

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 Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

HOLMES DEVELOPMENT, LLC,

Plaintiff-Appellant,

v.

PAUL COOK, an individual, COOK
DEVELOPMENT, LC, a Utah Limited
Liability Company, and FIRST
AMERICAN TITLE INSURANCE
COMPANY, a California corporation,

Defendants-Appellees.

Appeal No. 20000745-SC

Argument Priority 15

BRIEF OF APPELLEES PAUL COOK AND COOK DEVELOPMENT, LC

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

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IN THE UTAH SUPREME COURT

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)	
Plaintiff-Appellant,)	
)	Appeal No. 20000745-SC
v.)	
)	Argument Priority 15
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DEVELOPMENT, LC, a Utah Limited)	
Liability Company, and FIRST)	
AMERICAN TITLE INSURANCE)	
COMPANY, a California corporation,)	
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STATEMENT OF JURISDICTION

Pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996) this Court has jurisdiction over the appeal.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the trial court properly dismissed plaintiff-appellant Holmes Development, LLC's ("Holmes") breach of warranty claims in that any purported breach was corrected prior to the time that there were any alleged damages and wherein the alleged damages were caused by the actions of entities other than defendant-appellees Paul Cook and Cook Development, LC ("Cook Development") (collectively, "Cook"). In reviewing this grant of summary judgment, the Court accords no deference to the trial court's resolution of the legal issues presented. Harline v. Barker, 912 P.2d 433, 438 (Utah 1996). The Court determines whether the trial court erred in applying the governing law and whether it correctly held that there were no disputed issues of material fact. Id. (citations omitted). The court may affirm the trial court on any ground available to it, whether or not the grounds were relied upon below. Id. (citations omitted).

2. Whether Holmes' receipt of good title and the successful defense of such title by defendant-appellee First American Title Insurance Company ("First American") provided Holmes the only remedies available for an asserted breach of warranty, thus precluding Holmes' claim for damages. In reviewing this grant of summary judgment, the Court accords no deference to the trial court's resolution of the legal issues presented.

Harline v. Barker, 912 P.2d 433, 438 (Utah 1996). The Court determines whether the trial court erred in applying the governing law and whether it correctly held that there were no disputed issues of material fact. Id. (citations omitted). The court may affirm the trial court on any ground available to it, whether or not the grounds were relied upon below. Id. (citations omitted).

3. Whether the trial court properly dismissed Holmes' claims on the ground that the damages alleged by Holmes were not within the scope of the Indemnity Agreement. Further, even if the scope of the Indemnity Agreement was broader, whether the dismissal was proper because the damages alleged arose after the conveyance of good title and were caused by parties other than Paul Cook and Cook Development. In reviewing this grant of summary judgment, the Court accords no deference to the trial court's resolution of the legal issues presented. Harline v. Barker, 912 P.2d 433, 438 (Utah 1996). The Court determines whether the trial court erred in applying the governing law and whether it correctly held that there were no disputed issues of material fact. Id. (citations omitted). The court may affirm the trial court on any ground available to it, whether or not the grounds were relied upon below. Id. (citations omitted).

4. Whether the trial court properly denied Holmes' request for leave to amend which request was set forth in its memorandum opposing Cook's motion to dismiss, but which request was not set forth by motion. This Court should not disturb the trial court's

denial of Holmes' request to amend "absent a clear abuse of discretion which exceeds the limits of reasonability." Neztsosie v. Meyer, 883 P.2d 920, 922 (Utah 1994).

DETERMINATIVE STATUTES

Rule 56(c) of the Utah Rules of Civil Procedure provides as follows:

[T]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

Nature of the Case

This action pertains to a real estate transaction wherein Cook Development sold a 323 acre parcel of property by way of warranty deed to Holmes in April 1998. The aforesaid parcel (the "Property") was the subject of residential development. In connection with this transaction, Cook signed an Indemnity Agreement relative to the indemnification of Holmes under certain specified circumstances. Following the discovery by First American of a potential defect in the chain of title relative to the Property, Cook immediately took all steps necessary to cure such potential defect, which alleged defect was cured by at least September 3, 1998.

Two non-parties to this litigation, Premier Homes, L.C. ("Premier") and Keystone Development, L.C. ("Keystone"), entered into a sham transaction in November 1998 in which Premier purported to convey to Keystone the Property. On the same day,

November 25, 2001, Keystone filed a quiet title action against appellant Holmes claiming ownership of the Property and Keystone also filed a lis pendens. Pursuant to a title policy purchased by Cook Development, appellee First American defended the title to the Property in the case of Keystone Development, LC v. Holmes Development, L.L.C.; First American Title Insurance Company; Bank One Utah, N.A.; John Does 1 through 30 inclusive, Fourth Judicial District Court, Wasatch County, Utah, Civil No. 980500389 (the "Keystone Litigation"). In the Keystone Litigation it was determined as a matter of law that good title was held by Holmes pursuant to a Special Warranty Deed dated September 3, 1998.

Holmes asserts that it was damaged as a direct result of the Keystone Litigation and the lis pendens filed by Keystone. Rather than suing Premier and Keystone for their collusive actions and for Keystone's non-meritorious lawsuit and its filing of a lis pendens, Holmes filed suit against appellees Cook and First American. Holmes' claims against Cook were based on negligence (first cause of action), breach of warranty (fourth cause of action), and indemnification of damages resulting from appellees' (Cook's and First American's) negligence (fifth cause of action). The trial court found that the economic loss doctrine precluded any economic damage recovery against appellees on Holmes' claim of negligence. The breach of warranty claims were dismissed in that any breach of warranty which may have existed was cured prior to the time that Keystone filed its action against Holmes along with its lis pendens and no damages were alleged by

Holmes to have occurred prior to good title being conveyed. Holmes' claim for indemnification of damages resulting from appellees' alleged negligence was dismissed in that the claim was outside the scope of the Indemnification Agreement. Further, there was no showing of cognizable damage. Holmes has appealed the trial court's ruling on summary judgment.

Course of Proceedings and Disposition By The Trial Court

Holmes filed its complaint against Cook and First American on October 20, 1999 (R. 1-19). The claims against Cook were denominated as negligence, breach of warranty and indemnification. Other claims against First American were breach of contract/third party beneficiary and negligent misrepresentation. First American filed its Motion to Dismiss or in the Alternative for Partial Summary Judgment on November 29, 1999 (R. 23-42). Holmes filed its opposition on January 5, 2000 and on January 21, 2000 First American filed its reply (R. 78-153). Cook also filed a motion to dismiss or for summary judgment dated February 11, 2000 (R. 159-215). Holmes filed its opposition to the motion on March 23, 2000 and Cook filed a reply dated April 4, 2000 (R. 231-253). The trial court entered a summary judgment dismissing all of Holmes' claims against First American on May 18, 2000 and on August 2, 2000 the trial court entered summary judgment in favor of Cook on all claims. On August 24, 2000 Holmes filed its notice of appeal.

Statement of Facts

1. Cook Development is a Utah limited liability company. Paul Cook, an individual, is the principal owner and registered agent for Cook Development.

(Complaint ¶¶ 2-3, R. 2.)

2. In 1993 large parcels of land near Heber City, Utah were purchased by Paul Cook with the intention of developing the land for residential building purposes. This land totaled over 400 acres and was eventually transferred to Cook Development. The development was named Lake Creek Farms. (Complaint ¶¶ 9-10, R. 3.)

3. Development for residential building lots proceeded for sale in two phases. Phase I consisted of approximately 32 individual lots and was sold out in 1996. Phase II consisted of 40 lots, for which sales began to be offered in 1997, and by 1998 approximately 34 of the 40 lots had been sold. (Complaint ¶¶ 11-12, R. 3.)

4. Cook Development associated with another real estate developer by the name of Premier. The primary owner of Premier was John Thomas ("Mr. Thomas"). (Complaint ¶¶ 14-15, R. 4.)

5. In late October 1997 Cook Development and Premier formed two limited liability companies, i.e. Lake Creek Farms, LC ("LC Farms") and Lake Creek Associates, LC ("LC Associates"). Cook Development conveyed by Warranty Deed a 323 acre parcel to LC Farms and a 73 acre parcel to LC Associates. (Complaint ¶¶ 17-18, R. 4.)

6. For several months Premier and Cook Development attempted to find new financing for the Lake Creek Farms development. (Complaint ¶ 21, R. 4.)

7. The new financing was not obtained and Cook Development and Premier agreed to part ways. In so doing it was agreed that deeds would be executed on behalf of LC Farms and LC Associates conveying the 323 and 73 acre parcels back to Cook Development. (Complaint ¶¶ 22-23, R. 5.)

8. In order to effectuate the transfer of the parcels back to Cook Development, two deeds were necessary and it was the intent that LC Farms would quit claim its interest in the 323 acre parcel to Cook Development and that LC Associates would quit claim its interest in the 73 acre parcel to Cook Development. (Complaint ¶ 25, R. 5.)

9. Paul Cook contacted First American at its Heber City office to handle the transfer. He requested that quit claim deeds be prepared. The Heber City Office of First American was intimately familiar with the Lake Creek Farms development as First American had issued all of the title insurance policies and conducted all the closings associated with the lot sales in Phases I and II. Further, First American had handled the closing and issued the title insurance policy to Paul Cook when he originally acquired the property in 1993. (Complaint ¶¶ 26-29, R. 5-6.)

10. Thus, in March, 1998 First American's Heber City Office prepared two quit claim deeds which were signed by Paul Cook and Mr. Thomas and which were also recorded the same month at the request of First American. As to these two quit claim

deeds, First American did not issue a title insurance policy nor did it issue a title insurance commitment. (Complaint ¶ 30, R. 6.)

11. The quit claim deed which conveyed the 323 acre parcel from LC Farms to Cook Development contained a typographical error in that the deed named LC Associates as the grantor instead of LC Farms in whose name the parcel was titled. (Complaint ¶¶ 18, 31-32, R. 4, 6.)

12. The quit claim deed for the 73 acre parcel properly showed LC Associates as grantor. (Complaint ¶ 33, R. 6.)

13. Thereafter, Cook Development obtained certain financing from Clark Real Estate and used the 323 and 73 acre parcels as collateral. In connection with the loan, First American was asked to prepare a title insurance commitment report and issue a title insurance policy to Clark Real Estate. First American prepared a deed of first trust and promissory note and closed the loan of over one million dollars (\$1,000,000.00). (Complaint ¶¶ 34-38, R. 6-7.)

14. Thereafter, Cook Development proceeded to seek a buyer for the entire project and Holmes became interested in purchasing Lake Creek Farms in April 1998. (Complaint ¶ 39, R. 7.)

15. A contract was entered into between Holmes and Cook Development wherein Holmes agreed to purchase both the 323 and 73 acre parcels as well as a few remaining lots in Phase II of the development. First American was again retained to

prepare a title insurance commitment report and issue a title insurance policy to Holmes. This was handled by the Heber City Office of First American. First American prepared the necessary deeds and closing documents as well as conducted the closing. Holmes was instructed to sign a form entitled "Acknowledgment of Receipt of Commitment for Title Insurance". (Complaint ¶¶ 39 - 41, 44, R. 7-8.)

16. Thus, in May 1998 Holmes purchased the Lake Creek Farms Development from Cook Development for approximately three million six hundred thousand dollars (\$3,600,000.00). (Complaint ¶ 43, R. 8.)

17. Cook Development conveyed the Lake Creek Farms development to Holmes by way of warranty deed. An Indemnity Agreement was signed by Paul Cook and Cook Development dated effective May 19, 1998. (Complaint ¶ 46, R. 8, 180-181.)

18. After completing the purchase process, Holmes sought additional financing from Bank One of Utah ("Bank One"). The services of First American's Salt Lake City office were retained by Bank One to prepare the necessary trust deed and title insurance documents associated with the loan to Holmes. It was during this process that First American's Salt Lake City office discovered sometime in July 1998 that the quit claim deed for the 323 acre parcel had a typographical error and did not name the correct

grantor (i.e., the quit claim deed had LC Associates rather than LC Farms). (Complaint ¶¶ 48-50, R. 9.)¹

19. First American alerted Cook Development, Paul Cook and Holmes concerning this matter and also contacted Mr. Thomas of Premier and requested that Mr. Thomas and Paul Cook execute a new quit claim deed which would properly name LC Farms as the grantor of the 323 acre parcel. (Complaint ¶¶ 50-51, R. 9.)

20. Mr. Thomas, however, refused to execute a new deed. Paul Cook and Cook Development at all times stood ready and willing to remedy the deed. (Complaint ¶¶ 52-53, R. 9.)

21. Since First American could not obtain Mr. Thomas' cooperation to remedy the deed matter, First American prepared a special warranty deed for Cook Development's execution whereby LC Farms was to deed the 323 acre parcel to Holmes. The deed was to be signed by Paul Cook in his capacity as the member and manager of Cook Development which was a member of LC Farms. (Complaint ¶ 54, R. 10.)

22. The signature block in the special warranty deed prepared by First American for Paul Cook showed that Mr. Cook was signing in his individual capacity as a member of LC Farms instead of in his capacity as the manager of Cook Development which was a member of LC Farms. This special warranty deed was signed on September

¹ While paragraph 50 of the Complaint recites July 1999, it is clear from the context of the other allegations of the Complaint that July 1998 is the proper date.

3, 1998 by Paul Cook. Later, an affidavit was signed by Mr. Cook indicating that his signature was in his capacity as member and manager of Cook Development. (Complaint ¶¶ 55-58, R. 10.)

23. In late November 1998, Mr. Thomas purported to cause the sale or transfer of the aforesaid 323 acre parcel from Premier to Keystone. A warranty deed to Keystone was recorded on November 25, 1998. That same day a Complaint was filed by Keystone in the Fourth Judicial District Court for Wasatch County (Keystone Litigation), which included Holmes, First American, and Bank One as defendants. The Complaint, among other things, sought to quiet title to the 323 acre parcel in Keystone. (Complaint ¶¶ 62-63, R. 11.)

24. Keystone also prepared and caused to be recorded a lis pendens relative to the 323 acre parcel which was recorded on November 25, 1998. It is alleged that the filing of the said lis pendens prevented Holmes from selling any lots including those in Phase VIIA, which was the only phase ready for sale. (Complaint ¶ 64, R. 11.)

25. Holmes asserts that as a result of the lis pendens it lost all of the momentum it had generated and lost an entire selling season. (Complaint ¶¶ 68-70, R. 12.)

26. The aforesaid litigation commenced by Keystone was resolved by summary judgment which quieted title in favor of Holmes per the September 3, 1998 deed from Cook Development, and the lis pendens was released in June 1999. (Complaint ¶ 67, R. 12, 180-181.)

27. Following resolution of the Keystone Litigation in favor of Holmes, Homes did not file a lawsuit against Keystone or Premier for their collusive actions or for Keystone's meritless lawsuit. Instead, Holmes brought this lawsuit against Paul Cook, Cook Development and First American. Holmes' stated reason for not pursuing claims against Keystone is "because it has nothing, has no - no - no ability to compensate Holmes Development." (Transcript of Summary Judgment Hearing p. 26, lines 11, 16-21, R. 287.)

28. Holmes' Complaint asserts three causes of action against Paul Cook and Cook Development: negligence, breach of warranty, and indemnification of damages resulting from Paul Cook's, Cook Development's and First American's alleged negligence. (Complaint, R. 1-19.)

29. On May 18, 2000, the trial court entered summary judgment against Holmes and in favor of First American. Holmes' claims were dismissed on several grounds: (1) since any title defects had been cured by at least September 1998, two months before Keystone filed its lawsuit, the alleged title defect was not a proximate cause of Holmes' alleged injury; (2) Holmes' claims were barred by the Title Insurance Policy; (3) the economic loss rule precluded the assertion of claims based on negligence or negligent misrepresentation; (4) there was no reasonable expectation that Holmes would rely on First American's conduct; and (5) Holmes was not an intended third party beneficiary. (Summary Judgment, R. 261-264.)

30. On August 2, 2000, the trial court entered summary judgment against Holmes and in favor of Paul Cook and Cook Development. Holmes' claims were dismissed on three grounds: (1) the economic loss doctrine precluded any recovery against Paul Cook and Cook Development on Holmes' negligence claim; (2) the breach of warranty claims were barred by the fact that any breach of warranty which may have existed was cured before Keystone filed its lawsuit against Holmes and no damages were alleged to have occurred prior to good title being conveyed (i.e. September 3, 1998); and (3) Holmes' claim for indemnification of damages resulting from appellees' alleged negligence was found to be barred as being outside the scope of the Indemnification Agreement. (Summary Judgment, R. 266-269.)

SUMMARY OF ARGUMENTS

The Keystone Litigation was successfully defended at the expense of First American with title to the Property being quieted in Holmes. Regardless of whether there was at one time a breach of warranty by Cook Development, the Property transfer was cured prior to the time of any alleged damages arising from the Keystone Litigation and the related lis pendens and therefore the alleged damages were not caused by any breach of warranty. Further, even ignoring the foregoing, arguendo, the damages alleged by Holmes for breach of warranty are not cognizable under Utah law in that Holmes' remedies are limited to the value of any property lost plus the reasonable costs necessarily expended defending title. Since no part of the Property was lost by Holmes, and First

American assumed the defense of the title, the trial court correctly held that Holmes had no claim for damages based on its asserted breach of warranty.

Holmes' indemnification claim was also properly dismissed by the trial court. Holmes' indemnification claim seeks indemnification "for the damages it has already incurred and will continue to incur as a result of Cook Development and Paul Cook's negligence, as well as the negligence of First American." (Complaint ¶ 104, R. 18 .) The trial court held that no cognizable claim based on negligence existed based on the First Cause of Action against Cook or First American based on the economic loss rule and this portion of the trial court's ruling (First Cause of Action) has not been challenged on appeal. Thus, it also follows that no basis exists for indemnification of alleged negligence damages under the Indemnification Agreement.

Even ignoring Holmes' "negligence" pleading relative to indemnification (Fifth Cause of Action), there were no damages in any event which fell within the scope of the provisions of the Indemnity Agreement. Further, even if the scope of the Indemnity Agreement were broadened as to its meaning, Holmes nevertheless had good title to the Property prior to the time the damages alleged in the Complaint occurred and therefore there is no recoverable damage.

The trial court did not abuse its discretion by denying Holmes leave to amend because Holmes failed to file a motion pursuant to Rule 15, Utah Rules of Civil Procedure, and failed to provide the basis for amendment.

ARGUMENT

I.

THE TRIAL COURT'S GRANTING SUMMARY JUDGMENT ON BEHALF OF COOK DEVELOPMENT AND PAUL COOK WAS APPROPRIATE AND SHOULD BE SUSTAINED

In arguing that the summary judgment granted in favor of Cook should be reversed, Holmes sets forth four (4) points in its brief among which points there is certain overlap.² For a more orderly response, Cook addresses Holmes' sections 1 and 3 together, addresses section 2 separately in the context of the "Extension and Modification [sic] Agreement" ("Modification and Extension Agreement") and also separately addresses section 4, i.e. the "Indemnity Agreement."³ From a scrutiny of Holmes' arguments, the correctness of the trial court's action in granting summary judgment is apparent.

² A comparison of the points at pages 32-43 of appellant's brief with the Statement of the Issues at page 3 of its brief shows a lack of consistency. The two sections fail to completely match up. It appears that the points argued (pages 32-43) are broader than the Statement of the Issues.

³ In its section 2, Holmes refers to both the Modification and Extension Agreement and the Indemnity Agreement. As noted, for ease of reference, these two are herein separately addressed.

A. Summary Judgment Was Proper In That Holmes Is Not Entitled To Any Recovery Based On Breach Of The Warranty Deed From Cook Development To Holmes.

1. Even Assuming, Arguendo, A Breach of Warranty Existed, It Was Cured Before Commencement Of The Keystone Litigation And Therefore Was Not The Cause Of Any Of The Damages Alleged By Holmes In Its Complaint.

Although the argument of Holmes under sections 1 (appellant's brief p. 32) and 3 (appellant's brief p. 38) is somewhat diffuse, to a great extent it pertains to the Fourth Cause of Action of its Complaint, i.e., "breach of warranty."⁴ Apart from the paragraphs of the Complaint incorporated by reference, the specific allegations of the Fourth Cause of Action in Holmes' Complaint are as follows:

- 97. Paul Cook and Cook Development executed a Warranty Deed and a Special Warranty Deed in order to convey the 323 acre parcel to Holmes.
- 98. Paul Cook and Cook Development, by the terms of these two deeds, warranted that they had the authority to convey and did in fact own [the] 323 acre parcel that, by the terms of the deeds, they were conveying to Holmes.
- 99. Paul Cook and Cook Development did not, in fact, possess the authority nor did they have the right to convey title to Holmes in fee simple by virtue of the previous faulty quit claim deed prepared by First American.

⁴ In section 1, Holmes also references the "Indemnity Agreement" and the "Extension Agreement" (i.e. correctly the "Modification and Extension Agreement"). Section 3 pertains to the "Warranty Deed." As before noted, the Indemnity Agreement and the Modification and Extension Agreement are separately addressed leaving the "warranty" issue to be discussed under this Section A.

100. Paul Cook and Cook Development have therefore breached the warranties represented in the Warranty Deed and the Special Warranty Deed. These breaches has [sic] damaged Holmes in an amount in excess of \$1,000,000.00[.]

(Complaint ¶ 97-100, R. 17.)

The foundational premise of Holmes' warranty claim is that the conveyance of the 323 acre parcel by quit claim deed from LC Associates to Cook Development was faulty and hence the warranty deed provided thereafter in May, 1998 by Cook Development to Holmes was breached.⁵ Thus, for the purpose of the summary judgment argument before the trial court it was assumed that there was breach of warranty as alleged.

However, even assuming the existence of the alleged title problem with respect to the 323 acre parcel, it was remedied by the special warranty deed provided to Holmes dated September 3, 1998. The fact of this deed conveying good title was even established by judicial determination in the Keystone Litigation.⁶ Thus, there is no dispute among the parties that good title to the Property was in fact passed to Holmes no later than September 3, 1998, prior to any of the damages alleged by Holmes.

⁵ Although the cited paragraphs from the Complaint also reference the "Special Warranty Deed" (dated September 3, 1998), there is no dispute in the record but what the Special Warranty Deed conveyed good title.

⁶ It should be noted that appellees do not concede that the quit claim deed to Cook Development was defective or that the warranty deed thereafter from Cook Development to Holmes in May, 1998 was breached. However, for purposes of the summary judgment motion, in order to argue from a conservative premise, it was assumed that the original quit claim conveyance was problematic and the May, 1998 warranty deed was at one time breached.

In its brief at page 34, Holmes argues that Cook claims "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." This is not a complete and accurate characterization. What Holmes misses in its argument is the fundamental proposition that based on Holmes' own allegations in its Complaint, Holmes was not damaged by any alleged breach of warranty.

Although Holmes makes some general reference to damages, (e.g., the loss of limb and restoration footnote referenced at page 36 of its brief)⁷, the matter is governed by the factual record which is essentially comprised of Holmes' Complaint. For example, Holmes alleges that Premier purported to sell the 323 acre parcel in dispute to Keystone with the deed being recorded on November 25, 1998. (Complaint ¶ 62, R. 11.) At paragraph 63 of its Complaint (R. 11), Holmes further alleges that a lis pendens was also recorded on November 25, 1998 by Keystone which "prevented Holmes from selling any lots, including those in Phase VII A, which was the only phase ready for sale." (R. 11.)

Thereafter in its Complaint Holmes further alleges the impact of the lis pendens:

66. Because of the lis pendens, Holmes was faced with the unfortunate dilemma of trying to sell lots with the risk that potential buyers and the real

⁷ Holmes severed-limb analogy is faulty. For example, if there were damages analogous to a severed limb (which there are not under the economic loss doctrine), then to make the analogy more accurate one would have to assume that Keystone severed the limb, not Cook or First American. Clearly, under this analogy, neither Cook nor First American are the cause of the severed limb as it is a matter between Holmes and Keystone.

estate community would learn that Lake Creek Farms was in trouble and that lots could not be purchased because of the cloud over Holmes['] title to the land, a cloud that was ultimately generated by First American's incompetence and clerical errors.

67. The Keystone litigation was eventually resolved through summary judgment and the lis pendens released in late June of 1999.

68. However, by that time the damage was done. As a result of the lis pendens Holmes lost all of the momentum it had generated and the prime 1999 selling season was lost.

69. During the pendency of the Keystone litigation, Holmes was further forced to make interest and principal payments on its indebtedness without the benefit of the cash flow it anticipated it would enjoy from the sale of the Phase VIIA lots.

70. Holmes lost an entire selling season as a result of the lis pendens, and its master plan for Lake Creek Farms effectively lost an entire year. Holmes did not sell a single lot during the pendency of the Keystone litigation.

(Complaint ¶ 66-70, R. 12, emphasis added.)

Per its own allegations, Holmes' alleged damage resulted from the lis pendens filed over two and one-half (2 ½) months after the recording of the September 3, 1998 special warranty deed which conveyed good title. The asserted damage resulted from the culpable actions of Keystone, not Cook. Thus, even assuming that Cook breached warranties per the May, 1998 warranty deed, there is no damage resulting therefrom in order to sustain Holmes' claim related to the lis pendens.

2. Even If, Arguendo, The Damages Alleged Did Not Relate To The Lis Pendens Or Keystone's Frivolous Quiet Title Action, Such Damages Are Not Cognizable Under Utah Law In Any Event.

As set forth, supra, the damages actually alleged by Holmes were due to the lis pendens and Keystone, not Cook. Apart from the forgoing, the nature of the damages alleged (i.e., alleged loss of a selling season and inability to sell lots) are not cognizable under a breach of warranty claim pursuant to Utah law.

At pages 38-40 of appellant's brief Holmes argues it is entitled to damages for the alleged loss of a selling season even though title to the Property was successfully defended by First American. Holmes cites to no authority permitting the recovery of damages based on such a theory. The authorities cited by Holmes, as well as other Utah authority, holds to the contrary, i.e. that damages for breach of warranty are limited to the value of any property lost as a result of the breach of warranty plus the reasonable expense incurred in the defense of the property. Holmes has no cognizable damages in that good title was successfully defended.⁸ Holmes has not made and indeed has no claim for reasonable expenses incurred in the defense of the Property⁹ as such defense was

⁸ This case should be distinguished from those cases wherein clear title was not successfully defended and as a consequence the value of the subject property was reduced. In such cases damages would be measured by the value of the subject property which was lost.

⁹ No allegation is made in the Complaint for attorneys' fees expended in the process of clearing Holmes' title to the Property in relation to the breach of warranty claim. Title was defended by First American.

undertaken by First American pursuant to a title insurance policy purchased by Cook Development.

Holmes argues that the Utah case of Creason v. Peterson, 470 P.2d 403 (Utah 1970) somehow stands for the proposition that damages such as those alleged by Holmes are recoverable in a breach of warranty action. This assertion is not supported by Creason. In Creason, the plaintiff purchased certain real property from the defendant pursuant to a warranty deed. Id. at 403. After it was discovered that the legal description of the property purchased did not comport with the actual property lines as established by fence lines,¹⁰ plaintiff worked to correct the discrepancies by obtaining and giving quit claim deeds to his neighbors. Id. Plaintiff then sued to recover his attorneys fees necessary to clear up the title. The Supreme Court of Utah held that in this case plaintiff was entitled to an award of damages for the reasonable expenses of clearing up the title. The only types of damages addressed in Creason are those resulting from a loss of property and the reasonable expenses of clearing up the title. Id. at 405-06. Of course, neither type of damage was alleged by Holmes in the context of a breach of warranty claim. The dicta of Creason cited by Holmes does not support Holmes' theory of causation and damages.

Holmes also argues that Van Cott v. Jacklin, 226 P. 460 (Utah 1924) somehow supports its theory of damages. To the contrary, Van Cott supports Cook's contention

¹⁰ The trial court held that any actual loss of property was negligible.

that clear title and the cost of clearing title are the only remedies available to Holmes. Van Cott involved the loss of a portion of the real property warranted. Id. at 461. The trial court in Van Cott found that there was no breach of warranty because the parties were aware of the title discrepancy when the warranty deed was executed. The Utah Supreme Court reversed the trial court and remanded the matter for trial as to the issue of damages. Id. at 464. The Van Cott opinion explains at great length the measure of damages for breach of warranty, concluding that such damages are measured as a proportional part of the money paid and a "reasonable sum as attorney fees." Id. at 462-64. In discussing the measure of damages the opinion does not give any credence to the theory of damages asserted by Holmes.¹¹

Other Utah authority limiting damages in a breach of warranty action include Forrer v. Sather, 595 P.2d 1306 (Utah 1979), in which it was held that in an action for "breach of covenant against encumbrances", the "damages" recoverable were limited by the amount which was fairly and necessarily paid to extinguish the encumbrance, not to exceed, however, the amount of the purchase money paid by grantees to grantors, plus attorney fees reasonably incurred in contesting encumbrance, together with interest at legal rate from date of eviction and costs of court. See also, George H. Lowe Co. v.

¹¹ Holmes' initial brief devotes a paragraph of argument relative to the facts of Van Cott; however, notwithstanding all of the argument, this case continues to stand for the proposition that the only allowable damages for breach of warranty when title is cleared are those expenses necessarily incurred to clear the title.

Simmons Ware-House Co., 117 P. 874 (Utah 1911) (if an incumbrance is extinguished by the purchaser, he may recover a reasonable price necessarily paid for that purpose with interest if this does not exceed the amount paid the covenantor or the value of the property).

Holmes has good title to the Property which was successfully defended at the expense of First American. Under applicable law respecting damages in breach of warranty cases, Holmes is entitled to nothing more from Cook.¹²

B. Summary Judgment Was Proper In That Holmes Is Not Entitled To Any Recovery Based On Breach Of The Modification And Extension Agreement.

In its brief at 37-38, Holmes asserts that there was a breach of a Modification and Extension Agreement; in particular paragraph 3 thereof. First, no claim was made in the Complaint that is based on the Modification and Extension Agreement. Since such a claim is not part of the Complaint below, it cannot be an issue on appeal.

Second, even if, arguendo, it was part of the case below, there is no basis for such a claim. Paragraph 3 of the Modification and Extension Agreement states as follows:

3. Seller's Representations and Warranties.

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.

¹² Holmes may have claims against Keystone for the damages proximately caused by Keystone, but this is not a matter before this Court.

Because this language covers in all material and practical respects that which is encompassed by the warranties of a warranty deed, the argument under Section A, supra, is applicable to this paragraph. As set forth, supra, Holmes had good title as of September 3, 1998. The alleged damages arose from Keystone's filing of a lis pendens in late November, 1998 related to its spurious quiet title action. This is an issue between Holmes and Keystone and not Cook.

C. Summary Judgment Was Proper In That Holmes Is Not Entitled To Any Recovery Based On The Indemnity Agreement.

Holmes attempts to create or find a claim based on an Indemnity Agreement dated effective May 19, 1998. Again, the argument of Holmes on appeal does not comport with the allegations of the Complaint. In its allegations in the Fifth Cause of Action of the Complaint (apart from the incorporation of paragraphs), Holmes asserts that:

102. Holmes has demanded that Cook Development and Paul Cook indemnify it and hold it harmless from the damages it has sustained by virtue of its purchase of the Lake Creek Farms development and arising out of the faulty deeds.
103. Paul Cook and Cook Development have failed to honor the obligations imposed on them by the Indemnity Agreement and in so doing have breached the obligations each owe to Holmes.
104. Holmes is entitled to be indemnified per the Indemnity Agreement for the damages it has already incurred and will continue to incur as a result of Cook Development and Paul Cook's negligence, as well as the negligence of First American.

(Complaint ¶ 102-104, R. 17-18; emphasis added.)

In its Complaint Holmes makes no allegations concerning physical injury to the Property or to any person. The allegations pertain strictly to purported economic loss.

Because the purported damage basis is economic, Holmes is not entitled to any recovery based on negligence. In American Towers Owners Ass'n. v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996), the Utah Supreme Court underscores the applicability of the "economic loss rule" stating that "in other words, economic damages are not recoverable in negligence absent physical property damage or bodily injury." (Citation omitted.)¹³ American Towers at 1189. The Utah Supreme Court states that "the policy reasons supporting the economic loss rule are sound." Id. at 1190. For example, in the context of products, the Utah Supreme Court states that "contract principles resolve issues when the product does not meet the user's expectations, while tort principles resolve issues when the product is unsafe to person or property." Id. In Maack v. Resource Design & Construction, Inc., 875 P.2d 570 (Utah App. 1994) it is recognized that the "economic loss rule" is the majority rule. Id. at 579-80. As set forth in East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed.2d 865 (1986), the "economic loss rule" is the majority position that one may not

¹³ American Towers also cites approvingly the cases of Maack v. Resource Design & Construction, Inc., 875 P.2d 570 (Utah App. 1994) and Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994) which articulate the applicability of the "economic loss rule" in negligence actions.

recover "economic" losses under a theory of non-intentional tort.¹⁴ Id. at 476 U.S. 866-75, 106 S. Ct. 2300-04.

It is important to consider that the language in the Indemnity Agreement, infra, does not specifically reference "negligence." Indeed, as a matter of law the trial court ruled that no negligence claim exists against First American or Cook per the First Cause of Action. Any damage purportedly covered by the indemnity (Fifth Cause of Action) must, however, be damage cognizable under the law since there is no language in the indemnity specifically encompassing negligence. Thus, the type of negligence damage alleged by Holmes, i.e. economic loss, simply provides no basis for recovery under the indemnity.¹⁵

Ignoring, arguendo, Holmes' own pleading which premises the indemnity claim solely on negligence, there is still no basis for an indemnity claim and summary judgment was proper.

¹⁴ Holmes' Complaint includes a specific claim for negligence (First Cause of Action) against Paul Cook, Cook Development and First American. This negligence claim was dismissed by the trial court and its dismissal was not argued by Holmes on this appeal. If the First Cause of Action in the Complaint had been argued on appeal by Holmes, the argument in this section relative to the economic loss rule would be applicable.

¹⁵ Since it has been determined as a matter of law that Holmes has no negligence claim against Cook or First American, the indemnification claim based on the asserted negligence of Cook and First American must also necessarily fail. Macris & Assoc. v. Newways, 200 UT 93, __ P.3d __ (Utah 2000) (claim preclusion).

The paragraphs from the Indemnity Agreement relied upon by Holmes are as follows:¹⁶

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.

(R. 180-181.) Even if negligence is not considered the alleged basis for Holmes' indemnity claim, reliance on these paragraphs provides no claim for Holmes.

First, indemnification normally protects the indemnitee from claims brought against it by others, i.e. third parties. Holmes does not allege in its Complaint that it seeks damages because of the meritorious claims of others. What Holmes attempts to do

¹⁶ These specific paragraphs were not identified in the Complaint per se. As set forth supra, the Complaint only referenced a claim to indemnity damages based on "negligence."

by its argument is to turn the indemnity away from a hold harmless type of provision to a contract bestowing a direct, primary right of recovery. Thus, Holmes' so-called "indemnity" claim is really not a true claim for indemnity and therefore not proper.

Second, ignoring the foregoing and assuming the indemnity is a contract for direct, affirmative claims, with respect to paragraph (a) of the Indemnity Agreement it is limited to "claims that arise . . . prior to the date of this Agreement," i.e. prior to May 19, 1998. As set forth, supra, Holmes only alleges damages due to the lis pendens filed in late November, 1998 by Keystone. This has nothing to do with anything pre-May 19, 1998.

Even if one were to accept Holmes' implicit broader reading of paragraph (a), i.e. that it also covers for some reason damages arising after May 19, 1998, Holmes is still not entitled to any relief. Holmes had good title in September, 1998 which was prior to the filing of the lis pendens. There simply is no cognizable damage.

Third, there is no claim based on paragraph (b). Again, the only damages alleged in the Complaint arise from the lis pendens. Since Holmes had good title months prior thereto, there was no "damage, loss or deficiency" due to "misrepresentation, breach of warranty or nonfulfillment of any covenant or agreement" See also argument under breach of warranty, supra at Section I, Subsection A.

Fourth, as to paragraph (c) of the Indemnity Agreement there is also no basis for a claim. Again, per the Complaint, the only damage was due to the Keystone lis pendens. Paragraph (c) does not by its wording reference general or all types of damages. It

enumerates certain categories which do not help Holmes in this case. Holmes was in fact specifically protected relative to "actions" and "suits" as well as "proceedings, demands," "settlements" and "assessments" referenced in paragraph c by the successful title defense provided by First American. The Complaint makes no claim relative to "judgments, costs, investigation expenses," or to "interest" unrelated to the effects of the lis pendens. As to legal fees and expenses, a defense was provided by First American pursuant to the title insurance purchased by Cook Development and nothing in the record quantifies any other fees and expenses.

II.

THE TRIAL COURT PROPERLY REJECTED HOLMES' REQUEST TO AMEND ITS COMPLAINT

Holmes filed no Rule 15, Utah R. Civ. P., motion requesting leave to amend its Complaint. Instead, Holmes merely set forth such a request in the body of its memorandum in opposition to the Cook motion. The trial court rejected Holmes request for leave to amend its Complaint.

It is well recognized that the proper way to amend a pleading is by filing "a Rule 15 motion to amend with an attachment of the proposed amendment or new pleading." 3 Moore's Federal Practice, ¶ 15.7 (3d ed. 2000). The Tenth Circuit Court of Appeals and other courts have recognized that a motion to amend must satisfy the requirements of

Rule 7(b) of the Rules of Civil Procedure.¹⁷ Federal Rule of Civil Procedure 7(b), which has been adopted verbatim in Utah's rule 7(b), requires all motions to "state with particularity the grounds therefor, and shall set forth the relief or order sought." Fed. R. Civ. P. 7(b). The Tenth Circuit has stated based upon this rule that:

[A] request for leave to amend must give adequate notice to the district court and to the opposing party of the basis of the proposed amendment before the court is required to recognize that a motion for leave to amend is before it.

Calderon v. Kansas Dept. of Social and Rehabilitation Services, 181 F.3d 1180, 1186-87 (10th Cir. 1999). In Calderon the court concluded that an abbreviated request for leave, "lacking a statement of the grounds for amendment and dangling at the end of her memorandum, did not rise to the level of a motion for leave to amend." Id. at 1187. Since the Utah rules "were fashioned after the Federal Rules of Civil Procedure, it is proper that [this Court] examine decisions under the Federal Rules to determine the meaning thereof." Winegar v. Slim Olson, Inc., 252 P.2d 205, 207 (Utah 1953).

Holmes, as in the Calderon case, merely set forth a naked request at the end of its opposition memorandum with no other guidance for leave to amend, which is not an appropriate motion under Rules 7(b) and 15. Therefore, the trial court properly denied

¹⁷ Rule 4-501(1)(A), Utah Rules of Judicial Administration, requires that "All motions . . . be accompanied by a memorandum of points and authorities . . ." Thus, it is contemplated that a separate motion and memorandum be filed and that such be filed so that an appropriate opposition can be submitted in the full light of day. In this case neither a motion nor a supporting memorandum was filed. For these reasons no motion to amend exists in the record.

Holmes' request. This Court "will not disturb a trial court's ruling on a motion to amend a Complaint absent a clear abuse of discretion." Neztsosie v. Meyer, 883 P.2d 920, 922 (Utah 1994). Holmes has presented no evidence of abuse in this case and none exists.¹⁸

CONCLUSION

For the foregoing reasons, Cook respectfully requests that this Court affirm the District Court's granting the summary judgment.

DATED this 22nd day of March, 2001.

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¹⁸ Further, Holmes factually alleged that the damages arose after September 3, 1998. Even if an amendment were to encompass some other legal theory, the facts already alleged are nevertheless fatal to the causation for any claim that could be set forth against Cook.


CERTIFICATE OF SERVICE VIA FIRST CLASS MAIL

I CERTIFY that on March 22, 2001, I served two copies of the foregoing Brief of Appellees Paul Cook and Cook Development, LC on the following persons at the following addresses:

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by mailing by first class mail with sufficient postage two true and accurate copies of the Brief of Appellees Paul Cook and Cook Development, LC. Said copies were placed in a sealed envelope addressed to counsel for Plaintiff-Appellant and Defendant-Appellee at the addresses set forth above.



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