

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 : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Alan L. Sullivan, Robert W. Payne; Snell & Wilmer; Gifford W. Price, Gregory N. Jones; Mackey Price & Williams; attorneys for appellee.

Barry N. Johnson, Daniel L. Steele; Bennett Tueller Johnson & Deere; attorneys for appellant.

Recommended Citation

Reply Brief, *Holmes Development v. Cook*, No. 20000745.00 (Utah Supreme Court, 2000).
https://digitalcommons.law.byu.edu/byu_sc2/564

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

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.)	

REPLY BRIEF OF APPELLANT HOLMES DEVELOPMENT, LLC

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

Alan L. Sullivan, Esq. (3152)
Robert W. Payne, Esq. (5534)
Snell & Wilmer L.L.P.
15 West So. Temple, Suite 1200
Salt Lake City, UT 84101
Attorneys for Defendant-Appellee First
American Title Insurance Company

Barry N. Johnson (6255)
Daniel L. Steele (6336)
Bennett Tueller Johnson & Deere, LLC
3865 S. Wasatch Blvd., Suite 300
Salt Lake City, UT 84109
Attorneys for Plaintiff-Appellant
Holmes Development, LLC

Gifford W. Price (2647)
Gregory N. Jones (5978)
Mackey Price & Williams
57 West 200 South, Suite 350
Salt Lake City, UT 84101
Attorneys for Defendants-Appellees
Paul Cook and Cook Development, LLC

FILED

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.)	

REPLY BRIEF OF APPELLANT HOLMES DEVELOPMENT, LLC

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

Alan L. Sullivan, Esq. (3152)	Barry N. Johnson (6255)
Robert W. Payne, Esq. (5534)	Daniel L. Steele (6336)
Snell & Wilmer L.L.P.	Bennett Tueller Johnson & Deere, LLC
15 West So. Temple, Suite 1200	3865 S. Wasatch Blvd., Suite 300
Salt Lake City, UT 84101	Salt Lake City, UT 84109
Attorneys for Defendant-Appellee First	Attorneys for Plaintiff-Appellant
American Title Insurance Company	Holmes Development, LLC

Gifford W. Price (2647)
Gregory N. Jones (5978)
Mackey Price & Williams
57 West 200 South, Suite 350
Salt Lake City, UT 84101
Attorneys for Defendants-Appellees
Paul Cook and Cook Development, LC

TABLE OF CONTENTS

<u>ARGUMENT</u>	<u>1</u>
I. FIRST AMERICAN AND COOK BOTH PROXIMATELY CAUSED HOLMES' DAMAGES BY PREPARING AND EXECUTING FAULTY DEEDS AND MISREPRESENTING COOK'S ABILITY TO CONVEY THE PROPERTY AT ISSUE.	<u>1</u>
A. First American Proximately Caused Holmes' Damages by Preparing Deeds That Made Holmes' Title Vulnerable and Subject to Attack.	<u>1</u>
B. Cook Proximately Caused Holmes' Damages by Selling Property it Did Not Own and in Signing Warranty and Special Warranty Deeds That Were Flawed and Did Not Properly Convey Title to Holmes.	<u>6</u>
II. FIRST AMERICAN AND COOK EACH ASSUMED ADDITIONAL CONTRACTUAL DUTIES BEYOND AND IN ADDITION TO THEIR OBLIGATIONS PURSUANT TO TITLE INSURANCE AND WARRANTIES IN DEEDS.	<u>9</u>
A. Cook Assumed the Additional Duty of Indemnification Pursuant to the Indemnity Agreements.	<u>10</u>
B. First American Performed Additional Work Outside of the Title Policy for Holmes, Thereby Assuming Additional Duties That Were Breached When First American Erred in Preparing Deeds.	<u>14</u>
III. HOLMES CLEARLY MOVED FOR LEAVE TO AMEND ITS COMPLAINT AND COMPLIED WITH THE REQUIREMENTS OF RULES 7 AND 15 OF THE UTAH RULES OF CIVIL PROCEDURE.	<u>16</u>

<u>CONCLUSION</u>	<u>19</u>
<u>CERTIFICATE OF SERVICE VIA FIRST CLASS MAIL</u>	<u>21</u>

TABLE OF AUTHORITIES

CASES

Brown v. Weis, 871 P.2d 552, 565 (Utah App. 1994)	<u>2</u>
Cache County v. Beus, 1999 UT App 134, 978 P.2d 1043	<u>2</u>
Cheney v. Rucker, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963)	<u>16</u>
Creason v. Peterson, 470 P.2d 403 (Utah 1970)	<u>12</u>
Hansen v. Oregon Short Line R.R. Co., 55 Utah 577, 582, 188 P. 852, 854 (1920)	<u>15</u>
Johnson v. Brinkerhoff, 89 Utah 530, 538-39, 57 P.2d 1132, 1136 (1936)	<u>17</u>
Lewis v. Moultrie, 627 P.2d 94, 98 (Utah 1981)	<u>18</u>
McCorvey v. UDOT, 868 P.2d 41, 45 (Utah 1993)	<u>4</u>
Steffensen v. Smith's Mgmt. Corp., 820 P.2d 482, 486 (Utah Ct. App. 1991 ..	<u>4, 8</u>
Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 30 Utah 2d 187, 193, 515 P.2d 446, 449-50 (1973)	<u>18</u>
Thompson v. LeGrand Johnson Constr. Co., 688 P.2d 489, 491 (Utah 1984)	<u>9</u>
Timm v. Dewsnup, 851 P.2d 1178, 1183 (Utah 1993)	<u>16</u>
Utah State Bar v. Summerhayes & Hayden Pub. Adjustors, 905 P.2d 867, 870 (Utah 1995)	<u>14</u>
Van Cott v. Jacklin, 226 P. 460 (Utah 1924)	<u>12</u>
Warren v. Robison, 19 Utah 289, 300, 57 P. 287, 290 (1899)	<u>15</u>

STATUTES

Utah Code Ann. § 31A-20-110(a) (Supp. 1985) 15

RULES

Rule 7(b)(1) of the Utah Rules of Civil Procedure 17

Rule 15 of the Utah Rules of Civil Procedure 17

ARGUMENT

I. FIRST AMERICAN AND COOK BOTH PROXIMATELY CAUSED HOLMES' DAMAGES BY PREPARING AND EXECUTING FAULTY DEEDS AND MISREPRESENTING COOK'S ABILITY TO CONVEY THE PROPERTY AT ISSUE.

First American and Cook each argue in similar fashion that they did not cause Holmes' damages. Both point to the successful litigation and defense of Holmes' title pursuant to the policy of title insurance in support of such arguments. However, First American and Cook ignore the clear law of proximate cause and the fact that there can be more than one proximate cause of Holmes' damages. Because these arguments are intertwined with the issues of what duties each of the Defendants are charged with in this matter and whether or not said duties were subsequently breached, Holmes addresses these issues on an individual basis, Defendant by Defendant.

A. First American Proximately Caused Holmes' Damages by Preparing Deeds That Made Holmes' Title Vulnerable and Subject to Attack.

First American myopically assumes that the only duties it owed to Holmes are those outlined by the policy of title insurance it issued to Holmes at closing. Even if such were true, First American nevertheless breached its obligations in defending Holmes' title to the land in question and the issue of whether or not there was a breach is a question of fact that cannot be resolved by summary

proceedings. Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990) (issue of whether or not party breached its contractual obligations is a question of fact for the factfinder).

First American fails to address in its Brief the argument asserted by Holmes in opposition to First American's Motion to Dismiss that the title insurance policy requires First American to take "appropriate action" in defense of Holmes' title and in honoring its contractual duties under the title insurance policy and that First American failed to take appropriate action when it prepared a flawed Special Warranty Deed that required litigation and a corrective affidavit to validate. (R. at 85-86; T. at 27-28.) The same argument is clearly made in Holmes' initial Appellate Brief. See Holmes Brief, p. 16, 20-26.

Again, the question of whether or not First American took appropriate action is a question of fact. Brown v. Weis, 871 P.2d 552, 565 (Utah App. 1994) ("whether a breach has occurred is generally one of fact, not law, and thus is ordinarily left to the jury or finder of fact.") (citations omitted). The trial court completely ignored this question in its ruling and order. (R. at 255-56, 261-65.) It also, in implicitly rejecting this argument, resolved a question of fact that was disputed by Holmes. Again, questions of fact that are material and disputed may not be resolved through summary judgment. Cache County v. Beus, 1999 UT

App 134, 978 P.2d 1043. The trial court erred in ignoring and/or rejecting out of hand Holmes' argument that First American did not take appropriate action to defend Holmes' title when it prepared a Special Warranty Deed that contained a clerical error and opened the door for an adverse claim to Holmes' title.

It is also undisputed that First American's own errors¹ set the stage for the eventual adverse claim to Holmes' title. First American prepared quit claim deeds designed to convey to Cook the interests of Lake Creek Farms and Lake Creek Associates in two parcels of real property eventually purchased by Holmes. (R. at 29-30, 164.) One of these deeds was clearly and fatally flawed. Id. First American failed to discover its own error in two subsequent closings involving the property Holmes purchased. (R. at 3, 164-65.) When it discovered its errors, First American attempted to remedy the defect in Holmes' title by preparing a Special Warranty Deed that contained a clerical error later exploited by parties adverse to Holmes' title. (R. at 3, 166-67.)

¹First American and Cook conveniently construe Holmes' use of the term "negligence" to always imply a tort-based cause of action that is necessarily barred by the economic loss rule. To the contrary, Holmes' use of that term directly refers to the breach of contract and warranty claims raised by Holmes in its pleadings and arguments before the trial court. Put in simpler terms, Holmes does not believe Cook or First American intentionally caused Holmes' damages or purposefully breached their contractual obligations to Holmes. Instead, Holmes argues that Defendants' negligent behavior resulted in breaches of the contractual obligations and duties they each owed to Holmes.

This series of errors and lapses on First American's part placed Cook in a position where it was, at the very least, misled and under the erroneous assumption that it held with good title to the land it eventually sold to Holmes, even though three-fourths of the property was still owned by Lake Creek Farms, LLC, not Cook. It is less than genuine for First American to gloss over this fact and argue that it had nothing to do with the defect in Holmes' title when, but for First American's own mistakes, the Keystone litigation would not have been possible and the Warranty Deed from Cook to Holmes would have effectively conveyed title to Holmes.

Utah law is clear that there can be more than one proximate cause of an injury. McCorvey v. UDOT, 868 P.2d 41, 45 (Utah 1993); Steffensen v. Smith's Mgmt. Corp., 820 P.2d 482, 486 (Utah Ct. App. 1991). Furthermore, the question of causation is one for the jury and is a question of fact, not law. Id. Therefore, First American's arguments about causation are just as inappropriate and irrelevant on appeal as they were before the trial court. In fact, the entire line of argument about causation is evidence in-fact of the trial court's errors.

Holmes clearly presented evidence and argued the causation issue before the trial court. (R. at 81-88, 78-146; T. at 27.) Specifically, Holmes argued that "but for First American's negligence and breach of its contractual obligations,

Keystone could not have pursued its lawsuit and Holmes would not have been prevented from selling its lots and improving on its investment.” (R. at 84, paragraph 16; T. at 27.)² Holmes made similar arguments in its Brief, despite assertions to the contrary by First American. Holmes’ Brief argues that the Warranty Deed prepared by First American and signed by Cook did not convey title to Holmes. (Holmes’ Brief, p. 12.) Holmes further argued that this defect and the subsequent defect in the flawed Special Warranty Deed that First American prepared opened the door for Keystone to lay siege to Holmes’ title. (Holmes’ Brief, p. 14.) Similar references to causation are laced throughout Holmes’ Brief. (Holmes’ Brief, p. 16, 17, 21, 23.)

In short, Holmes’ arguments demonstrate a dispute of fact regarding causation that was erroneously resolved by the trial court in First American’s favor. By ruling for First American, the trial court resolved a material question of fact through summary judgment and that error must be reversed.

²Additional statements of fact further show that Holmes argued before the trial court that First American’s mistakes were the cause of Holmes’ damages. (R. at 84, paragraphs 17 and 18.)

B. Cook Proximately Caused Holmes' Damages by Selling Property it Did Not Own and in Signing Warranty and Special Warranty Deeds That Were Flawed and Did Not Properly Convey Title to Holmes.

Cook also argues that it did not cause Holmes' damages and that Holmes failed to meet its burden in briefing or demonstrating that Cook was a proximate cause of Holmes' damages. To the contrary, Holmes properly argued at the trial court that Cook was a proximate cause of Holmes' damages. (R. at 165-66, 236; T. at 31-33.)

The same legal arguments discussed above in response to First American's Brief apply to Cook. Cook signed a Warranty Deed that did not convey title to Holmes as promised. (R. at 164, 166, 196.) Cook then, in concert with First American's request, signed yet another deed, this time a Special Warranty Deed, in an effort to correct the errors perpetuated by the previous deeds to Cook and then to Holmes. (R. at 166.) In the Keystone litigation, Cook further attempted to correct the previous errors by executing and recording a corrective affidavit wherein he outlined his intentions with respect to the previous deeds. (R. at 130-37.) Cook does not dispute that the Special Warranty Deed contained an error. (R. at 166.) Nevertheless, Cook and First American ignore this fact and argue that their successful defense of Holmes' title acts as a magic wand and erases, as a

matter of law, the intervening 8 months wherein Holmes was unable to market or sell lots.

The analogy is simple and logical. The successful defense of Holmes' title and the eventual judicial validation of the Special Warranty Deed by a court of law did not restore Holmes to the status quo. It did not give back to Holmes the intervening eight (8) months where it could not sell lots, thereby losing profits, sales and momentum.

The need for the Special Warranty Deed and the subsequent litigation, lis pendens and corrective affidavit would have never arisen had First American and Cook not erred in conveying title to Holmes. Also, Cook and First American cannot point to any legal authority that allows them to escape the consequences of their actions simply because Holmes' title was successfully defended. That argument may have merit for First American insofar as its obligations under the title insurance policy may be concerned but it does not absolve Cook or First American for their breach of the contractual duties each owed to Holmes by virtue of obligations each assumed outside and beyond the title insurance policy. These additional duties are discussed below in greater detail.³

³The successful defense of Holmes' title cures but one of the five warranties Cook gave to Holmes in the Warranty Deed. Holmes established before the trial court and in its initial Brief that the other warranties given to Holmes (in addition to the promise to defend) were breached and have yet to be cured. (R. at 235-39; Holmes' Brief, 33-37.)

The definition of proximate cause is well known.

“Proximate cause is ‘that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.’”

Steffensen, 820 P.2d at 486 (citations omitted).

Here, the perpetual chain of errors that caused Holmes’ damages began when First American negligently prepared a deed that Cook signed in an effort to convey property owned by Lake Creek Farms, LLC to Cook. That deed undisputedly identified the wrong grantor. (R. at 29-31, 164.) Thereafter, Cook, thinking they owned the property when they did not, attempted to convey the property to Holmes. Again, First American was involved in this transaction. Id. The actors are the same and they perpetuated their previous errors and passed them on to Holmes. There is no break in the chain of causation.

Thereafter, when First American discovered its series of errors, it, along with Cook, attempted to remedy the fatal flaw in Holmes’ title by preparing and executing a Special Warranty Deed that contained a clerical error. (R. at 31, 166.) It was this Special Warranty Deed and the clerical error therein (along with previous infective conveyances) that Keystone specifically exploited in its legal action adverse to Holmes’ title. (R. 63-77, 123-37.) For the sake of argument,

Holmes agrees that Keystone's efforts to exploit these errors were a cause of Holmes' damages. However, but for the errors of Cook and First American, Keystone could not have pursued claims adverse to Holmes' title, regardless of its motivation. Holmes argues that these facts and Cook's errors (along with those of First American) are proximate causes of Holmes' damages. (R. at 4-5, paragraphs 8-10; T. at 31-32.)⁴ At the very least, the issue of causation is a question for the jury, not the trial court. Thompson v. LeGrand Johnson Constr. Co., 688 P.2d 489, 491 (Utah 1984).

II. FIRST AMERICAN AND COOK EACH ASSUMED ADDITIONAL CONTRACTUAL DUTIES BEYOND AND IN ADDITION TO THEIR OBLIGATIONS PURSUANT TO TITLE INSURANCE AND WARRANTIES IN DEEDS.

First American and Cook each argue on appeal that whatever duties they may have owed to Holmes were covered and satisfied by the policy of title insurance and by First American's successful defense of Holmes' title by virtue of that insurance. Similar arguments were presented to and accepted by the trial court. Nevertheless, Holmes has, at each stage of this litigation, argued that both

⁴Holmes does not dispute the assertion that the Keystone litigation was without merit from its perspective. Nevertheless, Keystone could not have brought its action or had colorable legal arguments and claims but for the chain of errors created by First American and Cook. Cook and First American opened the door and a less than genuine, but cognizable claim in the form of Keystone, walked through. (T. at 28.)

Cook and First American assumed and breached additional duties beyond those associated with title insurance.⁵

A. Cook Assumed the Additional Duty of Indemnification Pursuant to the Indemnity Agreements.

On May 18, 1998, Cook and Holmes executed an Indemnity Agreement. In the Indemnity Agreement, Cook covenanted to indemnify and hold Holmes harmless 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).) The Indemnity Agreement was executed on the very day Holmes consummated its purchase from Cook. Holmes is hard pressed to explain, let alone contradict, Cook's unexplainable and vaporous argument that this language does not apply to Holmes' damages. Did Cook sign a Warranty Deed that did not convey title to Holmes? Yes. (R. at 196-97.) Did Cook sign a Special Warranty Deed that contained an error and required litigation and a corrective affidavit to validate? Yes. (R. at 123, 130-37, 199-213.) Cook would have this Court accept, as the trial court did, the argument that the provisions of

⁵Holmes also maintains that First American breached its contractual obligation under the policy of title insurance that requires it to take "appropriate action" in defending Holmes' title or in fulfilling its obligations under the title insurance policy. (R. at 85-86.)

the Indemnity Agreement were satisfied by the successful defense of Holmes' title. However, the clear language of the Indemnity Agreement makes Cook liable for "any damage, loss or deficiency" and does not include a disclaimer or exception for title insurance.

Paragraph (a) of the Indemnity Agreement does contain an exception that releases Cook from liability situations covered by the title policy. In paragraph (a) Cook agrees to indemnify Holmes from:

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.

(R. at 180, paragraph (a) (emphasis added).) Had Holmes and Cook desired to include the exception found in paragraph (a) of the Indemnity Agreement in paragraph (b) it would have been a simple task. Of course, including the title insurance exception in paragraph (b) would not have changed matters. The title insurance policy does not cover Holmes' damages because First American pursued an alternative course in defending title as opposed to indemnifying Holmes. (R. at 139-46.) Put in other terms, Cook agreed in paragraph (b) of the Indemnity Agreement to indemnify Holmes for any and all damages Holmes sustained by virtue of Cook's errors, negligence and breach of warranties

regardless of whether or not Holmes' damages are covered by the title insurance policy.⁶ (R. at 180.)

Cook again relies on case law for the proposition that successful defense of Holmes' title precludes Holmes from collecting its damages from Cook. Again, the Indemnity Agreement says otherwise and is an affirmative covenant assumed by Cook. Furthermore, case law in Utah clearly allows parties to collect damages they sustain when one or more warranties in deeds of conveyance are breached. See Creason v. Peterson, 470 P.2d 403 (Utah 1970); Van Cott v. Jacklin, 226 P. 460 (Utah 1924).⁷

Also, Holmes' Complaint alleges that Cook breached the Indemnity Agreement by failing to indemnify Holmes for its damages. (R. at 17, paragraph 102.) This is a direct "breach of contract" claim. Additionally, Holmes' Second

⁶Cook illogically argues that the principle of indemnification applies only to damage caused by a third party and does not apply to the indemnitor. (Cook's Appellate Brief, p. 27.) However, Cook utterly fails to offer any evidence or support in case law or statute for its position. In fact, Black's Law Dictionary defines "indemnify" with the following language. "To restore the victim of a loss, in whole or in part To save harmless; to secure against loss or damage. . . ." Nothing in Black's Law Dictionary or in case law supports the proposition that an indemnitor's obligation to indemnify is triggered only when the loss is caused by someone other than the indemnitor.

⁷Cook gallantly attempts, but fails to distinguish Creason and Van Cott. Both stand for the proposition that where there has been a breach of warranty, the grantee is entitled to recover "the damage he suffers as a result of the breach thereof." Creason, 470 P.2d at 404. Neither Creason or Van Cott restrict the recoverable damages to only those situations where the grantee actually loses a portion of what he or she purchased.

Cause of Action references both direct breach of contract claims against First American and Cook as well as indirect third party beneficiary claims. (R. at 15.) Specifically, Holmes' Complaint references the breach of contract that occurred with the preparation, execution and recording of the Warranty Deed signed by Cook and designed to convey title directly to Holmes. (R. at 15, paragraph 86.) These questions of fact simply cannot be resolved through summary judgment and the trial court clearly erred when it did just that.⁸

In short, Cook assumed several duties. Warranties were given through two different deeds. The second Special Warranty Deed was specifically used in the context of Holmes' efforts to procure financing. (R. at 31, 84-85, 130-37, 165-66.) Holmes is entitled to recover its damages under the breach of warranty issues alone. However, Holmes is also entitled to indemnification for "any damage, loss or deficiency" Holmes sustains by virtue of Cook's misrepresentations. (R. at 180.) Holmes' Complaint and the arguments it presented to the trial court are

⁸Both Cook and First American argue that Holmes' Complaint says nothing about breach of contract claims and, instead, refers only to breaches in the third party beneficiary context. Perhaps Holmes' claims are not artfully pled or as clear as they could be. However, direct breach of contract claims are referenced in Holmes' Complaint and, when coupled with Holmes' arguments in opposition to Defendants' motions to dismiss and Holmes' request and motion to amend its Complaint, clearly place the trial court and the parties on notice of Holmes' claims.

clear and unmistakable on this issue. Either way, Cook is liable for Holmes' damages even though title was eventually quieted in Holmes.

B. First American Performed Additional Work Outside of the Title Policy for Holmes, Thereby Assuming Additional Duties That Were Breached When First American Erred in Preparing Deeds.

Had First American simply issued a title insurance commitment report and title insurance in the transaction between Holmes and Cook, its arguments would have some merit. However, First American ignores the meaningful evidence and clear questions of fact presented by Holmes' arguments before the trial court and in its initial Brief. Specifically, First American conducted the closing and prepared and recorded deeds, activities that are clearly separate and apart from the issuance of title insurance. (R. at 30-31, 119-21, 123-28, 130-37.)

First American would have this court accept the same illogical argument that the trial court accepted, which is that the additional services performed by First American for a profit are nevertheless gratuitous and fall under the protective umbrella of title insurance. Cook and Holmes did not have to use First American for the closing. They could have had their own legal counsel prepare the deeds and handle the closing. This would have been a logical approach because the preparation of documents that fix legal relationships between parties constitutes the practice of law. Utah State Bar v. Summerhayes & Hayden Pub. Adjustors,

905 P.2d 867, 870 (Utah 1995). Even if the preparation of deeds does not constitute the practice of law (a point Holmes does not concede), preparing deeds in a professional capacity, either gratuitously or for a fee, brings with that service the duty to do so in a competent and professional manner.⁹

Holmes' argument on this point is simple and ignored by First American. The settlement statement shows that First American charged Holmes and Cook \$300.00 each for settlement and closing fees (R. at 120, line 1101), \$120.00 to Cook for releases and \$15.00 to Holmes (R. at 120, line 1201), for recording an ineffective and worthless Warranty Deed in violation of the law (R. at 90, n.5). See Utah Code Ann. § 31A-20-110(a) (Supp. 1985) Even though it feels justified in charging these fees, First American argues that the services it rendered merit charging a fee to the parties to the transaction. It then goes on to argue that

⁹First American cannot argue that its failure to charge for the preparation of the Warranty Deed signed by Cook at closing was gratuitous and that it had no duty to prepare the deed in a competent and professional manner. Utah law regularly and consistently holds volunteers or gratuitous providers of services liable when they breach the duties that attach in that process. See Hansen v. Oregon Short Line R.R. Co., 55 Utah 577, 582, 188 P. 852, 854 (1920) (carrier held liable for damages to non-paying passenger); Warren v. Robison, 19 Utah 289, 300, 57 P. 287, 290 (1899) (the duties attached to service as an officer or director of a corporation may not be avoided because the officer or director served gratuitously and without compensation). First American also fails to refer to the Utah Liability Protection for Volunteers Act (the "Act") found at Utah Code Annotated § 78-19-1. Of course, this statutory exception to the general rule that duties of care and liability for the breach of those duties attach even in situations where payment occurs does not help First American. The Act only applies to non-profit entities and other individuals performing services for non-profit corporations or entities. It has no application here.

despite these charges, it did not charge the parties for deed or document preparation. It is less than genuine for First American to argue that it is nevertheless immune from criticism or suit because it also sold the parties title insurance and successfully defended a challenge to Holmes' title.

In short, First American wore two hats in the transaction. It insured title and, for a fee, assisted the parties in closing the transaction. Even if First American performed all of these services free of charge and simply out of courtesy as a reward for purchasing title insurance, a mere volunteer may still be held liable for its mistakes and form a contractual relationship even when no fees are assessed. At the very least, a question of fact is presented by the charges assessed by First American.

III. HOLMES CLEARLY MOVED FOR LEAVE TO AMEND ITS COMPLAINT AND COMPLIED WITH THE REQUIREMENTS OF RULES 7 AND 15 OF THE UTAH RULES OF CIVIL PROCEDURE.

In Utah, “[the Rules of Civil Procedure] must all be read in the light of their fundamental purpose of both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.” Timm v. Dewsnup, 851 P.2d 1178, 1183 (Utah 1993) (quoting Cheney v. Rucker, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963)). The Utah Supreme Court also stated more specifically that “[t]he policy of the law is

toward liberality in the allowance of amendments and to regard them favorably in order that the real controversy between the parties may be presented, their rights determined, and the cause decided.” Id. (quoting Johnson v. Brinkerhoff, 89 Utah 530, 538-39, 57 P.2d 1132, 1136 (1936)).

Rule 7(b)(1) of the Utah Rules of Civil Procedure is also important in this analysis. It states that:

[a]n application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(emphasis added). Here, Holmes requested leave of court to amend its complaint.

Point III of Holmes’ Memorandum of Points and Authorities in Opposition to First American’s Motion to Dismiss is devoted entirely to Holmes’ request to amend its Complaint. (R. at 92.) Holmes also requested the same opportunity to amend in its Memorandum in Opposition to Cook’s Motion to Dismiss. (R. at 245.)

Holmes admits that it did not file a separate pleading that was labeled as a “Motion.” Holmes also admits that it did not file a draft of the amended complaint in conjunction with its request for leave to amend. However, no such requirements are imposed by either Rule 7 or 15 of the Utah Rules of Civil Procedure. In fact, Rule 7(b)(1) allows a party to avoid the requirement of a

writing simply by making the motion during “a hearing or trial.” This Holmes did. Holmes specifically referenced its desire to amend its Complaint in the hearing held on First American’s and Cook’s motions to dismiss. (T. at 27.)

The Utah Supreme Court errs in favor of allowing amendments despite the fact that, at times, the manner in which leave of court is sought is less than artfully pled.

Some tempest has been raised about the court allowing the plaintiff to make tardy amendments to the pleadings. . . . The pleadings are never more important than the case that is before the court. . . . There can be no prejudice in this case because we’ll give ample time for an answer. . . . This is in harmony with what we regard as the correct policy: of recognizing the desirability of the pleadings setting forth definitely framed issues, but also of permitting amendment where the interest of justice so requires, and the adverse party is given a fair opportunity to meet it.

Lewis v. Moultrie, 627 P.2d 94, 98 (Utah 1981) (quoting Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 30 Utah 2d 187, 193, 515 P.2d 446, 449-50 (1973)).

The argument that Holmes did not offer sufficient detail about what it would do if allowed to amend its Complaint is also less than genuine. In Point III of its Memorandum in Opposition to First American’s Motion to Dismiss, Holmes clearly refers to the arguments and positions identified in detail in the body of its opposing memorandum. (R. at 92.) Those arguments are arguably part of

Holmes' Complaint, but would have been clarified and more artfully pled to include the claims that First American and Cook assumed additional contractual duties beyond those associated with the title insurance policy and deeds and that they breached those obligations.

In short, First American and Cook cannot point to any prejudice that would have flowed from a decision by the trial court to allow Holmes leave to amend its Complaint. No discovery had taken place. There was no established trial date. The trial court, First American and Cook were all clearly aware of Holmes' request to amend prior to and during the hearing. (R. at 151-52; T. at 27.) In fact, nothing had occurred beyond the filing of Holmes' Complaint and the Defendants' respective motions to dismiss. Unfortunately, the trial court ignored Holmes' arguments and chose to reach a rather harsh and abrupt conclusion that deprived Holmes of the opportunity to be heard and its grievances addressed.

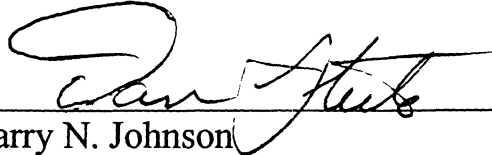
CONCLUSION

Holmes' request for relief on appeal is simple. Allow its case to be fully heard and considered before the same is dismissed out of hand. First American and Cook made mistakes that damaged Holmes. That much is not in dispute.

Holmes respectfully requests this Court to reverse the trial court's orders granting summary judgment and remand this case to the trial court for further proceedings.

Dated this 23 day of May, 2001

BENNETT TUELLER JOHNSON & DEERE

A handwritten signature in black ink, appearing to read "Barry N. Johnson", is written over a horizontal line.

Barry N. Johnson

Daniel L. Steele

Attorneys for Plaintiff and

Appellant Holmes Development, LLC

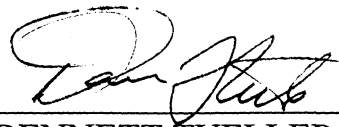
CERTIFICATE OF SERVICE VIA FIRST CLASS MAIL

I CERTIFY that on May 23, 2001, I served two copies of the foregoing Reply Brief of Appellant Holmes Development, LLC on the following persons at the following addresses:

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 Holmes Development, LLC. Said copies were placed in a sealed envelope addressed to counsel for Defendants/Appellees at the addresses set forth above.



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