

2005

Big Sky Finance, a Utah corporation v. Avis and Archibald Title Insurance, limited company, Lawyers Title Insurance Corporation, a Virginia corporation doing business in the State of Utah, Fireman's Fund Insurance Company, a California corporation doing business in the state of Utah, Title Pac, Inc., an Oklahoma company doing business in the State of Utah, Jayson Cherry, William A. Avis, and Robin Archibald. Reply Brief



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Utah Court of Appeals

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#### Recommended Citation

Reply Brief, *Big Sky Finance v. Avis and Archibald Title Insurance*, No. 20050313 (Utah Court of Appeals, 2005).  
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**IN THE COURT OF APPEALS IN AND FOR THE STATE OF UTAH**

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**BIG SKY FINANCE COMPANY, a Utah  
corporation,**

**Plaintiff/Appellant,**

**vs.**

**AVIS AND ARCHIBALD TITLE  
INSURANCE, limited company,  
LAWYERS TITLE INSURANCE  
CORPORATION, a Virginia corporation  
doing business in the State of Utah,  
FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation  
doing business in the state of Utah,  
TITLE PAC, INC., an Oklahoma  
company doing business in the State of  
Utah, JAYSON CHERRY, WILLIAM A.  
AVIS, and ROBIN ARCHIBALD,**

**Defendants/Appellees.**

**APPELLANT'S REPLY BRIEF**

**Appellate Case No. 20050313-CA**

**District Court No. 970907313**

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## ARGUMENT

### I. REPLY TO FIREMAN'S FUND'S ARGUMENT.

#### A. BIG SKY DID PRESERVE ISSUES FOR APPEAL AGAINST FIREMAN'S FUND.

Fireman's Fund continues to cling doggedly to the argument that Big Sky has failed to preserve any issues for appeal with respect to Fireman's Fund because Big Sky did not respond to Fireman's Fund's Motion for Summary Judgment below. <sup>n1</sup> This argument completely ignores the fact that Big Sky's appeal is based largely in part on the trial court's denial of Big Sky's Motion for Leave to Amend, which had nothing to do with Fireman's Fund's Motion for Summary Judgment, which was only denied with respect to Lawyers Title (R575-576), and which had already been denied prior to the time that Fireman's Fund's Motion for Summary Judgment was filed.

It is undisputed that Big Sky did not file an opposition to Fireman's Fund's Motion for Summary Judgment below. However, Big Sky did brief the exact same issues presented by Fireman's Fund and argue the exact same merits of the issues presented by Fireman's Fund in an earlier Motion for Summary Judgment filed by Lawyers Title. The issues were the same in both Motions for Summary Judgment, i.e., (1) Whether Big Sky had raised additional causes of action other than one for fraudulent nondisclosure in the Amended Complaint; and (2) whether Big Sky should be allowed to amend the Amended Complaint. In the hearing on Lawyers Title's Motion for Summary Judgment, the parties briefed the Rule 8 notice pleading issues, Big Sky argued that it had raised additional causes of action other than fraudulent nondisclosure in its Amended

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<sup>1</sup> This issue has already been briefed once on appeal by Big Sky and Fireman's Fund in the Memoranda relating to Big Sky's Motion for Summary Disposition.

Complaint, and the trial court decided that there was only one cause of action, fraudulent nondisclosure, raised by the Amended Complaint. In the hearing on Lawyers Title's Motion for Summary Judgment, the parties briefed the Rule 15 amendment issues, Big Sky argued that it should be allowed to amend the Complaint again, and the trial court determined that Big Sky was not allowed to amend the Amended Complaint further. Fireman's Fund's subsequent Motion for Summary Judgment raised the same issue that Lawyers Title had already raised, i.e., that Big Sky's claim for fraudulent nondisclosure against Fireman's Fund should be dismissed. Based on the law of the case, any response to Fireman's Fund's Motion for Summary Judgment would have been futile. In Sittner v. Big Horn Tar Sands & Oil, 692 P.2d 735, 736 (Utah 1984), the Utah Supreme Court ruled that when the trial court had denied a Motion for Summary Judgment, that the trial court could not later essentially overrule itself and grant a subsequent Motion for Summary Judgment, where the issues were the same, the facts were the same, and the only difference in the two Motions for Summary Judgment was that in the subsequent Motion, more authority was cited.

Fireman's Fund argues that the trial court acknowledged that Big Sky and Fireman's Fund would "live to fight another day" after the oral argument on Lawyers Title's Motion for Summary Judgment. However, pursuant to the law of the case, after reviewing Fireman's Fund's Motion for Summary Judgment, where the issues were exactly the same, i.e., that (1) Big Sky had only raised a claim for fraudulent nondisclosure, the trial court could not have made a different decision with respect to Fireman's Fund's Motion than it did with respect to Lawyers Title's Motion.

One branch of what is generally termed the doctrine of "law of the case" has

evolved to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case. Ordinarily one judge of the same court cannot properly overrule the decision of another judge of that court. There are several exceptions to this rule. However, only one could possibly be applicable here: The second judge may reverse the first judge's ruling if the issues decided by the first judge are presented to the second judge in a "different light," as where a summary judgment initially denied is subsequently granted after additional evidence is adduced. The issue here is whether the motion before Judge Leary presented the questions involved in the summary judgment motion in a "different light." Examination of the record shows that it did not. No discovery took place between the two hearings on the summary judgment motions. No additional evidence was introduced. All material facts remained the same. Indeed, a comparison of the moving papers filed in support of the original motion and the renewed motion discloses that the only difference between the two was the citation of additional authorities. In Board of Education v. Salt Lake County, 659 P.2d at 1033, the Court indicated that mere citation of additional authority is insufficient to warrant one judge's reversal of a coordinate judge's ruling, at least where the cited authority does not modify the fundamental theory of the motion. Plaintiff's additional citations did not satisfy this test. Therefore, Judge Leary's grant of summary judgment was error. We reverse and remand the case for trial without reaching any other issues raised on appeal.

Sittner v. Big Horn Tar Sands & Oil, 692 P.2d 735, 736 (Utah 1984). In this case, much like the two (2) motions in Sittner, the motions filed by Lawyers Title and Fireman's Fund were identical, except for the moving parties involved.

Fireman's Fund alleges that this Court should not consider Big Sky's argument because it is raised for the first time on appeal, and moreover, because Big Sky has not argued that there were exceptional circumstances that justified Big Sky's failure to oppose Fireman's Fund's Motion for Summary Judgment. Fireman's Fund repeatedly refers to Big Sky's Memorandum in Opposition to Fireman's Fund's Motion for Summary Disposition in its Brief, but does not acknowledge that Big Sky argued in its Memorandum in Opposition that this Court should consider Big Sky's argument on appeal because the circumstances are exceptional. (See Big



Sky's Memorandum in Opposition, p. 15.)

Finally, in Fireman's Fund's own Briefs on Appeal, Fireman's Fund admits that Big Sky filed a Motion for Leave to Amend, and that Fireman's Fund joined in the opposition to the Motion for Leave to Amend. (See Defendant Fireman's Fund's Memorandum in Support of Motion for Summary Disposition at page 4; Fireman's Fund's Brief at page 7; 20.) If nothing else, the trial court's decision on Big Sky's Motion for Leave to Amend has been properly preserved for appeal with respect to Fireman's Fund.

**B. THE TRIAL COURT DID ABUSE ITS DISCRETION IN DENYING BIG SKY'S MOTION TO AMEND WITH RESPECT TO FIREMAN'S FUND.**

Fireman's Fund argues that the trial court did not abuse its discretion because the trial court properly considered the Rule 15(a) factors of (1) timeliness of the motion, (2) justification given by the movant for the delay, and (3) the resulting prejudice to the responding party. As has already been argued, the trial court should have used a Rule 15(c) analysis rather than the Rule 15(a) analysis. However, assuming that the trial court should have used a Rule 15(a) analysis, the trial court's decision was really based on Holmes Dev. L.L.C. v. Cook and its incorrect application of the statute of limitations, even though the trial court used the words timeliness, justification for delay, and prejudice.

Moreover, the trial court never made specific findings of fact with respect to why the Motion to Amend was denied as to Fireman's Fund. This is a per se abuse of discretion. In Kelly v. Hard Money Funding, Inc., this Court acknowledged the well-accepted rule that "it is a per se abuse of discretion for a trial court to fail to explain its decision regarding a motion to

amend with reference to the appropriate principles of law or the factual circumstances that necessitate a particular result.” Kelly v. Hard Money Funding, Inc., 2004 UT App 44, P42 (Utah Ct. App. 2004). Certainly the denial of Big Sky’s Motion to Amend was a per se abuse of discretion with respect to Fireman’s Fund, as there are no specific factual findings of untimeliness, unjustifiable delay, or prejudice when it comes to Fireman’s Fund. (R575-576).

**C. BIG SKY’S CLAIMS FOR RELIEF AGAINST FIREMAN’S FUND ARE NOT FUTILE.**

Fireman’s Fund argues that Big Sky’s claims for relief against Fireman’s Fund are futile, and therefore the trial court’s denial of Big Sky’s Motion to Amend was appropriate. Big Sky’s arguments relating to first party insurer liability as opposed to third party insurer liability are correct with respect to a claim for bad faith. However, these arguments are irrelevant to the liability Big Sky would raise were it enabled to pursue its insurer liability claim. The claim that Big Sky asserts for notice pleading purposes is actually not only contained in Big Sky’s proposed Second Amended Complaint, but also in the Amended Complaint, and that is in the Prayer for Relief, paragraph 2, where Big Sky asks for relief stating that Fireman’s Fund’s and Lawyers Title’s are “liable for damages incurred by their insured.” Under Section 31A-22-201, Big Sky can obtain vicarious relief from Fireman’s Fund once Big Sky has proved that it has obtained a specific money judgment against Avis and Archibald, and that execution against Avis and Archibald is returned unsatisfied. In addition, Fireman’s Fund has admitted that Big Sky may bring a common-law negligence claim against Fireman’s Fund. (R382).

## II. REPLY TO LAWYERS TITLE'S ARGUMENT.

### A. BIG SKY'S CAUSES OF ACTION AGAINST LAWYERS TITLE AND FIREMAN'S FUND DID NOT EXIST WHEN BIG SKY COMMENCED THIS LITIGATION.

Lawyers Title cites Dep't of Natural Resources v. Huntington-Cleveland Irrigation Co., 2002 Utah LEXIS 102, P17-20, 52 P.3d 1257, 1264 (Utah 2002), a case cited by Big Sky at length in Big Sky's brief, purportedly to support the proposition that any statutory cause of action existed against Lawyers Title in 1997. However, Lawyers Title fails to recite the critical part of Huntington-Cleveland Irrigation Co., which is that "**generally the plaintiff must have suffered damages before a cause of action accrues for statute of limitations purposes.**" Id. (emphasis added). Despite the trial court's finding of fact that Big Sky had not suffered any "actual pecuniary loss . . . at the time of this hearing" (R133-136) Lawyers Title uses a unique but incorrect argument to try and show that Big Sky had actually suffered a pecuniary loss at the time that Big Sky filed its original Complaint. Lawyers Title argues, erroneously using language from Big Sky's brief, that Big Sky had actually suffered damages prior to the filing of Big Sky's original Complaint in November 1997 because Wayne Ogden paid funds back to Big Sky **after** the original Complaint in this action was filed. However, there is nothing in Big Sky's brief or the record that shows that Wayne Ogden paid funds back to Big Sky **after** the original Complaint in this action was filed. Contrary to Lawyers Title's argument, the Complaint filed against Wayne Ogden was a separate action from the instant action that was filed **prior** to Wayne Ogden's involuntary bankruptcy filed in June 1997 and the instant action filed in November 1997. Wayne Ogden paid funds back to Big Sky **before** his involuntary bankruptcy and the instant action were filed, which was why the Bankruptcy Court deemed the transfer to Big Sky

was a preferential transfer and therefore void. Big Sky filed the instant action against Avis & Archibald and Jayson Cherry because Big Sky anticipated that it might have to repay funds to the bankruptcy estate.

The fact that is clear in the record before this Court is that the trial court made a finding of fact on January 10, 2000 that “[t]he judgment entered against [Big Sky] by the Bankruptcy Court is an outstanding judgment but has not resulted in actual pecuniary loss to [Big Sky] at the time of this hearing.” (R133-136).

Lawyers Title next argues that because Big Sky alleged that Avis & Archibald and Jayson Cherry mishandled escrow funds in its original Complaint that somehow the causes of action had properly accrued as to Lawyers Title in 1997. However, this argument also flies in the face of the trial court’s January 10, 2000 Findings of Fact and Conclusions of Law, in which the court found that Avis & Archibald was liable for damages, but would not give Big Sky any damages amount against Avis & Archibald because the court found as a matter of fact that Big Sky had not experienced a pecuniary loss as a result of Avis & Archibald’s actions. (R133-136).

Because Big Sky did not suffer any damages until 2002, the claims against Lawyers Title and Fireman’s Fund did not accrue until 2002.

**B. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING BIG SKY’S MOTION TO AMEND.**

Lawyers Title uses the Findings of Fact and Conclusions of Law that Lawyers Title presented to the trial court for signature, in an effort to argue that the trial court actually made appropriate timeliness, justification for delay, and prejudice findings and conclusions. However, these findings and conclusions were not the ones reached by the trial court in oral argument.

Instead, the trial court's ruling at oral argument was based on the court's incorrect determination that the applicable causes of action had accrued in 1997 and therefore expired in 2000. (R720, pp. 22-26). In reality, the causes of action applicable to Lawyers Title did not accrue until 2002, and one cause of action against Fireman's Fund has still yet to accrue, as Big Sky has not been able to obtain a judgment against Avis & Archibald that it can then pursue against Fireman's Fund. The trial court actually found at oral argument that Big Sky had justified its delay in bringing the Motion to Amend due to the prior ongoing bankruptcy litigation in which Big Sky had been involved. Finally, the court's finding that Lawyers Title would be prejudiced if Big Sky were allowed to amend was again based on the court's erroneous conclusion as to the applicable statute of limitations. The court did make a reference to the potential prejudice that might result from the time that had passed, but merely made a guess as to whether or not Lawyers Title would be able to produce witnesses or documents. There is nothing in the record as to any real prejudice to Lawyers Title other than Lawyers Title's conclusory argument and the court's own conjecture that if the amendment were allowed, Lawyers Title would somehow be prejudiced.

**C. BIG SKY CAN DEMONSTRATE AN IDENTITY OF INTEREST BETWEEN AVIS & ARCHIBALD AND LAWYERS TITLE AND FIREMAN'S FUND.**

Lawyers Title argues that there is no identity of interest for relation back purposes between Lawyers Title and Avis & Archibald because the defenses raised by Lawyers Title and Avis & Archibald are different. In order for Big Sky to prevail against Lawyers Title on its statutory claim against Lawyers Title, Big Sky would have to show that Avis & Archibald somehow had liability for the disbursement of funds to Wayne Ogden. Big Sky would then have

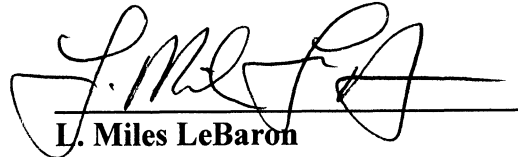
to show that Lawyers Title was liable as a principal for the acts of its agent. Unlike the father and son in Penrose v. Ross, 2003 UT App 157, 71 P.3d 631 (Utah App. 2003), Lawyers Title and Avis & Archibald do have a sufficient unity of legal interest based on their principal/agent relationship. Similarly, Fireman's Fund and Avis & Archibald have a sufficient identity of legal interest as provided for in their insured/surety relationship.

### **CONCLUSION**

The trial court erred in its interpretation and application of the applicable statute of limitations and its analysis of whether or not Big Sky's relation back arguments pursuant to Rule 15(c) of the Utah Rules of Civil Procedure made Big Sky's Motion to Amend appropriate. In the alternative, the trial court abused its discretion in denying Big Sky's Motion to Amend. Finally, the trial court erred in granting the Appellees' Motions for Summary Judgment, as Big Sky raised other causes of action in addition to the fraudulent nondisclosure claim that the trial court dismissed. The Memorandum Decision and Order of the trial court should be vacated, Big Sky should be allowed to amend its complaint, and the case should be remanded to allow Big Sky to proceed to trial.

**DATED and SIGNED this 6 day of February 2006.**

**LEBARON & JENSEN, P.C.**

  
**L. Miles LeBaron**

CERTIFICATE OF DELIVERY

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, to the following:

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on this 6 day of February 2006.

A handwritten signature in black ink, appearing to be "LME" followed by a stylized flourish or initials.