

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 Appellants

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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LYNN HARDING and EILEEN  
HARDING,

Plaintiff/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  
and ROGER CATER,

Defendants/Appellees.

**BRIEF OF APPELLANTS**

Appellate Case No. 20100999-CA

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Appeal from final Order Granting Summary Judgment of the Fifth Judicial District  
Court for Washington County, State of Utah, Judge James L. Shumate presiding.

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UTAH APPELLATE COURTS  
NOV 07 2011

### **PARTIES TO THE PROCEEDING**

LYNN HARDING, plaintiff (deceased).

EILEEN HARDING, plaintiff.

PECAN RIDGE PARTNERS, LLC, a Utah Limited Liability Company, defendant.

ATLAS TITLE INSURANCE AGENCY, INC, a Utah Corporation, defendant.

SCOTT WILSON, defendant.

JEREMY LARKIN, defendant.

RANDY KIDMAN, defendant.

DAVE WHITE, defendant.

## TABLE OF CONTENTS

PARTIES TO THE PROCEEDING .....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED FOR REVIEW.....	1
STANDARD OF APPELLATE REVIEW .....	1
ISSUE PRESERVATION .....	1
STATEMENT OF THE CASE.....	2
A. NATURE OF THE CASE.....	2
B. COURSE OF THE PROCEEDINGS .....	3
C. STATEMENT OF FACTS.....	4
1. INITIAL SALE AND FAILURE TO RECORD TRUST DEED .....	4
2. TRANSACTIONS FOLLOWING RECORDING OF TRUST DEED.....	6
SUMMARY OF ARGUMENTS.....	7
ARGUMENT .....	8
A. GENERAL PRINCIPLES OF SUMMARY JUDGMENT .....	8
B. DISPUTED FACTS .....	10
1. FACT #6.....	10
2. FACT #8.....	11
3. FACT #10.....	13

C.	PROXIMATE CAUSE AND SUMMARY JUDGMENT.....	14
1.	COURTS DISFAVOR SUMMARY JUDGMENT ON THE ISSUE OF CAUSATION.....	14
2.	IMPERMISSIBLE SPECULATION.....	18
D.	NEGLECT AND SUMMARY JUDGMENT.....	22
CONCLUSION.....		22
CERTIFICATE OF MAILING.....		23
ADDENDUM.....		a



## TABLE OF AUTHORITIES

### **CASES**

<u>Apache Tank Lines, Inc. v. Cheney</u> , 706 P.2d 614 (Utah 1985).....	22
<u>Berenda v. Langford</u> 914 P.2d 45 Utah 1996 .....	19
<u>Bowen v. Riverton City</u> , 656 P.2d 434 (Utah 1982) .....	22
<u>Butterfield v. Okubo</u> , 831 P.2d 97 (Utah 1992) .....	16
<u>Controlled Receivables, Inc. v. Harriman</u> , 413 P.2d 807 (Utah 1966) .....	9
<u>Cruz v. Middlekauff Lincoln-Mercury, Inc.</u> , 909 P.2d 1252 (Utah 1996).....	17
<u>Draper City v. Estate of Bernardo</u> , 888 P.2d 1097 (Utah 1995) .....	16
<u>Drysdale v. Ford Motor Co.</u> , 947 P.2d 678 (Utah 1997).....	9
<u>English v. Kienke</u> , 774 P.2d 1154 (UT App. 1989) .....	1
<u>Gardner v. Board of County Com'rs of Wasatch County</u> , 178 P.3d 893 (Utah 2008).....	8
<u>Glover by and through Dyson v. Boy Scouts of Ameirca</u> , 923 P.2d 1383 (utah 1996).....	19
<u>Godesky v. Provo City Corp.</u> , 690 P.2d 541 (Utah 1984).....	15
<u>Goodnow v. Sullivan</u> , 44 P.3d 704 (Utah 2002) .....	9
<u>Grynberg v. Questar Pipeline Co.</u> , 70 P.3d 1 (Utah 2003).....	10
<u>Harline v. Barker</u> , 854 P.2d 595 (Utah App.).....	16, 19, 20
<u>Harris v. Utah Transit Authority</u> , 671 P.2d 217 (Utah 1983).....	15, 18
<u>Holbrook Co. v. Adams</u> , 542 P.2d 191 (Utah 1975) .....	9
<u>Hously v. Anaconda Co.</u> , 427 P.2d 390 (Utah 1967).....	8
<u>Ingram v. Salt Lake City</u> , 733 P.2d 126 (Utah 1987).....	16, 22
<u>Jensen v. Mountain States Telephone &amp; Telegraph Co.</u> , 611 P.2d 363 (Utah 1980) .....	17, 18
<u>Lach v. Deseret Bank</u> , 746 P.2d 802 (Utah 1987).....	10
<u>Ostler v. Albina Transfer Co., Inc.</u> , 781 P.2d 445 (Utah App.1989) .....	15
<u>Singleton v. Alexander</u> , 431 P.2d 126 (Utah 1967) .....	15
<u>Steffensen v. Smith's Management Corp.</u> , 820 P.2d 482 (Utah App. 1991) ...	15, 17
<u>Thurston v. Workers Comp. Fund</u> , 83 P.3d 391 (UT App. 2003).....	15
<u>Timm v. Dewsnap</u> , 851 P.2d 1178 (Utah 1993).....	8
<u>Utah State University of Agriculture and Applied Science v. Sutro &amp; Co.</u> , 646 P.2d 715 (Utah 1982) .....	9
<u>Welchman v. Wood</u> , 337 P.2d 410 (Utah 1959) .....	8

### **STATUTES**

Utah Code Ann. §78a-4-104(2) .....	1
------------------------------------	---

## **RULES**

Utah R. Civ. Proc. 56 ..... 8, 9

## **CONSTITUTIONAL PROVISIONS**

Utah Const. Art. 1, § 11 ..... 9

### **STATEMENT OF JURISDICTION**

Jurisdiction is proper with this court pursuant to Utah Code Ann. §78a-4-104(2).

### **ISSUES PRESENTED FOR REVIEW**

1. Was the trial court correct to hold that there are no genuine issues of material fact?
2. Did the trial court properly grant summary judgment to defendants on the issue of proximate cause.

### **STANDARD OF APPELLATE REVIEW**

The court reviews facts and inferences from those facts in the light most favorable to the losing party, overturning summary judgment and remanding the case for further proceedings on issues if it concludes that genuine issue of material fact exist; where no material facts remain unresolved, the court examines the trial court's conclusions of law and review them for correctness. English v. Kienke, 774 P.2d 1154 (UT App. 1989), affirmed 848 P.2d 153 (Utah 1993).

### **ISSUE PRESERVATION**

On December 2, 2010, plaintiffs filed a Notice of Appeal of the district court's final Order Granting Summary Judgment, entered November 4, 2010 (R. 456, 460).



## STATEMENT OF THE CASE

### **A. NATURE OF THE CASE**

Plaintiffs sold their home and adjoining land in Washington County to Pecan Ridge Partners, LLC (hereinafter “Pecan Ridge”) (R. 115, 362). In exchange, the plaintiffs received a trust deed on the property and other consideration (R. 115, 116, 362).

Atlas Title Insurance Company, Inc. (hereinafter “Atlas Title”) performed the closing on December 5, 2011 (R. 116). At that time, the Hardings executed a warranty deed to Pecan Ridge, and Pecan Ridge executed a first trust deed on the property in favor of a group of investors in the amount of \$372,713.67, and a second trust deed in favor of the Hardings in the amount of \$800,633.11 (R. 116, 202, 214). The Hardings were told that their trust deed would be recorded the following day in second position (R. 116, 364). Atlas Title recorded the warranty deed and the first trust deed the following day, but failed to record the Harding’s trust deed for more than nine months (R. 116, 193, 202, 214).

Before the trust deed was recorded, Pecan Ridge had encumbered the property with two additional trust deeds, recorded on May 7, 2007 and August 17, 2007 (about the time Mr. Harding brought the failure to record the deed to Atlas Title’s attention), to third parties with a principal balance of \$1,391,000. Those trust deeds were also recorded by Atlas Title (R. 116, 218, 222). These additional

encumbrances completely destroyed the value of the Harding's security interest in the property (R. 367).

Pecan Ridge thereafter traded the original parcel for a second piece of land. As part of the transaction, the plaintiffs received a trust deed in second position on this new property and released their trust deed on the original parcel (R. 117). The holder of the trust deed in first position foreclosed upon the property in March of 2009, extinguishing the plaintiff's trust deed (R. 120).

## **B. COURSE OF THE PROCEEDINGS**

Plaintiffs filed a complaint in the Fifth District Court of Washington County, the on May 11, 2009 against Pecan Ridge and Atlas Title (R. 1). Plaintiffs served Pecan Ridge, Atlas Title and Pecan Ridge, as well as Randy Kidman and Dave White (employees of Atlas), and Jeremy Larkin and Scott Wilson (principals of Pecan Ridge) (R. 19, 23, 84, 85, 107, 318). Pecan Ridge did not file an answer and its default was entered and a judgment entered (R. 39, 104). Defendants Roger Cater (a former employee of Atlas Title) and Scott Nielson (a principal of Pecan Ridge) were not served.

The amended complaint included claims for breach of contract against Pecan Ridge, breach of contract against Atlas Title, breach of good faith and fair dealing, breach of fiduciary duty against Atlas Title, civil conspiracy, negligence against Atlas Title and conversion (R. 54).

The Hardings requested a jury trial (R. 41).

After discovery was completed, the defendants filed two motions for summary judgment (R. 111, 125)<sup>1</sup>. The first motion was in regard to the conspiracy claims (the Hardings do not contest the dismissal of this claim). The second motion sought dismissal of the remaining claims on the issue of proximate cause. The trial court granted both motions and the plaintiffs appealed (R. 456, 460).

The trial court, in its order, held that “there is no genuine issue as to any material fact that might preclude entry of summary judgment and that summary judgment is appropriate as a matter of law.” (R. 457). With respect to the proximate cause issue, the trial court held that:

Specifically, it is Plaintiffs’ burden to prove, with respect to all of their claims, that the Title Defendants’ actions were the proximate cause of Plaintiff’s damages. Plaintiffs did not meet this burden because determining causation on the facts and evidence presented to the court could not be done without engaging in impermissible speculation. (R. 457).

On appeal, the Hardings are not disputing the dismissal of the conspiracy claim, and only seek a review of the proximate cause ruling.

## **C. STATEMENT OF FACTS**

### **1. INITIAL SALE AND FAILURE TO RECORD TRUST DEED**

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<sup>1</sup> The motion was filed by defendants Atlas Title, Kidman and White; defendants Wilson and Larkin joined in the motion for summary judgment on the conspiracy



Lynn and Eileen Harding owned property located in Washington County containing approximately 10 acres. They lived in a home on the property and conducted their horse business there (R. 115, 362, 375).

The Hardings agreed to sell their home and property to Pecan Ridge, a real estate development group. The Hardings financed a large portion of the purchase price for the Initial Property (R. 115). Atlas Title Insurance Company, Inc.

(hereinafter "Atlas Title") performed the closing on December 5, 2011 (R. 116).

At that time, the Hardings executed a warranty deed to Pecan Ridge. Pecan Ridge executed a first trust deed on the property in favor of a group of investors in the amount of \$372,713.67, and a second trust deed in favor of the Hardings in the amount of \$800,633.11 (R. 116, 202, 214). The Hardings were told that their trust deed would be recorded the following day in second position (R. 116, 364).

Atlas Title recorded the warranty deed and the first trust deed the following day, but failed to record the Harding's trust deed for more than nine months (R. 116, 193, 202, 214).

The Harding attempted to obtain a copy of the papers from the closing and the recorded deed from Atlas Title during that nine month period, and were told that the papers would be provided. Finally, Mr. Harding went to the County recorder in August of 2007 and discovered that the trust deed had not been

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claim (R. 347).

recorded (R. 117, 364, 365). After bringing this to Atlas Title's attention, the Harding's trust deed was finally recorded on September 11, 2007 (R. 117, 366, 367).

Before the Harding's trust deed was recorded, Pecan Ridge had encumbered the property with two additional trust deeds, recorded on May 7, 2007 and August 17, 2007 (about the time Mr. Harding brought the failure to record the deed to Atlas Title's attention), to third parties. The principal balance of these two intervening trust deeds was \$1,391,000. Those trust deeds were also recorded by Atlas Title (R. 116, 218, 222). These additional encumbrances completely destroyed the value of the Harding's security interest in the property (R.367).

## **2. TRANSACTIONS FOLLOWING RECORDING OF TRUST DEED**

As part of a separate transaction, not related to the sale of the original parcel, plaintiff Pecan Ridge executed a second trust deed and note in favor of the Hardings (R. 117, 367). The Harding's second note had a principal balance of \$750,000, and the trust deed was recorded on a second parcel of property on September 27, 2011 (R. 117).

In April of 2008, Pecan Ridge engaged in a real estate exchange whereby it transferred the two properties encumbered by the Harding's trust deeds in exchange for a third parcel (R. 117). The Harding received a trust deed and note



on this third parcel, with a principal balance of \$1,550,633.10, the total unpaid balance of the two prior trust deed notes (R. 117, 118). The Hardings understood that their new trust deed would be in second position on the new property (R. 118).

The Hardings executed requests for reconveyance of the two prior trust deeds at that time, and Atlas Title, as trustee, executed and recorded the reconveyances (R. 117, 253, 256).

The Pecan Ridge development failed, perhaps due in part due to the collapsing real estate market in Washington County, and the trust deed in superior position to plaintiffs' final trust deed was foreclosed in March of 2009 (R. 119, 120), eliminating the Harding's secured interest in the third property. The Hardings filed this action two months later (R. 1).

### **SUMMARY OF ARGUMENTS**

The trial court failed to recognize that there are genuine issues of material fact with respect to at least three of defendant's factual assertions.

The trial court granted summary judgment on the issue of causation as it essentially decided that there may were other contributing factors to the Hardings' loss. Rather than requiring the defendant to prove that Atlas Title's neglect was not a possible cause of the Hardings' injury, the trial court instead essentially required the Hardings to show that Atlas Title's neglect was the sole cause of the

loss. Case law in Utah prohibits trial courts from deciding the issue of causation on such a basis.

## ARGUMENT

### **A. GENERAL PRINCIPLES OF SUMMARY JUDGMENT**

Summary judgment procedure is generally considered drastic remedy, should be granted with reluctance and requires strict compliance with rule authorizing it. Utah R. Civ. Proc. 56. Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993); Hously v. Anaconda Co., 427 P.2d 390 (Utah 1967). Summary judgment is a drastic remedy and courts should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial, and therefore, summary judgment should be granted only when under the facts viewed in the light most favorable to the plaintiff he could not recover as a matter of law. Welchman v. Wood, 337 P.2d 410 (Utah 1959). Summary judgment is a drastic remedy and should be granted with reluctance. Housley v. Anaconda Co., 427 P.2d 390 (Utah 1967).

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Gardner v. Board of County Com'rs of Wasatch County, 178 P.3d 893 (Utah 2008). Litigants must be able to present their cases fully to court before judgment can be rendered against them unless it is obvious from evidence before court that

party opposing judgment can establish no right to recovery. Drysdale v. Ford Motor Co., 947 P.2d 678 (Utah 1997). In view of constitutional guarantee of access to the courts for protection of rights and redress of wrongs, summary judgment, which denies opportunity for trial, should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail. Utah Const. Art. 1, § 11. Utah State University of Agriculture and Applied Science v. Sutro & Co., 646 P.2d 715 (Utah 1982)

It is not purpose of summary judgment procedure to judge credibility of averments of parties or witnesses, or the weight of evidence, nor is it to deny parties right to trial to resolve disputed issues of fact. Kilpatrick v. Wiley, Rein & Fielding, 1996, 909 P.2d 1283, certiorari denied 919 P.2d 1208. If there is any dispute as to any issue material to settlement of controversy, summary judgment should not be granted. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975).

The judge hearing a summary judgment motion may not draw fact inferences as to the moving party's purpose or intention; such inferences may only be drawn at trial. Rules Civ.Proc., Rule 56(c). Goodnow v. Sullivan, 44 P.3d 704 (Utah 2002). Contentions of the party opposing the motion must be considered in a light most advantageous to him and go to trial. Controlled Receivables, Inc. v. Harriman, 413 P.2d 807 (Utah 1966). Essentially, summary judgment is only appropriate when it is clear from the undisputed facts that the opposing party



cannot prevail. Lach v. Deseret Bank, 746 P.2d 802 (Utah 1987).

In reviewing a grant of summary judgment, the appellate court gives no deference to the district court's conclusions of law, and reviews them for correctness. Grynberg v. Questar Pipeline Co., 70 P.3d 1 (Utah 2003).

## **B. DISPUTED FACTS**

Despite the assertion of the trial court to the contrary, there were material facts presented by Atlas Title that were disputed by the Hardings. While the facts given in paragraphs 4 of Atlas Title's motion was disputed, they are not necessarily material. Only an inference was disputed in paragraph 12 of Atlas Title's facts. However, the facts and inferences from the facts set forth below were disputed and were material.

### **1. FACT #6**

Atlas Title's undisputed fact number six provided that:

The Hardings' trust deed note was to be secured by a trust deed recorded against the Initial Property. The Hardings did not provide Atlas Title with written recording instructions regarding the recording of the trust deed against the Initial Property.

(R, 116). The Hardings responded as follows:

Plaintiff's deny the second sentence of this paragraph. First, plaintiffs object that the citations to the record do not support that conclusion. The Trust Deed would not contain any closing instructions, and Request No. 70 of Exhibit 9 is a response to request for admissions, unverified and not given in the form of an unsworn declaration, and is therefore hearsay. Denying a request for admission is not evidence.

Plaintiff's assert that they did provide closing instructions, and state as additional facts that they were assured by Atlas Title that the recording would take place the morning after the closing:

a. At closing, plaintiffs signed a document which included recording instructions. It was prepared by Atlas Title. It said that their trust deed was to be recorded within 72 hours. Plaintiffs were verbally told by the Atlas representative that it would take approximately 3 days to get the recorded deed back to them. They were told Atlas Title that it would actually be recorded in the morning following the closing. Atlas Title told plaintiffs that they were going to give plaintiffs copies of these documents, as well as the title policy and many other documents they signed, within three days.

b. Plaintiffs were charged for a title policy. See defendant's exhibit 6, line 1108. Plaintiffs were also told by Atlas Title in a letter that Atlas had provided title insurance.

c. Plaintiffs requested in discovery that Atlas admit that tile insurance was provided, which Atlas denied, and requested a copy of these closing documents as well as the title policy. See Defendant Atlas Title's Insurance Agency, Inc., Answer to Plaintiff's First Discovery Request, response to request for admissions #3 and response to request for production of documents #17, 18, 19 and 20. Atlas provided nothing.

(R. 362-3). It is clear from this evidence that Atlas Title as provided closing instructions, but did not give copies to the Hardings.

## **2. FACT #8**

Atlas Title's undisputed fact number eight provided that:

The Hardings trust deed was to be recorded after the Goodman et al. trust deed, in second lien position on the Initial Property, but-through inadvertence-it was not immediately recorded by Atlas Title.

(R. 116). The Hardings responded as follows:

Plaintiffs deny that it was through inadvertence that the trust deed was not immediately recorded by Atlas Title. The citations to the record do not support that conclusion. The Trust Deed does not contain any information



on why the trust deed was not recorded for nine months, and the response to interrogatories states that "As best as Atlas Title can tell, it was inadvertence on the part of the employee whose duty it was to record documents for Atlas Title." That is not evidence that it was inadvertence, only a statement of probability or a guess.

Plaintiffs assert that it was not inadvertence with the following facts:

- a. The first position trust deed was recorded the day following the closing, September 6, 2007, just plaintiffs were told their trust deed would be recorded the following day.
- b. Three days after the closing, Lynn Harding called Atlas title to see if he could come and pick up the deed. They said they did not have it yet but they would get it to the Hardings.
- c. Two weeks after the closing, Lynn Harding went to Atlas Title. Someone new was in the office, and they said they would have to wait to get back to the Hardings until the person in charge was back from Christmas vacation.
- d. Eileen Harding called Atlas Title during the second week in January. She was told that Atlas would get a copy to the Hardings.
- e. After that, Lynn Harding called Atlas Title eight or ten times, approximately once per month, to get a copy of the recorded deed. They told him every time that they would get it to him.
- f. Eileen Harding stopped by twice at the Atlas Office to get a copy of the recorded deed, and was told that it would be sent to the Hardings.
- g. Lynn Harding stopped by the Atlas Office approximately six times, and was told that the deed would be sent to the Hardings. He remembers talking to Randy Kidman in particular on several occasions.
- h. Lynn Harding was at the title company as part of transactions with adjoining properties, and always requested a copy of the recorded deed.
- i. There were various excuses given for why the deed could not be provided by Atlas, including that they couldn't find the right file, that Randy was on vacation, that the file was not at that office, or that the guy who records the documents had the file with him.
- j. Finally, Lynn Harding went to the county recorder to just get a copy of the recorded deed in late August of 2007. At that time he found out that the deed had not been recorded.
- k. Lynn Harding immediately went to Atlas Title. Lynn Harding was told that it was a slip-up and that they would take care of it. At that time, Lynn Harding asked for titled his title insurance and closing instructions, and was told that they didn't have a copy of either document.
- l. Eileen Harding called during the first week in September, asking for a

copy of the deed. Atlas Title said they would fax it to her.

m. Eilenn Harding called the following week, and the recorded deed was faxed to her the next day.

n. There were additional deeds recorded on the "Initial Property" between the time of the Hardings' closing and when their trust deed was finally recorded. See defendant's exhibit # 12 and 13. These closings were performed by Atlas Title and Atlas Title served as the Trustee of the trust deeds. As stated above, the Hardings requested copies of the closing documents in discovery for these transactions, and Atlas did not provide them.

(R. 363-5) While the Hardings can point to no conclusive evidence that the failure to record the deed was intentional, there clearly is enough evidence, and inferences from that evidence, when viewed in the light most favorable to the Hardings, to conclude that the failure to record the deed was more than inadvertence.

### **3. FACT #10**

Atlas Title's undisputed fact number ten provided that:

Sometime in August or September 2007, the Hardings brought it to Atlas Title's attention that their trust deed was not recorded. After confirming this, Atlas Title immediately recorded the trust deed.

(R. 117). The Hardings responded as follows:

Plaintiff's deny the second sentence of this paragraph. First, plaintiffs object that the citations to the record do not support that conclusion. The Trust Deed would not contain any information regarding when the Hardings found out that their trust deed had not been recorded, and paragraph 65 of Exhibit 9 is a response to request for admissions, unverified and not given in the form of an unsworn declaration, and is therefore hearsay. Denying a request for admission is not evidence. Further, the response states that:



Atlas Title was not made aware of the failure to record until it was brought to their attention by Plaintiff Lynn Harding sometime in September 2007. Therefore, Atlas Title must deny because it did not notify Plaintiff of the recording issue. Nowhere in this statement does it state the recording took place immediately after Atlas was notified of the problem.

Plaintiff's assert that the deed was not immediately recorded after the problem was brought to Atlas' attention with the following facts:

- a. Lynn Harding went to the county recorder to just get a copy of the recorded deed in late August of 2007. At that time he found out that the deed had not been recorded.
- b. Lynn Harding immediately went to Atlas Title. Lynn Harding was told that it was a slip-up and that they would take care of it.
- c. Eileen Harding called during the first week in September, asking for a copy of the deed. Atlas Title said they would fax it to her.
- d. Eileen Harding called the following week, and the recorded deed was faxed to her the next day.

(R. 366, 367). The trust deed was eventually recorded a couple of weeks after Mr. Harding contacted Atlas Title, but it was not done "immediately."

## **C. PROXIMATE CAUSE AND SUMMARY JUDGMENT**

### **1. COURTS DISFAVOR SUMMARY JUDGMENT ON THE ISSUE OF CAUSATION**

Utah case law is replete with warnings to trial courts against granting summary judgment on the issue of causation.

Generally, the question of proximate cause raises an issue of fact "to be submitted to the jury for its determination." Mitchell v. Pearson Enters., 607 P.2d 240, 245-6 (Utah 1985). It is well established that the question of proximate cause

is generally reserved for the jury. Godesky v. Provo City Corp., 690 P.2d 541, 544 (Utah 1984); Ostler v. Albina Transfer Co., Inc., 781 P.2d 445, 451 (Utah App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990). Only in rare cases may a trial judge rule as a matter of law on the issue of proximate causation. Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991).

Summary judgments are more frequently given in contract cases because of greater ease in determining the factual issues . . . . However, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position . . . here enters prerogative of the jury to make a determination . . . Did the conduct of a party measure up to that of the reasonably prudent man, and, if not, was it a proximate cause of the harm done?

Singleton v. Alexander, 431 P.2d 126 at 128 (Utah 1967).

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. It is the efficient cause-the one that necessarily sets in operation the factors that accomplish the injury.

Thurston v. Workers Comp. Fund, 83 P.3d 391 at 14 (UT App. 2003). The proximate cause in this case is Atlas Title's failure to record the deed. That was the event which produced the injury. That "a trial judge *ordinarily* may not determine the issue of proximate cause is fully supported by Utah case law." Id. at 3 (Utah App. 2003) (emphasis in original); Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983).

Although summary judgment may on occasion be appropriate in cases



where proximate cause is an issue, it is appropriate only in the most clear-cut case.

Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987). As the Court of Appeals recited in Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283 (UT App. 2001), 1292:

Generally, causation “cannot be resolved as a matter of law.” Butterfield v. Okubo, 831 P.2d 97, 106 (Utah 1992). “Proximate cause is an issue of fact. Thus, only if there is no evidence upon which a reasonable jury could infer causation, is summary judgment appropriate.” Harline v. Barker, 854 P.2d 595, 600 (Utah App.) (citations omitted), cert. denied, 862 P.2d 1356 (Utah 1993). In other words, Utah litigants do not easily dispose of the element of causation on summary judgment.

Causation is a highly fact-sensitive element of any cause of action. In Utah, “[p]roximate causation is ‘[t]hat 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.’ ” Butterfield, 831 P.2d at 106 (citations omitted). To establish causation, plaintiffs must persuade a fact finder that their injury was a natural result of the defendant's breach. Plaintiffs therefore must spin together myriad facts into a durable thread that reasonably connects defendant's breach to plaintiffs' injury. Utah courts have recognized that “[f]act-sensitive cases ... do not lend themselves to a determination on summary judgment.” Draper City v. Estate of Bernardo, 888 P.2d 1097, 1101 (Utah 1995).

The Supreme Court held in Butterfield v. Okubo, 831 P.2d 97, 106 (Utah 1992) reversed summary judgment on the issue of proximate cause “[b]ecause proximate cause is an issue of fact, we refuse to take it from the jury if there is *any evidence* upon which a reasonable jury could *infer* causation.” (emphasis added).

Summary judgment on the issue of causation is not possible even where a



third-party criminal actor intervenes. Cruz v. Middlekauff Lincoln-Mercury, Inc., 909 P.2d 1252, 1257 (Utah 1996) (determining that when car dealership has history of thefts and yet continues to keep keys in cars and does nothing to improve security, it may be foreseeable that a thief would steal a car, drive recklessly while being pursued by police, and injure a bystander); Mitchell v. Pearson Enters., 697 P.2d 240, 246-47 (Utah 1985) (holding on proper facts hotel's inaction in providing security could be proximate cause of wrongful death of patron killed by intruder); Steffensen v. Smith's Management Corp., 820 P.2d 482, 489 (Utah App.1991) (concluding injury to customer during chase of shoplifter could be a foreseeable consequence of negligent training of personnel in pursuit of shoplifters), *aff'd*, 862 P.2d 1342 (Utah 1993).

In Jensen v. Mountain States Telephone & Telegraph Co., 611 P.2d 363 (Utah 1980), the trial judge granted defendant summary judgment on the issue of proximate cause in an action where the plaintiff had been injured in an automobile accident. The plaintiff claimed he was unable to see approaching traffic in executing a left-hand turn because a van owned by the defendant utility company negligently blocked his view by remaining in the intersection, and this was an intervening proximate cause of the accident. On appeal, the Utah Supreme Court reversed the summary judgment on the issue of proximate cause. The court held that the issue of proximate cause may only be taken from the jury where

reasonable minds could not differ as to what “was or was not the proximate cause of the injury.” Id. at 365 n. 4. The court concluded that “ in a situation involving independent intervening cause, the primary issue is one of the foreseeability of the subsequent negligent conduct of a third person, and in this case, [the issue of proximate cause] must be resolved by the finder of fact.” Id. at 365.

In Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983), the passenger of a jeep brought an action against a bus company and the jeep driver for injuries sustained in a traffic accident. The trial court granted the bus company a directed verdict, instructing the jury that if they found the jeep driver should have observed the bus prior to the accident, they must find, as a matter of law, that the jeep driver was the sole proximate cause of the accident. On appeal, the plaintiff claimed that a jury could infer that the bus negligently contributed to the accident and pointed to allegations that the bus stopped too rapidly, failed to drive out of the lane of traffic, and had faulty brake lights. Id. at 220. The Utah Supreme Court agreed with the plaintiff and reversed the directed verdict. The Harris court held it improper for the trial judge to have taken the issue of proximate cause from the jury. The court explained: “Where the evidence is in dispute including the inferences from the evidence, the issue should be submitted to the jury.” Id.

## **2. IMPERMISSIBLE SPECULATION**

Atlas Title and the court seemed to rely principally on language from the the



case of Haline v. Barker, 912 P.2d 433 (Utah 1996). In that case, the plaintiff brought an action against his bankruptcy attorneys for malpractice, as a bankruptcy court had refused to discharge in bankruptcy due to omissions and inaccuracies in his submissions to the court. The court there held that the issue of proximate cause could be decided by summary judgment in certain limited circumstances:

proximate cause issues can be decided as a matter of law when a determination of the facts falls on either of two opposite ends of a factual continuum. Thus, summary judgment is appropriate (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.

Harline v. Barker 912 P.2d 433 at 439 (Utah 1996). See also Berenda v. Langford 914 P.2d 45 Utah 1996. Trial courts are not permitted to speculate about the facts, but must take them as they find them.

However, the basis for the right must be evident from the facts as they exist. Glover cannot establish the basis for the right by merely speculating that under a different organizational structure the BSA and the Council could have retained the right to control scoutmasters at regular troop meetings. Such speculation is insufficient to create a genuine issue of material fact for purposes of a summary judgment motion.

Glover by and through Dyson v. Boy Scouts of Ameirca, 923 P.2d 1383 (utah 1996).

At the hearing, counsel for Atlas Title argued that the Hardings should not recover because of the economy collapsed ("That's the proximate cause of their

damages”) (Transcript, 21). He also stated that the Hardings should have submitted a claim to Atlas Title’s underwriter at the time the initial failure to record the deed was discovered, instead of later relinquishing their trust deed (Transcript, 22)<sup>2</sup>. Essentially, the Harding’s damages were caused by the larger economy or their own mistakes. This is an interesting argument that should be made to the jury, but which is exactly the ‘impermissible speculation” that the Harline case prohibits. Clearly, the economy did suffer, but what role that has in this action needs to be proved to a jury. Just as clearly, the Hardings should have obtained counsel and taken action sooner to recover for their losses. However, they would not have been in that position but for the failures of Atlas Title to record the deed. If the Hardings failed to mitigate damages or contributed to the loss, the jury needs to determine the extent of the Harding’s fault and what effect that has on damages.

Harline essentially argues that there is not causation where the action of the defendant had no impact on the injury. The trial court’s interpretation seems to be that there is no causation where there may be other factors that led to the injury. Harline is clear that summary judgment is not appropriate in these circumstances.

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<sup>2</sup> This was not really possible, as Atlas Title did not provide copies of the tile policy or any other documents to the Hardings, despite their repeated requests. Atlas denied in discovery that it provided insurance for the transaction, even though it charged the Hardings for insurance in the closing, and did not provide to the Hardings any information regarding the alleged insurance despite a request for

The trial court cannot decide which cause it feels was the primary one and rule on that basis on summary judgment, it can only grant summary judgment if the defendant's neglect was unrelated to the injury.

That the trial court turned the burden on its head can be seen in the court's ruling. The court held that "it is Plaintiffs' burden to prove, with respect to all of their claims, that the Title Defendants' actions were the proximate cause of Plaintiff's damages. (R. 457). This may be true at trial, but on summary judgment it is Atlas Title's burden to show that the Atlas Title *was not* the proximate cause of the injury. This was simply not possible under Utah law.

Here, defendant Atlas Title failed to record a trust deed for nine months. In the interim, two other trust deeds were recorded on the property. This destroyed the value of the security (R. 367). The plaintiffs were presented with the opportunity to possibly recoup the damages they suffered, at least partially, due to Atlas Title's failure by moving their security interest to another property. As stated by the Hardings in response to the motion for summary judgment, they never would have released their original trust deed if it had been recorded in a timely manner (R. 367). But for Atlas Title's failure to record, the plaintiffs would never have agreed to release their deed.

If they had been in second position on the original property as they should

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production of documents(R. 363-365).



have been, they would have had the resources to redeem the original property (R. 367). They only released their original trust deed because it had become worthless due to Atlas Title's failure to record (R. 368). They attempted to collect the debt they were owed by moving it from the original property to another that *might* be of value, or least in the hope that moving the indebtedness would at least assist Pecan Ridge to recover and fulfill its obligations (R. 368). The effort nevertheless failed, but just because the Hardings' attempted to save their asset Atlas Title should not be allowed to escape liability for the problem it caused by failing to record the deed.

#### **D. NEGLECT AND SUMMARY JUDGMENT**

Plaintiffs' complaint includes a cause of action against Atlas Title for neglect. Summary judgment should be granted in such cases with great reluctance. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985). Only in the most clear-cut cases is summary judgment appropriate in negligence matters. Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987); Bowen v. Riverton City, 656 P.2d 434 (Utah 1982).

#### **CONCLUSION**

Wherefore, plaintiffs pray that the court reverse the trial court's Order Granting Summary Judgment, and remand the case to the district court for jury trial.

Dated this 7<sup>th</sup> day of November, 2011.



Samuel G. Draper, attorney for plaintiffs

**CERTIFICATE OF MAILING**

I hereby certify that a full, true and correct copy of the above and foregoing BRIEF OF APPELLANTS was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid, on the 7th day of November, 2011, addressed as follows:

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ADDENDUM

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FIFTH DISTRICT COURT  
WASHINGTON COUNTY  
BY \_\_\_\_\_

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42879.00

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

LYNN HARDING and EILEEN HARDING,

Plaintiffs,

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 and ROGER  
CATER and JOHN DOES, 1 through 9,

Defendants.

**ORDER GRANTING  
SUMMARY JUDGMENT**

Case No. 090501506  
Judge James L. Shumate

This matter came before the Court on Defendants Atlas Title Insurance Agency, Inc., Randy Kidman, and Dave White (collectively "Title Defendants") motions for summary judgment addressing (i) all claims for lack of causation and (ii) the civil conspiracy claim on the merits. Defendants Scott Wilson and Jeremy Larkin joined in the Title Defendants' motion for partial summary judgment as to Plaintiffs civil conspiracy claim.




The Court held a hearing on the motions on October 19, 2010. Having reviewed and considered the parties' memoranda and argument, the Court concludes that there is no genuine issue as to any material fact that might preclude entry of summary judgment and that summary judgment is appropriate as a matter of law. Specifically, it is Plaintiffs' burden to prove, with respect to all of their claims, that the Title Defendants' actions were the proximate cause of Plaintiffs' damages. Plaintiffs did not meet this burden because determining causation on the facts and evidence presented could not be done without engaging in impermissible speculation. Therefore, summary judgment is granted as to all claims asserted against the Title Defendants and Defendants Scott Wilson and Jeremy Larkin. Summary judgment is also appropriate as to Plaintiffs' claim for civil conspiracy as no clear and convincing evidence has been produced on which a reasonable fact finder could conclude that Plaintiffs meet each of the elements of a civil conspiracy.

For the foregoing reasons, the Court grants the motions for summary judgment and dismisses Plaintiffs' claims against the Title Defendants, Scott Wilson, and Jeremy Larkin.

DATED this 29 day of Oct 2010.

BY THE COURT:

  
JAMES L. SHUMATE  
DISTRICT COURT JUDGE