

2010

Lynn and Eileen Harding v. Pecan Ridge Partners,
Atlas Title Insurance Agency, Scott Wilson, Jeremy
Larkin, Scott Nielson, Randy Kidman, Dave White,
and Roger Cater: Brief of Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Lynn Harding and Eileen Harding,

Plaintiffs/Appellants,

v.

Pecan Ridge Partners, LLC, a Utah limited liability company; Atlas Title Insurance Agency, Inc., a Utah corporation; Scott Wilson; Jeremy Larkin; Scott Nielson, Randy Kidman; Dave White; Roger Cater; and John Does 1 through 9,

Defendants/Appellees.

Case No. 20100999-CA

On appeal from a judgment of the Fifth District Court for Washington County
The Honorable James L. Shumate

BRIEF FOR APPELLEES ATLAS TITLE INSURANCE AGENCY,
RANDY KIDMAN, AND DAVE WHITE

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**APPELLATE COURTS
POSTMARKED**

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JURISDICTION

The Utah Supreme Court transferred this appeal to the Utah Court of Appeals. Therefore, this Court has jurisdiction pursuant to Utah Code § 78A-4-103(j).

ISSUES AND STANDARDS OF REVIEW

Did the district court properly grant summary judgment to Atlas Title and its employees on the grounds that Plaintiffs failed to present any non-speculative evidence that a recording mistake made by Atlas Title on one parcel of property proximately caused the damages Plaintiffs suffered when an entirely different parcel of property was foreclosed?

Standard of Review. “An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness.” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600.

Preservation. This issue was preserved below at R. 456-457, 111-123.

DETERMINATIVE PROVISIONS

There are no statutes or constitutional provisions which are determinative of this appeal.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Plaintiffs/Appellants Lynn and Eileen Harding sued numerous defendants, including Atlas Title Insurance Agency, Inc. and its employees, Randy Kidman and Dave White, for breach of contract, breach of good faith and fair dealing, breach of fiduciary

duty, civil conspiracy, negligence, and conversion which Plaintiffs claim arose from the foreclosure of their security interest in a failed real estate development in Washington County. .

After discovery, Atlas Title, Kidman, and White brought two separate motions for summary judgment. One addressed the civil conspiracy claim. The other addressed all claims and was based on the fact that Plaintiffs could not demonstrate that a recording error committed by Atlas Title on one parcel of property was the proximate cause of the damages Plaintiffs claim to have suffered when an entirely different parcel of property was foreclosed. The district court granted both motions. Plaintiffs now appeal.

II. STATEMENT OF FACTS¹

Pecan Ridge and the Initial Property Transaction.

This litigation involves a failed residential development in Washington County known as Pecan Ridge. (R. 115.) Pecan Ridge was the brainchild of a development group known as Pecan Ridge Partners LLC. (R. 115.) To pursue the Pecan Ridge development, Pecan Ridge Partners began acquiring property. (R. 115.) One such property was owned by Plaintiffs/Appellants Lynn and Eileen Harding. (R. 115.) That property is hereinafter referred to as the “Initial Property.”

In December 2006, the Hardings sold the Initial Property to Pecan Ridge Partners for the sum of \$1.15 million. (R. 115.) The Hardings seller financed a large portion of

¹ The facts are the undisputed facts before the trial court on summary judgment.

the purchase price for the Initial Property, and received a trust deed note from Pecan Ridge Partners in the amount of \$800,633.11. (R. 115-116.)

Atlas Title Insurance Agency, Inc. ("Atlas Title") handled the closing and recording of the transactions related to Pecan Ridge. (R. 116.) The Hardings did not provide Atlas Title with written recording instructions regarding the recording of the trust deed against the Initial Property. (R. 116.) Nevertheless, it is undisputed that the Hardings' trust deed note was to be secured by a trust deed recorded in *second* position against the Initial Property. (R. 116.) The first position trust deed on the Initial Property was recorded in favor of a group of individual investors who had provided additional funding to Pecan Ridge. (R. 116.) The first position trust deed secured the sum of \$372,713.64. (R. 214.)

Through inadvertence, Atlas Title did not immediately record the Hardings' trust deed in second lien position on the Initial Property. (R. 116.) Instead, Atlas Title recorded two other trust deeds in front of the Hardings. (R. 116.) The beneficiaries of these two trust deeds were two different investment entities. (R. 116.) These two trust deeds secured \$436,000 and \$955,000, respectively. (R. 218, 222.)

Approximately nine months later, the Hardings brought the non-recording to Atlas Title's attention. (R. 117.) After confirming that the trust deed was not recorded, Atlas Title immediately recorded the Hardings' trust deed. (R. 117, 403-404.)

The Land Exchange Transaction, Trust Deed Reconveyances, and Final Property: Rendering the Initial Property Irrelevant.

There were several options available to Atlas Title to remedy the issue. (R. 404.) Among other things, these included working with the two investor groups recorded in front of the Hardings to subordinate their trust deeds to the Hardings. (R. 404.) Atlas Title could also have tendered the matter to Stewart Title Guaranty Company, which provided a lender's policy of title insurance on the Initial Property. (R. 404.) The Hardings did not insist on Atlas Title taking either of these or any other actions to remedy the mistake. (R. 404.)

Rather, around this same time frame, Pecan Ridge Partners—with Lynn Harding's assistance—acquired an additional parcel of property, hereinafter referred to as the “Additional Property.” (R. 117.) The Hardings also took a security interest against the Additional Property in the form of a trust deed securing the sum of \$750,000. (R. 117.) This security position was recorded in second position behind a senior lienholder. (R. 117.)

With the Initial and Additional Properties, Pecan Ridge Partners was now in a position to acquire the property that it ultimately intended to develop. (R. 117.) To that end, Pecan Ridge Partners combined the Initial and Additional Properties for a land exchange with the local special service district, Ash Creek Special Service District. (R. 117.) To accomplish this exchange, Pecan Ridge obtained reconveyances of the trust deeds recorded against the Initial and Additional Properties. (R. 117.) This included a

reconveyance of the Hardings' two trust deeds, which Atlas Title reconveyed pursuant to written instruction from the Hardings. (R. 117, 252, 256.)

Through the exchange, Pecan Ridge acquired a new piece of property—the “Final Property”—that it intended to develop into the Pecan Ridge development. (R. 118.) The Hardings' loans to Pecan Ridge were then secured by the Final Property in the form of a trust deed securing the amount of \$1,550,633.10. (R. 118.)²

The Hardings' trust deed was recorded in second position on the Final Property, where the Hardings instructed Atlas Title to put it. (R. 118.) In fact, the Hardings signed Lender's Closing Instructions to Atlas Title stating: “Lynn and Eileen Harding also understand that upon recordation of the new Trust Deed for the property described in ‘Exhibit B-1’ the new recorded Trust Deed will be in second lien position on the property described in ‘Exhibit B-1.’” (R. 118, 275.) The property described as Exhibit B-1 in the Lender's Closing Instructions, of course, was the Final Property. (R. 118, 275.) The Hardings' trust deed was behind the first trust deed of yet another investor group. (R. 118.) The first trust deed secured the sum of \$625,000. (R. 298.)

Thus, after the reconveyancing, property exchanges, and recording of the new trust deeds, the Hardings ended up with a second position trust deed on the Final Property—exactly where they intended to be all along. (R. 118.)

² This amount is the total combined amount of the Hardings' notes for the Initial Property (\$800,633.11) and Additional Property (\$750,000).

**The Economy Tanks, the Development Fails, Pecan Ridge Partners Defaults,
and the First Trust Deed is Foreclosed.**

It was around this same time that the real estate and financial credit crisis began sweeping the nation, hitting the Washington County housing market particularly hard. (R. 119.) Like many developments during this time period, Pecan Ridge was on borrowed time. (R. 119.) Feeling the effects of the economic crisis and failing Washington County real estate market, funding soon ran out and the development came to a grinding halt. (R. 119.) Defendant/Appellee Scott Wilson, a principal of Pecan Ridge Partners, explained it to the Hardings this way:

. . . . Despite our best efforts we were not able to get the project funded. We leveraged every resource we had to try and make it work. It did not ...

As you are fully aware, we are in unprecedented financial times - the worst many of us have ever seen - some say the worst there has ever been. This project and all of us involved have been caught in the devastating effects of the markets downward spiral. The project and company ran out of options for funding. Funding dried up - it went away - we tried everything we could to get the project funded and the funding markets simply stopped lending on residential projects, not only locally but also on a national basis.

.... We were committed to what we felt was a great real estate project and what many others felt was the best project in the entire area. We dedicated several years of our lives to make this work. Unfortunately for all of us it didn't.

(R. 119-120.)

Unable to meet its financial obligations, Pecan Ridge Partners defaulted on the loan secured by the first trust deed against the Final Property. (R. 120.) This resulted in a foreclosure of the first position trust deed. (R. 120.)

With their security in the Final Property wiped out by the foreclosure of the senior trust deed, the Hardings responded by suing practically everybody that was associated with the transaction: Pecan Ridge Partners, its principals, its real estate agent, as well as Atlas Title and its employees, Randy Kidman and Dave White. (R. 1, 54, 120.)

The Lawsuit and Summary Judgment.

The specific claims the Hardings made against Atlas Title, Kidman, and White (collectively the "Title Defendants") were for breach of contract, breach of good faith and fair dealing, breach of fiduciary duty, civil conspiracy, negligence, and conversion. (R. 54-63.) The Hardings sought nearly \$2.5 million in damages. (R. 62.)

After discovery, the Title Defendants brought two concurrent motions for summary judgment. (R. 111, 125.) One addressed the civil conspiracy claim. (R. 125-146.) The other addressed all claims and was based on the fact that the Hardings could not demonstrate that Atlas Title's error was the proximate cause of the damages they later suffered as a result of the default and foreclosure. (R. 111-123.)

On the issue of causation, the Title Defendants argued that any error made by Atlas Title in the recording of the Hardings' trust deed was cured and rendered irrelevant by the subsequent reconveyance, property exchange, and the recording of the subsequent trust deed in second position, all pursuant to the Hardings' instructions. (R. 121-123.) The undisputed facts demonstrated that the Hardings were damaged when Pecan Ridge Partners defaulted on its loan with the senior lienholder, foreclosing out the Hardings' second place trust deed, and thereafter failing to pay the Hardings on the underlying note.

(*Id.*) There was no evidence that the Title Defendants had anything to do with these defaults or foreclosure. (*Id.*)

The Hardings submitted a joint opposition memorandum to the Title Defendants' motions. (R. 361-373.) Regarding causation, they argued that but for Atlas Title's mistake, they never would have been damaged. (R. 371-372.) The Title Defendants replied that the Hardings causation argument was purely speculative. (R. 406-430.)

The trial court agreed with the Title Defendants, and granted both motions for summary judgment. (R. 456-457.) It reasoned that the Hardings did not meet their burden of demonstrating causation because "on the facts and evidence presented [this] could not be done without engaging in impermissible speculation." (R. 457.) The trial court also granted summary judgment on the conspiracy claim because the Hardings presented "no clear and convincing evidence ... on which a reasonable fact finder could conclude that [the Hardings] meet each of the elements of a civil conspiracy." (R. 457.) The Hardings now appeal.

SUMMARY OF ARGUMENT

This is a case where summary judgment worked as it should. Atlas Title made an error in recording the Hardings' trust deed on the Initial Property. That is not in dispute. However, it is also undisputed that the error was rendered irrelevant when the Hardings reconveyed that trust deed to allow for a land exchange on a different parcel of property—the Final Property. Atlas Title recorded the Hardings' trust deed on the Final Property in second position, exactly where the Hardings instructed Atlas Title to place it.

What followed is also undisputed: The economic crash struck the Washington County real estate market; funding dried up; Pecan Ridge Partners defaulted on its loan obligation to the senior lienholder; the senior lienholder foreclosed; and the downstream lienholders, including the Hardings, had their security interests wiped out. Pecan Ridge Partners is now defunct, and the Hardings cannot collect on their loan.

Regardless of whether the Hardings' claims are based in contract or tort, they fail if the Hardings cannot demonstrate that Atlas Title's error was the proximate cause of their damages. This they cannot do. "Proximate cause is that cause which, in the natural and continuous sequence unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred.'" *Mahmood v. Ross*, 1999 UT 104, ¶ 22, 990 P.2d 933 (quoting *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996) (alterations omitted)).

The reconveyance of the trust deed and all the events that followed intervened to break any connection between Atlas Title's error and the damage the Hardings later suffered. On that score reasonable persons could not disagree. Therefore, the trial court correctly granted summary judgment to the Title Defendants. *See Harline*, 912 P.2d at 439 (reasoning that causation fails as a matter of law and summary judgment is appropriate "when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a legal standard to the facts").

Notwithstanding these undisputed facts, the Hardings' attempt to connect the dots of causation from Atlas Title's error to the damage caused by the foreclosure by arguing

that they only released their trust deed on the Initial Property to avoid the effects of Atlas Title's error, placed it on the Final Property to somehow recoup their losses, and only had the damage manifest itself when Pecan Ridge Partners defaulted and the senior lienholder foreclosed its trust deed. As the trial court concluded, this is pure speculation.

There is nothing to suggest that the same result would not have happened without Atlas Title's error. Rather, it requires speculation that second place on the Initial Property was somehow better than second place on the Final Property. It requires speculation that, despite the economy, there would have been no default and foreclosure. And, barring that, it requires speculation that there would have been some equity left over to make the Hardings whole even if the error had not occurred.

Further, it requires us to ignore the fact that the Initial Property was held for only a short period of time. Other property was acquired, combined with the Initial Property, and swapped for the Final Property, which would become Pecan Ridge. There is nothing to suggest that this would not have occurred but for Atlas Title's error. We can only speculate.

Furthermore, the Hardings' argument impermissibly ignores what they did or could have done to avoid the loss. For example, if releasing the trust deed on the Initial Property was to their detriment—as they argue—they should not have agreed to release it. They could have refused to release their trust deeds against the Initial and Additional Properties until they were paid in full on the underlying obligation. They did not. They could have refused to agree to the Ash Creek land exchange until they were fully

compensated. They did not. They could have insisted that Atlas Title remedy the error. They did not. Instead, they released their trust deed and instructed Atlas Title to put them in second position on the Final Property.

Indeed, as demonstrated by the undisputed facts, the Hardings were never intended to be in better than second place on any property on which they took a security interest. It is speculation for them to now claim that they would not have had their second position security interest foreclosed but for Atlas Title's error. As a result, the trial court correctly concluded that the Hardings' claims failed as a matter of law. *See Harline*, 912 P.2d at 439 (stating that causation fails as a matter of law and summary judgment is appropriate "when the proximate cause of an injury is left to speculation").

This Court should affirm.

ARGUMENT

I. THE "DISPUTED FACTS" IDENTIFIED BY THE HARDINGS ARE NOT MATERIAL TO THE ISSUE ON APPEAL.

The Hardings identify what they believe are three fact statements that preclude entry of summary judgment and warrant reversal. (Appellants' Br. at 10-13.) However, the brief of our co-Appellees Scott Wilson and Jeremy Larkin (at 9-11) has it right: These so-called disputes are not material to the issue presented on appeal. The three fact statements targeted by the Hardings address the following:

- Whether there were written instructions for the recording of the Hardings' trust deed on the Initial Property (Fact No. 6):

- Whether Atlas Title's failure to immediately record the Hardings' trust deed against the Initial Property was the result of inadvertence or something sinister (Fact No. 8); and
- Whether Atlas Title "immediately" recorded the trust deed after the Hardings first brought the recording issue to Atlas Title's attention or whether it was a week or so after (Fact No. 10).

None of these attempted disputes are material to the causation issue now on appeal. The initial recording instructions are not material because the Hardings do not dispute that they were supposed be in second position on the Initial Property. The reason Atlas Title did not immediately record the Hardings' trust deed in second position against the Initial Property and whether Atlas Title recorded that trust deed "immediately" after the issue was brought to its attention or within a few weeks thereafter are also not material. The argument section of the Hardings' brief bears this out, as there is no analysis demonstrating how these supposed fact disputes warrant reversal of the trial court's causation determination.

"[T]he mere existence of genuine issues of fact in the case as a whole does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case." *Horgan v. Industrial Design Corp.*, 657 P.2d 751, 752 (Utah 1982). *See also Sanns v. Butterfield Ford*, 2004 UT App 203, ¶ 6, 94 P.3d 301 (the "mere existence of genuine issues of fact ... does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case") (citation and quotation omitted); Utah R. Civ. P. 56(c). Because these alleged disputed facts are not material to the resolution of the

causation issue, they cannot form the basis for reversing the trial court's entry of summary judgment.³

To be sure, these fact statements were presented by the Title Defendants primarily in connection with their summary judgment motion on the Hardings' civil conspiracy claim. (R. 125, 131-133.)⁴ The Hardings submitted a joint opposition to both motions, attempting to dispute these facts in an effort to keep their conspiracy claim alive. (R. 361-367, 372-373.) But, as indicated at page 4 of their brief, the Hardings "do not contest" summary judgment on the conspiracy claim. (Appellants' Br. at 4.) As a result of their failure to brief or otherwise appeal entry of summary judgment on the conspiracy claim, they have abandoned that issue. *See Pixton v. State Farm Mutual Auto. Ins. Co.*, 809 P.2d 746, 751 (Utah Ct. App. 1991). Their fact disputes are not material.

³ Moreover, even if these attempted disputes are material to the causation motion—and they are not—the Hardings did not properly dispute these fact statements before the trial court in the first instance. As the Title Defendants argued below, the Hardings' responses to these fact statements were insufficient to put them in dispute. To properly dispute a fact statement, a non-movant is required to offer a direct counter to that statement. *See Johnson v. Hermes Assocs., Ltd.*, 2005 UT 82, ¶ 24, 128 P.3d 1151. None of the Hardings' responses to the fact statements in question constitute a direct counter. Rather, they consist of drawn out commentary, recharacterize each statement, and give long recitations of conclusory opinion and argument. That is not providing a direct counter and, "[a]bsent a direct counter," the statement is undisputed. *Id.* ¶ 24.

⁴ For ease of reference, we submitted identical fact statements and a joint set of exhibits to the trial court in both summary judgment motions. (R. 131-136, 115-120, 148.)

II. A TRIAL COURT MAY DECIDE CAUSATION ON SUMMARY JUDGMENT.

The Hardings begin their argument by devoting over six pages of their brief (at 8-10, 14-18) assailing summary judgment generally and cherry picking quotations from opinions to make it appear as though summary judgment is never appropriate on the issue of causation. That is not true.

For starters, “[s]ummary judgment of lawsuits is a valuable and necessary tool in a judicial system such as ours, which strives for the efficient and timely resolution of legal disputes. Granting summary judgment saves the parties and the courts the time and expense of a full-blown trial.” *Wycalis v. Guardian Title*, 780 P.2d 821, 824 (Utah Ct. App. 1989). Indeed, “[t]he purpose of summary judgment is to eliminate the time, trouble, and expense of trial when it is clear as a matter of law that the party ruled against is not entitled to prevail.” *Amjacs Interwest, Inv. v. Design Assocs.*, 635 P.2d 53, 54 (Utah 1981).

The value and purpose of summary judgment is not diminished simply because the issue involves causation. The Utah Supreme Court flat rejected that suggestion in *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996): “We therefore reject Harline’s first contention that the presence of an issue of proximate cause precludes summary judgment.” *Id.* at 439. See also, e.g., *Mitchell v. Pearson Enters.*, 697 P.2d 240, 246 (Utah 1985) (affirming summary judgment on causation); *Thurston v. Workers Comp. Fund*, 2003 UT App 438, ¶¶ 14, 23, 83 P.3d 391 (affirming summary judgment on proximate cause issue); *Clark v. Farmers Ins. Exchange*, 893 P.2d 598, 601 (Utah Ct.

App. 1995) (affirming summary judgment on causation issue where plaintiff could not show cause of injury without speculating). Thus, the Hardings attack on summary judgment and selective quotations from case law are not sufficient to overturn the trial court's grant of summary judgment.⁵

Rather, summary judgment is always appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Utah R. Civ. P. 56(c). As set forth below, there is no genuine issue of material fact and the Title Defendants are entitled to judgment as a matter of law.

III. ATLAS TITLE'S FAILURE TO RECORD THE TRUST DEED AGAINST THE INITIAL PROPERTY IS NOT THE PROXIMATE CAUSE OF THE HARDINGS' DAMAGES.

A. Proximate Cause.

The Hardings alleged five claims against the Title Defendants: breach of contract, breach of good faith and fair dealing, breach of fiduciary duty, negligence, and conversion. (R. 54-62.)⁶ They seek nearly \$2.5 million in damages. (R. 62-63.) Whether based in contract or tort, each of these claims has a common and essential element: proximate cause. *See Mahmood v. Ross*, 1999 UT 104, ¶¶ 19-22, 990 P.2d 933 (proximate cause standard in contract cases); *Thurston v. Workers Compensation Fund*,

⁵ We believe the brief and arguments of our co-Appellees Wilson and Larkin have adequately distinguished the principal cases relied on by the Hardings and therefore find it unnecessarily duplicative to restate them here. Rather, we join in those arguments.

⁶ As noted above, the sixth claim for conspiracy was decided on separate grounds (R. 457) and not appealed. *See* Appellants' Br. at 4. Therefore, the Hardings have abandoned the conspiracy claim. *See Pixton*, 809 P.2d at 751.

2003 UT App 438, ¶¶ 20-23, 83 P.3d 391 (citing *Mahmood* and reasoning that proximate cause standard is the same whether based on contract or tort).

“Proximate cause is that cause which, in the natural and continuous sequence unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred.” *Mahmood*, 1999 UT 104, ¶ 22 (quoting *Harline*, 912 P.2d at 439 (alterations omitted)). Though determining proximate cause is generally a question of fact left for the fact finder, the issue may be decided by the court as a matter of law on summary judgment where the “facts fall on either of two opposite ends of a factual continuum.” *Harline*, 912 P.2d at 439. These are: “(i) when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a 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.*

The Title Defendants based their summary judgment motion on the grounds that the Hardings’ claims against the Title Defendants fall at the first end of the continuum. The Hardings responded below—and argue on appeal—that but for Atlas Title’s error they would not have been damaged. As the trial court correctly concluded, the Hardings’ argument simply pulled the matter to the opposite end of the continuum, thereby resulting in summary judgment for the Title Defendants. As set forth below, at either end of the continuum, summary judgment should be affirmed.

B. Reasonable People Could Not Disagree About the Cause of the Hardings' Damages.

Each of the Hardings' claims against the Title Defendants is premised on the assumption that the failure to timely record the trust deed in second position against the Initial Property was the proximate cause of the Hardings' damages. The undisputed facts show otherwise.

The failure to timely record the Hardings' trust deed on the Initial Property is irrelevant. There was no default on any loan for the Initial Property. The Hardings, as junior lien holders on the Initial Property, did not have their security interest wiped out by a foreclosure of a senior interest thereby leaving them without security. Thus, the "damage" caused by Atlas Title's recording error was completely hypothetical. And it would remain a hypothetical because the Initial Property was not intended for the final development stage.

Rather, it was combined with the Additional Property and swapped with a special service district for an entirely separate parcel—the Final Property. To that end, the lienholders, including the Hardings, reconveyed their interests on the Final and Additional Properties to make the exchange happen. Atlas Title then followed the Hardings' written instructions by placing them in second position on the Final Property. Atlas Title's recording error became irrelevant the minute the Hardings requested the reconveyance. *See Utah Code § 57-1-33.1(1)(a)* ("When an obligation secured by a trust deed has been satisfied, the trustee shall, upon written request by the beneficiary, reconvey the trust property."). Those acts re-set the frame of the transaction.

What is not hypothetical and is relevant is what undisputedly happened next. The economy crashed and real estate funding dried up. Pecan Ridge Partners defaulted on its loan to the senior lienholder. The senior lienholder foreclosed on the Final Property. That foreclosure wiped out the security interests of junior lienholders, including the Hardings. It is unexceptional that anyone who takes anything other than a senior lien position on collateral runs the risk of having their security foreclosed out by the senior lienholder. *See* 53 C.J.S. *Liens* § 50 (West 2010) (recognizing that “foreclosure by a senior lienor often wipes out junior lien interest in the same collateral”).

Atlas Title’s recording error on the now irrelevant Initial Property did not cause these events to occur. To connect the dots of causation back to the error, the Court would have to ignore all of these intervening events. But it cannot, because without these intervening events there is no damage. That much is beyond dispute. These undisputed facts establish a clear break in any causal link between Atlas Title’s error and the damage suffered by the Hardings. These are the supervening events wholly unrelated to the error—the “efficient intervening causes” which break the natural and continuous sequence of events and, by definition, defeat proximate cause. *Mahmood*, 1999 UT 104, ¶ 22; *Harline*, 912 P.2d at 439.

And, to be clear, while the foreclosure by the senior lienholder left the Hardings unsecured, it did not extinguish the note from Pecan Ridge Partners. *See* 53 C.J.S. *Liens* § 50 (the “extinguishment of the junior lien on the property, however, does not discharge the debtor’s underlying obligation to the junior lien creditors”). It only meant that the

Hardings were left to pursue Pecan Ridge Partners directly on the underlying contractual obligation.

We are only entrenched in litigation because the Hardings do not like that remedy. Pecan Ridge Partners is now defunct so the Hardings train their fire on the only going concern—Atlas Title—and the various individuals Kidman, White, Wilson, and Larkin associated with Atlas Title and Pecan Ridge Partners. But the causation analysis does not change because the plaintiff does not like its remedy. This case is, and always has been, a simple breach of contract case against Pecan Ridge Partners. Pecan Ridge Partners' performance (or lack thereof) has nothing to do with the conduct of the Title Defendants. On that score, reasonable minds cannot differ. Accordingly, the trial court correctly granted summary judgment to the Title Defendants. *See Harline*, 912 P.2d at 439. This Court should affirm.⁷

C. The Trial Court Correctly Concluded that the Hardings' "Evidence" of Causation was Impermissibly Speculative.

Not surprisingly, the Hardings don't see it that way. In their view, if a defendant commits a wrong then it is responsible for all damages suffered by the plaintiff thereafter, regardless of what the damages actually are and what caused them. In an effort to link up

⁷ Although the trial court did not base its ultimate decision on this ground, "it is well settled that an appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action[.]'" *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225 (quoting *Limb v. Federated Milk Producers Ass'n*, 461 P.2d 290, 293 n.2 (Utah 1969)). Because this was the primary basis for the Title Defendants' summary judgment motion below, the Court may use it as the basis to affirm the trial court's grant of summary judgment.

Atlas Title's error with the damages they suffered, the Hardings now claim that the reconveyance was nothing more than a "mitigation" effort, and that they only released the trust deed on the Initial Property because of Atlas Title's error. (Appellants' Br. at 20, 22.) In other words, the Hardings present a "chain of events" theory, claiming that but for Atlas Title's error they never would have suffered the damage for which they now complain. The trial court correctly rejected this argument as impermissible speculation. So, too, should this Court.

1. Causation built on speculation fails as a matter of law.

Our case law makes clear that it is not enough to simply argue a but for, "chain of events" theory to defeat summary judgment. Rather, there must be a direct causal link between the error committed and the damage suffered. For example, in *Goebel v. Salt Lake City Southern R.R. Co.*, 2004 UT 80, 104 P.3d 1185, the plaintiff was injured when he was riding his bike and lodged the front tire into a gap at a railroad crossing. *See id.* ¶¶ 4, 6, 13. He argued that the proximate cause of his injuries resulted from a protuberance on the crossing that caused him to swerve his bike into the gap, which, in turn, caused him to wreck and suffer injury. *See id.* ¶¶ 4, 6, 13. Notwithstanding the plaintiff's argument that he only steered into the gap to avoid the protuberance, "this does not mean that the existence of the protuberance necessarily forced [the plaintiff] to steer into the gap." *Id.* ¶ 13. Affirming the trial court's directed verdict,⁸ the Supreme Court

⁸ Though *Geobel* is a directed verdict case, there is no practical difference in the standards for evaluating summary judgments and directed verdicts. *See Mahmood*, 1999 UT 104, ¶ 16. On a motion for directed verdict, like summary judgment, the trial court

reasoned that “[t]he protuberance was no more a cause of [the plaintiff’s] accident than his decision to ride his bicycle that day, or the weather. After reviewing the evidence, we agree with the trial court ... that [the plaintiff] could have steered his bicycle into the gap regardless of whether the protuberance existed at all.” *Id.* ¶ 13.

In *Mitchell v. Pearson Enterprises*, 697 P.2d 240 (Utah 1985), the Court affirmed summary judgment because, even though the plaintiff could establish the defendant’s negligence, there was no “direct evidence” that any of the negligent acts resulted in the injury that the plaintiff ultimately suffered. *See id.* at 246. Moreover, the Court would not allow the plaintiff to put the case before a jury to permit the jury to speculate on whether the defendant’s negligent acts caused the injury or whether the injury would have resulted despite the negligent acts. *See id.*

Similarly, in *Thurston*, 2003 UT App 438, this Court affirmed summary judgment on the issue of causation on the plaintiff’s tort and contract claims. *See id.* ¶¶ 20, 23. There, the plaintiffs sued for the death of an individual under the medical care of the defendants. The plaintiffs argued, like the Hardings do here, that “but for Defendants’ acts,” there would have been no injury. *Id.* ¶ 23. However, the “but for” was based on speculation that if the plaintiff had received better medical care, his demise could have been prevented. *See id.* ¶ 20. This Court held that the “Defendants’ acts, whether breaches of contract or torts, must be causally linked to Plaintiffs’ damages.” *Id.* ¶ 23.

does not weigh evidence, must consider the evidence in a light most favorable to the non-moving party, and can only enter a directed verdict when it is “able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented ...” *Id.* (citations and quotations omitted).

The best the plaintiff could do, however, was speculate that better medical care would have precluded the death. *See id.* ¶¶ 20, 23.

In this case, the Hardings insist that a jury must decide whether Atlas Title's error was the proximate of the injuries they suffered. But their "but for" argument fares no better than the failed arguments in the preceding cases. To borrow from *Goebel*, the evidence shows that the Hardings were steering their bike into the gap regardless of Atlas Title's error.

Here, the Hardings ignore the fact that the Initial Property was held for only a short period of time. It would not become the Pecan Ridge development. With the assistance of Lynn Harding, other property was acquired, combined with the Initial Property, and swapped for the Final Property, which would become Pecan Ridge. There is nothing to suggest that this would not have occurred but for Atlas Title's error and it may not be assumed in the Hardings' favor simply because this is a summary judgment motion. *See Mountain West Surgical Center, L.L.C. v. Hospital Corp. of Utah*, 2007 UT 91, ¶ 10, 173 P.3d 1276 ("The court must view all facts and inferences in the light most favorable to the nonmoving party, but it may not assume facts for which no evidence is offered.").

Thus, the Hardings could have and likely would have ended up in second place on the Final Property regardless of Atlas Title's error. As demonstrated by the undisputed facts, they were never intended to be in better than second place on any property on which they took a security interest. It is speculation for them to now claim that they

would not have lost their security but for the error. And they can't escape speculation by claiming that they were only attempting to avoid the effects of Atlas Title's error. Atlas Title's error was no more the cause of their damage than the Hardings' decision to seller finance the sale of the Initial Property to Pecan Ridge Partners or their decision to accept nothing better than a second place security position on any property securing that financing.

Further highlighting the speculative nature of the Hardings' causation argument is to assume that no error had occurred and that the Hardings had what they wanted: a second position trust deed on the Initial Property. We would have to speculate—on top of everything else—that the Initial Property, unlike every other property in Washington County, including the Final Property, would have held its value thus leaving something for the Hardings in the event of a foreclosure of the trust deed in front of them. But there was nothing special about the Initial Property to show that it was the one and only piece of property immune to market forces. And the Hardings provided no evidence to show otherwise.⁹

Moreover, there is no evidence to show that the housing market crash, Pecan Ridge Partners' default, the subsequent foreclosure by a senior lienholder, dropping

⁹ Even giving the Hardings the benefit of the doubt and every possible inference, the difference between the trust deed ahead of them on the Initial Property and the trust deed ahead of them on the Final Property was \$252,286.33. Yet, the Hardings seek nearly \$2.5 million in damages against the Title Defendants. They do not explain how they get to this figure and how Atlas Title's error took them there. Moreover, even taking the \$252,286.33 difference into account, the Hardings submitted no competent evidence that the ultimate foreclosure would have left enough equity in any property to cover the difference.

property values, and erasure of the Hardings' second position security interest would not have occurred if the Hardings were secured in second position on the Initial Property. To conclude otherwise is purely speculative. Consequently, as in *Thurston* and *Mitchell*, the trial court was correct in granting summary judgment as a matter of law.

2. The Hardings' causation theory impermissibly ignores what they did and could have done to avoid the injury.

Another fatal flaw in the Hardings' causation argument is that it asks the Court to ignore what they actually did do and what they could have done, which keeps their causation argument at the speculation end of the continuum. This is aptly demonstrated by *Mahmood v. Ross*, 1999 UT 104. *Mahmood* involved a plaintiff and defendant who entered into a series of agreements, each of which called upon the defendant to make loan payments to a third party. *See id.* ¶¶ 3, 8. The plaintiff had pledged his own property to secure the loans and, when the defendant breached and failed to pay, the third party lender began foreclosure proceedings. *See id.* ¶¶ 4-5. To stave off foreclosure, the plaintiff re-financed the loan on a short term note. *See id.* ¶ 24. He also entered into a settlement agreement with the defendant. *See id.* That agreement required the defendant to make monthly payments to the third party lender on the plaintiff's behalf, thus giving the plaintiff time to sell or develop the property, or to re-finance the loan before a balloon payment came due. *See id.* ¶ 25.

The defendant eventually breached the settlement agreement by failing to make all monthly payments to the third party lender. *See id.* ¶ 8. This resulted in the initiation of new foreclosure proceedings. *See id.* ¶ 8. The plaintiff then negotiated with the third

party lender, picked up the monthly payments, and made every effort to market and develop the property. *See id.* ¶¶ 9-11, 26. However, the plaintiff was unable to make the scheduled balloon payment and lost the property to foreclosure. *See id.* ¶¶ 15, 26.

The plaintiff then sued the defendant claiming that the defendant's breach of the settlement agreement caused the plaintiff to lose his equity in the foreclosed property. *See id.* ¶ 12. The trial court denied the defendant's motion for a directed verdict on that issue. *See id.*¹⁰ The trial court accepted the plaintiff's argument—which is similar to the argument the Hardings advance here—that the breach of the settlement agreement started a “chain of events which seriously impaired his ability to save the ... property by refinancing or selling it before the balloon payment on the [third party] loan became due.” *Id.* ¶ 27. The plaintiff sought and the jury awarded, inter alia, damages in the form of his lost equity in the property. *See id.* ¶ 14.

The Utah Supreme Court reversed, holding that the matter never should have gone to the jury. *See id.* ¶ 39. Although there was evidence that the defendant's breach made it more difficult on the plaintiff, there were alternatives available to the plaintiff which the plaintiff did not pursue, including simply re-financing with another lender. *See id.* ¶ 28. In other words, there was no evidence establishing the casual link between the breach and the foreclosure—namely, that the breach, by itself, prevented the plaintiff from re-financing the property, paying back the loan, or otherwise saving the property from foreclosure. *See id.* ¶ 28. Instead, the plaintiff's “but for the breach,” chain of events

¹⁰ *Mahmood* is also a directed verdict case. However, as noted above, that is a distinction without a difference for purposes of this appeal.

theory required the fact finder to engage in “unsupported speculation.” *Id.* The Court would not ignore what the plaintiff actually did and could have done in response to any breach to protect himself from the harm.

The present case is no different. Indeed, most revealing about the Hardings’ claim that the error caused their damages is to view it through the lens of what the Hardings actually did and could have done but did not do, as opposed to simply accepting what they surmise was the chain of events that followed the error. The Hardings argue that “but for Atlas Title’s failure to record, the [they] would never had agreed to release their deed.” (Appellants’ Br. at 21.) If releasing the trust deed on the Initial Property was to their detriment—as they argue—they should not have agreed to release it. If they were damaged by the recording error, they should have pursued their legal remedies at that time. They did not. Instead, they did release their trust deed. In fact, they went out with Pecan Ridge Partners to secure additional property for the development.

Moreover, they could have refused to release their trust deeds against the Initial and Additional Properties until they were paid in full on the underlying obligation. They did not. They could have insisted on additional security in the form of personal guarantees from the principals of Pecan Ridge Partners. They did not. They could have refused to agree to the Ash Creek land exchange until they were fully compensated. They did not. Like the plaintiff in *Mahmood*, the Hardings failed to pursue available and reasonable actions to avoid the harm, choosing instead to put it all at the feet of the Title Defendants when things did not go their way.

And there's more. The Hardings could have insisted that Atlas Title fix the error. The options were there for that to happen. Atlas Title could have worked with those recorded in front of the Hardings to subordinate their interests to the Hardings. The matter could have been tendered to the title insurer. Certainly, these are things that Atlas Title would have done and stood ready to do in order to protect itself from the effects of its error—something that cannot be ignored in determining causation. *See Zion Factory Stores Holding v. Lawrence*, 2005 UT App 361, ¶¶ 15-16, 121 P.3d 53 (reversing court for engaging in speculation by focusing on the plaintiff's harm and ignoring what the defendant may have done in the transaction to protect himself). But none of these actions were taken because the Hardings instructed Atlas Title to instead release and reconvey the trust deeds and record a new trust deed in second position against the Final Property.

The Hardings, like the plaintiff in *Mahmood*, are not entitled come back later, get in front of a jury, and present speculation about what caused their damage. Rather, like the plaintiff in *Mahmood*, there were other things that could have been done to save their security position on their underlying loans. Like the plaintiff in *Mahmood*, the Hardings did not pursue these options. They cannot now un-ring the bell and escape the consequences of their actions and decisions and force the Title Defendants, the trial court, and a jury through the time and expense of a trial to present speculative theories about how they believe Atlas Title's error caused them harm.

The trial court correctly ruled that the Hardings' causation arguments and evidence are purely speculative. As a result, this Court should affirm summary judgment.

D. The Trial Court Properly Applied Summary Judgment Burdens.

The Hardings also argue (at 21) that the trial court impermissibly shifted the burden to them to come forward with evidence of causation. They argue they only have a burden at trial, not on summary judgment. The Hardings are wrong.

“A summary judgment movant, on an issue where the nonmoving party will bear the burden of proof at trial, may satisfy its burden on summary judgment by showing, by reference to ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ that there is no genuine issue of material fact.” *Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600 (quoting Utah R. Civ. P. 56(c)). When the moving party makes this showing, “the burden then shifts to the *nonmoving* party, who ‘may not rest upon the mere allegations or denials of the pleadings,’ but ‘must set forth specific facts showing that there is a genuine issue for trial.’” *Id.* (quoting Utah R. Civ. P. 56(e)).

The trial court correctly applied the burdens on each party as it relates to summary judgment. The Hardings, as the plaintiffs, are the party with the burden of proving their claims at trial—including, as stated above, causation. *See Thurston*, 2003 UT App 438, ¶¶ 20-23 (reasoning that plaintiff must demonstrate causation regardless of whether claim is based on contract or tort). The Title Defendants presented a motion for summary judgment, supported by affidavits, documents, and discovery responses, which demonstrated that there were no disputed issues of material fact and that they were entitled to judgment as a matter of law. (R. 111-124, 406-429.) The Hardings never

argued below (R. 361-373) and do not argue on appeal that the Title Defendants did not meet their initial burden of demonstrating that there was no genuine issue of material fact related to the causation issue.

Thus, after the Title Defendants made their initial showing, the burden shifted to the Hardings to come forward with “specific facts” showing that there was a genuine issue for trial. The Hardings did not come forward with specific facts. They came forward with speculation and conjecture. As detailed above, that is not sufficient to withstand summary judgment.

IV. THE COURT SHOULD DISREGARD THE HARDINGS’ FINAL ARGUMENT.

The Hardings tack on a final argument under the heading “Neglect and Summary Judgment.” (Appellants’ Br. at 22.) This argument appears to be a retread of their central theme that summary judgment should not be granted in cases such as this, only this time “focusing” on the negligence claim. As set forth in detail above, the Hardings are wrong. Moreover, in light of the fact that this argument is a single paragraph and fails to indicate how it differs in substance from the Hardings’ other arguments on appeal, the Title Defendants will simply refer the Court to their arguments as set forth above.

What’s more, for this reason, the argument should be ignored because it is inadequately briefed. It is a single paragraph in length and does not contain any analysis. It says only that the Hardings pleaded negligence and summary judgment is only appropriate in a “clear cut” case. (Appellants’ Br. at 22.) It does not provide any explanation as to why this is not a “clear cut” case.

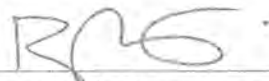
“An issue is inadequately briefed if the argument merely contains bald citations to authority [without] development of that authority and reasoned analysis based on that authority.” *Benjamin v. Utah State Tax Comm’n*, 2011 UT 14, ¶ 31 n.8, 250 P.3d 39 (citations and quotation omitted); Utah R. App. P. 24(a)(9). The Hardings’ argument does not measure up to these standards. *See State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (declining to address issue “when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court”). The Court should therefore ignore the Hardings’ final argument. *See Seamons v. Brandley*, 2011 UT App 434, ¶ 5 (per curiam).

CONCLUSION

The trial court should be affirmed.

DATED THIS 6 day of January 2012.

DURHAM JONES & PINEGAR, P.C.



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CERTIFICATE OF COMPLIANCE
WITH RULE 24(f)

This brief complies with UTAH R. APP. P. 24(f)(2) in that it is a principal brief not exceeding 30 pages. Therefore, it is not subject to the type-volume limitation of UTAH R. APP. P. 24(f)(1).

Dated: January 6, 2012



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CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on January 6, 2012, I caused two (2) copies of **BRIEF FOR APPELLEES ATLAS TITLE INSURANCE AGENCY, INC., RANDY KIDMAN, AND DAVE WHITE** to be served upon counsel for Appellants in this matter, via first class mail with sufficient postage prepaid, to the following addresses:

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