on August 24, 2000. (R. at 270-271.)

#### **A. STATEMENT OF FACTS**

1. In 1993, Cook purchased two tracts of land east of Heber City, Utah with the intention of developing and selling residential building lots. Cook developed a portion of the property focusing his efforts primarily on the largest tract of land consisting of approximately 323 contiguous acres. By 1997, the first

phase of the development, known as Lake Creek Farms, was nearly sold out. (R. at 3, ¶¶ 8-12.)

2. Due to financial difficulties, Cook eventually associated with a partner by the name of Premier Homes (“Premier”). Premier promised to infuse the project with new cash flow. (R. at 3, ¶¶ 9-16.)

3. Cook and Premier jointly formed two limited liability companies, Lake Creek Farms, LLC and Lake Creek Associates, LLC. Cook Development and Premier were the only members of these two new entities and the property consisting of the unsold lots and undeveloped property remaining in Lake Creek Farms was deeded to the new LLCs. Thereafter, Lake Creek Farms, LLC owned the 323 acre parcel and Lake Creek Associates, LLC owned a smaller 73 acre parcel that was not part of the pending development plans. (R. at 4, ¶¶ 17-22.)

4. Eventually, Cook and Premier parted ways. According to Cook, Premier and Cook Development agreed that Lake Creek Farms, LLC and Lake Creek Associates, LLC would each transfer their respective ownership interests in the Lake Creek Farms’ property to Cook Development.<sup>2</sup> (R. at 5, ¶¶ 23-25.)

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<sup>2</sup>In order to accomplish this transfer, it would be necessary for Lake Creek Farms, LLC to convey the 323 acre parcel to Cook Development and Lake Creek Associates would likewise need to convey the 73 acre parcel to Cook Development as well.

5. In furtherance of that agreement, Cook hired First American to prepare two deeds wherein Lake Creek Farms, LLC and Lake Creek Associates, LLC would convey title in the 323 and 73 acre parcels back to Cook Development. (R. at 5, ¶ 26; 80, ¶ 1.)

6. First American prepared two quit claim deeds. Unfortunately, both deeds identified Lake Creek Associates, LLC as the grantor, including the deed for 323 acre parcel that was actually owned by Lake Creek Farms, LLC. Cook and First American failed to discover this error and Cook immediately sought and obtained new interim financing through Clark Real Estate. First American again handled the closing of the Clark Real Estate loan, prepared and recorded a trust deed and issued title insurance in that context. First American did not discover its own error at that time. (R. at 6, ¶ 30-38; 80, ¶ 2-3; 116-117.)

7. In April of 1998, Holmes agreed to purchase the unsold lots and property remaining in Lake Creek Farms.<sup>3</sup> (R. at 183-188.) Part of Holmes' obligations included paying off the Clark Real Estate loan. Thereafter, Holmes closed the sale and Cook Development conveyed the 323 and 73 acre parcels to Holmes by way of a Warranty Deed. First American prepared all closing

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<sup>3</sup>Holmes agreed to purchase both the 323 acre parcel as well as the smaller and undeveloped 73 acre parcel.



documents, deeds, settlement statements and otherwise acted as the escrow agent for the transaction. (R. at 8, ¶ 44; 82, ¶ 7-10.)

8. In connection with Holmes' purchase, Cook signed an Indemnity Agreement. Cook executed the Indemnity Agreement on May 19, 1998 at the closing. (R. at 180-181; see also Addendum Exhibit C.) The Indemnity Agreement states in relevant part:

(a) Any and all claims that arise from, or are in any way related to, Seller's acquisition, ownership or development of the Covered Property prior to the date of this Agreement, except for those claims covered by the title insurance policy to be purchased pursuant to the Purchase Agreement;

(b) Any damage, loss or deficiency resulting from any misrepresentation, breach of warranty or nonfulfillment of any covenant or agreement on the part of Cook Development under any agreement or any other document executed in connection with Holmes purchase of the Covered Property; and

(c) All actions, suits, proceedings, demands, settlements, assessments, judgments, costs, investigation expenses, interest, penalties, legal fees and expenses incident to the transactions between Cook Development and Holmes or involving or in connection with the Covered Property.

(R. at 180; see also R. at 8, ¶ 46, 180, 233-244; T. at 31; Addendum, Exhibit C.)

9. On May 19, 1998, Holmes and Cook also executed a "Modification and Extension Agreement" (the "Extension Agreement"). Cook makes representations and warranties in the Extension Agreement similar to those made

in the Warranty Deed. The Extension Agreement states in relevant part as follows:

Seller hereby represents and warrants that it has full legal and equitable title to the Property, subject only to the liens, charges, restrictions or encumbrances either of record or disclosed in the Original Agreement.

(R. at 194, ¶ 3; 233, ¶¶ 3-4; T. at 31.)

10. First American prepared the Warranty Deed whereby Cook attempted to convey its purported ownership interest in the 323 and 73 acre parcels to Holmes. (R. at 8, ¶ 46.) First American also prepared the closing documents, recorded the Warranty Deed and handled all aspects of the closing. First American charged fees for each of these services. (R. at 119-121; T. at 28-29) Additionally, First American issued a title insurance commitment report and a Policy of Title Insurance (the “Policy”) on behalf of Holmes and charged a separate fee to issue that Policy. (R. at 81, ¶ 4; 140-46; 196; 233, ¶ 5.)

11. Unfortunately, Cook Development did not possess title to the 323 acre parcel it tried to convey to Holmes even though Cook made numerous statements through written warranties expressed in the Warranty Deed, the Indemnity Agreement and the Extension Agreement that it was the owner of the 323 acre parcel. (R. at 194, 233, ¶ 1; 234, ¶ 6.)

12. Holmes immediately began developing Phase VIIA of the project in anticipation of selling lots in the coming spring of 1999.<sup>4</sup> In furtherance of that goal, Holmes obtained financing from Bank One of Utah (“Bank One”). Bank One approved Holmes for a substantial seven figure loan and submitted the closing of that loan and the preparation of a trust deed to First American’s Salt Lake City office.<sup>5</sup> (R. at 9, ¶ 47-49; 82, ¶ 8; 234, ¶ 7.)

13. In examining title for the Bank One loan, First American discovered the error in the deed from Lake Creek Associates, LC to Cook Development purporting to convey the 323 acre parcel to Cook Development and upon which Cook Development and Holmes relied when Cook attempted to convey title to Holmes. (R. at 9, ¶ 50.)

14. Recognizing its mistakes, First American first attempted to cure the fatal defect in Holmes’ title by asking Premier to sign a new deed. Premier

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<sup>4</sup>Due to the short building season in Wasatch County, the prime selling season for residential building lots is in the spring. Purchasing a lot in the spring leaves enough time for the owner and builder to build a home, or at least frame and roof the home, before the weather worsens in the fall. For reasons that will become apparent below, the inability of Holmes to sell or even market lots during the spring of 1999 was a devastating blow to the momentum of the project and resulted in lost sales, lost profits and significant cash flow problems for Holmes.

<sup>5</sup>First American’s Heber City office handled all prior transactions including most of the closings of individual lot sales, the preparation of trust deeds and documents associated with interim financing obtained by Cook after it purportedly received title back from the two LLCs and the preparation of deeds and documents associated with Holmes’ purchase. (R. at 6, ¶¶ 27-29.)

refused. Thereafter, and at First American's request, Paul Cook signed a Special Warranty Deed in an effort to effectuate the transfer of the 323 acre parcel from Lake Creek Farms, LC to Holmes.<sup>6</sup> (R. at 9, ¶¶ 51-54; 82, ¶ 9; 123.)

15. Unfortunately, First American erred again in preparing the Special Warranty deed from Lake Creek Farms, LC to Holmes.<sup>7</sup> Instead of having Paul Cook sign the deed on behalf of Cook Development in its capacity as a member of Lake Creek Farms, LC, First American prepared the Deed showing Paul Cook signing the Special Warranty Deed in his individual capacity. However, Paul Cook was not a member of Lake Creek Farms, LC and had no authority as an individual to convey any real property owned by Lake Creek Farms, LC. (R. at 10, ¶¶ 55-58; 82, ¶ 10.)

16. Holmes thereafter closed the loan with Bank One and invested the loan proceeds in the development of Phase VIIA. In November, 1998, Premier, as

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<sup>6</sup>The preparation of the Special Warranty Deed is an implicit admission by First American that the Warranty Deed it prepared that was designed to convey title from Cook Development to Holmes was worthless and ineffective. To this day, title vests in Holmes through the Special Warranty Deed, not the Warranty Deed. (R. at 199-213.) However, even the Special Warranty Deed was negligently prepared and required litigation and a corrective affidavit before it was validated by the trial court in litigation adverse to Holmes' title.

<sup>7</sup>It is interesting to note that First American's efforts with the Special Warranty Deed represented a conveyance from an entity (Lake Creek Farms, LC) that was not a party to Holmes purchase from Cook and that had no relationship with Holmes, contractual or otherwise.

a member of and on behalf of Lake Creek Farms, LC, conveyed the 323 acre parcel to Keystone Development (“Keystone”). Keystone promptly recorded a lis pendens against the 323 acre parcel and initiated a quiet title action (the “Keystone litigation”) in the Fourth Judicial District Court. (R. at 11, ¶¶ 61-62, 64.)

17. Keystone named as defendants Holmes, Paul Cook, Cook Development, First American and Bank One. Pursuant to the obligations imposed on it by virtue of the Policy issued to Holmes and a similar policy issued to Bank One, First American hired local counsel to defend all of the named defendants in the Keystone lawsuit. (R. at 11, ¶¶ 63, 65; 83, ¶ 14.)

18. In an effort to defend Holmes’ title and correct First American’s mistake in the Special Warranty Deed, defense counsel prepared a corrective affidavit wherein Paul Cook states that he intended to sign the Special Warranty Deed in his capacity as the managing member of Cook Development and that Cook Development intended to convey the 323 acre parcel to Holmes on behalf of Lake Creek Farms, LC of which Cook Development was a member along with Premier. (R. at 130-137; 84, ¶ 19.)

19. Defense counsel recorded Paul Cook’s affidavit with the Utah County Records Office and filed the same in the Keystone litigation. (R. at 130-137.) Paul Cook’s affidavit was later referred to and relied on by defense counsel and

the Fourth District Court to determine Paul Cook's intent in signing the Special Warranty Deed in spite of First American's error in identifying Paul Cook as signing in his individual capacity.<sup>8</sup> (R. at 84, ¶ 19; 130.)

20. The Fourth Judicial District Court entertained oral argument on motions for summary judgment filed by the respective parties in the Keystone litigation. The Honorable Judge Fred Howard eventually granted summary judgment on behalf of Holmes and the other defendants and entered an order quieting title in Holmes and releasing the lis pendens recorded by Keystone. (R. at 63-77.) The summary judgment order was signed by Judge Howard on June 29, 1999. (R. at 68.)

21. During the pendency of the Keystone litigation Holmes could not market the Lake Creek Farms development and could not sell a single lot due to

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<sup>8</sup>The issue of Paul Cook's intent when he signed the special warranty deed and in what capacity he signed the same was a major issue in the Keystone litigation. As can be seen by the Summary Judgment Order signed by the Honorable Judge Fred D. Howard, (R. at 63-77), the major focus of Judge Howard's ruling was whether or not Paul Cook had the authority to convey the 323 acre parcel to Holmes on behalf of Lake Creek Farms, LC. That very question turned on the Utah Limited Liability Company Act and the issue of in what capacity Paul Cook was acting when he signed the Special Warranty Deed. Paul Cook's affidavit established his intent to sign on behalf of Cook Development as a member of Lake Creek Farms, LC, rather than in his individual capacity. (R. at 63-77.) The Keystone court specifically ruled that there was no dispute as to the fact that Paul Cook intended to convey the property to Holmes in the Special Warranty Deed Cook signed on September 3, 1998. (R. at 64-66.) This conclusion was possible because of Paul Cook's affidavit and that fact that Keystone failed to offer any evidence to the contrary or create a dispute as to any material facts associated with Paul Cook's intentions.

the lis pendens filed and recorded by Keystone and because of the obvious defect in Holmes' title, a defect that Keystone exploited in its quiet title action. (R. at 12, ¶ 68.)

22. Holmes continued making interest payments to Bank One in connection with the loan Holmes procured from Bank One in September of 1998, even though it could not generate any cash flow from lot sales so long as Keystone's lis pendens was in effect. (R. at 12, ¶ 69.)

23. Because the selling season for Wasatch County is short, Holmes lost the prime selling season, including the spring of 1999, and suffered damages in the form of lost profits and lost sales, not to mention the fact that Holmes continued to outlay funds to pay for the property and make interest payments on its loan with Bank One. (R. at 12, ¶'s 70-71; 235, ¶ 9.)

## **V. SUMMARY OF ARGUMENTS**

First American cannot hide behind the Policy it issued to Holmes, or its successful defense of Holmes' title, to immunize it from its errors. The Policy issued to Holmes requires First American to take "appropriate action" to defend Holmes' title. However, First American did not take appropriate action and breached its obligations to Holmes under the Policy. (R. at 85-87.)

Specifically, First American breached its obligation to take appropriate action to defend Holmes' title when it prepared the faulty Special Warranty Deed intended to have Cook Development, in its capacity as a member of Lake Creek Farms, LC, convey the 323 acre parcel to Holmes. That effort was of questionable efficacy to begin with and turned on whether or not Cook Development had unilateral authority to convey real estate owned by Lake Creek Farms, LC without Premier's permission. (R. at 85-87.)

First American also did not take appropriate action when it contacted Premier thereby alerting Premier to the title problem. To make matters worse, First American prepared the faulty Special Warranty Deed without Premier's permission or approval and in an effort to circumvent Premier's objection to the attempted sale of the property to Holmes. In light of Premier's clearly adverse position to Holmes' title, First American's efforts to ignore Premier's claims and proceed with the Special Warranty Deed invited litigation adverse to Holmes' title and would have done so even if the Special Warranty Deed was accurate. Unfortunately, the Special Warranty Deed contained a clear error thus compounding the problem and further clouding Holmes' title. (R. at 13, ¶ 73-78; T. at 27-29.)



These arguments create genuine issues of material fact that preclude summary judgment. The trial court therefore erred when it resolved the question of fact of whether or not First American took appropriate action in favor of First American and ruled that First American honored its title insurance obligations and is not liable.

The trial court further erred in rejecting Holmes' arguments that First American assumed and breached additional contractual obligations beyond those associated with the Policy. (R. at 88-92; T. at 27-29.) Specifically, First American closed the transaction between Holmes and Cook and prepared and recorded the Warranty Deed that could not and did not convey to Holmes title to the 323 acre parcel. First American charged Holmes and Cook for these services and Holmes relied on those services in purchasing the property from Cook. First American assumed the contractual obligation to prepare and record an effective Warranty Deed and its failure to competently perform that duty is a breach of its contractual obligations.

When First American prepared the Warranty Deed it also acted as an abstractor of title and implicitly represented that the deed it prepared would transfer title to Holmes. Obviously, the Warranty Deed did not transfer title in the 323 acre parcel and First American's errors in that context subject it to liability

separate and apart from any obligations connected with title insurance policy.

First American's breach of these additional contractual duties is not subject to the economic loss rule and the trial court erred in dismissing Holmes' claims through summary judgment.

Cook also may not hide behind the Policy and First American's successful defense of Holmes' title because Cook breached the warranties established by the Warranty Deed to Holmes and the subsequent Special Warranty Deed Cook signed in an effort to cure the ineffective transfer via the earlier Warranty Deed. (R. at 234-36.) As a matter of law, warranty deeds establish affirmative covenants on behalf of the grantee that the grantor is lawfully seized of the premises, that the seller has good right to convey the property, that the seller guarantees that the premises are free from encumbrances, that the grantor is in quiet possession of the property and that the grantor forever warrants to defend title in the grantee against any and all lawful adverse claims. Schafir v. Harrigan, 879 P.2d 1384, 1394 (Utah Ct. App. 1994). (R. at 235-36; T. at 31-32.)

Each of these duties are independent, contractual and clear. Just because Cook participated in the successful defense of Holmes' title and purchased the Policy to cover their promise and warranty to defend title does not mean that they are absolved from their breach of the other warranties conveyed in the Warranty

Deed. The duty to defend title is but one of the many duties Cook assumed by signing the Warranty Deed. The trial court therefore erred when it ignored these warranties and allowed Cook to avoid the ramifications of their breach of the warranties established by the Warranty and Special Warranty Deeds. (R. at 235-242.)

Cook is also liable to Holmes pursuant to the language of an Indemnity Agreement wherein Cook agrees to indemnify and hold Holmes harmless from a broad array of damages and losses that may arise from Cook's breach of any warranty, covenant or agreement with Holmes. (R. at 180-81.) These contractual promises, along with the warranties established in the Warranty and Special Warranty deeds, are separate and apart from any duties associated with or covered by the Policy. The trial court therefore erred in disregarding the clear and unambiguous language of the Indemnity Agreement and in dismissing Holmes' claims against Cook through summary judgment. (R. at 280.)

Finally, the trial court erred when it denied Holmes' motion to amend its Complaint in response to the motions to dismiss filed by defendants. Rule 15 of the Utah Rules of Civil Procedure dictates that leave to amend is to be freely given when requested. Defendants cannot point to any prejudicial delay or any other reason why leave to amend should not have been granted. (R. at 92, 245.)

## VI. ARGUMENT

### A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BEHALF OF FIRST AMERICAN

#### 1. The Question of Whether or Not First American Took Appropriate Action to Defend Holmes' Title Is a Question of Fact Disputed by Holmes. The Trial Court Therefore Erred When it Resolved That Question of Fact in Favor of First American.

The law is clear that summary judgment is precluded where there is a genuine dispute as to any material fact. Hodges v. Howell, 2000 UT App 171, ¶6, 4 P.3d 803, 804. A party opposing a motion for summary judgment is entitled to have all the facts presented and the inferences fairly arising therefrom considered in a light most favorable to it. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991). Here, the trial court clearly ignored this long standing and well reasoned principle of law when it granted First American's alternative Motion for Summary Judgment.

Holmes argued in its opposing papers that First American breached its contractual obligation to defend Holmes' title when, in an attempt to vest title to the 323 acre parcel in Holmes and correct its earlier mistakes, First American negligently prepared a Special Warranty Deed in a direct effort to cure a serious and potentially fatal defect in Holmes' title that was actually created by First American less than one year earlier. (R. at 85-87.) Holmes established a genuine

issue of material fact when it argued before the trial court that First American did not take “appropriate action” to defend Holmes’ title and, in fact, took action that actually gave rise to the litigation and fueled the adverse claim to title brought by Keystone. (R. at 85-87.)

The Policy lists several options available to First American when a defect in title arises or title is challenged by a third party. These options consist of settling with the adverse party, paying Holmes’ damages up to the limit of the title insurance policy, defending title through litigation or taking any other action “which in its [First American’s] opinion may be necessary or desirable to establish the title to the estate or interest.” See paragraph 4(b) the Policy, (R. at 50.) The Policy also requires First American to “take any **appropriate action**” and to do so “**diligently.**” (R. at 50) (emphasis added).

In its Motion, First American argued, and the trial court agreed, that it fully complied with the terms of the Policy because it successfully defended Holmes’ title. While it is true that First American’s defense of the Keystone litigation was ultimately successful, the litigation was only one component of First American’s efforts to cure its own mistakes and defend Holmes’ title; mistakes that created the defects in Holmes’ title in the first place. Furthermore, the litigation was, in part,

the result of First American's feeble efforts to correct its own numerous and repeated errors.

Specifically, prior to any litigation or adverse claim to title, First American attempted to cure the defect in the faulty Quit Claim Deed, and remedy the completely ineffective Warranty Deed from Cook to Holmes, by contacting Premier and asking it to execute a new deed that correctly identified Lake Creek Farms, LC as the grantor of the 323 acre parcel. Premier refused to cooperate in this effort. (R. at 9.) Premier's refusal to cooperate raised a clear red flag that it was adverse to Holmes' title. In spite of Premier's clear and hostile position to Holmes' claim to the 323 acre parcel, First American thereafter prepared a Special Warranty Deed for Cook Development's signature. However, the Special Warranty Deed contained a critical error in how the signature block identified Paul Cook and in what capacity Paul Cook signed the special Warranty Deed. (R. at 123.)

The efficacy of the Special Warranty Deed and First American's decision to ignore Premier's apparent adverse position to Holmes' title are questionable at best. What did First American do to insure that a special warranty deed signed by one member of a limited liability company would effectively pass title to Holmes when the other member of that limited liability company was clearly opposed to

such actions? It goes without saying that litigation and a dispute as to Holmes' title was imminent and likely, particularly when First American ignored Premier's position however reasonable or unreasonable Premier's position may have been and encouraged Cook as Premier's partner to transfer a \$4 million asset to Holmes over Premier's objections. These decisions, when coupled with a faulty special warranty deed, are hardly "appropriate action." At the very least it is a question of fact for the jury, not the trial court.

The Special Warranty Deed invited litigation, a lis pendens and an adverse claim to Holmes' title. It did not clear Holmes' title or secure Holmes' position. (R. at 84-85.) Only after 8 months of litigation and a court ruling did Holmes have marketable and clear title to the property even though it bargained and paid for such at the outset. At the very least, First American's efforts to execute the Special Warranty Deed in an environment hostile to Holmes' title raise an issue of fact as to whether or not First American took "appropriate action" to defend Holmes title. Add to that the fact that First American botched the Special Warranty Deed and recorded the same with a clear error that went to the heart of Keystone's position in its litigation adverse to Holmes' title compounds the factual nature of the inquiry and demonstrates why the trial court erred in granting summary judgment on behalf of First American.

Keystone's Complaint relied heavily on the error in the Special Warranty Deed. (R. at 11, ¶¶ 62-64; 83, ¶ 14; 84, ¶¶ 18-20; 86-87.) In fact, it was the very foundation of Keystone's Complaint.<sup>9</sup> Without the errors in the Special Warranty Deed, Keystone's claims would have either been non-existent or totally frivolous and easily defeated. As it was, defense counsel for Holmes and First American had to reform the Special Warranty Deed by filing and recording an affidavit from Paul Cook. (R. at 130-138.) Defense counsel then sought a judicial ruling through summary judgment that the Special Warranty Deed was valid and conveyed title in the land to Holmes. (R. at 63-77.)

Additionally, in attempting to correct the defects in Holmes' title, First American assumed the role of an abstractor of title in several contexts. As will be argued below, First American assumed abstractor liability and additional contractual obligations not contemplated or included with the issuance of a title insurance commitment report when it prepared the Warranty Deed for Cook's signature. Cook made specific warranties in that document and did so with the assistance of First American. Holmes relied on the warranties associated with the

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<sup>9</sup>The faulty Special Warranty Deed was specifically identified in Keystone's first cause of action to quiet title. It further was the sole document and basis for Keystone's second cause of action for slander of title and its fourth cause of action for fraud and conspiracy to commit fraud.



Warranty Deed and also relied on First American to prepare an accurate and appropriate deed which it did not do.

Later, First American compounded its own mistakes and misrepresentations when it represented to Holmes that the faulty Special Warranty Deed cured the defects in Holmes' title and granted to Holmes clear title to the property in question. (R. at 10-11, 83.) There can be no question or dispute that the preparation of a Special Warranty Deed signed by someone in their individual capacity without authority to sign the deed is not "appropriate action."

The fact that the faulty special warranty deed was not "appropriate action" is further evidenced by the actions of defense counsel in the Keystone litigation wherein an affidavit signed by Paul Cook was recorded with the Special Warranty Deed attached in an effort to correct First American's errors in the Special Warranty Deed. At the very least, a question of fact exists as to whether or not First American acted as an abstractor in preparing and recording the Warranty and Special Warranty Deeds and whether it breached the contractual obligations that flow from its role as an abstractor. Also, Utah law specifically preserves causes of action for negligent misrepresentation where a title insurer acts as an abstractor and negligently performs those duties or misrepresents to its insured the status of title. Culp Construction Company v. Buildmart Mall, 795 P.2d 650, 655 (Utah

1990) (“Genuine issues of material fact exist with regard to whether Lawyer’s Title know that Tower would rely upon the commitment in making the loan.”)

The trial court therefore erred when it granted summary judgment and ignored the clear questions of fact presented by Holmes regarding First American’s efforts in defending title.

**2. First American Assumed and Breached Contractual Duties Separate and Apart from Those Established by the Title Policy When it Prepared Deeds Designed to Convey Title to Holmes That Were Ineffective.**

In its arguments before the trial court, First American relied on the argument and presumption that the only contractual obligations it owes to Holmes arise out of the Policy.<sup>10</sup> (R. at 88-92.) However, as demonstrated in the statement of facts above and the record before the trial court, First American clearly assumed additional contractual duties when it agreed to prepare and record deeds and act as the escrow agent for the parties in connection with Holmes’ purchase from Cook and performed these services for a fee. (R. at 119-21.) Put in other terms, when First American agreed to prepare the Warranty Deed whereby

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<sup>10</sup>On page 9 of First American’s Memorandum of Points and Authorities in Support of its Motion to Dismiss or in the alternative for partial Summary Judgment (R. at 35), First American states that “[o]ther than this policy [the title insurance policy], Holmes and First American have no contractual or other relationship between them.” Such self serving statements clearly ignore the additional services First American performed in conducting the closing and recording the Warranty Deed from Cook to Holmes.

Cook would transfer title to Holmes and further agreed to record such, it took on additional obligations and duties to see that the Warranty Deed was accurately prepared and effectively conveyed title to the land in question. See Culp 795 P.2d at 655.

The Settlement Statement prepared by First American, (R. at 119-121), shows that Holmes shared in the costs associated with closing the transaction with Cook. Obviously, First American agreed to conduct the closing and prepare all of the necessary documents needed to complete the transaction. In preparing the Warranty Deed, First American had to obtain a legal description of the property to be conveyed. It further had to identify and accurately describe the grantor in order for the Warranty Deed to effectively transfer title. How First American obtained the information needed to prepare the Warranty Deed and what efforts it employed see that the Warranty Deed was accurate and sufficient to accomplish its stated purpose is a factual question that warrants discovery and investigation by Holmes. It cannot be resolved through summary judgment nor can First American hide behind the title Policy and its successful defense of Holmes when it assumed additional contractual obligations that it failed to properly perform.

First American also cannot argue that it acted as a mere scribe in preparing the Warranty Deed. In Utah, the preparation of documents that fix legal

obligations and relationships between parties constitutes the practice of law. Utah State Bar v. Summerhayes & Hayden, Public Adjustors, 905 P.2d 867, 870 (Utah 1995) (citing Malia v. Giles, 114 P.2d 208, 212 (Utah 1941)); see also Perkins v. CTX Mortg. Co., 969 P.2d 93, 95 (Wash. 1999) (holding that the preparation of promissory notes and deeds of trust is the practice of law).

Therefore, First American's efforts in preparing the Warranty Deed and the Special Warranty Deed constitute the practice of law. Its errors in preparing these deeds is held to a higher standard of care and the duties that attach to such were assumed by way of contract. This leaves several questions unanswered. Did First American utilize the services of an attorney in preparing the faulty deeds? If so, what did that attorney do to research title and ascertain the necessary information to prepare the faulty deeds? Holmes is entitled to discovery with respect to these facts. First American has not, and cannot at this juncture, set forth facts that show that the preparation of the Warranty and Special Warranty Deeds was done by legal counsel, nor can it show what due diligence and research was performed in conjunction with the preparation of the Warranty Deed.

Simply put, one cannot prepare a deed expressly designed to convey title with warranties without taking on abstractor liability or, at the very least, additional contractual obligations not associated with the Policy that subject the

title insurance company to contractual liability, including claims for negligent misrepresentation. See Culp, 795 P2d at 655; see also Seeley v. Seymour, 190 Cal. App. 3d 844, 237 Cal. Rptr. 282, 291-92 (1987) (title insurance company can be held liable for negligently recording an invalid document).<sup>11</sup>

The importance of the role First American played in the preparation of the Warranty and Special Warranty Deeds is obvious when one examines the position of trust and reliance the parties placed in First American when they retained it to prepare documents and conduct the closing of the transaction. Cook and Holmes hired First American to do several things. Initially, they hired First American to provide title insurance insuring title to the property in Holmes. In conjunction with this obligation, First American issued a title insurance commitment report which outlined the exceptions against which First American would not insure. Behind this title insurance commitment report is First American's apparently self-serving efforts to examine the chain of title and identify existing or potential defects in the chain of title.<sup>12</sup>

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<sup>11</sup>The Seeley court found that "[t]itle companies participate in the vast majority of real estate transactions in this state. As institutions charged with the public trust, it is important that they be held accountable when their negligent acts result in economic harm to individual property interests." Seeley, 237 Cal. Rptr. at 291-92 (1987).

<sup>12</sup>Although it may not form the basis of a cause of action, Utah Code Ann. § 31A-20-110(a) (Supp. 1985) requires title insurers and their agents to conduct "a reasonable search and examination of the title and has made a determination of insurability of title

The process of issuing a title insurance commitment report in and of itself may not normally create any duties or liability on the part of the title insurer. Culp Construction Company v. Buildmart Mall, 795 P.2d 650 (Utah 1990). In Culp, where the Utah Supreme Court held that, in general, a title company is not an abstractor of title and is therefore not subject to tort liability when its title insurance commitment report fails to discover or disclose a defect in title adverse to the insured.

If First American's involvement with the transaction between Holmes and Cook ended with the issuance of the title insurance policy then First American's motion regarding Holmes' negligent breach of contract claims might have some merit. However, First American prepared and recorded the Warranty Deed and the Special Warranty Deed and acted as Holmes' escrow agent for post-closing transactions. The Policy does not address these activities in any way. The very fact that First American received compensation for these services, separate and apart from the premium charged for the Policy, creates separate contractual obligations apart from the Policy. Id. at 655 (establishing that title insurers can assume additional duties beyond those outlined in the insurance policy, including

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under sound underwriting principles.” Clearly, this statute demonstrates how shallow and unsound First American's underwriting principles and title search and examination techniques were when it failed to discover the defects in Holmes' title in two separate title insurance commitment reports and closings.

those imposed on abstractors of title); see also New West Federal Savings and Loan Ass'n. v. Guardian Title Co. of Utah, 818 P.2d 585, 589-90 (Utah Ct. App. 1991) (citing Anderson v. Title Ins. Co., 655 P.2d 82, 84-85 (Idaho 1982) and recognizing that title insurers can assume additional contractual duties and obligations beyond those identified in the policy of title insurance).

Several questions and references are raised by First American's conduct. Did First American rely on its own title insurance commitment report and its own title research in its that effort to prepare the Warranty Deed and the Special Warranty Deed and the legal description of the property therein? If so, First American acted as an abstractor. Otherwise, First American would have had to perform a separate search of the chain of title to the 323 acre parcel in order to accurately and competently prepare the Warranty Deed. Either way, First American, as a deed preparer, is wearing a different hat and assumed additional liability independent of its role as a title insurer. See Culp, 795 P.2d at 654, 655.

In short, Cook and Holmes hired First American and paid it to prepare and record the necessary documents to complete the transaction contemplated by Cook and Holmes. Holmes (and Cook for that matter) relied on First American to provide these services in a professional and accurate manner, which it failed to do. Title insurance was but one of those obligations. It is certainly reasonable for

Holmes to rely on First American to ensure that the transaction proceeded and concluded as contemplated and contracted by and between the parties and that the deeds First American prepared properly conveyed title to the land. First American was in a superior position to ascertain the status of title and see that the Warranty Deed eventually signed by Cook accomplished what it purported to accomplish. Unfortunately, the Warranty Deed did not accomplish this goal in any way and was a complete nullity.

Clearly, First American assumed additional duties beyond those in the Policy and breached those duties when it prepared the faulty Warranty Deed. The trial court's decision to ignore these contractual obligations and First American's breach of the same should be reversed.

**B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BEHALF OF COOK DEVELOPMENT AND PAUL COOK.**

**1. Paul Cook and Cook Development May Not Avoid the Liability and Obligations They Assumed In The Indemnification Agreement and Other Contractual Documents That Clearly Impose Additional Duties upon Them Regardless of Whether or not Title Insurance Exists or Title Is Successfully Defended.**

When Cook Development signed the Warranty Deed, it made specific warranties and promises to (Holmes). These warranties include “[1] that [Cook Development] is lawfully seized of the premises; [2] that [Cook Development] has



good right to convey the same; [3] that [Cook Development] guarantees the grantee, his heirs and assigns in the quiet possession thereof; [4] that the premises are free from all encumbrances; and [5] that the grantor [Cook Development], [its] heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever.” Schafir v. Harrigan, 879 P.2d 1384, 1394 (Utah App. 1994); see also Utah Code Ann. § 57-1-21 (1953).<sup>13</sup> Paul Cook individually also made similar promises and covenants in various documents he signed, including the Indemnity Agreement and the Extension Agreement. (R. at 180-181; 192-195.)

Each of these covenants run with the property and can, on an individual basis, vest in the grantee a cause of action for breach of warranty when a covenant is broken. See Creason v. Peterson, 24 Utah 2d 305, 307, 470 P.2d 403, 404 (Utah 1970) (“The majority rule, with which we are in accord, is that there is a breach of warranty when it is shown that the grantor did not own the land that he purported to convey by the warranty deed description”).

It is undisputed that Cook Development did not own the property it purported to convey to Holmes on May 19, 1998, nor did Cook Development own

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<sup>13</sup> “A warranty deed is a contract between the grantor and the grantee” wherein the grantor gives to the grantee the covenants or promises established by Utah Code Ann. § 57-1-12. See Butler, Crockett and Walsh Development Corp. v. Pinecrest Pipeline Operating Co., 909 P.2d 225, 233 (Utah 1995).

the property at the time it signed an agreement to sell the property to Holmes.

Thus, the second and third warranties referenced in Utah Code Ann. § 57-1-12 and included in the Warranty Deed were breached the minute Cook Development signed the Warranty Deed.

Cook successfully argued at the trial court that the eventual successful defense of Holmes' title nullifies the breaches of the covenants referenced above and absolves Cook of any liability for said breaches. Such arguments are not logical or meritorious. Cook clearly breached several of the covenants established by the Warranty Deed and other written agreements. Cook Development signed a contract to sell real estate it did not own and had no right to sell. It thereafter signed the Warranty Deed and conveyed title to property it did not own.

According to Section 57-1-12, Cook Development was not "lawfully seised of the premises" and Cook Development did not have "good right to convey the same."

Paul Cook individually stood behind these representations and backed them with his personal guarantee.

Although Cook (through the purchase of the Policy) vicariously upheld its covenant to defend Holmes' title, the successful defense of title occurred well after the damage was done. Furthermore, the covenant to defend is but one of several covenants established by the Warranty Deed. Nothing in Section 57-1-12, or case

law interpreting the same, supports the proposition that no breach occurred simply because Cook honored and kept one of the five covenants it made (the duty to defend) when it executed the Warranty Deed. Each covenant is separate and individually made, and the breach of any one of those covenants is actionable by the grantee. Ultimately, it is telling that the title to the property Holmes now enjoys was granted to Holmes not by Cook Development, but by Lake Creek Farms, LC, an entity that was never a party to the transaction between Holmes and Cook. At no time whatsoever- either at closing, at the time the Special Warranty Deed was executed, or when the Fourth District Court quieted title in Holmes-did Cook Development ever honor or keep all of the covenants it made when it executed the Warranty Deed.

Cook's argument that the successful defense of Holmes' title and its vicarious keeping of that particular covenant cures all other breaches would eviscerate the importance and necessity (as required by statute) of the other covenants found in the Warranty Deed. Holmes relied on those warranties. To focus only on the covenant to defend title deprives Holmes of the confidence, at a very basic level, that it is buying the property from one who has the right to sell it. No individual or entity would knowingly purchase real property from someone who did not own the property and based solely on the covenant that the grantor

will defend the grantee's title. What good are the covenants of seisen and "good right to convey" if a grantee cannot rely on those covenants between the time of closing and the time the defect is discovered and then successfully defended? Simply put, it is a fundamental assumption on the part of a grantee that the grantor who conveys to the grantee by way of warranty deed actually owns the property and can convey the same to the grantee.<sup>14</sup>

Cook Development's argument also assumes Holmes was not damaged by Cook Development's breach of the covenants established by the Warranty Deed simply because title was successfully defended. Such is not in comport with Utah law, including the cases cited by Cook Development in its Motion to Dismiss. In George A. Lowe Co. v. Simmons Warehouse Co., 117 P. 874 (Utah 1911), the grantee purchased a parcel of land that had been carved out of a larger tract owned by the grantor. Unbeknownst to the grantee, a tax lien for the whole parcel owned by the grantor attached a pro-rata portion of the past-due taxes to the parcel conveyed to the grantee. When the tax commission demanded payment from the

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<sup>14</sup>Cook Development's argument is tantamount to absolving a tortfeasor who severs a limb from his or her victim simply because the tortfeasor thereafter hired and paid for a surgeon who successfully re-attached that limb and the victim ultimately achieved full and complete function of the re-attached limb. It ignores the interim pain and damage that occurs even though eventually all was restored to the victim. Here, Holmes now has free and clear title to the property because Cook Development paid for a title insurance policy. However, this does not resolve the significant damage incurred by Holmes in the interim.

grantee, the grantee went to the grantor and demanded payment. When the grantor refused to pay the taxes the grantee was left with two choices. He could allow the property he purchased to be foreclosed and liquidated to satisfy the lien or he could pay the taxes and sue the grantor for reimbursement. The grantee paid the taxes, ( id. at 875), and then successfully sued the grantor for breach of the covenant that the “premises are free from all encumbrances.” No other warranties or covenants were at issue or alleged to be breached, even though the grantor did not defend title by paying the taxes and arguably breached that covenant as well, leaving the grantee to defend title by paying the taxes.

Other Utah cases involve a breach of one but not all of the covenants made in a warranty deed that conforms with Section 57-1-12. See Brewer v. Peatross, 595 P.2d 866 (Utah 1979)(breach of covenant against encumbrances); George v. Robison, 63 P. 819 (Utah 1901)(breach of the covenant of quiet and peaceable possession).

The trial court clearly erred when it ruled that First American’s successful defense of Holmes’ title cured Cook Development’s breach of the warranties it gave Holmes in the Warranty Deed and the Special Warranty Deed. The trial court’s decision should therefore be reversed.

**2. Paul Cook and Cook Development Also Breached the Warranties and Representations They Made and Promised in Paragraph 1 of**

**the Indemnity Agreement and Paragraph 3 of the Extension and Modification Agreement.**

Not only did Cook Development breach the covenants and warranties made in its Warranty Deed, but Cook also breached the warranties and representations made in the Indemnity and Modification Agreements they signed on the day of closing, May 19, 1998. It is undisputed that Cook Development did not have title to the property when it signed the Indemnity and Modification Agreements just as it did not have title to the property when it executed the Warranty Deed that same day. Had Holmes known that Cook Development did not and could not convey title it certainly would not have purchased the property Cook Development was attempting to sell. At the very least, the terms would have been vastly different.

The trial court therefore erred in ignoring these contractual duties and in resolving the question of fact of whether or not Cook breached these duties in Cook's favor.

**3. Damages for Breach of the Covenants in a Warranty Deed Include Much More than the Expenses Incurred in Successfully Defending Title And, Instead, Include Actual Damages.**

Cook argued before the trial court that the only damages available in breach of warranty or covenant cases are those incurred in "cleaning up the title." (R. at 173-74.) However, not only is this statement not accurate or consistent with Utah law, it is also misplaced in light of the precedent established by the cases cited by

Cook in their Motion to Dismiss and that were apparently accepted as dispositive by the trial court.

Specifically, Cook relied on Creason v. Peterson, 470 P.2d 403 (Utah 1970) in support of the statement that the only damages Holmes is entitled to are those it incurred in “cleaning up title.” (R. at 172.) However, the quote cited by Cook when placed in context and quoted in full actually states that a grantee “is only entitled to **the damage** he suffers as a result of the breach thereof, but this **includes** taking such measures as are reasonable and necessary to clear up any difficulty which would represent a substantial flaw in his title.” Id. at 404 (emphasis added). Nothing in Creason limits the damages to costs incurred in “cleaning up title.” In fact, Creason stands for the proposition that damages incurred due to the breach of covenant *and* the costs incurred in quieting and defending title are both available to grantees where the grantor breaches one or more of the warranties in a warranty deed. Id.

The same is true in the case of Van Cott v. Jacklin, 226 P. 460 (Utah 1924). (R. at 172.) Pursuant to the holding in Van Cott, damages available to a grantee due to a grantor’s breach of the covenants in a conveyance are that party’s “damages including costs and attorneys fees incurred by plaintiff in attempting to sustain the title to the real estate referred to.” Id. at 460. In Van Cott, the grantee

lost a portion of the property he purchased from the grantor to an individual who had a superior right or titled interest in that portion. The Van Cott court summarized its holding at the end of its written opinion with the following language:

In view of the great weight of authority, therefore, we feel constrained to hold that in addition to the damages which we have discussed on the first proposition the plaintiff is also entitled to recover such reasonable sum as attorney fees as he may have paid or has become legally obligated to pay together with the costs before referred to.

Id. at 462-63. In reaching this holding, the Van Cott court quoted from 11 CYC 1172 that establishes the general principle that the grantee who loses a part of the land conveyed may sue for breach of the covenants established by the deed of conveyance and recover “the actual damage resulting from the eviction – not exceeding the consideration paid – interest, and expenses of suit.” Id. at 461-62.

Simply put, Cook and the trial court misconstrued the holding in Van Cott by arguing that Cook is liable to Holmes only for damages in an “amount that is fairly and necessarily paid to extinguish the encumbrance plus attorney fees reasonably incurred in contesting the encumbrance”). (R. at 172.) The trial court therefore erred when it held that Cook vicariously satisfied its obligations through First American’s successful defense of Holmes’ title and through its purchase of Policy that paid all legal fees and costs associated with clearing Holmes’ title.



**4. The Indemnity Agreement Cook Signed by Paul Cook and Cook Development Holds Them Responsible For Damages Resulting from Misrepresentation, Breach of Warranty and Any Claims Not Covered by the Title Insurance Policy.**

Cook's arguments that the Indemnity Agreement they signed along with Holmes does not apply in this instance leaves one wondering just what Cook agreed to do and what obligations they took upon themselves in signing the Agreement. The Indemnity Agreement requires Cook to indemnify Holmes and hold Holmes harmless from:

(a) Any and all claims that arise from, or are in any way related to, Seller's acquisition, ownership or development of the Covered Property prior to the date of this Agreement, except for those claims covered by the title insurance policy to be purchased pursuant to the Purchase Agreement;

(b) Any damage, loss or deficiency resulting from any misrepresentation, breach of warranty or nonfulfillment of any covenant or agreement on the part of Cook Development under any agreement or any other document executed in connection with Holmes purchase of the Covered Property; and

(c) All actions, suits, proceedings, demands, settlements, assessments, judgments, costs, investigation expenses, interest, penalties, legal fees and expenses incident to the transactions between Cook Development and Holmes or involving or in connection with the Covered Property.

(R. at 180, 234.)

Paragraph (a) of the Agreement limits Cook's obligation to indemnify Holmes regarding "claims" not covered by the title insurance policy that arise out

of Cook's "acquisition, ownership or development of the Covered Property prior to the date of this Agreement." (R. at 180.) Paragraph (a) says nothing about damages incurred by Holmes as a result of the activities of Cook prior to Holmes' acquisition or damages that result from Cook's breach of any warranty, covenant or promise to Holmes. Paragraph (a) is simply a recitation that applies to claims adverse to Holmes' title that are not covered by title insurance. Obviously, Cook cannot hide behind this paragraph so long as First American succeeds in arguing that the title insurance policy does not cover Holmes damages. Paragraph (a) also says nothing of damages, expenses, costs or attorney fees incurred by Holmes in a claim adverse to its title. (R. at 180.)

Additionally, paragraphs (b) and (c) of the Indemnity Agreement clearly require Cook to indemnify Holmes regardless of what is covered by the Policy. Paragraph (b) requires Cook to indemnify Holmes from "[a]ny damage, loss or deficiency resulting from any misrepresentation, breach of warranty or nonfulfillment of any covenant or agreement on the part of Cook Development under any agreement or any other document executed in connection with Holmes purchase of the Covered Property." (R. at 180.) Paragraph (b) does not offer any grace or out for Cook and is not contingent on what title insurance pays for or accomplishes by the defense of Holmes' title. It is also worth noting that

paragraph (b) refers to “damage, loss or deficiency” as opposed to the “any and all claims” language of paragraph (a). (R. at 180.)

Paragraph (c) obligates Cook to reimburse Holmes for its “costs, investigation expenses, interest, penalties, legal fees and expenses incident to the transactions between Cook Development and Holmes or involving or in connection with the Covered Property.” (R. at 180.) One of the elements of Holmes’ damages in this action is the interest payments it was forced to make on the property without being able to sell lots or generate cash flow while the lis pendens was in place. This paragraph also entitles Holmes to be reimbursed for the attorneys fees it incurred in the quiet title action as well as in prosecuting this action.

The trial court erred in ignoring the plain language of the Indemnity Agreement and by ruling that Cook was entitled to Summary Judgment.

**C. LEAVE TO AMEND A COMPLAINT SHOULD BE FREELY GIVEN IN THE CONTEXT OF A MOTION TO DISMISS AND THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT HOLMES MOTION FOR LEAVE TO AMEND.**

Rule 15 of the Utah Rules of Civil Procedure is clear. “[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Here, the trial court denied Holmes’ request to amend its Complaint in response to the motions

filed by Cook and First American. Holmes requested leave of court and moved for the opportunity to amend in the papers it filed in opposition to the motions to dismiss. (R. at 92-93, 245; T. at 27.) However, the trial court's ruling and orders are void of any explanation regarding Holmes' motions to amend. They were simply denied without explanation. (R. at 255-56).

Cases where Utah appellate courts have found no abuse of discretion by the trial court in denying a motion to amend virtually all deal with situations where previous amendment had already been allowed, where the case had been pending for years before the motion to amend was filed, where the motion was brought on the eve of trial, or where significant delay would occur or discovery deadlines had passed. See R&R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068 (Utah 1997) (motion to amend brought 4 years into the litigation and after trial of the fundamental issue in case); Westley v. Farmer's Ins. Exch., 663 P.2d 93 (Utah 1983) (amendment would delay trial and the substance of the new allegation was known by the moving party one year earlier); Atcitty ex rel. Atcitty v. Board of Education, 967 P.2d 1261 (Utah Ct. App. 1998) (motion filed over two months after discovery deadline and where moving party had long been aware of new issues); Harper v. Summit County, 963 P.2d 768 (Utah Ct. App. 1998) (motion brought after summary judgment was entered and discovery complete); Kleinert

v. Kimball Elevator Co., 854 P.2d 1025 (Utah Ct. App. 1993) (party had already been allowed to amend once before in a three year old case involving an eight year old injury); Kelly v. Utah Power & Light, 746 P.2d 1189 (Utah Ct. App. 1987) (amendment would add two new defendants and motion was brought just before trial).

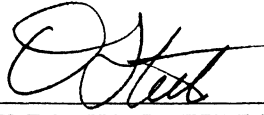
Here, Holmes' motions to amend were brought in response to the motions to dismiss filed by First American and Cook in response to Holmes' Complaint. No discovery had occurred. No trial date was set and First American and Cook could not and did not demonstrate any prejudice that would result if Holmes' motions for leave to amend were granted.

In short, the trial court abused its discretion in denying Holmes' motions to amend. In the event Holmes' appeal is unsuccessful on its other issues for review, this matter should nevertheless be remanded to allow Holmes the opportunity to amend its Complaint.

## **CONCLUSION**

For the foregoing reasons, Holmes respectfully requests that this Court reverse the trial court's decisions granting Cook Development, Paul Cook and First American's Motions to Dismiss or in the Alternative for Summary Judgment and remand the case to the trial court for a jury trial.

Dated this 16 day of January, 2001.

A handwritten signature in black ink, appearing to read "B. Tueller", written over a horizontal line.

BENNETT TUELLER JOHNSON & DEERE

Barry N. Johnson

Daniel L. Steele

Attorneys for Plaintiff and Appellant Holmes  
Development, LLC

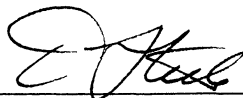
## **CERTIFICATE OF SERVICE VIA FIRST CLASS MAIL**

I CERTIFY that on January 16, 2001, I served two copies of the foregoing Reply Brief of Appellant on the following person at the following address:

Alan L. Sullivan, Esq.  
Robert W. Payne, Esq.  
Snell & Wilmer L.L.P.  
15 West So. Temple, Suite 1200  
Salt Lake City, UT 84101  
Attorneys for Defendant and Appellee First American Title Insurance Company

Gifford W. Price  
Gregory N. Jones  
Mackey Price & Williams  
57 West 200 South, Suite 350  
Salt Lake City, UT 84101  
Attorneys for Defendants Paul Cook and Cook Development, LC

by mailing by first class mail with sufficient postage two true and accurate copies of the Reply Brief of Appellant. Said copies were placed in a sealed envelope addressed to counsel for Defendant/Appellee at the address set forth above.



---

BENNETT TUELLER JOHNSON & DEERE  
Barry N. Johnson  
Daniel L. Steele  
Attorneys for Plaintiff and  
Appellant Holmes Development, LLC

Tab A



Alan L. Sullivan (3152)  
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111 E. Broadway, Suite 900  
Salt Lake City, UT 84111-1004  
Telephone: (801) 237-1900  
Facsimile: (801) 237-1950

Attorneys for Defendant First American Title  
Insurance Company

**FILED DISTRICT COURT**  
Third Judicial District

MAY 18 2000  
By C. R. [Signature]  
SALT LAKE COUNTY  
Deputy Clerk

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH**

HOLMES DEVELOPMENT, LLC, a Utah  
limited liability company,

Plaintiff,

vs.

PAUL COOK, an individual, COOK  
DEVELOPMENT, LC, a Utah limited  
liability company, and FIRST AMERICAN  
INSURANCE COMPANY, a California  
corporation,

Defendant.

**SUMMARY JUDGMENT**

Case No. 990910568

Honorable J. Dennis Frederick

On April 10, 2000, defendant First American Title Insurance Company's Motion to Dismiss or in the Alternative for Partial Summary Judgment (November 29, 1999) came for hearing before the Court, with the Honorable J. Dennis Frederick, Third District Court Judge, presiding. Plaintiff Holmes Development, LLC (hereinafter "Holmes") was represented by Barry N. Johnson. Defendant First American Title Insurance Company (hereinafter "First

American”) was represented by Alan L. Sullivan. Defendant Paul Cook and defendant Cook Development LC (hereinafter “Cook Development”) were represented by Gregory N. Jones. At the close of the hearing, the Court took the motion under advisement. On April 11, 2000, the Court issued its minute entry indicating that the motion would be converted to a summary judgment motion due to extraneous matters considered by the Court and that the motion would be granted for the reasons specified in the supporting memoranda and stated at oral argument.

Based upon the memoranda and affidavit submitted to the Court and the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

1. Pursuant to the terms of Rules 12(b) and 56, Utah Rules of Civil Procedure, the Court has considered matters outside the pleadings, as presented by the parties, and therefore has treated First American’s motion as one for summary judgment. The Court will dispose of the motion as provided by Rule 56, all parties having been given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

2. Based upon the undisputed facts presented, the Court hereby concludes as follows:

(a) As a matter of law, First American did not proximately cause Holmes’s alleged injury because First American cured the title problem created by the defective Quit Claim Deed of March 13, 1998 before Keystone Development Company filed its quiet title action against Holmes. According to the judgment of the Fourth District Court in the Keystone litigation, the subsequent Special Warranty Deed from Lost Creek Farms LC to Homes dated

September 3, 2000, effectively conveyed title to the disputed acreage to Holmes. Accordingly, all of Holmes's claims against First American are barred as a matter of law

(b) Holmes's claims against First American are also barred as a matter of law by section 9(b) of the First American Title Insurance Policy, on or about dated May 20, 1998, which provided in pertinent part: "If the company establishes the title, or removes the alleged defect, lien or encumbrance . . . in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby."

(c) Holmes's First Cause of Action for negligence and Third Cause of Action for negligent misrepresentation against First American are also barred, as a matter of law, by the rule that one may not recover economic losses under a theory of non-intentional tort.

(d) In addition, Holmes's Third Cause of Action for negligent misrepresentation is barred because, as a matter of law, First American could not have reasonably expected Holmes to rely upon its conduct in connection with the transaction between Cook Development and Lake Creek Farms Associates, LC.

(e) Holmes's Second Cause of Action against First American for third-party beneficiary liability is also barred, as a matter of law, because of the established rule that for a third party to have an enforceable right, the contracting parties must have clearly intended to confer a separate and distinct benefit upon a third party, and that neither Holmes nor Cook

Development intended to confer a separate and distinct benefit upon Holmes as of the time that they entered into their agreements.

3. Based upon the foregoing conclusions, First American is entitled to judgment as a matter of law in its favor.

4. The First, Second and Third Causes of Action of the Complaint against First American are hereby dismissed with prejudice.

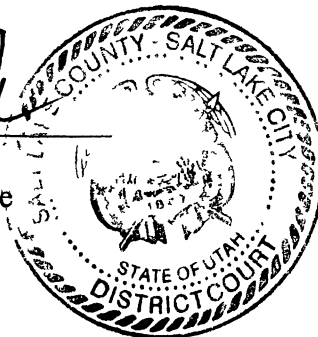
5. To the extent that Holmes moved for leave to amend its complaint, its motion is denied because Holmes failed to present facts that would be necessary to state a legally sufficient claim.

6. Defendant First American is hereby awarded its costs of court incurred herein.

DATED this 18 day of May, 2000.

BY THE COURT

  
J. Dennis Frederick  
Third District Court Judge



APPROVED AS TO FORM

BENNETT TUELLER JOHNSON & DEERE, LLC

---

Barry N. Johnson  
Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be mailed a true and accurate copy of the foregoing,  
**SUMMARY JUDGMENT**, postage prepaid, on the 28<sup>th</sup> day of April, 2000:

Barry N. Johnson, Esq.  
Daniel L. Steele, Esq.  
BENNETT TUELLER JOHNSON & DEERE, LLC  
3865 South Wasatch Blvd., Suite 300  
Salt Lake City, Utah 84109  
Attorneys for Holmes Development, LLC

Gifford W. Price  
Grogory N. Jones  
170 South Main Street, Suite 900  
Salt Lake City, Utah 84101  
Attorneys for Paul Cook and Cook Development LC



---

Tab B

**FILED DISTRICT COURT**  
Third Judicial District

AUG - 2 2000

By C. Bailey  
SALT LAKE COUNTY  
Deputy Clerk

Gifford W. Price (Utah #2647)  
Gregory N. Jones (Utah #5978)  
MACKEY PRICE & WILLIAMS  
170 South Main Street, Suite 900  
Salt Lake City, Utah 84101  
Telephone: (801) 575-5000

Attorneys for Defendants Paul Cook  
and Cook Development, LC

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY  
STATE OF UTAH

HOLMES DEVELOPMENT, LLC, a Utah  
limited liability company

Plaintiff,

vs.

PAUL COOK, an individual, COOK  
DEVELOPMENT, LC, a Utah limited liability  
company, and FIRST AMERICAN TITLE  
INSURANCE COMPANY, a California  
corporation,

Defendants

**SUMMARY JUDGMENT**

Civil No. 990910568

Judge J. Dennis Frederick

On April 10, 2000, defendants Paul Cook and Cook Development, LC (collectively, "Cook") Motion to Dismiss/Summary Judgment (February 11, 2000) came for hearing before the Court, with the Honorable J. Dennis Frederick, Third District Court Judge, presiding. Plaintiff Holmes Development, LLC (hereinafter "Holmes") was represented by Barry N. Johnson.

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Defendants Cook were represented by Gregory N. Jones. Defendant First American Title Insurance Company was represented by Alan L. Sullivan. At the hearing the Court also heard argument relative to defendant First American Title Insurance Company's Motion to Dismiss or in the Alternative for Partial Summary Judgment (November 29, 1999). At the close of the hearing, the Court took the motion under advisement. On April 11, 2000, the Court issued its minute entry indicating that the motion would be converted to a summary judgment motion due to extraneous matters considered by the Court and that the motion would be granted for the reasons specified in the supporting memoranda and stated at oral argument.

Based upon the memoranda and affidavit submitted to the Court and the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

1. Pursuant to the terms of Rules 12(b) and 56, Utah Rules of Civil Procedure, the Court has considered matters outside the pleadings, as presented by the parties, and therefore has treated Cook's motion as one for summary judgment. The Court will dispose of the motion as provided by Rule 56.

2. Based upon the undisputed facts presented, the Court hereby concludes as follows:

(a) Holmes's First Cause of Action for negligence against Cook is barred, as a matter of law, by the rule that one may not recover economic losses under a theory of non-intentional tort.

(b) Holmes's Second Cause of Action for Breach of Contract/Third Party



Beneficiary and Third Cause of Action for Negligent Misrepresentation are inapplicable to Cook.

(c) Holmes's Fourth Cause of Action for Breach of Warranty is barred, as a matter of law, by the fact that any breach of warranty which may have existed by the Quit Claim Deed of March 13, 1998, was cured before Keystone Development Company filed its quiet title action against Holmes. According to the judgment of the Fourth District Court in the Keystone litigation, the subsequent Special Warranty Deed from Lake Creek Farms LC to Holmes dated September 3, 1999, effectively conveyed title to the disputed real property to Holmes. The conveyance of good title and successful defense of such title by defendant First American Title Insurance Company provided Holmes the only remedies available for breach of warranty and a claim for damages as alleged by Holmes is not permitted, as a matter of law.

(d) Holmes's Fifth Cause of Action based upon an Indemnity Agreement between Cook and Holmes is also barred, as a matter of law, as the damages alleged by Holmes are not within the scope of the Indemnity Agreement.

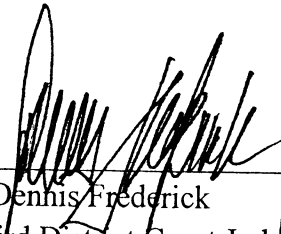
3. Based upon the forgoing conclusions, Cook is entitled to judgment as a matter of law in its favor.

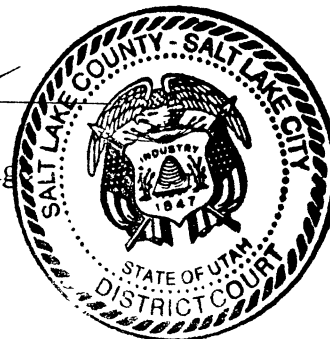
4. The First, Fourth and Fifth Causes of Action of the Complaint against Cook are hereby dismissed with prejudice.

5. To the extent that Holmes moved for leave to amend its Complaint, its motion is denied.

DATED this 28<sup>th</sup> day of July, 2000.

BY THE COURT

  
\_\_\_\_\_  
J. Dennis Frederick  
Third District Court Judge



APPROVED AS TO FORM

BENNETT TUELLER JOHNSON & DEERE, LLC  
Barry N. Johnson  
Daniel L. Steele

\_\_\_\_\_  
Counsel for Plaintiff

Tab C

### INDEMNITY AGREEMENT

THIS INDEMNITY AGREEMENT (this "Agreement") effective as of May 19, 1998, is between COOK DEVELOPMENT, LC, a Utah limited liability company ("Cook Development"), PAUL COOK, and HOLMES VENTURES, LC, a Utah limited liability company ("Holmes").

### RECITALS

A. Cook Development and Holmes entered into a certain Real Estate Purchase Contract and Agreement dated April 2, 1998 (the "Purchase Agreement"), as modified by that certain Modification and Extension Agreement of even date herewith, in which Cook Development agreed to sell and Holmes agreed to purchase certain real property (the "Property") described in the Purchase Agreement, which is incorporated herein by this reference.

B. Section 5.2.3 of the Purchase Agreement requires that Cook Development and Paul Cook provide Holmes with an indemnification related to claims arising from Cook Development's ownership of all of the Property except for the 6 lots on which the parties closed in the "first closing" as defined in the Purchase Agreement (referred to as the "Covered Property").

C. Cook Development and Holmes anticipate closing the Purchase Agreement on May 19, 1998 and, as a part of that closing, desire to enter into this Agreement.

### AGREEMENT

In consideration of the above recitals and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Indemnification. Cook Development and Paul Cook shall indemnify, defend and hold harmless Holmes, its successors and assigns from and against:

(a) Any and all claims that arise from, or are in any way related to, Seller's acquisition, ownership or development of the Covered Property prior to the date of this Agreement, except for those claims covered by the title insurance policy to be purchased pursuant to the Purchase Agreement;

(b) Any damage, loss or deficiency resulting from any misrepresentation, breach of warranty or nonfulfillment of any covenant or agreement on the part of Cook Development under any agreement or any other document executed in connection with Holmes' purchase of the Covered Property; and

(c) All actions, suits, proceedings, demands, settlements, assessments, judgments, costs, investigation expenses, interest, penalties, legal fees and expenses incident to the transactions between Cook Development and Holmes or involving or in connection with the Covered Property.

2. Representations and Warranties of Cook Development and Paul Cook.

(a) Cook Development's and Paul Cook's execution of this Agreement complies with relevant law, and will not violate, conflict with, or cause a breach of any agreement to which either Cook Development or Paul Cook is a party; and

**EXHIBIT**

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(b) No breach of contract, tort or other claim in any way related to the Covered Property has been asserted by any creditor, claimant or other person against Cook Development or Paul Cook, nor, to the best of Cook Development's and Paul Cook's knowledge, has there been any occurrence which could give rise to such a claim, nor has any suit, action or proceeding been threatened or commenced against Cook Development or Paul Cook involving such a claim.

3. Miscellaneous.

(a) All notices, requests, demands and other communications hereunder shall be given as required in the Purchase Agreement.

(b) No failure to exercise, delay in exercising or single or partial exercise of any right, power or remedy by any party hereto shall constitute a waiver thereof or shall preclude any other or further exercise of the same or any other right, power or remedy.

(c) This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof, and shall not be amended or modified except by written document signed by the party to be charged with such amendment or modification.

(d) This Agreement shall be governed by the laws of the State of Utah. In the event suit or action is brought by any party under this Agreement to enforce any of its terms, it is agreed the prevailing party shall be entitled to a reasonable attorney fee to be fixed by the trial and appellate courts.

(e) This Agreement shall be binding on the parties and their respective heirs, successors and assigns.

EXECUTED as of the date first written above

COOK DEVELOPMENT, LC

By: Paul Cook, Manager by Candace J. Cook  
Paul Cook, Manager  
Date: May 19, 1998  
Paul Cook by Candace J. Cook  
PAUL COOK  
Date: May 19, 1998

HOLMES VENTURES, LC

By: [Signature], Manager  
Date: May 19, 1998