

2000

Holmes Development, LLC v. Paul Cook, Cook Development, and First American Title Insurance Company : 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.

Appellate Court No. 20000745-SC

Trial Court No. 990910568

Priority No. 15

BRIEF OF APPELLEE FIRST AMERICAN TITLE INSURANCE COMPANY

Appeal from Third Judicial District Court, Salt Lake County,
Judge J. Dennis Frederick

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UTAH**

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Did the trial court properly dismiss the claims of appellant Holmes Development, LLC (hereinafter “Holmes”) on the ground that First American’s negligence was not the proximate cause of Holmes’ injuries? 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 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. Did the trial court properly dismiss Holmes’ claims on the ground that the claims are barred as a matter of law by the express provisions of the title insurance policy from First American to Holmes? 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).

3. Should the appellate court affirm the decision of the trial court because Holmes failed to appeal and argue all grounds upon which the trial court dismissed the claims against First American? Issues that appellant fails to raise in its opening brief are

waived and will not be considered by the appellate court. Brown v. Glover, 16 P.3d 540 (Utah 2000).

4. Did the trial court properly deny Holmes' request for leave to amend set forth at the end of its memorandum opposing First American's motion to dismiss? 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:

[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

In April 1998, appellant Holmes Development, LLC (hereinafter "Holmes") purchased approximately 400 acres of property (hereinafter the "Property") from appellee Cook Development, LC (hereinafter "Cook Development") for development of residential building lots. As part of that transaction, Cook Development provided Holmes with a title insurance policy from appellee First American Title Insurance Company (hereinafter "First American"). In July 1998, First American discovered a

defect in Holmes' chain of title. First American set about to cure the defect and, by September 1998, had cured the defect.

In November 1998, two entities, Premier Homes, L.C. ("Premier") and Keystone Development, L.C. ("Keystone"), entered into a sham transaction in which Premier purported to convey to Keystone a portion of the Property. On the same day, Keystone filed a quiet title action against Holmes claiming to own approximately 323 acres of the Property. Pursuant to the Policy, First American hired counsel to represent Holmes in the action brought by Keystone. Within eight months Holmes' counsel had obtained summary judgment against Keystone on its non-meritorious claims.

Holmes claims to have suffered lost profits and other damages as a direct result of the pending Keystone litigation. Instead of suing Premier and Keystone for their collusive conduct and for Keystone's non-meritorious lawsuit, Holmes filed suit against Paul Cook, Cook Development, and First American. Recognizing that Premier and Keystone were the cause of Holmes' alleged damages, the trial court granted summary judgment to First American, Cook Development and Cook Development on all of their claims. The trial court also held that Holmes' claims were barred by the Policy. The Court also dismissed Holmes' claims against First American on the ground that Holmes failed to comply with the economic loss doctrine, on the ground that Holmes could not prove reasonable reliance for its negligent misrepresentation claim, and on the ground that Holmes was not an intended beneficiary of the contract between Cook Development and First American. Holmes then appealed the trial court's ruling on summary judgment.

In its brief to this Court, herein, Holmes addressed only two of the district court's five independent grounds for dismissal.

Course of Proceedings and Disposition Below

On October 20, 1999, Holmes filed its Complaint against Paul Cook, Cook Development and First American asserting claims for negligence, breach of contract as a third party beneficiary, negligent misrepresentation, breach of warranty and indemnification. (R. 1-19). On November 29, 1999, First American filed its Motion to Dismiss or in the Alternative for Partial Summary Judgment. (R. 23-42). Holmes filed its opposition to the motion on January 5, 2000. R. 78-146. On January 21, 2000, First American filed its reply. (R. 147-153). Cook and Cook Development also filed a motion to dismiss or for summary judgment which was fully briefed by April 4, 2000. (R. 159-215; 231-246 & 247-253). On May 18, 2000, the trial court entered a Summary Judgment in favor of First American on all Holmes' claims against First American. (R. 261-265). On August 2, 2000, the trial court entered Summary Judgment in favor of Cook and Cook Development. (R. 266-269). On August 24, 2000, Holmes filed its notice of appeal.

Statement of Relevant Facts

Transfers of the Property from Cook to Holmes

In 1993, Cook Development was the owner of 396 acres of property near Heber, Utah which it planned to develop and which it named Lake Creek Farms (the "Property"). (Complaint, ¶¶ 8-10, R. 3) In or about 1997, in hopes of obtaining

financing help, Cook Development associated with another developer, Premier Homes, L.C. (“Premier”) for the purpose of developing the Property. (Complaint, ¶¶ 14-16, R. 4). Cook Development and Premier formed two limited liability companies, Lake Creek Farms, LC (“Lake Creed Farms”) and Lake Creek Associates, LC (“Lake Creek Associates”) (Complaint, ¶ 17, R. 4). Cook Development conveyed 323 acres of the Property to Lake Creek Farms and 73 acres of the Property to Lake Creek Associates. (Complaint, ¶ 18, R. 4).

Because Premier failed to provide its promised financing, in approximately 1998, Cook Development and Premier agreed to part ways. As part of this agreement, Premier agreed to execute and sign deeds on behalf of Lake Creek Farms and Lake Creek Associates conveying all of the Property back to Cook Development. (Complaint, ¶¶ 22-24, R. 5). In order to effectuate the transfer, two Quit Claim Deeds were prepared by First American, one describing the 323 acres and one describing the 73 acres. (Complaint, ¶ 25-30, R. 5-6). Each deed was signed by Cook Development and by Premier on March 13, 1998. (Complaint, ¶ 30, R. 6). Unfortunately the Quit Claim Deed that described the 323 acres contained a typographical error and identified Lake Creek Associates, rather than Lake Creek Farms, as the grantor of that acreage. (Complaint, ¶¶ 31-32, R. 6). It was undisputed below and remains undisputed on appeal that in March 1998 Cook Development, Premier and First American knew and understood that all of the property owned by Lake Creek Farms and Lake Creek Associates was intended to be reconveyed to Cook Development in March 1998. (Complaint, ¶¶ 24-33, R. 5-6; Appellant’s Brief, pp. 7-8).

Holmes had no involvement with the Property until April 1998 when Cook Development began to market the Property. (Complaint, ¶ 39, R. 7). In April 1998, Holmes presented Cook Development with an offer to buy the Property. (Complaint, ¶ 40, R. 7). On or about May 20, 1998, the sale of the Property from Cook Development to Holmes closed, with Cook Development issuing a Warranty Deed to Holmes. The Warranty Deed was prepared by First American, and First American was retained to provide title insurance and to assist with the closing. (Complaint, ¶ 41, R. 7).

First American provided Holmes with an Owners Policy of Title Insurance (hereinafter the “Policy”). (R. 44 & 49-55). A true and correct copy of the Policy is attached hereto as Exhibit “A.” The Policy insured the entire Property, including both parcels from Lake Creek Farms and from Lake Creek Associates. Id. It insured Holmes against loss or damage sustained or incurred by reason of any defect in the title to the policy. (Policy, R. 49). In the event of a title defect, the Policy permitted First American “to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured.” (Policy, ¶ 4(b), R. 50). The policy provided that if First American “establishes title, or removes the alleged defect . . . all as insured, in a reasonably diligent manner by any method . . . it shall have fully performed its obligations with respect to the matter and shall not be liable for any loss caused thereby.” (Policy, ¶ 9(a), R. 50-51)).

In July 1998, First American discovered that the March 1998 Quit Claim Deed relating to the 323 acres portion of the Property inadvertently identified Lake Creek Associates, rather than Lake Creek Farms, as the grantor. (Complaint, ¶ 50, R. 9).

Pursuant to its obligation to Holmes under the Policy, First American immediately proceeded to remedy the problem. In July 1998, First American requested Cook Development and Premier to execute a new Quit Claim Deed relating to the 323 acres. (Complaint, ¶ 51, R. 9). Premier refused to execute the new Quit Claim Deed and, for the first time, took the position that it did not intend for Lake Creek Farms to convey the 323 acre parcel to Cook Development. (Complaint, ¶ 52, R. 9).

Rather than institute a lawsuit for reformation of the original Quit Claim Deed, First American elected to correct the problem and bypass a legal battle with Premier by preparing a special warranty deed that would run from Lake Creek Farms to Holmes (the “Special Warranty Deed”). (Complaint, ¶ 54, R. 10). First American determined that Paul Cook could sign the Special Warranty Deed for Cook Development as a member of Lake Creek Farms. The Special Warranty Deed was signed by Paul Cook on September 3, 1998 and effectively conveyed the Property to Holmes. (Special Warranty Deed, R. 123).

Premier and Keystone’s Collusive Behavior and the Keystone Lawsuit

Despite Premier’s knowledge that the 323-acre parcel had already been conveyed to Holmes, on November 25, 1998, Premier purported to convey the same parcel from Lake Creek Farms to Keystone Development, L.C. (“Keystone”). (Complaint, ¶ 62, R. 11). On the same day, Keystone filed a quiet title action against Holmes and others claiming to be the owner of the 323-acre parcel. (Complaint, ¶ 63, R. 11). Keystone also filed a lis pendens on the 323-acre parcel. (Complaint, ¶ 64, R. 11). In its lawsuit, Keystone argued that Cook Development did not have authority to convey the 323 acre-

parcel from Lake Creek Farms to Holmes because Premier, and not Cook Development, was the manager of Lake Creek Farms and only the manager had authority to convey the 323-acre parcel. (R. 63-68).

On or about December 7, 1998, Holmes provided First American with notice of the Keystone litigation. (Heiner Affid., ¶ 7, R. 44). Within ten days of receiving that notice, First American undertook the defense of Holmes and hired counsel to defend Holmes. (Heiner Affid., ¶¶ 18-19, R. 45). Within eight months, counsel for Holmes obtained summary judgment against Keystone on all of its claims. (Heiner Affid., ¶¶ 11-13 & Exhibit D, R. 45 & 63-67).

On June 29, 1999, the trial court in the Keystone litigation issued its summary judgment on all of Keystone's claims. (Summary Judgment, R. 63-67). A true and correct copy of the summary judgment is attached hereto as Exhibit "B." In that order, the court ruled as a matter of law that Cook Development, as a member of Lake Creek Farms, had the statutory authority to convey the 323-acre parcel from Lake Creek Farms to Cook Development. (Id., ¶¶ 1-6, R. 64-65). The court also found that there was "no genuine issue of material fact that Paul H. Cook, as a member of Cook Development, LC, executed the Special Warranty Deed having Lake Creek Farms, as grantor, and Holmes, as grantee" (Id., ¶ 7, R. 65-66). The court concluded that the Special Warranty Deed was a valid and binding conveyance, (Id., ¶ 8, R. 66), that the Special Warranty Deed was filed before the deed from Premier to Keystone, (Id., ¶ 9, R. 66), and that Keystone had both constructive and actual knowledge that the property had been

conveyed to Holmes before Keystone “acquired” the 323 acres from Premier. (Id., ¶ 9, R. 66). Keystone did not appeal the summary judgment. (Heiner Affid., ¶14, R. 45).

Holmes’ Claims Against First American

In October 1999, Holmes brought suit against Paul Cook, Cook Development, and First American for damages allegedly caused by Keystone’s lawsuit. According to Holmes, it decided not to pursue its claims against Keystone “because it has nothing, has no—no—no ability to compensate Holmes Development.” (Transcript of Summary Judgment Hearing, p. 26, ll. 16-21).

Holmes asserted three claims against First American in the court below. First, Holmes alleged that First American was negligent in the preparation of the original Quit Claim Deed relating to the 323-acre parcel from Lake Creek Farms to Cook, the Warranty Deed from Cook Development to Holmes, and the Special Warranty Deed from Lake Creek Farms to Holmes. (Complaint, ¶¶ 74-76, R. 13). Holmes claimed that First American’s negligence caused Holmes’ injuries. Holmes’ second claim for relief was a breach of contract/third-party beneficiary claim. Holmes alleged that it was an intended third-party beneficiary of the contract between Cook Development and First American pursuant to which First American prepared the Quit Claim Deed for the transfer of the 323-acres from Lake Creek Farms to Cook Development. (Complaint, ¶¶ 81-87, R. 14-15). Holmes’ third claim for relief was for negligent misrepresentation. Holmes claimed that the Quit Claim Deed and the Special Warranty Deed were “representations” from First American upon which Holmes relied to its detriment. (Complaint, ¶¶ 89-94, R. 15-

16). Holmes alleged that the deeds permitted Keystone to pursue its “less than genuine” lawsuit. Id.

Significantly, Holmes did not sue First American for breach of the Policy or for breach of any other alleged contract between First American and Holmes. (Complaint, R. 1-19). In fact, Holmes acknowledged to the trial court that First American had fully complied with its contractual obligations to Holmes. In its memorandum opposing First American’s motion for summary judgment, Holmes stated:

Holmes does not dispute the fact that First American hired competent legal counsel to defend Holmes in the Keystone litigation. Ultimately the resolution of the Keystone lawsuit was favorable and quieted title in the land in question to Holmes. Holmes also does not dispute that First American’s successful defense of the Keystone litigation occurred in a reasonable amount of time and in a professional manner. . . .

(R. 10, n.2).

First American’s Summary Judgment Against Holmes

On May 18, 2000, the district court entered summary judgment against Holmes. (Summary Judgment, R. 261-264). A true and correct copy of the summary judgment against Holmes is attached hereto as Exhibit “C.” The district court dismissed Holmes’ claims on five independent theories. First, the court dismissed Holmes’ claims because First American had cured any title defects by March 13, 1998, two months before Keystone filed its claim. (Id., ¶ 2(a)). As a matter of law, First American was not the cause of Holmes’ damages. Second, the court dismissed Holmes’ claims on the ground that Holmes’ relationship with First American was contractual and, because First American diligently and timely cured all Holmes’ title problems in accordance with the

Policy, Holmes could not recover for its alleged injuries from First American. (*Id.*, ¶ 2(b)). Third, the court dismissed Holmes' negligence and negligent misrepresentation claims on the basis of the economic loss rule. (*Id.*, ¶ 2(c)).¹ Fourth, the court dismissed Holmes' negligent misrepresentation claim on the ground that First American could not, as a matter of law, have expected Holmes to rely upon any of its conduct with respect to the Quit Claim Deeds.² Finally, the Court dismissed Holmes' third party beneficiary claim on the ground that First American and Cook Development did not, as a matter of law, intend to confer a benefit upon Holmes in March 1998.³

SUMMARY OF ARGUMENTS

Holmes' brief on appeal completely ignores the primary basis for the trial court's ruling below. The trial court concluded that Holmes' damages, if any, were caused not by any conduct of First American, but by the collusive behavior of Premier and Keystone and the non-meritorious lawsuit of Keystone. By the date the Keystone litigation was instituted, First American had prepared the Special Warranty Deed, which fully and completely resolved all previous title defects. The trial court in the Keystone litigation determined as a matter of law that the Special Warranty Deed was a valid transfer of the Property. Therefore, Holmes' damages, if any, were caused not by any breach of First American's duty, but by the subsequent wrongful actions of Keystone.

First American fully complied with all of its obligations under the Policy. By September 1998, First American had cured the defect in Holmes' title. Thereafter, First

¹ In its appeal, Holmes has not challenged this basis for the trial court's decision.

² In its appeal, Holmes has not challenged this basis for the trial court's decision.

³ In its appeal, Holmes has not challenged this basis for the trial court's decision.

American promptly defeated the Keystone lawsuit. Holmes acknowledged to the trial court First American's fulfillment of its contractual obligations. Holmes did not provide the trial court with any evidence that First American breached any other duty to Holmes outside of the scope of the Policy, and the judgment below should be affirmed.

This Court should also affirm the trial court's ruling because Holmes has neglected to address three of the five grounds for the Court's ruling below. Having failed to address those grounds in its opening brief, Holmes has waived any right to challenge them now.

The trial court did not abuse its discretion in 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 grounds and facts supporting amendment.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT FIRST AMERICAN'S ACTIONS WERE NOT THE CAUSE OF HOLMES' DAMAGES.

First American's principal argument below was, and on appeal remains, that First American was not the cause of Holmes' damages. Curiously, Holmes has once again failed in its briefing to deal with the problem of proximate cause. Holmes failed to sue the two entities that caused its alleged losses—that is, Premier and Keystone—and instead hopes that by focusing only upon First American it can bypass the necessary and missing element of cause. Unfortunately for Holmes, it cannot.

In order to recover against First American on any theory of law, Holmes has the burden to prove that First American proximately caused its alleged injuries. See, e.g. Harline v. Barker, 912 P.2d 433, 439 (Utah 1996). As this Court recognized in Harline, “[P]roximate 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.’” Id. (quoting Mitchell v. Pearson Enters., 697 P.2d 240, 245-46 (Utah 1985) (quoting State v. Lawson, 688 P.2d 479, 482 & n.3 (Utah 1984))).

Questions of proximate cause may be decided as a matter of law in two circumstances. Those circumstances are “(i) when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of the legal standard to the facts, and (ii) when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law.” Id. See also Mitchell v. Pearson Enters., 697 P.2d 240 (Utah 1985) (granting summary judgment because cause purely speculative); Bansasine v. Bodell, 927 P.2d 675 (Utah Ct. App. 1996) (granting summary judgment because reasonable persons could not disagree about cause). First American prevailed in the court below because the facts concerning the proximate cause of Holmes’ injuries were not, and could not be, disputed by Holmes.

The undisputed facts concerning the cause of Holmes’ injuries are these: (1) in March 1998, Cook Development and Premier executed a Quit Claim Deed by which they intended to convey the 323-acre parcel from Lake Creek Farms to Cook Development

(Complaint, ¶¶ 22-24, R. 5); (2) the Quit Claim Deed contained a typographical error and identified Lake Creek Associates, rather than Lake Creek Farms, as the grantor (Complaint, ¶¶ 31-32, R. 6); (3) despite Premier's undisputed intent in March 1998, it refused to execute a corrective deed in July 1998 (Complaint ¶ 52, R. 9); (4) in early September 1998, First American cured the title defect by having Cook, as a member of Lake Creek Farms, execute a Special Warranty Deed conveying the 323-acre parcel directly to Holmes (Complaint, ¶ 54, R. 10); (5) the Special Warranty Deed was "a valid and binding conveyance" (R. 66); (6) Premier and Keystone knew that the 323-acre parcel had been conveyed to Holmes (R. 66); (7) despite their knowledge, in November 1998, Premier and Keystone created a sham conveyance of the 323-acre parcel, and Keystone filed its quiet title action against Holmes (Complaint, ¶ 62, R. 11); (8) the damages claimed by Holmes are a direct result of the Keystone litigation (Complaint, ¶¶ 68-70, R. 12); (9) by June 2000 counsel hired by First American to defend Holmes obtained summary judgment against Keystone on all of its claims.

Holmes' alleged injuries began in November 1998, two months after First American cured Holmes' title problems. Holmes' injuries were the direct result of Premier's and Keystone's sham real estate transaction and Keystone's non-meritorious lawsuit against Holmes. Having rectified all title problems by September 1998, First American bore no responsibility for the subsequent actions of Premier and Keystone. Holmes has failed to provide any justification for its failure to sue Keystone and/or Premier, the parties responsible for its alleged losses. Under no circumstances, however, should First American be held liable for the damages that they caused. The district court

properly granted summary judgment to First American on all of Holmes' claims, and its judgment should be affirmed.

II. FIRST AMERICAN FULFILLED, AS A MATTER OF LAW, ANY AND ALL DUTIES OWED TO HOLMES.

Because Holmes' injuries were not caused by First American, it should be unnecessary for the Court to address Holmes' allegations concerning the specific duties owed by First American. As shown below, however, Holmes has failed to demonstrate the breach of any existing duty owed from First American to Holmes.

A. The Facts Were Undisputed that First American Fully Complied with Its Duties Under the Policy.

In May 1998, First American provided Holmes with the Policy of title insurance. (R. 49-55). On the occurrence of a covered title defect, the Policy permitted First American "to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to [Holmes'] estate or interest, as insured." (R. 50, ¶ 4(b) (emphasis added)).

First American first became aware of a title defect in July 1998. To rectify that defect, First American immediately approached Cook Development and Premier about executing a new Quit Claim Deed relating to the 323 acres. (R. 9, ¶ 51). When Premier refused to execute the new Quit Claim Deed, First American considered the options available. Pursuant to the Policy, First American could have instituted and prosecuted an action against Premier for reformation of the Quit Claim Deed. Instead, however, it opted to do "another act" to avoid a legal battle with Premier and effectively convey the property to Holmes. That "other act" was the conveyance of the 323-acre parcel by

Special Warranty Deed directly to Holmes. By September 1998, less than two months after the defect was discovered, the Special Warranty Deed had been executed and delivered. As recognized by the court in the Keystone litigation, this deed was a “valid and binding conveyance of the [P]roperty” to Holmes. (R. 66).⁴

The Special Warranty Deed should have been the end of the problem.

Unfortunately, Premier and Keystone decided to raise further problems for Holmes. On November 25, 1998, with full knowledge of the Special Warranty Deed and of the rightful ownership of the Property by Holmes, Premier and Keystone participated in a sham conveyance of the 323-acre parcel, and Keystone instituted a quiet title action against Holmes. (R. 11, ¶¶ 62-63). Again, First American acted diligently under the Policy. Within two weeks of notice of Keystone’s claims, First American hired counsel to defend Holmes. (R. 45, ¶¶ 18-19). Within 8 months, counsel had obtained summary judgment against Keystone which reconfirmed what all parties knew at the outset—that Holmes was the rightful owner of the Property. (R. 45, ¶¶ 11-13 & R. 63-67).

Having cleared the title defect in September 1998, and having favorably resolved the non-meritorious Keystone lawsuit by June of 1999, First American had fully complied with the terms of the Policy. Significantly, Holmes acknowledged to the trial

⁴ In its brief, Holmes suggests that First American breached the Policy because the Special Warranty Deed “opened the door” to the Keystone litigation. This argument is not supported by any evidence and is contrary to the finding of the court in the Keystone litigation. The Keystone court concluded on summary judgment that the Special Warranty Deed was a “valid and binding conveyance of the [P]roperty” to Holmes. (R. 66). The form of the deed was of no concern to the Keystone court as evidenced by the court’s Summary Judgment order. (R. 63-68) Contrary to Holmes’ claims, the central issue before the court in the Keystone litigation was not the form of the Special Warranty Deed, but the legal question concerning Cook’s ability to execute that deed on behalf of Lake Creek Farms. *Id.* The Keystone court resolved any and all issues concerning the Special Warranty Deed in favor of Holmes on summary judgment. In light of this fact, Holmes cannot complain about that deed.

court that First American acted diligently to resolve Keystone's non-meritorious claims. (R. 87). Pursuant to the Policy, having "establishe[d] title, [and] removed the alleged defect . . . all as insured, in a reasonably diligent manner by any method . . . [First American] fully performed its obligations with respect to the matter and [was not thereafter] liable for any loss caused thereby." (Policy, R. 50-51, ¶ 9(a)). The district court properly recognized this fact and granted summary judgment on Holmes' claims. This decision should be affirmed on appeal.

B. Holmes Presented the Trial Court with No Evidence that First American Breached Any Duty to Holmes Outside of the Policy.

Recognizing that it could not support a breach of contract claim under the Policy, Holmes asserted various negligence and third party beneficiary claims against Holmes in its unverified Complaint. In its briefing on summary judgment, Holmes then argued in very general terms that First American breached other duties to Holmes outside the duties set forth in the Policy.⁵ Although an insurer may undertake separate duties apart from obligations owed under an insurance policy,⁶ First American did not breach any such duties in this case. Significantly, Holmes did not present the trial court with an affidavit or any other proof that First American had undertaken or breached any additional duties to Holmes. Having failed to present such evidence to the trial court, Holmes cannot complain about the court's grant of summary judgment. See, e.g., Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124-125 (Utah 1994) (affirming summary judgment because

⁵ First American supported its motion for summary judgment with the Affidavit of Blake T. Heiner in which Mr. Heiner outlined First American's contractual duties to Holmes and its compliance with those duties. (Heiner Affidavit, R. 44-77).

⁶ See generally, Culp Construction Co. v. Buildmart Mall, 795 P.2d 650 (Utah 1990).

opposing party failed to “meet his burden of presenting some evidence, by affidavit or otherwise, raising a credible issue of material fact.”).

1. **First American did not breach any duty to Holmes relating to its preparation of the warranty deed from Cook Development to Holmes.**

Holmes points to the May 1998 Warranty Deed from Cook Development to Holmes as one of the instruments creating an additional duty to Holmes. Holmes claims that when First American undertook to draft the Warranty Deed, it undertook the additional responsibility of abstracting the title to the Property. In making this argument, Holmes does not rely upon any express agreement by First American to provide abstracting services. In fact, no such services were requested by Holmes.⁷

Because it could not point to any express agreement from First American for abstracting services, Holmes makes the legal argument that “one cannot prepare a deed expressly designed to convey title with warranties without taking on abstractor liability.” (Appellants brief, p. 28). Holmes does not, however, support this legal proposition with any cases or other legal authorities.⁸ There is simply no support in Utah for the proposition that one who drafts a deed automatically undertakes abstractor liability.

⁷ If Holmes had requested abstracting services, those services would have been reflected in the Settlement Statement at closing. The Settlement Statement contained a space for fees relating to an “Abstractor or title search.” This item is blank on the form used at closing. (R. 120). It should also be noted that Holmes paid nothing to First American for its services in drafting the Warranty Deed. The Settlement Statement also contains a space for “Document preparation” which is left blank. (R. 120).

⁸ Holmes also argues that when First American prepared the various deeds in this case, it was participating in the unauthorized practice of law. First American does not agree with that proposition and notes that many courts have held otherwise. See, e.g., State Bar of New Mexico v. Guardian Abstract and Title Co., Inc., 575 P.2d 943, 949 (N.M. 1978) (preparation of statutory forms of deeds not unauthorized practice of law). In any event, however, Holmes has not cited the Court to any authority for the proposition that lawyers who prepare deeds undertake abstractor liability. That is simply not the case. Therefore, whether deed preparation is characterized as the practice of law or not is irrelevant in this dispute.

In the final analysis, Holmes does not, and cannot, contend that there was anything wrong with the form or content of the Warranty Deed. The Warranty Deed as drafted would have accomplished the passage of title from Cook Development to Holmes but for the defect in the original Quit Claim Deed. Had the original Quit Claim Deed accurately named the grantor, the Warranty Deed would have conveyed title to Holmes.

If Holmes had intended to obtain abstracting services from First American, it could have specifically requested and paid for those services. Instead, Holmes did what many purchasers of property do today. It requested and received title insurance from First American. The Policy entitled Holmes to have its title cured in the event of any defects and to a defense in the event that its title was challenged. First American cured the problem with the Quit Claim Deed and diligently defended Holmes against the spurious claims of Keystone. Holmes got what it bargained and paid for.

2. First American did not breach any duty to Holmes relating to its assistance with the closing.

Holmes suggests that by assisting with the closing and acting as the escrow agent for the transaction, First American undertook additional responsibilities to Holmes and that First American breached those duties. Holmes does not, however, point to any activities performed by First American in connection with its closing or escrow services that were somehow negligent or caused any harm to Holmes. It points to no problems with the closing or with the escrow, because none exists.⁹

⁹ Holmes refers the Court to New West Fed. Sav. and Loan Assoc. v. Guardian Title Company of Utah, 818 P.2d 585, 588 (Utah Ct. App. 1991), in which it was undisputed that Guardian Title had undertaken express responsibilities to the plaintiff in connection with the escrow and then breached those responsibilities. Id. Holmes has not, and cannot, point to any similar facts in this case.

Instead, Holmes again argues that by undertaking to help close the transaction, First American automatically agreed to abstract the chain of title and discover the error in the original Quit Claim Deed. Once again, Holmes sites no authority for this proposition and none exists.

3. **First American did not breach any duty to Holmes relating to its preparation of the Special Warranty Deed.**

Holmes argues that by drafting the Special Warranty Deed, First American undertook additional responsibilities to Holmes, and breached those duties. Holmes' arguments concerning the Special Warranty Deed fail for two reasons. First, as shown above, First American's efforts with respect to the Special Warranty Deed clearly fell within its rights and responsibilities under the Policy. First American was entitled to "do any other act which in its opinion [was] necessary or desirable to establish the title to [Holmes'] estate or interest, as insured." (Title Policy, ¶ 4(b), R. 50). First American prepared the Special Warranty Deed as the means by which to correct the defects with Holmes' title.

Second, and most importantly, the Keystone court determined as a matter of law that the Special Warranty Deed effectively conveyed title to Holmes. The Keystone court ruled that the Special Warranty Deed was a "valid and binding conveyance of the [P]roperty" to Holmes. (R. 66). Therefore, Holmes could have no legitimate complaint concerning that deed.

Holmes never alleged any facts to show that First American breached any of its duties under the Policy or that it assumed and breached any other duties outside of the

Policy. Therefore, the trial court properly granted summary judgment in favor of First American.

III. HOLMES' FAILURE TO ADEQUATELY BRIEF EACH OF THE GROUNDS RELIED UPON BY THE TRIAL COURT IN AWARDING SUMMARY JUDGMENT CONSTITUTES A WAIVER AND AN ABANDONMENT OF THOSE GROUNDS ON APPEAL.

It is a well settled principle of appellate review that issues not briefed by an appellant are deemed waived and abandoned and will not be considered by the appellate court. See Brown v. Glover, 16 P.3d 540 (Utah 2000); see also Langeland v. Monarch Motors, Inc., 952 P.2d 1058, 1063 n.5 (Utah 1998); see also American Towers Owners Assoc., Inc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1185 (Utah 1996).

If an appellant raises an issue in the notice of appeal, but does not meaningfully discuss or analyze that issue in their appellate brief, the appellate court will not consider the issue and will affirm the trial court on that issue. See Utah v. Vigil, 922 P.2d 15, 25 (Utah 1996); see also Pixton v. State Farm Mutual Automobile Ins. Co., 809 P.2d 746, 751 (Utah Ct. App. 1991). Rule 24, Utah Rules of Appellate Procedure, requires the appellant, in its opening brief, to include “[a] statement of the issues presented for review.” Utah R. App. P. 24(a)(5). The rule requires the appellant to provide argument containing the “contentions and reasons of the appellant with respect to the issues presented.” Id. at 24(a)(9).

A brief must contain support for each contention. Rukavina v. Triatlantic Ventures, Inc., 931 P.2d 122, 125 (Utah 1997); Walker v. U.S. General, Inc., 916 P.2d 903, 908 (Utah 1996). This requires that each argument contain the contentions of the

appellant with citations to the authorities, statutes and parts of the record relied on. Id. Where an issue is not properly briefed—or where, as here, it is not addressed at all—the appellate court should decline to address the issue. See Sperry v. Sperry, 990 P.2d 381, 383 (Utah 1999); Rukavina, 931 P.2d at 125; Walker, 916 P.2d at 908; State v. Wareham, 772 P.2d 960, 966 (Utah 1989). This Court has repeatedly recognized that the appellant must adequately raise and argue each issue in its appellate brief and may not “dump the burden of argument and research” on the Court. State v. Jaeger, 973 P.2d 404, 410 (Utah 1999).

Holmes had failed to address three of the five independent grounds on which the trial court awarded summary judgment to First American. Although the district court dismissed Holmes’ negligence and negligent misrepresentation claims on the basis of the economic loss rule, Holmes has not addressed this issue. Although the trial court dismissed Holmes’ negligent misrepresentation claim on the additional ground that First American could not, as a matter of law, have expected Holmes to rely upon any of its conduct with respect to the Quit Claim Deeds, Holmes had not addressed this issue. Finally, although the trial court dismissed Holmes’ third party beneficiary claim on the ground that First American and Cook did not, as a matter of law, intend to confer an enforceable benefit upon Holmes in March of 1998, Holmes does not address this issue. All of these grounds were briefed by the parties to the court below.

Holmes’ failure to address these issues violates Rule 24 and constitutes a waiver and abandonment of any challenge of the district court’s ruling on these questions. It is not sufficient for Holmes to raise them in its reply brief. See Trial Mountain Coal Co. v.

Utah Division of State Lands and Forestry, 921 P.2d 1365, 1371 n.11 (Utah 1996), cert. denied, 519 U.S. 1142 (1997) (stating that argument raised for the first time in a reply brief is deemed waived); see also Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1321 n.5 (Utah Ct. App. 1991), cert. denied, 832 P.2d 476 (Utah 1992). This Court should affirm summary judgment on these unchallenged issues.

IV. THE DISTRICT COURT PROPERLY REJECTED HOLMES' REQUEST TO AMEND ITS COMPLAINT.

The district court rejected Holmes' request for leave to amend its Complaint on the ground that, "[t]o 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." (Summary Judgment, ¶ 5, R. 264). The district court was not persuaded that Holmes' request, set forth in the body of its memorandum without a Rule 15 motion, was adequate. Moreover, even if construed as a Rule 15 motion, the trial court was not persuaded that Holmes could present facts necessary to state a claim for relief.

Commentators have 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 James Wm. Moore et al., *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. Federal Rule of Civil Procedure 7(b), which has been adopted verbatim in Utah's rule

7(b),¹⁰ 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). Based upon this rule, the Tenth Circuit has stated 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 Servs., 181 F.3d 1180, 1186-87 (10th Cir. 1999). The Calderon court concluded that Ms. Calderon’s 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. Accord, Torres v. Pueblo Board of County Commissioners, 2000 U.S. App. LEXIS 23593, *7 n.3 (10th Cir. 2000).

Here, as in the Calderon and Torres cases, Holmes’s bald request for leave to amend dangling at the end of its memorandum is not an appropriate motion under Rules 7(b) and 15. Therefore, the district court properly denied 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). No abuse exists in this case and the court should affirm the district court’s denial of leave to amend.

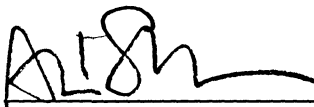
¹⁰ Because the Utah rules “were fashioned after the Federal Rules of Civil Procedure, it is proper that [this Court] examine decisions under the Federal Rules to determine the meaning thereof.” Winegar v. Slim Olson, Inc., 122 Utah 487, 491, 252 P.2d 205, 207 (1953) (looking to Federal Rules for interpretation of Rule 41(b)). Accord Madsen v. Borthick, 679 P.2d 245, 249 (Utah 1988) (same); Goldberg v. Jay Timmons & Assocs., 896 P.2d 1241, 1244 (Utah Ct. App. 1995) (looking to Federal Rules for interpretation of Rule 39(c)).

CONCLUSION

For all of the foregoing reasons, First American respectfully urges this Court to affirm the district court's motion for summary judgment.

DATED this 22nd day of March, 2001.

SNELL & WILMER

By  _____
Alan L. Sullivan
Attorneys for Defendant/Appellee
First American Title Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2001, I caused a true and correct copy of the within and foregoing **BRIEF OF APPELLEE** to be sent to the following, via United States Mail, postage prepaid:

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

Gifford W. Price, Esq.
Gregory N. Jones, Esq.
MACKEY PRICE & WILLIAMS
57 West 200 South, Suite 350
Salt Lake City, Utah 84101



Tab A

Form No. 1402.92
(10/17/92)
ALTA Owner's Policy



POLICY OF TITLE INSURANCE



ISSUED BY

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

First American Title Insurance Company

BY *Parker S. Kennedy* PRESIDENT

ATTEST *Mark R. Ames* SECRETARY

UT 112948

or any purchaser of the insured of either (i) an interest in the land, or (ii) an indebtedness secured by a first mortgage mortgage given to the insured

NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) v, (ii) in case knowledge shall come to an insured under of any claim of title or interest which is adverse to title to the estate or interest, as insured, and which might result in loss or damage for which the Company may be liable under this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required, provided, however, that failure to notify the Company shall in no case deprive the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The insured shall have the right to select counsel of its choice subject to the right of the insured to object for reasonable cause to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or advisable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any action to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the

the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay, or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of

(i) the Amount of Insurance stated in Schedule A, or

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:

(i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the Amount of Insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy, or (ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. APPORTIONMENT.

If the land described in Schedule (A)(C) consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the Amount of Insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of adverse claimant of title, all as insured in a reasonably diligent

and remedies against any person or persons, in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) The Company's Rights Against non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guarantees, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is \$1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of \$1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to a arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if an attached hereto by the Company is the entire policy or contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by a claim asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, a Secretary, an Assistant Secretary, or validating officer authorized signatory of the Company.

16. SEVERABILITY.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. NOTICES, WHERE SENT.

All notices required to be given the Company and statement in writing required to be furnished the Comp

EXCLUSIONS FROM COVERAGE

Following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which by reason of:

- a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land, (ii) the character, dimensions or location of any improvement now or hereafter erected on the land, (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy
- b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy

Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge

Defects, liens, encumbrances, adverse claims or other matters

- a) created, suffered, assumed or agreed to by the insured claimant,
- b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy,
- c) resulting in no loss or damage to the insured claimant,
- d) attaching or created subsequent to Date of Policy, or
- e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy

Any claim, which arises out of the transaction vesting in the Insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on

- (i) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or
- (ii) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure
 - (a) to timely record the instrument of transfer, or
 - (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor

CONDITIONS AND STIPULATIONS

DEFINITION OF TERMS.

The following terms when used in this policy mean

- (a) "insured" the insured named in Schedule A, and as to any rights or defenses the Company would have against the named insured, those who succeed to the estate of the named insured by operation of law as distinguished from purchase including, but not limited to, distributees, devisees, survivors, personal representatives of kin, or corporate or fiduciary successors
- (b) "insured claimant" an insured claiming loss or damage
- (c) "knowledge" or "known" actual knowledge, constructive knowledge or notice which may be imputed to insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land
- (d) "land" the land described or referred to in Schedule (A), and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule (A), nor any right, title, interest, estate or interest in abutting streets, roads, avenues, alleys, lanes, or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is required by this policy
- (e) "mortgage" mortgage, deed of trust, trust deed, or other security instrument
- (f) "public records" records established under state laws at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court in the district in which the land is located
- (g) "unmarketability of the title" an alleged or apparent matter affecting the title to the land not excluded or excepted from coverage which would entitle a purchaser of estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title

by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation shall terminate any liability of the Company under this policy as to that claim

6 OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS, TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options

- (a) To Pay or Tender Payment of the Amount of Insurance

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were

for any loss or damage caused thereby

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction and disposition of all appeals therefrom, adverse to the title as insured

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto

11. LIABILITY NONCUMULATIVE.

It is expressly understood that the Amount of Insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed payment under this policy to the insured owner

12. PAYMENT OF LOSS.

(a) No payment shall be made without producing the policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company

(b) When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter

13. SUBROGATION UPON PAYMENT OR SETTLEMENT

SCHEDULE A

Policy No. 28326.0

Order No. W-39016

J 112948

Amount of Insurance \$3,640,000.00

Premium \$4,938.00

Date of Policy: MAY 20, 1998 AT 10:02 A.M.

1. Name of Insured:

HOLMES DEVELOPMENT, L.L.C.,
a Utah limited liability company

2. The estate or interest in the land which is covered by this policy is:

FEE SIMPLE

3. Title to the estate or interest in the land is vested in:

HOLMES DEVELOPMENT, L.L.C.,
a Utah limited liability company

4. The land referred to in this policy is situated in the State of Utah, County of Wasatch, and is described as follows:

(PARCEL NO. 1)

BEGINNING at the Northeast Corner of Section 11, Township 4 South, Range 5 East, Salt Lake Meridian; and running thence East 1313.13 feet thence South 00°25'00" East 2685.15 feet, thence West 82.50 feet, thence South 1170.24 feet, thence East 1408.82 feet, thence South 165.00 feet, thence South 00°08'10" East 1349.62 feet, thence West 2637.89 feet, thence South 89°49'53" West 790.94 feet, thence North 00°09'30" West 209.92 feet, thence South 89°50'30" West 401.95 feet, thence South 00°09'30" East 209.99 feet, thence South 89°49'53" West 66.03 feet, thence North 01°01'52" East 125.54 feet, thence North 29°58'49" West 406.14 feet, thence North 80°40'00" West 152.85 feet, thence West 400.00 feet, thence South 00°20'43" East 250.43 feet, thence South 89°44'05" West 603.44 feet, thence South 00°06'44" East 252.63 feet, thence South 89°50'30" West 82.04 feet, thence North 00°10'22" West 2926.23 feet, thence South 87°57'21" East 319.02 feet, thence South 24°47'19" East

67.97 feet, thence South 77°00'48" East 63.37, thence South 33°02'25" East 113.25 feet, thence North 70°39'58" East 502.74 feet, thence South 66°17'34" East 101.20 feet, thence South 51°37'20" East 261.60 feet, thence South 02°43'41" East 162.60 feet, thence South 23°00'06" East 138.63 feet, thence South 57°16'52" East 128.78 feet, thence South 71°58'34" East 174.97 feet, thence South 66°48'52" East 559.85 feet, thence South 72°33'47" East 141.95 feet, thence South 80°32'36" East 141.22 feet, thence North 72°02'29" East 150.50 feet, thence North 25°34'26" East 98.60 feet, thence North 21°15'45" East 224.07 feet, thence North 79°29'08" East 275.48 feet, thence North 59°33'00" East 228.91 feet, thence North 44°30'14" West 326.91 feet, thence North 45°34'05" East 231.65 feet, to a curve to the Left 937.32 feet, with a radius being 1170.00 feet, having a chord bearing of North 22°57'02" West 912.45 feet, thence North 151.75 feet, thence West 14.76 feet, thence North 1472.50 feet, thence East 8.59 feet to the point of beginning.

(PARCEL NO. 2)

BEGINNING at the Northwest corner of Section 13, Township 4 South, Range 5 East, Salt Lake Base and Meridian; and running thence East 40 chains; thence South 20 chains; thence West 30.095 chains; thence North 39°20' West 0.30 chains; thence North 34°15' West 6.75 chains; thence South 49°06' West 7 chains to the Section line; thence North 19.25 chains to the place of beginning.

EXCEPTING THE FOLLOWING DESCRIBED TRACT:

BEGINNING at a point 125 feet East of the Northwest corner of Section 13, Township 4 South, Range 5 East, Salt Lake Base and Meridian; and running thence West 125 feet; thence South 1270.5 feet; thence on a diagonal line in the Northeasterly direction to a point South of the beginning; thence North to the point of beginning.

SCHEDULE B

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the company will not pay costs, attorneys' fees or expenses) which arise by reason of:

Section One:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
3. Easements, claims of easements or encumbrances which are not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.
5. Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof, water rights, claims or title to water.
6. Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.

Section Two:

7. Taxes for the year 1998, now a lien, not yet due. Tax ID No. OWC-1755 (Parcel No. 2) and OWC-1799 (Parcel No. 2) (The 1997 Taxes have been duly paid).
8. The effect of the 1969 Farmland Assessment Act, wherein there is a five (5) year roll-back provision with regard to assessment and taxation, which becomes effective upon a change in the use of all or part of eligible land, by reason of that certain Application for Assessment and Taxation of Agricultural Land.

9. The property described herein is situated within the boundaries of the Wasatch County Fire District and Special Service District 21 and Twin Creeks Special Service District and the Wasatch County Water District # 1 and is subject to the charges and assessments thereof.

(AS TO PARCEL NO. 1)

10. A Right of Way for a County Road known as 2400 South along the South approximately 33 feet of said property.
11. A telephone transmission line beginning at the Northwest corner of the Southeast quarter, of Section 11, Township 4 South, Range 5 East and running thence Southeasterly to a point on the South line of the Southeast corner of the Southeast quarter at a point approximately 1200 feet West from the Southeast corner of the said section.
12. A small cemetery situated in the Southwest quarter of the Southeast quarter of said Section 11. (No legal description is shown)

(AS TO PARCELS NO. 1 & 2)

13. A Deed of Trust given to secure the amount of \$1,360,000.00 and any other amounts payable under the terms thereof, dated April 24, 1996 and recorded April 29, 1996 as Entry No. 186538 in Book 321 at page 160-165 of Official Records,
- TRUSTOR : COOK DEVELOPMENT, LC,
TRUSTEE : KEY BANK OF UTAH, a Utah Corporation,
BENEFICIARY : KEY BANK OF UTAH, a Utah Corporation.

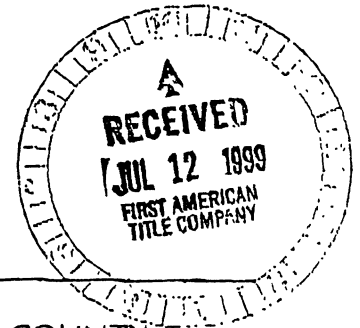
* * *

DJ/lt
6/3/98

Tab B

FILED
Fourth Judicial District Court of
Wasatch County, State of Utah
CARMA B. SMITH, Clerk
-29-99 Deputy
M

Ronald G. Russell, Esq. (4134)
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants and Third-Party Plaintiff
185 South State Street, Suite 1300
Post Office Box 11019
Salt Lake City, Utah 84147-0019
Telephone: (801) 532-7840



IN THE FOURTH JUDICIAL DISTRICT COURT FOR WASATCH COUNTY

STATE OF UTAH

KEYSTONE DEVELOPMENT, L.C., a
Utah Limited Liability Company,

Plaintiff,

vs.

HOLMES DEVELOPMENT, L.L.C., a Utah
Limited Liability Company; FIRST
AMERICAN TITLE INSURANCE
COMPANY, a California corporation,
qualified to do business in Utah; BANK
ONE UTAH, N.A., a Federal Reserve
Bank, qualified to do business in Utah;
and JOHN DOES 1 through 30,
inclusive,

Defendants.

HOLMES DEVELOPMENT, LLC, a Utah
limited liability company,

Third-Party Plaintiff,

vs.

SUMMARY JUDGMENT

00215846
00430 PM 00165-00179
WASATCH CO RECORDER-ELIZABETH M PARCELL
1999 JUL 13 09:13 AM FEE \$84.00 BY KWC
REQUEST: FIRST AMERICAN TITLE COMPANY

Civil No. 980500389

00063

LAKE CREEK FARMS, L.C., a Utah)
 limited liability company; and COOK)
 DEVELOPMENT, LC, a Utah limited)
 liability company,)
)
 Third-Party Defendants.)

This matter came before the court on June 15, 1999 on the Motion for Summary Judgment filed by defendant Holmes Development, LLC ("Holmes") and the cross Motion for Partial Summary Judgment filed by plaintiff Keystone Development, L.C. ("Keystone") and third-party defendant Lake Creek Farms, L.C. ("Lake Creek Farms"). Ronald G. Russell appeared on behalf of Holmes and David O. Black appeared on behalf of Keystone and Lake Creek Farms. The court, having considered the arguments of counsel and the record in this matter, is persuaded to rule in favor of Holmes. As grounds for its decision, the court finds and concludes as follows:

1. Utah Code Ann. § 48-2b-116 requires that the articles of organization of a limited liability company specify whether the company is to be managed by managers or by the members.

2. Utah Code Ann. § 48-2b-121 requires that the articles of organization of a limited liability company be amended when there is a change in who is the manager or if the limited liability company is managed by its members, who is a member.

3. Utah Code Ann. § 48-2b-117 requires that the articles of organization and any certificates of amendment must be filed with the Utah Division of Corporations and Commercial Code of the Department of Commerce.

4. Utah Code Ann. § 48-2b-126 permits the members of a limited liability company to enter into an operating agreement to provide for "the regulation and management of the affairs of the limited liability company in any manner not inconsistent with law or the articles of organization."

5. Because the articles of organization of Lake Creek Farms, L.C. provided for management by the members, the court concludes that a manager could not be designated in an operating agreement in that such designation would be contrary to the sections of the limited liability company act cited above and would be inconsistent with the retention of management by the members as set forth in the Articles of Organization of Lake Creek Farms.

6. Utah Code Ann. § 48-2b-127 provides that if management has been retained by the members of a limited liability company, an instrument providing for the disposition of property of the limited liability company shall be valid and binding if executed by one or more members.

7. There is no genuine issue of material fact that Paul H. Cook, as a member of Cook Development, LC, executed the Special Warranty Deed having Lake Creek Farms, as grantor, and Holmes, as grantee, which was recorded at the office of the Wasatch

County Recorder on September 3, 1998 as Entry No. 206446, in Book 394, at Page 418 of the official records.

8. The court concludes that said Special Warranty Deed is a valid and binding conveyance of the property described therein.

9. The Special Warranty Deed conveying title to Holmes was recorded prior to the later Warranty Deed upon which Keystone bases its claim to title and Keystone had both actual and constructive notice of the prior conveyance of the property to Holmes at the time it received its claimed conveyance.

Based on the foregoing and for the reasons set forth in the memoranda filed by Holmes in support of its Motion for Summary Judgment,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Motion for Partial Summary Judgment filed by Keystone and Lake Creek Farms is denied.

2. The Motion for Summary Judgment filed by Holmes is granted and Keystone's Complaint is hereby dismissed with prejudice and on the merits.

3. Holmes is hereby granted judgment on Count II of its Counterclaim and title to the following-described real property located in Wasatch County, Utah is hereby quieted in favor of Holmes and against Keystone, Lake Creek Farms, and all parties to this action subject only to that certain trust deed having Holmes, as trustor, and Bank One, Utah, National Association, beneficiary, which trust deed was recorded at the office

of the Wasatch County, Utah Recorder on September 3, 1998 as Entry No. 206449, in Book 394, at Page 436 of the official records:

See Exhibits "A" and "B" attached hereto and incorporated herein by this reference.

4. The Lis Pendens recorded at the office of the Wasatch County, Utah Recorder on November 25, 1998 as Entry No. 209014, in Book 404, at Page 673 of the official records, a copy of which is attached hereto marked Exhibit "C" and incorporated herein by this reference, is hereby ordered released and discharged and shall no longer have any legal effect or provide notice pertaining to the property described in Exhibits "A" and "B" hereto or as may otherwise be described in said Lis Pendens.

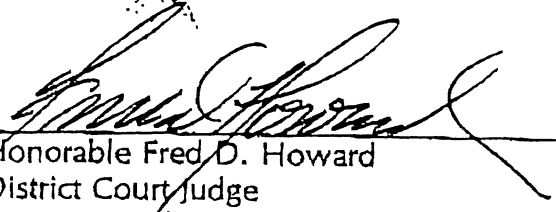
5. The court grants judgment in favor of Holmes and against Keystone in the amount of the costs incurred herein by Holmes totaling \$_____. *

6. Because the court has adjudicated that Holmes is the owner of the real property at issue in this action, all remaining third-party claims, counterclaims, and cross claims now before the court are moot and are, therefore, dismissed without prejudice. In the event the court's decision regarding ownership of the subject property is reversed on appeal, the remaining third-party claims, counterclaims, and cross claims would no longer be moot and would be reinstated.

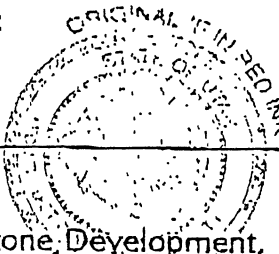
* Reserved. (Cost memorandum not submitted). *flth*.

DATED this 29th day of June, 1999.

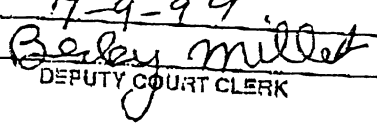
BY THE COURT:

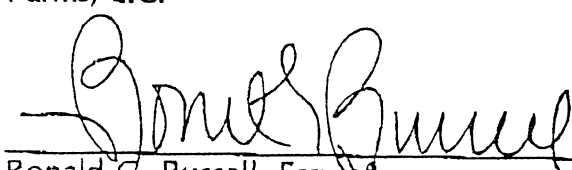

Honorable Fred D. Howard
District Court Judge

APPROVED AS TO FORM:


David O. Black, Esq. of
BLACK, STITH & ARGYLE
Attorneys for Plaintiff Keystone Development,
L.C. and Third-Party Defendant Lake Creek
Farms, L.C.

I CERTIFY THAT THIS IS A TRUE COPY OF
AN ORIGINAL DOCUMENT ON FILE IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH
COUNTY, STATE OF UTAH.

DATE: 7-9-99

DEPUTY COURT CLERK


Ronald G. Russell, Esq. of
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants

00215846 Bk 00430 Pg 00170

EXHIBIT "A"

PARCEL NO. 1: (OWC-1795-0-012-045)

Beginning at the Northwest of Corner of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian; East 20 chains; South 36.50 chains; West 20 chains; North 36.50 chains to beginning.

Less and Excepting the following parcels:

Exception Parcel A:

Proposed subdivision of Lakecreek Farms Phase 7A being more particularly described as follows:

Commencing at a point located South 89°22'03" West along the section line 8.59 feet, and North 0.10 feet from the Northeast corner of Section 11, Township 4 South, Range 5 East, Salt Lake Base and Meridian; thence as follows:

North 90°00'00" East 1321.72 feet; thence South 00°25'00" East 1475.96 feet; thence South 89°35'00" West 48.65 feet; thence North 38°40'38" West 148.79 feet; thence North 32°55'18" West 85.54 feet; thence North 73°42'56" West 143.10 feet; thence South 80°52'32" West 107.32 feet; thence South 80°52'32" West 256.68 feet; thence South 80°52'32" West 115.44 feet; thence South 71°44'51" West 123.60 feet; thence South 63°52'04" West 201.46 feet; thence South 82°52'24" West 219.31 feet along the boundary of Lake Creek Farms Plat "B"; thence North 90°00'00" West 14.76 feet along the boundary of Lake Creek Farms Plat "A"; thence North 00°00'00" East 1472.50 feet to the point of beginning.

Exception Parcel B:

Any portion lying within the bounds of 1200 South Street and 4800 East Street.

00215846

Bk 00430 Pg 00171

Exception Parcel C:

Lake Creek Farms Plat A

00214541

Bk 00425 Pg 00495

Exception Parcel D:

Lake Creek Farms Plat B

00206446

Bk 00394 Pg 00419

PARCEL No. 2: (OWC-1793-0-012-045)

Parcel No. 2A

South $\frac{1}{2}$ of the Southwest $\frac{1}{4}$ of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian

Parcel No. 2B

Also beginning at the Northwest Corner of the Southwest $\frac{1}{4}$ of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian; thence as follows: South 20 chains; East 18.75 chains, North 20 chains, East 1.25 chains; North 3.50 chains; West 20 chains; South 3.50 chains to beginning.

Less and Excepting the following as referenced by assessors number:

OWC-1793-1-012-045

Also Less and Except:

Lake Creek Farms Subdivision Plat B

00215846 Bk 00430 Pg 00172

PARCEL NO. 3: (OWC-1793-1-012-045)

Beginning North 1860.74 feet from Southwest Corner of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian; North 174.7 feet; East 359.78 feet; South 174.27 feet; West 359.78 feet to beginning.

PARCEL NO. 4: (OWC-1755-011-045)

00214541 Bk 00425 Pg 00496

Beginning Northeast Corner of Section 11, Township 4 South, Range 5 East, Salt Lake Meridian; South 5280 feet; West 791.96 feet; North 210 feet; West 401.95 feet; South 2310 feet; West 66 feet; North 124.63 feet; North 60°18' West; North 29°41'52" West 92.28 feet; North 29°53'57" West 304.53 feet; North 80°20' West 152.85 feet; West 400 feet; South 498.8 feet; West 637.38

feet; North 5280 feet; East 40 feet; South 435 feet; East 1480 feet; North 435 feet; East 60 feet; South 435 feet; East 1000 feet; North 871.2 feet; East 60 feet to the beginning.

Less and Excepting the following:

Exception Parcel A:
Center Creek Road

Exception Parcel B:
The following parcels referenced by tax assessors No's:

Parcel OWC-1755-3, Parcel OWC-1763, Parcel OWC-1755-6, Parcel OWC-1755-2, Parcel OWC-1755-4, Parcel OWC-1755-5.

Exception Parcel C:
Lake Creek Farms Subdivision Plat A

Exception Parcel D:
Lake Creek Farms Subdivision Plat B

PARCEL NO. 5: (OWC-1755-6)

00215846 Blk 00430 Pg 00173

Beginning North 1860.74 feet and East 2645.24 feet from the Southwest Corner of Section 11, Township 4 South, Range 5 East, Salt Lake Meridian; North 0°10'22" West 174.27 feet; East 2640 feet; South 174.27 feet; West 2640 feet to the beginning.

00214541 Blk 00425 Pg 00497

PARCEL NO. 6: (OWC-1794-0-012-045)

Beginning at the Southeast Corner of the Northeast 1/4 of the Southwest 1/4 of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian; West 20 chains, North 2.50 chains, East 20 chains, South 2.50 chains to beginning.

PARCEL NO. 7: (OWC-1799)

00214446 Blk 00394 Pg 00421

Beginning at the Northwest Corner of Section 13, Township 4 South, Range 5 East, Salt Lake Meridian; East 40 chains; South 20 chains; West 30.95 chains; North 39°20' West 30 chains; North 34°15' West 6.75 chains; South 49°06' West 7 chains; North 19.25 chains to the beginning.

Less and Excepting the following:

Card No. C-1800 also known by assessors number OWC-1800-0-013-045.

00215846 BK 00430 Pg 00174

00214541 BK 00425 Pg 00498

~~00206446~~ BK 00394 Pg 00422

EXHIBIT "B"

Proposed subdivision of Lakecreek Farms Phase 7A being more particularly described as follows:

Commencing at a point located South 89°22'03" West along the section line 8.59 feet, and North 0.10 feet from the Northeast corner of Section 11, Township 4 South, Range 5 East, Salt Lake Base and Meridian; thence as follows:

North 90°00'00" East 1321.72 feet; thence South 00°25'00" East 1475.96 feet; thence South 89°35'00" West 48.65 feet; thence North 38°40'38" West 148.79 feet; thence North 32°55'18" West 85.54 feet; thence North 73°42'56" West 143.10 feet; thence South 80°52'32" West 107.32 feet; thence South 80°52'32" West 256.68 feet; thence South 80°52'32" West 115.44 feet; thence South 71°44'51" West 123.60 feet; thence South 65°52'04" West 201.46 feet; thence South 82°52'24" West 219.31 feet along the boundary of Lake Creek Farms Plat "B"; thence North 90°00'00" West 14.76 feet along the boundary of Lake Creek Farms Plat "A"; thence North 00°00'00" East 1472.50 feet to the point of beginning.

Less and excepting any portion lying within the bounds of 1200 South Street and 4800 East Street.

00215846 BK 00430 Pg 00175

00214541 BK 00425 Pg 00499

~~00206446 BK 00394 Pg 00423~~

Ann Berumen
NOTARY PUBLIC
Residing in Salt Lake County
Commission expires: March 12, 2001 00074

EXHIBIT A

00215846 Bk 00430 Pg 00177

00209014 Bk 00404 Pg 00674

DESCRIPTION OF REAL ESTATE

Parcel OWC-1795-0-012-045 (Part of 328.22 Acres of Extra Land)

Beginning at the Northwest of Corner of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian; East 20 chains; South 36.50 chains; West 20 chains; North 36.50 chains to beginning. Contains 73 acres.

Parcel OWC-1793-0-012-045 (Part of 328.22 Acres of Extra Land)

South 1/2, SW 1/4 of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian. Also beginning at the Northwest Corner of the SW 1/4 of Section 12, South 20 chains; East 18.75 chains, North 20 chains. East 1.25 chains; North 3.50 chains; West 20 chains; South 3.50 chains to beginning. Less: OWC-1793-1-012-045, contains 124.50 123.06 acres.

Parcel OWC-1793-1-012-045 (Part of 328.22 Acres of Extra Land)

Beginning North 1860.74 feet from Southwest Corner of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian; North 174.7 feet; East 359.78 feet; South 174.27 feet; West 359.78 feet to beginning. Contains 1.44 acres more or less.

00215846 Bk 00430 Pg 00178

Parcel OWC-1755-011-045 (Part of 328.22 Acres of Extra Land)

Beginning NE Corner of Section 11, Township 4 South, Range 5 East, Salt Lake Meridian; South 5280 feet; West 791.96 feet; North 210 feet; West 401.95 feet; South 2310 feet; West 66 feet; North 124.63 feet; North 60°18' West; North 29°41'52" West 92.28 feet; North 29°53'57" West 304.53 feet; North 80°20' West 152.85 feet; West 400 feet; South 498.8 feet; West 637.38 feet; North 5280 feet; East 40 feet; South 435 feet; East 1480 feet; North 435

00209014 Bk 00404 Pg 00675

EXHIBIT A

Page 2 of 2

DESCRIPTION OF REAL ESTATE

feet; East 60 feet; South 435 feet; East 1000 feet; North 871.2 feet; East 60 feet to the beginning. Contains 286.04 acres.

Less: Center Creek Road 0.4923 acres, Parcel OWC-1755-3 1.0 acres, Parcel OWC-1763 20.0271 acres, Parcel OWC-1755-6 10.56 acres, Parcel OWC-1755-2 0.92 acres, Parcel OWC-1755-4 1.0 acres, Parcel OWC-1755-5 0.622 acres. Net area 251.98 acres more or less. (Less Lake Creek Farms Subdivision, 62.85 acres) Net area 189.13 acres.

Parcel OWC-1755-6-011-045 (Part of 328.22 Acres of Extra Land)

Beginning North 1860.74 feet and East 2645.24 feet from the Southwest Corner of Section 11, Township 4 South, Range 5 East, Salt Lake Meridian; North $0^{\circ}10'22''$ West 174.27 feet; East 2640 feet; South 174.27 feet; West 2640 feet to the beginning. Contains 10.56 acres more or less.

Parcel OWC-1794-0-012-045 (Part of 328.22 Acres of Extra Land)

Beginning at the Southeast Corner of the Northeast 1/4 of the Southwest 1/4 of Section 12, Township 4 South, Range 5 East, Salt Lake Meridian; West 20 chains, North 2.50 chains, East 20 chains, South 2.50 chains to beginning. Contains 5.0 acres.

00215846 Sk 00430 Pg 00179

LOTS 7A1 through 7A24, Lake Creek Farms Subdivision Phase VIIA

00209014 Sk 00404 Pg 00676

Tab C

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Attorneys for Defendant First American Title
Insurance Company

FILED DISTRICT COURT
Third Judicial District

MAY 18 2000

By C. Bailey
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.

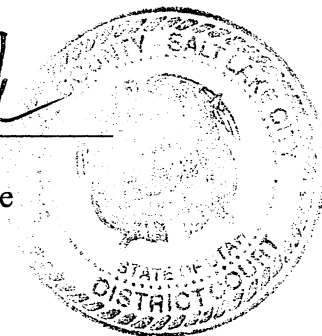
5. To the extent that Holmes moved for leave to amend its complaint, its motion is denied because Holmes failed to present facts that would be necessary to state a legally sufficient claim.

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

DATED this 18th 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 28th day of April, 2000:

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