

2010

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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.

**REPLY BRIEF OF
APPELLANTS**

Appellate Case No. 20100999-CA

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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**APPELLATE COURTS
POSTMARKED**

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ARGUMENT

REPLY TO BRIEF FOR ATLAS TILE

A. STATEMENT OF FACTS

The Statement of Facts in the Brief for Appellees Atlas Tile Insurance Agency, Randy Kidman and Dave White (hereinafter "Atlas Brief"), recites many facts were disputed by plaintiffs in their response to the summary judgment motion and states that they were undisputed, but this is clearly not the case. In addition, the Atlas Brief suggests inferences from other facts that were not presented in their motion or in the facts presented to the trial court.

The court must view all facts and inference in the light most favorable to the non moving party. Allred ex rel. Jensen v. Allred, 182 P.3d 337 (Utah 2008). 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)

The Atlas Brief also includes facts that were not part of its Statement of Undisputed Facts. Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure provides that "memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists." The facts are required to appear in the initial memorandum. Some of these additional facts were presented in an affidavit in support of the reply

memorandum to the motion for summary judgment. However, a reply memorandum is limited to rebuttal matters raised in the memorandum in opposition. When a party first raises an issue in his reply memorandum, it is not properly before the trial court, and the appellate court will not consider it for the first time on appeal. Soriano v. Graul, 186 P.3d 960 (Utah 2008)

The following facts, as recited in the Atlas Brief, were dispute by petitioner in their reply to summary judgment motion, were not part of the undisputed facts, or are inferences not made in the original motion:

[T]he Hardings sold the Initial Property to Pecan Ridge Partners for the sum of \$1.15 million (Atlas Brief, 2)	This not correct, as there was other consideration (R, 362).
The Hardings did not provide Atlas Title with written recording instructions regarding the recording of the trust deed against the Initial Property (Atlas Brief, 3)	Plaintiffs did provide recording instructions (R, 362-3)
Through inadvertence, Atlas Title did not immediately record the Harding's trust deed in second lien position on the Initial Property (Atlas Brief, 3).	The Atlas Defendants provided no evidence that the failure to record was inadvertent, and plaintiffs provided substantial circumstantial evidence that it was not inadvertent (R. 363-5)
[A]fter confirming that the trust deed was not recorded, Atlas Title immediately recorded the Harding's trust deed (Atlas Brief, 3).	The Atlas Defendants did not provide any evidence that they immediately recorded deed, and the plaintiff provided evidence that the deed was not recorded for several weeks after it was brought to Atlas' attention that the deed was not recorded.
There were several options available to Atlas Title to remedy the issue. (R. 404.) Among other things, these included working with the two investor	None of these facts were part of the "Statement of Undisputed Material Facts" that were part of Atlas's Title's motion for summary judgment (R.115-

<p>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.) (Atlas Brief, 4).</p>	<p>120). Rather, they appear in a an affidavit filed with their reply memorandum. However, facts presented by plaintiffs dispute these issues. First, Atlas Title never provided a copy of the Stewart Title policy, or any other closing documents, to plaintiffs. Plaintiffs requested in discovery that Atlas Title admit that insurance had been provided and that a copy of the policy be provided. Atlas Title denied that there was insurance, and did not provide a copy of the policy in discovery (R, 363). Plaintiffs could not seek redress under the title insurance, when Atlas Title denied that there was such insurance and refused to provide plaintiffs with a copy of the policy.</p>
<p>Thus, after reconveyancing, property exchanges, and recordings 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.</p>	<p>This statement suggests that the plan was for the plaintiffs to be subordinated in this position on the Final Property all along. There is no statement of fact to that effect in Atlas Title's "Statement of Undisputed Material Facts." (R, 115-20), and that inference should not be drawn. In fact, the Hardings stated that, as part of their opposition to the motion for summary judgment, that the only reason they agreed to a second subordination agreement was that their original security interest was destroyed by Atlas Title (R, 367). They intended to be paid in full on the original note when the property transfer took place (R, 367). Atlas's neglect prevented this. The Hardings would have been able to cure any default on the original trust deed, but it was not worth it on the Final Property – not only was the</p>

	property worth less, but the trust deed in superior position had almost double the principle balance (R, 214, 298, 367-8). The Hardings did not intend for the original note to be in second position on a less valuable property with a larger trust deed in first position.
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B. CAUSE OF PLAINTIFF'S DAMAGES

The respondent's basic argument is that the plaintiffs were not harmed by Atlas Title's admitted negligence in not recording the Harding's initial trust deed, making the damage "completely hypothetical." (Atlas Brief, 17).

However, the Hardings would never have agreed to take a second position on the "Final Property", but for Atlas Title's neglect. As stated by the plaintiffs in their opposition to the motion for summary judgment:

1. The Hardings only agreed to sign the reconveyance in April of 2008, reference in paragraph 15 of defendant's facts, and not receive payment in full of their trust deed on the Initial Property because their security interest in the Initial Property had been ruined by Atlas Title's failure to record their trust deed. They would not have done so had Atlas Title recorded their deed properly.
2. If the Harding's trust deed had been recorded properly on the Initial Property and Pecan Ridge had gone in default on the trust deed in first position, the Hardings had made arrangements to cure the first trust deed. However, due to Atlas Title's failure to record the Harding trust deed, there was not sufficient value in the property to cure the first, second and third trust deeds then in place on the property.
3. Because the Hardings trust deed had basically become worthless due to the actions of Atlas Title, they agreed to reconvey. They knew that Pecan Ridge was in trouble. The Hardings were no longer getting full payment on either of the trust deeds, and their security for their original trust deed was ruined by Atlas Title. Scott Wilson and Scott Neilson told Lynn Harding that Pecan Ridge would go under if the reconveyance was not done.

4. Scott Wilson told the Hardings that Pecan Ridge had a deal set up to receive \$1,000,000, which would be used in part to complete the Hardings new home, from the school board for part of the property Pecan Ridge was acquiring from Ash Creek (the "Final Property"), and that the Hardings had to do the reconveyance so that Pecan Ridge could transfer the Original Property to Ash Creek in exchange for the Final Property.

5. The Hardings are not sure if Pecan Ridge received the \$1,000,000, but the home was not completed and the Hardings never received their new home and property they has been promised.

6. When the "Final Property" went into foreclosure the Hardings were in second position, but the first position was \$625,000. See defendant's exhibit 20. It was just a raw piece of ground, and not worth that amount [citations to the declaration omitted] (R, 367-8).

The above facts were given as part of the Statement of Additional facts, provided in plaintiff's opposition to the motion for summary judgment.¹

From this, it is apparent that the failure to record the deed completely destroyed the value of their first trust deed. They would have been paid in full on that original note upon the Final Property being acquired. They only agreed to take an interest in the Final Property as their trust deed on the original property was now valueless.

Atlas Title argues that the general economic problems in the economy resulted in the loss (Atlas Brief, 18). However, there are at least two problems with this theory. First, the plaintiff's trust deed on the second property did not have as much equity as their deed on the original property. The Final Property was worth less than the original property (R, 368), and the trust deed in first

¹ Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure allows a party in their opposing memorandum to set forth "additional facts."

position on the original property was substantially smaller than the trust deed in first position on the Final Property (Atlas Brief, 3, 5).

Also, and more importantly, but for Atlas Title's neglect, the plaintiffs would have been paid in full on the original trust deed when the property transfer took place (R, 367) – before the worst of the Washington County property woes. The plaintiffs would not have agreed to obtain another trust deed rather than being paid in full, but for the neglect of Atlas Title in recording their trust deed (R. 367).

Atlas Title argues that, despite the direct evidence presented by plaintiffs, that the plaintiffs would have taken second position on the Final Property anyway. This is speculation, and Atlas Title presents no evidence on this point.

Atlas Title makes much of Goebel v. Salt Lake City Southern R.R. Co., 104 P.3d 1185 (Utah 2004), where plaintiff, while perhaps trying to avoid a protuberance in the road, ran into a gap, causing him injury. The court held that the protuberance was not the proximate cause of the injury. The court stated that:

[T]he protuberance was no more a cause of Mr. Goebel's accident than his decision to ride his bicycle that day, or the weather. After reviewing the evidence, we agree with the trial court and Southern that Mr. Goebel could have steered his bicycle into the gap regardless of whether the protuberance existed at all.

The case is complicated by a variety of issues, none of which are mentioned by Atlas Title in its brief, including the fact that the plaintiff could not remember the incident, and that the defendant could only be found liable for the protuberance

and not the gap. Causation was speculative because the plaintiff could not remember why he went in the gap. In the present case, the plaintiffs obviously remembered the failure to record the deed, and they have presented direct evidence that their failure to be paid in full for the first trust deed was due entirely to Atlas Title's negligence. No such evidence was presented, or could have been presented, in Goebel.

Likewise, the evidence presented by plaintiffs in this case is much more direct, and much less speculative, than in any of the other cases cited by Atlas Title.

C. CAUSATION AND SPECULATION ABOUT OTHER ACTIONS THE HARDINGS COULD HAVE TAKEN

Atlas Title's next argument is that the plaintiffs should have either taken other actions to protect themselves. Atlas Title raises many possibilities, most of which were not raised at the trial court.

For example, Atlas Title argues that the plaintiffs should have requested personal guarantees from the Pecan Ridge partners. This argument should not be considered by this court. Atlas Title would have the court speculate that (1) such personal guarantees had value, (2) the partners would have agreed to this, and (3) the Harding did not actually request this. Atlas Title's statement of facts did not state that the plaintiffs did not make this request, and any inference from the facts must be made in favor of the plaintiffs. Allred ex rel. Jensen v. Allred, 182 P.3d

All of the supposed fixes by Atlas Title in its brief suffer from the same problems. This court is asked to speculate that the creditors who benefitted from Atlas Title's negligence would have cooperated to reduce the value of their interests. Atlas Title asks this court to find there is no proximate cause for failing to take actions which were most likely futile.

Atlas Title is principally relying on Mahmood v. Ross, 900 P.2d 933 (Utah 1999) in this argument. Mahmood is a contract case. The defendant had contracted to pay a certain amount to a third party on behalf of plaintiff, and failed to make the payments. The third party eventually foreclosed on some property owned by plaintiff. However, it appears that the foreclosure took place, not because the defendant failed to make the payments, but because a balloon payment to the third party was not made by the plaintiff. The court decided that the plaintiff could have refinanced the debt to the third party, or sold the property. The failure of the defendant to make the payments was not the direct cause of plaintiff's problems; rather, it was the failure to make the balloon payment. The court indicates that the failure of the defendant to make its payments may have made the refinance more difficult, but the court specifically found that there was no evidence presented that the missed payments made the refinance impossible. With that in mind, the holding of Mahmood is unremarkable. There was

essentially no evidence that the defendant caused plaintiff's damages.

The situation in this case is quite different. It is clear that Atlas Title, by its neglect, completely destroyed the value of the plaintiff's security interest in the original property (R, 367). Plaintiff should have been in second, rather than fourth, position on the property, and would have been in a position to cure the trust deed in first position if the deed had been properly recorded (R, 367). Plaintiff's intended that they would be paid in full on their full trust deed at the time of the acquisition of the Final Property (R, 367).

In Mahmood, there was no evidence that he could not refinance. In this case, the Atlas Title's neglect completely destroyed the value of plaintiff's security interest. Foreclosure on the trust deed would have been futile.

While Atlas Title here speculates about various actions that plaintiff could have undertaken, most of which seem extremely unlikely to succeed, the most direct way the plaintiffs had to collect their debt – foreclose on the lien – had become pointless. The plaintiff in Mahmood could still have sold or refinance the property in question in that case. Plaintiff's here had no realistic options, as the value of their security had been entirely destroyed.

Essentially, the plaintiff in Mahmood was not put in his position by the defendant's wrongful act. What caused his damages was his failure to make the balloon payment, not the failure of the defendant to make the payments. In this

case, it was Atlas Title's neglect that forced plaintiff to accept a second trust deed on the Final Property. In Mahmood, it appeared entirely likely that the plaintiff would have lost the property regardless of whether the defendant had made his payments. Here, the evidence is clear that plaintiff would, absent Atlas Title's neglect, have been paid, at least in part, on their first trust deed (R, 367). That is fundamentally why Mahmood does not apply to in this matter; the defendant didn't cause plaintiff's damages in that case, but that causation is clearly established here.

D. SUMMARY JUDGMENT BURDENS

Atlas Title next argues that the burden has shifted to the plaintiff to show causation. Plaintiff did provide evidence in its reply to the motion for summary judgment, in the form of its "Statement of Additional Facts" (R, 367-8), which establish causation, as well as the statements regarding Atlas Title's failure to disclose information about the title policy in their "Statement of Controverted Facts" (R, 362-3). These facts all relate to causation, including Mahmood's "impermissible speculation" issue.

REPLY TO BRIEF FOR LARKIN AND WILSON

A. STATEMENT OF FACTS

Defendants Larkin and Wilson do not include the disputed facts in their statement of facts, but do fail to include the facts in plaintiffs' Statement of

Additional Facts from their memorandum in opposition to the motion for summary judgment (R. 367-8).

B. OTHER CLAIMS FOR RELIEF

Defendants Larkin and Wilson claim that plaintiffs have not set forth any claim against them individually other than civil conspiracy. However, the complaint includes defendants generally in every cause of action, including the breach of the covenant of good faith and fair dealing (R, 59-62). Defendants Larkin and Wilson requested summary judgment only on the civil conspiracy claims (R, 347). They did not seek summary judgment on any of the other claims in the action, and did not seek summary judgment on the proximate cause issue either. Strangely, the court not only granted Defendants Larkin and Wilson summary judgment on the civil conspiracy claim, but also on “all claims,” which Defendants Larkin and Wilson did not request (R, 457).

Providing the plaintiffs prevail on the proximate cause issue, the remaining claims against the Larkin and Wilson defendants (other than civil conspiracy) should be remanded to the trial court. The trial court may have dismissed the other claims, but it could only have done so on the issue of proximate cause, as that was the only issue raised before the court.

C. PROXIMATE CAUSE

In regards to the proximate cause issue, plaintiff incorporates herein their

response to the Atlas Brief above.

Regarding the specific cases discussed by Defendants Larkin and Wilson, Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985) involves a third party criminal act. There was no showing that even if the defendant had done more to protect the plaintiff, that the crime would not have occurred. As discussed above in relation to Mahmood, there is no such breakdown in causation in the present case. Absent the failure to record the deed and the recording of deeds in superior positions to plaintiffs (which Larkin and Wilson participated in), petitioners would have been paid on their first trust deed.

Defendants do not discuss the facts of the case in Godesky v. Provo City, 690 P.2d 541 (Utah 1984). The plaintiff worked for a roofing company and received a shock from a power line. The defendant argued that the plaintiff's neglect was the proximate cause of his injury. The Supreme Court held that:

An intervening negligent act does not automatically become a superseding cause that relieves the original actor of liability. 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 defendants in the present case, as in Godesky, should be allowed to raise their arguments about what the plaintiffs should have done, and the effects of the slowing economy, when the deed did not get recorded. But it is not grounds for summary judgment.

In Ostler v. Abina Transfers Co., Inc., 781 P.2d 445 (Utah 1989) , the

plaintiff complained that the trial court did not order a directed verdict on the issue of proximate cause. The issue was decided by the jury, as it should be tried in this case. It was not decided on the basis of summary judgment.

Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991) is another case where a plaintiff is seeking to recover damages due to the criminal activity of a third party. The trial court had granted a directed verdict on the issue, but the appellate court appeared to disagree with this conclusion. The trial court found that there was substantial evidence which indicated that the injuries were proximately caused by the defendant. However, the case was ultimately affirmed because the appeals court, interpreting other actions of the jury, found that the jury must have found that the case lacked proximate cause, and therefore the trial court's incorrect ruling was harmless error. This case does not support defendant's position; in fact, it stands for the proposition that such a case should be heard by a jury.

The case is similar to Cruz v. Middlekauff, 909 P.2d 1252 (Utah 1996), also discussed by defendants. Even a third party criminal actor does not necessarily break the link of causation.

In Thurston v. Workers Compensation Fund of Utah, 83 P.3d 391 (Utah App. 2003), the cause of the plaintiff's injury was completely unclear. He was found dead and naked in his car with a blood alcohol level of .22. It was unclear if

he had committed suicide or been placed in the vehicle. Given that it was unclear how the injury had occurred, it is not surprising that Thurston was one of the rare cases where summary judgment on the issue of proximate cause was appropriate. The plaintiff could not establish a causal connection, something which can easily be done in this case.

It is striking how the Atlas Title and Larkin and Wilson defendants all rely on cases (Goebel and Thurston) regarding causation where the plaintiff cannot prove causation as he was either dead or unconscious. Establishing that there is no proximate cause by summary judgment is obviously not an easy task. Essentially, the plaintiff was unable to say why he was injured, in contrast to the instant matter where the failure to record the trust deed, and the recording of additional deeds, destroyed the plaintiffs' security interest in the original property.

Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987), is a government immunity case, and proximate cause is not the issue.

In Kilpatrick v. Wiley, 909 P.2d 1283 (Utah App. 1996), the trial court had granted summary judgment on the issue of causation. The appellate court reversed, finding that the trial court had found facts and weighed evidence, "which was inappropriate in consider a motion for summary judgment Id., 1292. This case does not support the defendants position.

CONCLUSION

“Proximate cause is a factual issue that generally cannot be resolved as a matter of law,” and because it is a factual issue appeals courts “refuse to take it from the jury if there is any evidence upon which a reasonable jury could infer causation.” Butterfield v. Okubo, 831 P.2d 97 (Utah 1992). This case is no exception.

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 9th day of February, 2012.



Samuel G. Draper, attorney for plaintiffs

CERTIFICATE OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing
REPLY BRIEF OF APPELLANTS was placed in the United States mail at St.
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