

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 and ROGER
CATER, and John Does 1 through 9,

Defendants/Appellees.

Case No. 20100999-CA

On appeal from an order granting summary judgment of the
Fifth Judicial District Court for Washington County, Utah
The Honorable James L. Shumate

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JURISDICTION

The order granting summary judgment of the Fifth Judicial District Court in and for Washington County, Utah ("District Court") was entered on November 4, 2010. The Notice of Appeal was filed December 2, 2010. The appeal was transferred to the Court of Appeals January 6, 2011. This Court has jurisdiction pursuant to Utah Code Section 78A-3-102(3)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

I. Whether the District Court correctly awarded Defendants Scott Wilson ("Wilson") and Jeremy Larkin ("Larkin") summary judgment against Plaintiffs Lynn Harding and Eileen Harding (the "Hardings") on all of the Hardings' claims and causes of action and whether the District Court properly concluded that the Hardings presented insufficient evidence to overcome summary judgment on the issue of proximate cause.

Standard of Review for Summary Judgment: Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Further, although all reasonable inferences are to be decided in favor of the non-moving party (see Payne v. Myers, 743 P.2d 186, 187-188 (Utah 1987)), "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing

that there is a genuine issue for trial.” Utah R. Civ. P. 56(e); and see Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985).

Standard of Review for Proximate Cause: Summary judgment finding that Defendants were not the proximate cause of the Hardings’ alleged damages is appropriate if the Hardings failed to raise a genuine issue of fact as to whether Atlas Title Insurance Agency, Inc. (“Atlas”); Randy Kidman (“Kidman”) and Dave White’s (“White”) (Atlas, Kidman and White collectively hereinafter “Title Defendants”) failure to record the trust deed in second position on the Initial Property was the proximate cause of the Hardings’ alleged damages or as to whether there was a sufficient break in the chain of events causing the Hardings’ alleged damages. Proximate cause may be decided by the District Court as a matter of law on summary judgment 1) “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” or 2) “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, 439 (Utah 1996); see also Crestwood Cove Apts. Bus. Trust v. Turner, 2007 UT 48.

2. The Hardings did not appeal the District Court’s Order granting summary judgment insomuch as the order pertained to the Hardings’ claims for civil conspiracy against Defendants Wilson and Larkin. See Brief of Appellants, P. 4. Accordingly, the issue of civil conspiracy is not presently before this Court.

STATEMENT OF THE CASE

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

The Hardings originally brought this action against Defendant Pecan Ridge Partners, LLC (“Pecan Ridge”) for breach of contract alleging that Pecan Ridge and Defendant Scott Nielson breached their contract with the Hardings for construction of a home. (R. 5). After Pecan Ridge failed to answer the Hardings’ Complaint, Plaintiffs took default judgment against Pecan Ridge. Defendant Nielson was never served with the Complaint. (See the Hardings’ Memorandum in Opposition to Motion to Dismiss for Lack of Jurisdiction on file with this Court, page 1). As part of their original action, the Hardings also brought a breach of contract claim against Atlas and a claim for breach of the covenant of good faith and fair dealing associated with those contracts. (R. 6). The Hardings later amended their Complaint to include the following claims and causes of action: breach of fiduciary duty action against Title Defendants; civil conspiracy against Title Defendants and Defendants Wilson and Larkin; negligence; and conversion. (R. 60-62).

The Hardings allege that Title Defendants are liable to the Hardings for Title Defendants’ failure to timely record a second position Deed of Trust on an “Initial Property”. The Hardings also allege that, through a civil conspiracy, all Defendants are liable for the failure to timely record the second position Deed of Trust on the Initial Property. (R. 7). However, the failure to timely record the trust deed was not a proximate cause of the Hardings’ damages. The Hardings released their interest in the Initial

Property and in an "Additional Property." The Hardings exchanged those interests for an interest in a "Final Property". The Hardings voluntarily accepted a secured interest in the Final Property and voluntarily released their secured interest in the Initial Property and Additional Property. Despite accepting the substitute interest in the Final Property, the Hardings claim that Title Defendants' failure to timely record the second position Deed of Trust on the Initial Property caused them damage when a first position interest holder foreclosed on the Final Property, extinguishing the Hardings' second position Deed of Trust on the Final Property. (R. 4 ¶ 35).

The Hardings filed their Complaint on May 11, 2009. (R. 1). The District Court entered a Default Judgment against Pecan Ridge on July 13, 2010. (R. 39, 104). The Hardings filed an Amended Complaint on January 29, 2010 which included additional parties as set forth above and included additional causes of action (R. 54).

On July 15, 2010, Title Defendants filed a Motion for Summary Judgment requesting summary judgment as to the issue of proximate cause on all of the Hardings' claims. Concurrently therewith Title Defendants filed a Motion for Summary Judgment regarding the Hardings' conspiracy claims. (R. 111, 125). Defendants Wilson and Larkin filed a Joinder Motion to Title Defendants' Motion for Summary Judgment on the Hardings' conspiracy claims. (R. 347).

On October 19, 2010, the District Court heard oral argument on the matter at which hearing the Hardings were represented by Samuel G. Draper, Esq.; Title Defendants were represented by Bryan J. Pattison, Esq.; and Defendants Wilson and Larkin were represented by Stephen R. Schwendiman, Esq. (R. 468). At the hearing, the

District Court granted Defendants' motion for summary judgment on Plaintiffs' claims for civil conspiracy and granted Defendants' motion for summary judgment on the issue of proximate cause for all other claims and causes of action asserted by the Hardings against any of the participating parties. (R. 456-457).

On October 29, 2010, the District Court issued an order reflecting its ruling and granting summary judgment against the Hardings and effectively dismissing the Hardings' claims against Defendants ("Summary Judgment Order"). (R. 456-457). The Court set forth the following in its Summary Judgment Order:

- a. That there was not a genuine issue as to any material fact which precluded the entry of summary judgment and, therefore, summary judgment was appropriate as a matter of law;
- b. That the Hardings could not meet their burden of proof on causation because, from the facts and evidence presented, such determination would necessitate impermissible speculation.
- c. That summary judgment was granted against the Hardings as to their claim for civil conspiracy.
- d. That summary judgment was granted as to all claims against Title Defendants and Defendants Wilson and Larkin.

(R. 456-457).

The Summary Judgment Order was entered on November 4, 2010, and the Hardings appealed the District Court's Summary Judgment Order on December 2, 2010.

(R. 480-481). The Hardings have not appealed the District Court's ruling on summary judgment as to the Hardings' claims for civil conspiracy. See Brief of Appellants, P. 4.

II. STATEMENT OF FACTS

In addition to the facts found in the brief of Title Defendants ("Atlas Brief"), Defendants Wilson and Larkin set forth the following facts:

1. This litigation involves a failed residential development in Washington County known as The Communities at Pecan Ridge, which was to be developed by Pecan Ridge. (R. 157, 160).

2. To begin the development, Pecan Ridge acquired property. (R. 193, 195).

3. One property Pecan Ridge acquired was owned by the Hardings (the "Initial Property"). (R. 193).

4. In December 2006, the Hardings sold and conveyed the Initial Property to Pecan Ridge for \$1,150,000.00. (R. 193, 197)

5. The Hardings seller-financed a portion of the Initial Property's purchase price, and received a trust deed note from Pecan Ridge for \$800,633.11 ("Note"). (R. 197, 201).

6. The Note was to be secured by a second position trust deed recorded against the Initial Property ("Initial Trust Deed"). The parties used Atlas for the closing. (R. un-numbered page between 202 and 203, 203-204, 208 Req. No. 70).

7. A first position trust deed on the Initial Property was recorded in favor of a group of investors who collectively provided additional funding to Pecan Ridge. (R. 212, 214-216)

8. Although the Hardings' trust deed on the Initial Property was to be recorded in second lien position after the investors' trust deed, the Hardings' trust deed was not immediately recorded by Atlas, and Atlas recorded two other deeds of trust in front of the Hardings' trust deed. (R. un-numbered page between 202 and 203, 203-204, 209, Int. No. 13).

9. The beneficiaries of these trust deeds were REV Investments 1 and Solaris International, LLC. (R. 218-220, 222-225).

10. In August or September 2007, the Hardings and/or Atlas discovered that the Hardings' trust deed had not been recorded in second position as planned. After this discovery, Atlas recorded the Hardings' trust deed. (R. un-numbered page between 202 and 203, 203-204, 207, Req. No. 65)

11. With the cooperation of the Hardings, Pecan Ridge acquired an additional parcel of property (the "Additional Property"). (R. 229-231, Int. No. 3)

12. The Hardings also took a security interest against the Additional Property via trust deed securing \$750,000.00 ("Additional Trust Deed"). (R. 243-245)

13. The Additional Trust Deed was in second position on the Additional Property also behind a trust deed in favor of REV Investments 1 and Solaris International, LLC. (R. 247-249)

14. Ultimately, the Additional Property was packaged with the Initial Property by the parties for a land exchange deal with the Ash Creek Special Service District ("Ash Creek"). (R. 229-231)

15. To facilitate the land exchange, Pecan Ridge obtained reconveyances of the trust deeds recorded against the Initial Property and the Additional Property, including a reconveyance of the Hardings' trust deeds. (R. 229-231; 251-256).

16. Through the land exchange with Ash Creek, Pecan Ridge acquired a new piece of property (the "Final Property"). (R. 229-231, 258-259).

17. The Hardings' loans to Defendant Pecan Ridge were secured by a trust deed securing the amount of \$1,550,633.10 ("Final Trust Deed"). (R. 261-264)

18. Pursuant to agreement between the Hardings and Defendant Pecan Ridge, the Final Trust Deed was recorded in second position on the Final Property. (Compare R. 266-270 with R. 261-264).

19. As part of the land exchange transaction, the Hardings signed Lender's Closing Instructions to Atlas 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 [Final Trust Deed] will be in second lien position on the [the Final Property].'" (R. 275).

20. The Hardings' trust deed on the Final Property was in second position behind the trust deed of a group of investors as agreed. (R. 266-270).

21. Pecan Ridge ultimately defaulted on the loan secured by the investors' first-position trust deed against the Final Property. (R. 297-299).

22. In March 2009, the investors holding the first-position trust deed on the Final Property foreclosed on their trust-deed interest. (R. 313-317).

23. Defendant Wilson was a member and owner of a business entity which was an investor, member, manager and principal of Pecan Ridge. (R. 356-357).

24. Defendant Larkin was a member and owner of a business entity which was formerly an investor member, manager and principal of Pecan Ridge but who sold its interest in Pecan Ridge in October 2007. (R. 359-360).

III. RESPONSE TO THE HARDINGS' DISPUTED FACTS

The Hardings' brief states that they presented evidentiary support to the District Court that raised genuine issues of material fact sufficient to overcome summary judgment. However, the facts disputed in the Hardings' brief have no impact on whether this Court should reverse summary judgment in favor of Defendants Wilson and Larkin. If the Hardings' voluntary exchange of an interest in the Initial Property and second-position interest in the Additional Property with a second-position interest in the Final Property sufficiently breaks the chain of causation and/or leaves the Hardings' claims sufficiently to speculation as the District Court found, then the facts the Hardings dispute make no difference to the outcome of this case.

A. Fact #6

The Hardings dispute the following fact:

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.

The Hardings dispute this statement by setting forth factual allegations showing that the Hardings did provide Title Defendants with recording instructions. However,

whether recording instructions were provided is irrelevant to the issue of whether the failure to timely record the Initial Trust Deed was the proximate cause of damages to the Hardings.

B. Fact #8

The Hardings dispute the following fact:

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.

The Hardings dispute this statement by setting forth factual allegations showing that Title Defendants' failure may not have been the result of "inadvertence." However, whether Title Defendants' failure was the result of inadvertence is irrelevant to whether Title Defendants' failure to timely record was the proximate cause of any damages to the Hardings. The District Court found no causal connection with the failure to record, regardless of whether that failure was negligent, inadvertent or even intentional.

C. Fact #10

The Hardings dispute the following fact:

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.

The Hardings dispute this statement by setting forth factual allegations showing that, when Title Defendants realized that the Initial Trust Deed was not recorded, Title Defendants did not "immediately" record the Initial Trust Deed. Whether Title Defendants immediately recorded the Initial Trust Deed after discovery of their error or

whether they waited days or even weeks is irrelevant to whether the failure to timely record the Initial Trust Deed was the proximate cause of damages to the Hardings.

SUMMARY OF ARGUMENT

Defendants Wilson and Larkin hereby adopt the arguments set forth in the Atlas Brief, and Defendants Wilson and Larkin hereby set forth the following additional arguments:

1. The Hardings failed to present any evidence to the District Court showing that Defendants Wilson or Larkin participated in any wrongdoing or that these Defendants breached any obligation to the Hardings. Further, the Hardings' only claim that connected Defendants Wilson and Larkin to possible liability was the Hardings' cause of action for civil conspiracy. Because there is no evidence showing any wrongdoing on the part of Defendants Wilson and Larkin individually and because the Hardings are not appealing the District Court's order granting summary judgment as it pertains to the Hardings' conspiracy claims, summary judgment should be affirmed in favor of Defendants Wilson and Larkin as to all of the Hardings' claims.

2. The alleged failure of Title Defendants to timely record the Initial Trust Deed, and any actions of Defendant Wilson and/or Defendant Larkin that could be attributed thereto, were not the proximate cause of the Hardings' damages. Although the facts presented to the District Court show that Atlas failed to timely record the Initial Trust Deed on the Initial Property, this failure had no legally recognizable impact on the Hardings and was not the proximate cause of the Hardings' damages, as Plaintiffs were put in the agreed-to second position on the Final Property. The Court should not allow

the Hardings to create an issue of fact on causation where no issue exists based on the Hardings' speculation, and the Court should affirm the District Court's decision granting summary judgment.

ARGUMENT

I. INTRODUCTION

The District Court properly entered summary judgment against the Hardings. In opposition to summary judgment, the Hardings were unable to set forth evidence and/or disputed material facts necessary to overcome summary judgment on the issue of proximate cause. The Hardings argued to the District Court that Defendants Wilson and Larkin were personally liable for the alleged damages suffered by the Hardings as a result of Title Defendants' failure to timely record the Hardings' Initial Trust Deed on the Initial Property. However, the Hardings failed to provide evidence that Defendants Wilson and/or Larkin personally engaged in wrongdoing which was the proximate cause of damage to Plaintiffs or that Title Defendants' failure to timely record the Initial Trust Deed was the proximate cause of damage. Accordingly, this Court should uphold the District Court's decision as it pertains to Defendants Wilson and Larkin.

II. THE HARDINGS DID NOT RAISE A GENUINE ISSUE OF FACT.

A. The Hardings do not contest the District Court's Summary Judgment Order relating to the Hardings' claims for civil conspiracy.

At the Summary Judgment hearing, Plaintiffs admitted that it was difficult for them to show a conspiracy, and Plaintiffs represented and admitted that they lacked evidence showing a conspiracy. (R. 468, P. 16). Further, the Hardings' brief states that

they are “[n]ot disputing the dismissal of the conspiracy claim, and only seek a review of the proximate cause ruling.” See Brief of Appellants, P. 4. The Hardings’ claim for civil conspiracy was the only theory linking Defendants Wilson and Larkin personally to any liability in this matter. The Hardings did not make any other allegations and did not present any other evidence showing that Defendants Wilson and Larkin personally did anything intentionally and/or negligently causing Title Defendants’ failure to timely record the Initial Trust Deed. Accordingly, without a civil conspiracy claim, Defendants Wilson and Larkin cannot be liable for the Hardings’ damages, and the District Court properly granted summary judgment in favor of Defendants Wilson and Larkin.

B. The Hardings did not present facts indicating any other personal wrongdoing on the part of Wilson and/or Larkin.

The Hardings’ opposition to Defendants’ motion for summary judgment did not set forth any other recognizable claim or cause of action against Defendants Wilson and/or Larkin. The causes of action set forth in the Hardings’ Complaint are the following: 1) breach of contract; 2) breach of the covenant of good faith and fair dealing; 3) breach of fiduciary duty; 4) negligence; 5) civil conspiracy; and 6) conversion, which causes of action the Hardings allege arose as a result of Title Defendants’ failure to timely record the Initial Trust Deed in second position on the Initial Property. The record in this case is void of any allegation against Defendants Wilson and/or Larkin which would indicate that either of them personally and/or individually engaged in any conduct meeting the elements of these causes of action.

Although the standard for summary judgment is a strict standard, the standard does not allow the Hardings' a "free pass" to trial and does not give the trial court free reign to create evidence where none exists. See Mountain West Surgical Center, L.L.C. v. Hosp. Corp. of Utah, 2007 UT 92, P10 (the summary judgment standard does not allow the court to assume facts for which no evidence is offered). Without any facts or evidence implicating Defendants' Wilson and/or Larkin, the District Court's Summary Judgment Order should stand.

Further, the Hardings cannot oppose summary judgment with speculation. The Hardings argued to the District Court that the reason they agreed to exchange the Initial Trust Deed and Additional Trust Deed with the Final Trust Deed was because the Hardings' security interest in the Initial Property had been damaged, forcing them to make the best of a lost situation. (R. 468 p. 16). The Hardings cannot rely on financial hindsight to argue that they *could* have acted differently when they voluntarily took affirmative action, without protest (even receiving compensation for that action (R. 468 p. 20)) which action made the alternative impossible. Such speculation is not sufficient to overcome a motion for summary judgment.

III. THE HARDINGS FAILED TO SHOW A CAUSAL LINK TO DAMAGES.

A. Title Defendants' failure to timely record the Deed of Trust on the Initial Property is not the proximate cause of the Hardings' damages.

The Hardings cannot show a causal connection between Defendant Wilson and Larkin's actions and/or their failure to act and any damages. As stated above, in addition to civil conspiracy, the causes of action set forth in the Hardings' Complaint include

breach of contract; breach of the covenant of good faith and fair dealing; breach of fiduciary duty; negligence; civil conspiracy; and conversion. An essential element of each of these causes of action is proximate cause. Accordingly, if Title Defendants' failure to timely record the Initial Trust Deed in second position on the Initial Property was not the cause of damage, none of the causes of action can provide the Hardings with a recovery.

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.

See Harline, 912 P.2d at 439 (quoting Mitchell v. Pearson Enterprises, 697 P.2d 240, 245-46 (Utah 1985). In this case, Title Defendants' failure to timely record the Initial Trust Deed is irrelevant. Ultimately, the Hardings exchanged their trust-deed interest in the Initial Property and Additional Property with an interest in the Final Property through a land exchange. Once the Hardings were provided with, and voluntarily accepted, the Additional Trust Deed in second position on the Additional Property and once the Hardings' voluntarily participated in the land exchange for the Final Property, the chain of causation necessary to establish proximate cause was broken.

The Hardings cannot causally link Title Defendants actions and the Hardings' unknown (and unascertainable) damages with the artificial chains of speculation. "[W]here the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law." See Mahmood v. Ross, 1999 UT 104, P21 (quoting Sumsion v. Streater-Smith, Inc., 132 P.2d 680, 683 (Utah 1943). What would have occurred if the Hardings

had not voluntarily accepted a second position deed of trust on the Additional Property or Final Property is speculation. An opposition to summary judgment should be based on actual facts (i.e. what actually happened), not on speculation (i.e. what could have happened).

Further, proximate cause not only looks at what the complaining party would have done, but must also contemplate what all of the parties would have done. “Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate.” See Mahmood, 1999 UT 104 at P28; see also Zion Factory Stores Holding v. Lawrence, 2005 UT App. 361, P7 (finding that the Court could not say what actions the parties would have taken had the Plaintiff been notified of the actual circumstances and that it was speculation to say whether either of the parties would have or would not have conducted matters in their own self-interests). In this case, it is impossible to speculate as to how each of the parties would have conducted themselves had the Hardings not voluntarily agreed to move their interests to the Final Property. The possibilities are endless, and any evidence that a certain possibility would have prevailed is nonexistent. Accordingly, the District Court correctly found that the Hardings could not overcome summary judgment.

B. A finding that the Hardings were damaged requires impermissible speculation.

Even if the Hardings had shown the District Court some evidence of wrongdoing on the part of Defendants Wilson and Larkin, whether the Hardings suffered any damages at all, requires speculation. The Hardings would be entitled to damages only if they had

shown the District Court that they would have received a return on the Initial Property. Such a showing is impossible since the land swap occurred and all of the Hardings' interests were moved to the Final Property. The Utah Supreme Court has stated that a jury is not free to find

...a causal connection between a breach and some subsequent injury by relying on unsupported speculation....Where there are probabilities the other way equally more potent the deductions are mere guesses and the jury should not be permitted to speculate.

See Mahmood, 1999 UT 104 at P21. The speculative nature of the damages becomes even more problematic when the logical end of the Hardings' argument is pursued. If the Hardings' were damaged, no court could possibly quantify those damages. To quantify the damages, the Court would not only be required to speculate from the almost numberless possibilities as to what the Hardings would have done, but the Court would also have to speculate from numberless possibilities as to what the result of those actions would have been.

Further, even if the Hardings would not have transferred their trust deed interest from the Initial Property and Additional Property to the Final Property and even if Atlas had properly recorded the Hardings' trust deed in second position on the Initial Property, the Hardings would have been in second position on the Initial Property behind the first position trust deed of other investors, and the Hardings' interest in the Initial Property would have been lost when the investors foreclosed on the Initial Property. Unfortunately, the destination of the Hardings' investment was the same regardless which path the parties took to get there. Accordingly, the District Court acted properly when it

did not allow the Hardings to use a mistake in the process of recording to provide them with an opportunity to seek speculative and punitive damages.

C. The Hardings presented no evidence or facts to the District Court showing that Defendants Wilson and/or Larkin's actions were the proximate cause of their alleged damages.

Even if the Court finds that summary judgment was not appropriate as to Title Defendants on the issue of proximate cause, summary judgment should be affirmed as to Defendants Wilson and Larkin because Defendants Wilson and Larkin were not individually or personally the proximate cause of damage to the Hardings. The Hardings' brief continually argues that the cause of the Hardings' damages was *Title Defendants'* failure to record the Initial Deed of Trust in second position on the Initial Property. The Hardings have the "burden to show that [Defendants Wilson and Larkin's] conduct was a substantial causative factor that led" to the Hardings' alleged damages. Mitchell v. Pearson Enterprises, 697 P.2d 240, 246 (Utah 1985). The Hardings have not met this required burden. There are no allegations that Defendants Wilson or Larkin had anything to do with the untimely recording, and the Hardings attribute the failure to properly record only to Title Defendants. Where there are no actions of Defendants Wilson and Larkin in failing to record the interest on the Initial Property, Defendants Wilson and Larkin cannot be the proximate cause of the Hardings' damages.

D. The case law presented by the Hardings does not support a reversal of the District Court.

The case law cited by the Hardings, although extensive, does not support a reversal of the District Court's Summary Judgment decision. Each of the cases cited by

the Hardings is either distinguishable from this case or actually supports the District Court's ruling. The following is a brief analysis of the applicability of the more notable cases used by the Hardings to support their appeal.

1. Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985) was a case where the Utah Supreme Court considered whether a hotel owner failed to provide suitable security measures to prevent a murder. The court in that case concluded that attributing the alleged negligence of the hotel owner as the proximate cause of the death involved complete speculation and, therefore, the claims failed as a matter of law. Id at 246. The case presently before this Court is similar to Mitchell in that the Hardings' case is based on speculation. Because the Hardings were given, and agreed to take, a second position interest in the Additional Property and then exchanged those interests for an interest in the Final Property, it is impossible to conclude what might have occurred if the Hardings kept their interest in the Initial Property.

2. Godesky v. Provo City, 690 P.2d 541 (Utah 1984) was a personal injury case where the Utah Supreme Court considered whether superseding acts broke the chain of causation in the defendant's negligence. The court stated the following:

The earlier actor is charged with the foreseeable negligent acts of others. Therefore, if the intervening negligence is foreseeable, the earlier negligent act is a concurring cause....The proper test is whether the subsequent negligence was foreseeable by the earlier actor.

See Id. at 545. In the present case, the Hardings took part in an intentional act that was meant to and did in fact break the chain of causation when they transferred their interest to the Final Trust Deed (i.e. the exchange of their lien interest in the Initial Property to

the Additional Property and then to the Final Property). The Hardings even represented that they received compensation for this exchange. (R. 468 p. 20). Accordingly, the Hardings own intentional act should be sufficient to break the chain of causation.

3. Ostler v. Albina Transfer Co., 781 P.2d 445 (Utah Ct. App. 1989) was a traffic accident case where the vehicle plaintiff was traveling in crashed into the defendant's parked trailer. After citing the standard for proximate cause, the Utah Court of Appeals found that the negligence of the driver driving the plaintiff's vehicle was a sufficient intervening cause to break the chain of causation in relation negligence of defendant parking his trailer on the side of the road. See Id. at 45. If the negligence in that case is a sufficient intervening cause, then, the Hardings' voluntary and intentional actions to take a trust-deed interest in the Final Property should also be a sufficient intervening cause.

4. In Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah Ct. App. 1991) a store customer was injured when employees chased a shoplifter from the store. Although the Utah Court of Appeals found that only in "rare" cases may a court properly take the issue of proximate cause from the jury, the court also found such appropriate when "(1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation." See Id. at 487. The Court of Appeals in that case found that the causal relationship between the alleged act and the alleged damage was too speculative. Id. at 490. The present case fits neatly into both ends of the spectrum set forth in Steffensen. First, as stated above, a jury would be forced to

engage in impermissible speculation as a result of the Hardings accepting a substitute deed of trust. Second, the facts in this case are such that reasonable persons could not differ in their conclusion that Title Defendants' failure to timely record the Initial Trust Deed was not the proximate cause of damages.

5. In Thurston v. Workers Compensation Fund of Utah, 2003 UT App 438 the Utah Court of Appeals stated the following: "Demonstrating material issues of fact with respect to defendants' negligence is not sufficient to preclude summary judgment if there is no evidence that establishes a direct causal connection between that alleged negligence and the injury." Id. at P16. In the present case, the Hardings are attempting to show that summary judgment should be overturned because they may have raised an issue of fact as to whether Title Defendants breached a duty owed to the Hardings. However, simply providing evidence of a breach is not sufficient to overcome summary judgment on the issue of proximate cause – evidence that provides the causal link is required.

6. Although the Supreme Court in Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987) found that summary judgment is not appropriate in negligence cases when the case is not "clear-cut", the court also recognized that summary judgment is appropriate on occasion in negligence cases. In Ingram, as a result of the city's non-delegable duty, there seemed to be no question as to the actual cause of a personal injury. In the present case, the Hardings' claim still involves a question as to the actual cause of damages. Further, the Hardings' claims do not involve a non-delegable duty. Accordingly, the present case differs from Ingram.

7. Kilpatrick v. Wiley, 909 P.2d 1283 (Utah Ct. App. 1996) was a legal malpractice action. In that case, the Utah Court of Appeals stated that “causation or the connection between fault and damages in legal malpractice actions cannot properly be based on speculation or conjecture.” Id. at 1291. The court further stated that “[t]o establish causation, plaintiffs must persuade a fact finder that their injury was a natural result of the defendant’s breach.” Id. at 1292. As previously stated, the Hardings’ alleged damages were not the natural result of any breach and whether Title Defendants’ actions were a cause of those alleged damages can only be determined through speculation.

8. Butterfield v. Okubo, 831 P.2d 97 (Utah 1997) was a medical malpractice case. The Utah Supreme Court considered whether expert testimony could overcome summary judgment when the testimony was based on factually unsupported conclusions. The court found that affidavits must contain actual facts to overcome summary judgment. See Id. In the present case there are no evidentiary facts linking Defendants Wilson and Larkin’s actions to any alleged damages.

9. Lastly Cruz v. Middlekauff, 909 P.2d 1252 (Utah 1996) was a case where a traffic accident became the by-product of a police chase. A thief was able to steal a car involved in the accident because the dealership selling the car left the key in the car. The plaintiff in that case sued the car dealership. The Utah Supreme Court stated the following: “An intervening, independent, and efficient cause ordinarily severs whatever connection there may be between the defendant’s negligence and the plaintiff’s injuries, unless the intervening cause was foreseeable.” Id. at 1257. Although the court found that

the thief's actions were foreseeable, the Supreme Court distinguished that Cruz, was not a typical case of intervening cause. The Hardings' case differs from Cruz in that in the present case, the Hardings' own acts that broke the chain of causation were intentional and voluntary acts.

CONCLUSION

The District Court properly granted Defendants Wilson and Larkin summary judgment because Plaintiffs asserted no facts or evidence supporting a contrary finding. As stated above, the only cause of action in this matter directly related to Defendants Wilson and Larkin was the Hardings' claim for civil conspiracy, which issue is not before this Court on appeal. The Hardings' Complaint makes no allegations that Defendants Wilson and/or Larkin personally had a contract with the Hardings and no allegations that Defendants Wilson and/or Larkin personally breached a fiduciary duty and/or acted negligently. Plaintiffs' claims all revolve around Title Defendants' failure to timely record Plaintiffs' trust deed on the Initial Property and mention nothing of acts Defendants Wilson and Larkin performed or failed to perform. As shown above, even if the Hardings' allegations could be construed to include Defendants Wilson and Larkin, the District Court properly found no causal connection between Defendants' actions and the alleged damages.

Accordingly, this Court should affirm the District Court's Summary Judgment Order, which grants Title Defendants and Defendants Wilson and Larkin summary judgment as to all claims and causes of action of the Hardings.

DATED this 9th day of December, 2011.



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CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Heath H. Snow, certify that on December 9th, 2011, I caused two (2) copies of the BRIEF FOR APPELLEES JEREMY LARKIN AND SCOTT WILSON to be served upon counsel via first class mail with sufficient postage pre-paid to the following:

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