10-1-2013

DAFCO v. Stewart Title Guaranty Co Respondent's Brief Dckt. 40738

IN THE SUPREME COURT FOR THE STATE OF IDAHO

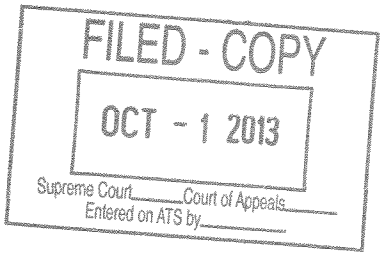
DAFCO LLC.,	)	
	)	
Plaintiff/Appellant,	)	Supreme Court Docket No. 40738-2013
	)	
vs.	)	**RESPONDENTS' BRIEF**
	)	
STEWART TITLE GUARANTY COMPANY, AMERITITLE, INC.,	)	
	)	
Defendants/Respondents.	)	
	)	

Appeal from the District Court of the Seventh Judicial District
for Bonneville County

Honorable Dane H. Watkins, Jr., District Judge, presiding

Stephen D. Hall and Nathan M. Olsen
Residing at 485 E Street, Idaho Falls, ID 83402, for Appellant

Michael T. Spink and Richard H. Andrus
Residing at 251 E. Front Street, Boise, ID 83702, for Respondents



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Statement of the Case

DAFCO LLC. ("DAFCO") [1] routinely disregarded deadlines and procedures throughout the proceedings before the district court. Now on appeal, DAFCO asks this Court to overlook the pattern of abuse.

This case involves the enforcement of the terms of a title insurance policy issued by Stewart Title Guaranty Company ("Stewart") and escrow closing services provided by AmeriTitle, Inc. ("AmeriTitle") related to a spec home built by Joshua M. Jarvis. In March 2008, Mr. Jarvis sought a construction loan from Snake River Funding, Inc. ("Snake River Funding"). R. p. 427. On March 13, 2008, Mr. Jarvis, as grantor, executed a deed of trust (the "Insured Deed of Trust") for the benefit of Snake River Funding, which gave Snake River Funding a security interest in the real property on which Mr. Jarvis intended to build the spec home. R. pp. 95-96, and 360; *see New Phase Investments, LLC v. Jarvis*, 153 Idaho 207, 208, 280 P.3d 710, 711 (2012).

A. The Title Policy

On March 18, 2008, Stewart issued a Loan Policy of Title Insurance to Snake River Funding with an insurance amount of $268,000.00 (the "Title Policy") for the Insured Deed of Trust. R. pp. 65-77 and 96-97. Stewart entered into no other agreement and/or contract with

[1] A Complaint in this matter was originally filed on January 15, 2010 and named two non-existent entities – "Snake River Funding, LLC" and "D.A.F.C.O., LLC." R. pp. 012-016. The Plaintiffs eventually amended their Complaint to change "Snake River Fund, LLC" to "Snake River Funding, Inc." and "D.A.F.C.O., LLC." to "DAFCO LLC" although the correct name of the entity is "DAFCO LLC.".

Snake River Funding other than the Title Policy. R. p. 505, ¶ 24; R. p. 511, ¶ 9; Tr. p. 90, L. 25, p. 91, L. 1.

AmeriTitle was not a party to the Title Policy. R. pp. 65-77. AmeriTitle did not insure DAFCO under the Title Policy or have any other obligations under the Title Policy. R. pp. 65-77, and; 505, ¶ 25.

The Title Policy includes various provisions regarding how an insured must submit a claim, how Stewart may handle a claim, how litigation and appeals may be pursued, and what liability Stewart has under the Title Policy for any losses or damages claimed by the insured. R. pp. 65-77. The district court determined and DAFCO did not dispute that the terms and provisions of the Title Policy are clear and unambiguous. R. pp. 365 and 368; *see* R. pp. 95-107.

The Title Policy does not require payment to an insured merely because a third-party may challenge the validity or priority of the Insured Deed of Trust. R. pp. 65-77; Tr. p. 90, Lns. 9-16. Section 7 of the "Conditions" portion of the Title Policy allows, but does not require, Stewart to settle a claim by paying or tendering the amount of the insurance or otherwise settling with the insured. R. p. 68. Sections 5(b) and 5(c) of the "Conditions" portion of the Title Policy provide options for Stewart to pursue when the Insured Deed of Trust is challenged:

> (b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as Insured, or to prevent or reduce loss or damage to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subjection, it must do so diligently.

> (c) Whenever the Company brings action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

R. p. 68, §§ 5(b) and (c) (emphasis added).

The Title Policy provides that if the validity of the Insured Deed of Trust is upheld in litigation or on appeal, Stewart is not responsible for any loss or damage to the insured. R. p. 69, § 9. Specifically, Section 9(a) of the "Conditions" portion of the Title Policy provides as follows:

> If the Company establishes the title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, or establishes the lien of the Insured Mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the insured.

R. p. 69, § 9(a) (emphasis added). Section 9(b) of the "Conditions" portion of the Title Policy provides further:

> In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

R. p. 69, § 9(b) (emphasis added).

B. The Closing Instructions

Mr. Jarvis and Snake River Funding used AmeriTitle's escrow services to close their loan transaction. R. p. 502, ¶ 9. Mr. Jarvis and Snake River Funding as parties to the escrow closing

submitted certain Closing Instructions to AmeriTitle (the "Closing Instructions"). R. pp. 507-509. DAFCO was not a party to the Closing Instructions. R. pp. 508-509; Tr. p. 81, Lns. 2-3. Stewart was not a party to the Closing Instructions and did not have any responsibility under the escrow closing. R. pp. 505, 508-509, and 511, ¶¶ 9 and 23-24; Tr. p. 90, L. 9 – p. 91, L.8.

The Closing Instructions set forth certain documents and other items required from each party prior to close of the escrow transaction. R. p. 503, ¶ 11. The Closing Instructions did not obligate AmeriTitle to obtain the signature of Mrs. Jarvis. Tr. p. 92, Lns. 4-7. AmeriTitle was only required to provide form documents to Snake River Funding and Mr. Jarvis for their transaction. R. p. 503, ¶¶ 12-14. AmeriTitle did not draft documents for the parties. R. p. 503, ¶ 14. AmeriTitle merely acted as scrivener under instructions from Snake River Funding and Mr. Jarvis to provide a form deed of trust. Tr. p. 92, Lns. 1-6; R. p. 503, ¶ 15.

The clear and unambiguous Closing Instructions signed by Snake River Funding provide in pertinent part:

> The closing agent is directed to comply with the instructions contained in these instructions and the parties hereto agree to indemnify and hold harmless the closing agent from any and all actions or losses related hereto other than failure to comply herewith, including but not limited to any attorney's fees or costs incurred by the closing agent in defending itself in any such action.
>
> BY THEIR EXECUTION OF THESE INSTRUCTIONS, THE BUYER AND SELLER ACKNOWLEDGE THE FOLLOWING:
>
> 1) The closing agent is not acting as a representative of either party,
> 2) The documents prepared in connection with this transaction will affect the legal rights of the parties, and the parties rights or interests in those documents may differ,
> 3) Any documents typed by the closing agent have been done so at our direction or the direction of our counsel,

4) The closing agent is not licensed to practice law and no legal advice, advice as to the content of the documents, nor advice as to the merits of the transaction has been offered by the closing agent,
5) Copies of the Subdivision Plat and Restrictive Covenants where applicable,
6) AmeriTitle shall not be responsible for any penalties, or loss of principal or interest or any delays in the investment pursuant to our instructions, nor shall AmeriTitle be liable for any loss or impairment of funds while those funds are on deposit in a financial institution if such loss or impairment results from the failure, insolvency or suspension of financial institution.
7) Idaho Code 55-2501, et seq. is known as the "Idaho Property Condition Disclosure Act" and this transaction may be affected by the Act. AmeriTitle has advised you to seek separate advise regarding the law and AmeriTitle has not given you any advise about the law that is not contained in these Closing Instructions. With the execution of these Closing Instructions you are certifying that compliance with the law, if applicable, has been accomplished outside of closing.
8) THE CLOSING AGENT HAS ADVISED THE PARTIES HERETO TO SEEK THE ADVICE OF INDEPENDENT COUNSEL IF ANY PART OF THIS TRANSACTION IS NOT FULLY UNDERSTOOD.

R. p. 509 (underlined emphasis added).

C. Assignment of Insured Deed of Trust to DAFCO

On April 17, 2008 (a month after the escrow closing), Snake River Funding assigned its rights under the Insured Deed of Trust to DAFCO. R. pp. 360 and 548. After Mr. Jarvis executed the Insured Deed of Trust, Mr. Jarvis and his wife, Rebecca Jarvis, executed multiple deeds of trust for the benefit of New Phase Investments, LLC ("New Phase"). R. pp. 360-361. The Insured Deed of Trust was recorded prior to any of New Phase's deeds of trusts. *New Phase Investments, LLC v. Jarvis*, 153 Idaho 207, 208, 280 P.3d 710, 711 (2012).

D. Default and Claims Litigation

Mr. Jarvis ultimately defaulted on his loan obligations. *New Phase Investments*, , 153 Idaho at 208-09, 280 P.3d at 711-12. On November 19, 2008, Mr. Jarvis and his wife filed a petition for Chapter 13 bankruptcy. R. p. 511, ¶ 11. On or about November 26, 2008, the first legal counsel to represent Snake River Funding and/or DAFCO, sent a self-styled "Notice of Claim" letter to Stewart, but the letter did not seek any particular action by Stewart. R. pp. 63, ¶ 7, 89-90, 361, and 511, ¶ 15. Nevertheless, Stewart retained Charles A. Homer of Holden Kidwell Hahn & Crapo P.L.L.C. on December 17, 2008 to represent the insured. R. p. 512, ¶ 17.

Mr. Homer objected to the Chapter 13 bankruptcy on behalf of the insured, and Mr. Jarvis caused the bankruptcy action to be dismissed in February 2009. R. pp. 512, ¶ 20 and 525. Mr. Jarvis filed for a Chapter 7 liquidation bankruptcy on February 23, 2009 (R. pp. 361, 512, ¶ 24, and 525), once again pulling the spec home property into a bankruptcy and stay. R. pp. 361and 513 ¶ 26. Mr. Homer worked diligently to get relief from the second bankruptcy stay. R. p. 513 ¶ 26; Tr. p. 89, L. 23 – p. 90, L. 6. On July 24, 2009, the bankruptcy court released the spec home property from the stay. R. pp. 513, ¶ 35, and 578-579.

Stewart entered into negotiations with New Phase on behalf of the insured to resolve the priority of the various deeds of trust. R. p. 514, ¶¶ 36-40; Tr. p. 90, Lns. 4-6. Snake River Funding, DAFCO, and New Phase complicated and drew out the negotiations by switching legal counsel during the negotiations. R. p. 514, ¶¶ 37-38. The negotiations were ultimately not fruitful. R. p. 514, ¶ 40.

On February 1, 2010, Mr. Homer filed Bonneville County Case No. CV-2010-624 on behalf of Snake River Funding and DAFCO seeking to foreclose the Insured Deed of Trust and seeking a determination that DAFCO held a superior interest in the spec home property. R. p. 514, ¶ 41. New Phase then filed a lawsuit (Bonneville County Case No. CV-2010-651) seeking to foreclose its security in the spec home property, claiming, among other things, that it held an interest superior to DAFCO. R. p. 514, ¶ 42. The February 1, 2010 case (Case No. CV-2010-624) was dismissed, and the parties proceeded to litigate the priority of the interests in the spec home property under Case No. CV-2010-651 (the "Claims Litigation"). R. p. 514, ¶ 43.

On August 5, 2010, the district court in the Claims Litigation issued a decision holding the Insured Deed of Trust was void because Mrs. Jarvis did not sign it. R. pp. 361-362. Mr. Homer, on behalf of Snake River Funding and DAFCO, appealed the district court's decision. *New Phase Investments, LLC*, 153 Idaho at 208-709, 280 P.3d at 714-15. On June 29, 2012, this Court issued its decision reversing the district court and holding the Insured Deed of Trust was valid and held first priority over any of the New Phase deeds of trust. *Id.* This Court specifically held as follows:

> DAFCO's deed of trust is valid, not having been challenged by Rebecca. There is no dispute but that DAFCO's trust deed was recorded prior to any of New Phase's. Being the first-recorded encumbrance, DAFCO's trust has first priority. Therefore, we ... hold DAFCO's deed to be the first priority encumbrance against the Property.

Id. at 211-12, 280 P.3d at 714-715 (citations omitted). DAFCO has admitted the decision in *New Phase Investments, LLC* upheld the first position priority and validity of the Insured Deed of Trust. R. p. 602, ¶ 18; Tr. p. 62, Lns. 22-24.

E. DAFCO's Disregard for Court Schedule and Deadlines

The present case was actively litigated for a year and several months before the district court vacated hearings and trial dates on March 24, 2011. R. pp. 1-11 and 460-461. The parties engaged in discovery prior to the March 24, 2012. R. p. 1. A motion for summary judgment, a motion to dismiss, a motion to reconsider, and motions to amend the Complaint were also filed and considered by the district court during that time. R. pp. 1-5.

Snake River Funding and DAFCO amended their Complaint for the first time on April 29, 2010, but DAFCO made no effort to add AmeriTitle or to add to or clarify its existing claims despite that any potential claims should have been known. R. pp. 1 and 22-43. In a motion for summary judgment dated September 21, 2010, Snake River Funding and DAFCO claimed they were entitled to immediate and full payment without waiting for a final appeal decision regarding the validity and priority of the Insured Deed of Trust. R. pp. 100-106. The district court denied the motion and determined that, under the plain language of the Title Policy, Stewart had the right to appeal the district court's decision in the Claims Litigation. R. p. 368-369.

On March 11, 2011, Snake River Funding and DAFCO filed their Second Amended Complaint. R. pp. 426-453. The Second Amended Complaint included the original claim against Stewart for breach of the Title Policy and added claims against Stewart and AmeriTitle for an "express and/or implied" contract to obtain the signature of Mrs. Jarvis. R. pp. 430-431. Again, DAFCO made no effort to add other claims despite the fact that any potential claims should have been known.

After this Court issued its decision in *New Phase Investments, LLC*, the district court determined nothing in the decision created any conflicts of interest that did not already exist. Tr. pp. 77, Lns. 10-14 and 83, Lns. 7-10. The decision also did not create any claims that would not have existed when the first Complaint was filed or when the first or second amended Complaints were filed.

DAFCO's legal counsel sought to withdraw from representation after the decision in *New Phase Investments, LLC* claiming a conflict of interest prevented further joint representation. Tr. p. 83, Lns. 7-10; R. pp. 464-465. DAFCO's present legal counsel – its third – joined the case on August 20, 2012. Tr. p. 77, Lns. 15-24; R. pp. 678-680 (timeline adopted by district court). Counsel for Stewart and AmeriTitle made multiple calls to DAFCO's counsel throughout August and September 2012 to discuss the status of the case in light of the Supreme Court's decision in *New Phase Investments, LLC*. Tr. p. 77, Lns. 15-24; R. p. 678. DAFCO's attorney did not return any of those phone calls. Tr. p. 77, Lns. 15-24; R. p. 678.

In the meantime, Snake River Funding also retained new counsel that determined the case lacked merit and moved to dismiss its claims against Stewart and AmeriTitle. Tr. p. 26, Lns. 11-18. DAFCO went the opposite direction. At a status conference on September 6, 2012, counsel for DAFCO told the district court that DAFCO was contemplating amending its Complaint for a third time. Tr. p. 21, Lns. 1-9.

On September 20, 2012, Snake River Funding filed and served a Motion for Dismissal of Plaintiff Snake River Funding, Inc. as Party Plaintiff. Tr. p. 77, Lns. 15-24; R. pp. 468-470 and 678. The motion was set for hearing on November 28, 2012. Tr. p. 38, Lns. 14-24 and 77, Lns.

15-24; R. p. 679. DAFCO never filed an objection to the motion for dismissal. Tr. 77, Lns. 15-24; R. pp. 1-11 and 679.

DAFCO kept the district court and other parties to the lawsuit guessing about how it would proceed with the case. On October 10, 2012, the district court held another status conference. Tr. pp. 26-37. The parties discussed Snake River Funding's pending motion to dismiss its claims. Tr. p. 26, Lns. 11-18. DAFCO's counsel again stated that he was "exploring the possibility of claims" against Snake River Funding and a third amended Complaint "with regard to the defendants' claims." Tr. p. 27, Lns. 14-25. Counsel for Stewart and AmeriTitle expressed concern that DAFCO still had not articulated what those unpleaded claims might be. Tr. p. 31, Lns. 4-7. Additionally, Snake River Funding had already filed its motion to dismiss its own claims with prejudice. Tr. p. 77, Lns. 15-24; R. pp. 468-470 and 678.

At the district court's insistence, counsel for DAFCO agreed that he would determine within two weeks (by October 24, 2012) whether he would file a third amended Complaint. Tr. p. 31, Lns. 10-21, p. 33, Lns. 1-5, p. 34, Lns. 20-25, and p. 35, L. 1; R. p. 678. DAFCO did not move to file a third amended Complaint within the two week deadline and did not notify the district court of its intent to do so. Tr. p. 77, Lns. 15-24; R. pp. 7-8 and 678-679.

On October 11, 2012, Stewart and AmeriTitle served DAFCO with Motions for Summary Judgment documents (collectively, the "Motions for Summary Judgment") and a Notice of Hearing on Motions for Summary Judgment. Tr. p. 77, Lns. 15-24; R. p. 678, ¶ 6. Because DAFCO had not sought to file a third amended Complaint, the Motions for Summary Judgment moved the district court on the claims set forth in Second Amended Complaint, which

included breach of contract claims against Stewart based on the Title Policy and a vague "express or implied contract to obtain the joiner of Mrs. Jarvis . . . or obtain a release or disclaimer of her interests" and a breach of contract claim against AmeriTitle based on an unspecified "express or implied contract to obtain the joiner of Mrs. Jarvis . . . or obtain a release or disclaimer of her interests." R. pp. 430-431, ¶¶ 27-35.

The Motions for Summary Judgment were originally scheduled for hearing on November 14, 2012. Tr. p. 77, Lns. 15-24; R. p. 678, ¶ 6. Counsel for Stewart and AmeriTitle later agreed as a professional courtesy and at the request of DAFCO's counsel to reschedule the hearing on the Motions for Summary Judgment to allow more time for DAFCO's counsel to respond. Tr. p. 77, Lns. 15-24; R. p. 679, ¶ 7. The new hearing date, December 12, 2012, gave DAFCO nearly a month longer to respond to the Motions for Summary Judgment making DAFCO's response brief and supporting affidavits due on November 28, 2012. Tr. p. 77, Lns. 15-24; R. pp. 639, ¶ 3, and 678, ¶ 6. Despite being granted the lengthy extension, DAFCO, nevertheless, failed to file a timely response to the Motions for Summary Judgment.

On November 28, 2012, the district court held a hearing on Snake River Funding's motion to dismiss with prejudice its claims against Stewart and AmeriTitle. Tr. pp. 38-41 and 77, Lns. 15-24; R. p. 679, ¶ 9. Counsel for DAFCO failed to appear at the hearing or file any indication of whether it disputed Snake River Funding's motion. Tr. pp. 38-41, and 77, Lns. 15-24; R. p. 679, ¶ 9. The district court even called counsel for DAFCO on the day of the hearing, but counsel for DAFCO was not in the office and did not respond to the district court's phone call. Tr. pp. 38-41 and 77, Lns. 15-24; R. p. 679, ¶ 9. The district court entered an order on

December 4, 2012, dismissing Snake River Funding from the lawsuit and dismissing with prejudice Snake River Funding's claims against Stewart and AmeriTitle. Tr. p. 77, Lns. 15-24; R. pp. 580-581, and 679, ¶ 8.

Even after extensions had been granted, DAFCO continued to disregard every deadline. On the evening of December 5, 2012, after close of business and after Stewart and AmeriTitle's reply brief on their Motions for Summary Judgment would otherwise be due, counsel for DAFCO fax-served on Stewart and AmeriTitle numerous documents including (among others) a Motion to File a Third Amended Complaint, a Response in Opposition to Defendants' Motions for Summary Judgment, and an Affidavit in Support of Response in Opposition to Defendants' Motions for Summary Judgment. Tr. p. 77, Lns. 15-24; R. pp. 582-644, and 679, ¶ 11.

DAFCO's documents responsive to the Motions for Summary Judgment were filed not only a week late, after DAFCO had already been granted a month extension, but also on the day Stewart and AmeriTitle's reply briefs would be due under Idaho Rule of Civil Procedure 56(c). I.R.C.P. 56(c); Tr. p. 77, Lns. 15-24; and R. pp. 679, ¶ 11, and 701. In addition, the motion to file the Third Amended Complaint was filed forty-two days after the district court's deadline for filing such a motion and after Snake River Funding's claims against Stewart and AmeriTitle had been dismissed with prejudice. Tr. p. 77, Lns. 15-24; R. pp. 679, ¶ 11, and 701.

To put this in perspective, the motion to file the Third Amended Complaint came nearly three years after the original Complaint. R. p. 647, ¶ 11. Even if the period during the appeal in *New Phase Investments, LLC* is not taken into account, nearly two years elapsed. Not only had the trial date been extended three times, but the corresponding discovery deadlines had been

extended. R. p. 647, ¶¶ 11-13. The extended discovery deadlines began expiring five days before DAFCO's motion was set to be heard on December 19, 2012. R. p. 647, ¶¶ 15 and 16.

The proposed Third Amended Complaint sought to add the following causes of action: (1) Count I was described as a breach of contract claim against Stewart based on the Title Policy; (2) Count II was described as a breach of contract claim against AmeriTitle based on the Closing Instructions; (3) Count III was a "per se negligence" claim against Stewart and AmeriTitle based on IDAPA Rule 18.01.25; (4) Count IV was a negligence claim against AmeriTitle; (5) Count V was a claim for a breach of the duty of good faith and fair dealing against Stewart and AmeriTitle; and (6) Count VI was a breach of warranty claim against Snake River Funding, which sought for Snake River Funding to indemnify and/or hold DAFCO harmless for its interest in the property due to the alleged conduct of Stewart and AmeriTitle. R. pp. 594-597.

F. The District Court's Determination

On December 12, 2012, the district court held a hearing on Stewart and AmeriTitle's Motions for Summary Judgment. Tr. pp. 42-93. The district court determined to proceed with argument on DAFCO's motion to amend in addition to the Motions for Summary Judgment. Tr. pp. 42-45.

The district court examined the history of the case since its inception and adopted the timeline as set forth by Stewart and AmeriTitle in Defendants' Response to DAFCO's Motions to (1) Continue, (2) Allow Filing of Affidavit and Response Brief, and (3) Shorten Time: and Memorandum in Support of Defendants Motions to Strike Affidavit and Response Brief. Tr. p. 77, Lns. 15-24; R. pp. 677-682. Ruling from the bench, the district court first addressed

DAFCO's Motion to Amend and examined three factors: (1) whether the amendment would cause delay or prejudice; (2) whether the pleadings set forth a valid claim; and (3) whether an opposing party has a valid defense. Tr. pp. 78-79. The district court discussed that the trial was set for March 2013 and had been extended three times. Tr. p. 77, Lns. 3-4. The district court noted that if DAFCO's motion to amend was heard when scheduled "it would have been after discovery and after the deadlines provided by the Court." Tr. p. 77, Lns. 7-10. The district court described that DAFCO's own counsel admitted the nature of the claim did not change after the decision in *New Phase Investments, LLC*. Tr. p. 77, Lns. 10-14. No legitimate reason existed for DAFCO to not have originally pled the case as it sought to plead in the Third Amended Complaint. As a result, the district court found that "any prejudice in this case would exceed any justification to allow the amendment." Tr. p. 83, Lns. 20-22. The district court acknowledged the prejudicial nature of adding parties previously dismissed from a case (as Snake River Funding had). Tr. p. 83, Lns. 10-22. The district court also noted DAFCO had an opportunity to oppose Snake River Funding's motion to dismiss. Tr. p. 83, Lns. 15-17. The district court held there "appears to be no justification to permit the amendment at this state of the proceedings." Tr. p. 84, Lns. 14-15.

The district court also ruled on the Motions for Summary Judgment, which addressed the causes of action then pending before the court. The district court examined the record and found no material question of fact existed regarding the contract claims against either Stewart or AmeriTitle. Tr. pp. 89-92. Regarding Stewart, the district court determined Stewart had fulfilled its obligations under the Title Policy. Tr. pp. 89-92. Further, the district court concluded

Stewart acted diligently in obtaining representation for DAFCO and retained counsel then diligently handled the litigation permitted under the Title Policy. Tr. pp. 89-90. The district court also found the Title Policy was the only contract that Stewart entered. Tr. pp. 90, L. 25 and 91, L. 1.

Regarding AmeriTitle, the district court determined AmeriTitle was not a party to the Title Policy and did not insure DAFCO under the Title Policy. Tr. p. 84, Lns. 9-11. Further, DAFCO's claims against AmeriTitle for breach of contract could not survive the Motions for Summary Judgment based on a lack of contractual duty, express or implied, between AmeriTitle and DAFCO and a lack of privity between AmeriTitle and DAFCO. Tr. pp. 89-92. The district court necessarily tied its analysis of DAFCO's motion to amend to its analysis regarding the Motions for Summary Judgment. Tr. pp. 92-93.

Attorney Fees on Appeal

Stewart and AmeriTitle are entitled to an award of costs and attorney fees on appeal. The Closing Instructions authorize AmeriTitle an award of attorney fees and costs that it incurs in defending any actions or losses related to the Closing Instructions. R. p. 504, ¶ 20. DAFCO claims the Closing Instructions are the basis for its claims against AmeriTitle; hence attorney fees and costs are awardable under the Closing Instructions. Stewart and AmeriTitle were the prevailing parties below and should be the prevailing parties on this appeal. Additionally, DAFCO concedes its claims against Stewart and AmeriTitle are commercial transactions. *Appellant's Brief* p. 14. Therefore, Stewart and AmeriTitle are each entitled to attorney fees on this appeal pursuant to Idaho Code Section 12-120(3). I.C. § 12-120(3). Accordingly, costs

should also be awarded to Stewart and AmeriTitle as a matter of course pursuant to Idaho Appellate Rule 40. I.A.R. 40.

Awards of attorney fees to Stewart and AmeriTitle are also appropriate under Idaho Code Section 12-121. I.C. § 12-121. Such awards are appropriate when an appeal has been brought frivolously, unreasonably, or without foundation. *Karlson v. Harris*, 140 Idaho 561, 571, 97 P.3d 428, 438 (2004). An award is proper to both Stewart and AmeriTitle because DAFCO appealed the district court's denial of its motion to amend despite its repeated disregard for deadlines and the prejudice it created for other parties. Specifically, DAFCO completely ignored the district court's deadline to file a motion to amend. An award under Section 12-121 is particularly appropriate in the appeal against Stewart because, as argued below, even the legal authority cited by DAFCO directly prohibits the type of claims it seeks to pursue.

Argument

I. THE DISTRICT COURT PROPERLY DENIED DAFCO'S MOTION TO AMEND.

A. Standard for Denying Motions to Amend.

The grant or denial of a motion to amend a pleading is within the discretion of the district court. *Maroun v. Wyreless Sys. Inc.*, 141 Idaho 604, 612, 114 P.3d 974, 982 (2005) (citations omitted). The abuse of discretion standard is deferential to the district court. *First Sec. Bank of Idaho, N.A. v. Hansen*, 107 Idaho 472, 480, 690 P.2d 927, 935 (1984) (holding the district court is given a "large degree of discretion."). On appeal, the Court considers whether:

> (1) the court correctly perceived the issue as one of discretion; (2) the court acted within the boundaries of such discretion and consistently with legal standards

> applicable to specific choices; and (3) the court reached its decision by an exercise of reason.

State Ins. Fund v. Jarolimek, 139 Idaho 137, 139, 75 P.3d 191, 193 (2003).

Sufficient grounds to deny a motion to amend include undue delay, bad faith, dilatory motive, or prejudice. *Maroun*, 141 Idaho at 612, 114 P.3d at 982. In *Weitz v. Green*, the district court was justified in determining the opposing party was prejudiced when the motion to amend was made a year after filing the initial Complaint and would require additional evidence and witness gathering. 148 Idaho 851, 858, 230 P.3d 743, 750 (2009). A district court may also deny a motion to amend if the amended pleading does not set out a valid claim, or if the opposing party has an available defense. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1990).

The district court recognized the decision of whether to grant or deny the motion to amend as an issue left to the discretion of the court and cited the various standards applicable to motions to amend. Tr. pp. 79-84. DAFCO claims the district court did not reach its decision by an exercise of reason. *Appellant's Brief* pp. 16-17. The record demonstrates otherwise.

B. *The Motion to Amend Was Untimely, Constituted Undue Delay, and Was Prejudicial.*

DAFCO asks the Court to ignore the history of the case prior to the decision in *New Phase Investments, LLC*. This case was actively litigated for a year and several months before the district court vacated hearings and trial dates on March 24, 2011. R. pp. 1-5 and 460-461. During that time, the parties engaged in discovery and the district court considered and decided a motion for summary judgment, a motion to dismiss, a motion to reconsider, and motions to

amend the Complaint. R. pp. 1-5. Notably, the March 24, 2011 order vacating hearings and trial dates did not preclude DAFCO from moving forward on discovery. R. pp. 460-461.

Snake River Funding and DAFCO amended their Complaint twice before the district court's order on March 24, 2011. R. pp. 1, 4, 22-43, and 426-453. When Snake River Funding and DAFCO filed their Second Amended Complaint, DAFCO made no effort to clarify the claims despite the fact any potential claims should have been known. R. pp. 1, 4, 22-43, and 426-453.

DAFCO provides no legitimate excuse for not including the claims sought to be added in the proposed Third Amended Complaint in the prior three versions of the Complaint filed and served by DAFCO. The district court correctly decided that nothing in this Court's decision in *New Phase Investments, LLC* created any conflicts. Tr. pp. 83, Lns. 7-10. Additionally, the decision did not create any claims that would not have existed when the first Complaint was filed or when the first or second amended Complaints were filed. Tr. pp. 83, Lns. 7-10.

DAFCO's own Motion to File Third Amended Complaint recognized limits to a district court's granting of leave to amend, such as when the "motion is made after court-imposed deadlines, adds parties that were earlier dismissed, at a time that multiple discovery deadlines had passed." R. p. 586 (*citing Maroun*, 141 Idaho 604, 114 P.3d 974). All of the elements cited by DAFCO as reasons why a court may properly deny a motion to amend are present in this case.

After the decision in *New Phase Investments, LLC*, DAFCO showed complete disregard for the district court and the other parties in the litigation. DAFCO ignored the district court's

two week deadline set on October 10, 2012 for DAFCO to seek to file an amended Complaint. Tr. pp. 34-35 and 77, Lns. 15-24; R. pp. 7-8 and 678, ¶ 4. The failure to meet the deadline was not only inexcusable but extremely prejudicial because Snake River Funding's claims against Stewart and AmeriTitle were dismissed with prejudice after DAFCO failed to timely seek to file an amended Complaint. DAFCO's failure to meet the district's court deadline is sufficient alone to justify denying the motion to amend.

DAFCO's disregard for the district court's docket and the other parties continued when DAFCO failed to appear at the November 28, 2012 hearing on Snake River Funding's motion for dismissal of its claims. Tr. pp. 38-41 and 77, Lns. 15-24; R. p. 679, ¶ 8. Based on the past history of the case and DAFCO's decision not to seek to file an amended Complaint, the district court entered an order on December 4, 2012 dismissing Snake River Funding from the lawsuit with prejudice. Tr. pp. 77, Lns. 15-24; R. pp. 580-581 and 679, ¶ 8.

DAFCO bemoans that Snake River Funding "did not even appear" at the hearing on DAFCO's motion to amend. *Appellant's Brief* p. 18. Yet Snake River Funding had already been dismissed from the case and DAFCO never objected to the dismissal. DAFCO provides no authority for the proposition that a party once dismissed from a lawsuit as a plaintiff must receive notice of later motions to add the party as a new defendant. *Appellant's Brief* p. 21.

Despite Stewart and AmeriTitle's courtesy in rescheduling the hearing on their Motions for Summary Judgment for a month later than originally noticed, DAFCO disregarded the extension and did not file timely responses. On the evening of December 5, 2012, after close of business and after Stewart and AmeriTitle's reply brief on their Motions for Summary Judgment

would be due, counsel for DAFCO fax-served on Stewart and AmeriTitle numerous motion documents including a Motion to File a Third Amended Complaint (forty-two days late from the district court's deadline), a Response in Opposition to Defendants' Motions for Summary Judgment (a week late even after a one month extension), and an Affidavit in Support of Response in Opposition to Defendants' Motions for Summary Judgment (a week late even after a one month extension). Tr. p. 77, Lns. 15-24; R. pp. 582-644, and 679, ¶ 11.

The district court appropriately noted the motion to file the Third Amended Complaint was filed:

- After nearly three years elapsed from when the original Complaint was filed. R. p. 647, ¶11; Tr. 77, Lns. 15-24;
- After the trial date been extended three times. R. p. 647, ¶ 13; Tr. 77, Lns. 15-24;
- After the discovery deadlines had been extended for each trial reset. R. p. 647, ¶ 13; Tr. 77, Lns. 15-24; and
- The extended discovery deadlines began expiring five days before DAFCO's motion was set to be heard on December 19, 2012. R. p. 647, ¶ 15; Tr. p. 77, Lns. 15-24.

DAFCO's repetitious disregard for deadlines and the history of the case must be viewed as a whole when assessing the district court's decision to deny the motion to amend. Ultimately, the district court could properly deny the motion to amend based solely on the timing of the motion because of the numerous blown deadlines and the delay and prejudice created by DAFCO's actions.

C. The Proposed Third Amended Complaint Did Not State Valid Claims.

The district court could properly deny DAFCO's motion to amend based solely on the untimeliness of the request. However, the district court also properly determined the proposed Third Amended Complaint did not state valid claims against Stewart or AmeriTitle – an independent basis for denying the DAFCO's motion to amend.

Although this Court has stated a "trial court may not consider the sufficiency of evidence supporting the claim sought to be added in determining leave to amend because that is more properly determined at the summary judgment stage," it is "certainly proper for the district court to consider whether the proposed amended complaint alleged valid claims." *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 612, 114 P.3d 974, 982 (2005). In this case, the district court made certain foundational determinations as part of the pending Motions for Summary Judgment. The district court was justified in relying on its determination of those issues when considering the validity of the claims sought to be added under the motion to amend. *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003) ("The decision to grant or refuse permission to amend is left to the sound discretion of the trial court where a party proposes to amend its complaint when the record contains no allegation, which, if proven, would entitle the party to the relief claimed.") (emphasis added).

a. Claims Against Stewart.

i. Idaho law prohibits DAFCO's negligence claims against Stewart.

DAFCO explains in the *Appellant's Brief* that the "claims pending under the Second Amended Complaint, which were the subject of the summary judgment motions, were purely

contractual claims under the Policy (against Stewart Title) and the Closing Instructions (against AmeriTitle)" and the Third Amended Complaint merely sought to add causes of action against Stewart based in tort. *Appellant's Brief* pp. 17 and 18. DAFCO describes the proposed claims against Stewart in the Third Amended Complaint as negligence in the way AmeriTitle (not Stewart) handled the escrow closing and a second claim for bad faith in the way Stewart "responded to and handled the claim by DAFCO under the policy." *Appellant's Brief* pp. 17 and 18.

DAFCO provides the Court with no legal authority for the proposition that a title insurer is liable under tort principles for issuance of a title policy. *Appellant's Brief* p. 26. DAFCO cites broadly to case law, provisions of the Idaho Code, and the Idaho Administrative Code (IDAPA), but none of the cited authority actually sets forth a duty that a title insurer owes beyond the terms of the title policy. *Appellant's Brief* p. 19-20 (citing *All American Realty, Inc. v. Sweet*, 107 Idaho 229, 230-231; 687 P.2d 1356, 1357-1358 (1984); I.C. § 30-901 *et seq.*; I.C. § 41-101 *et seq.*; and IDAPA 18.01.25). Rather, Idaho law limits tort claims related to issuance of a title policy because contracts and policies are the source of the duties between the parties, not negligence principles. *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho 56, 58, 764 P.2d 423, 425 (1988). The party asserting a duty beyond the title policy must show "the act complained of was a direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." *Id.* at 59, 764 P.2d at 426. DAFCO fails to set forth any such duties.

The portion of IDAPA cited by DAFCO as supporting a duty owed by Stewart further belies DAFCO's tort claims against Stewart. *Appellant's Brief* p. 20; R. pp. 595-596. Section 18.01.25.01.d of the IDAPA, which is cited by DAFCO, provides:

> Issuance of a Policy. The preparation, execution and delivery of a title policy which is hereby deemed to be only a contract of insurance up to the face amount of such policy and in no way shall create a tort liability as to the condition of the record insured from. The same shall include any necessary investigation just prior to actual issuance of a policy to determine if there has been proper execution, acknowledgement and delivery of any conveyances, mortgage papers, and other title instruments which may be necessary for the issuance of a policy.

IDAPA 18.01.25.01.d (emphasis added). This section of IDAPA clearly shows that no tort claim can arise from the investigation prior to issuance of a policy or the execution, acknowledgement, and delivery of any conveyances, mortgage papers, and other title instruments that may be necessary for the issuance of a title policy. In the present case, this includes the execution of the Insured Deed of Trust.

DAFCO's negligence claims based on the escrow transaction handled by AmeriTitle is also not valid because Stewart was not a party to the escrow and Stewart performed no escrow duties. R. p. 501, ¶¶ 23-24; Tr. pp. 90-92. Accordingly, none of the authority DAFCO cites regarding escrow duties applies to Stewart. *See Appellant's Brief* pp. 19-20 (citing *All American Realty, Inc.*, 107 Idaho at 230-231; 687 P.2d at 1357-1358; I.C. § 30-901 *et seq.*; and IDAPA 18.01.25.001.01). The district court determined Stewart was not a party to the Closing Instructions and the Title Policy was the only contract Stewart entered. Tr. pp. 90-91. Therefore, Stewart owed no duty, and no tort claim related to the escrow work is viable against Stewart.

ii. No basis exists for DAFCO's claim against Stewart for breach of an alleged duty of good faith and fair dealing.

DAFCO later states the proposed Third Amended Complaint sought for the first time to add a claim for breach of the covenant of good faith and fair dealing. *Appellant's Brief* p. 21. However, DAFCO confuses its own claim. On the one hand, it argues the claim for the breach of the covenant of good faith and fair dealing should not have been dismissed as part of the Motions for Summary Judgment, which addressed the claims found in the Second Amended Complaint, but on the other hand, it states the claim was only sought to be added under the Third Amended Complaint. *Compare Appellant's Brief* p. 21 *with* p. 25. DAFCO cannot have it both ways. Either the claim for breach of the covenant of good faith and fair dealing was included in the Complaints before the proposed Third Amended Complaint or it was not. DAFCO also confuses the nature of a claim for a breach of the covenant of good faith and fair dealing when it first argues the claim is a tort and later argues it is also a contractual claim. *Appellant's Brief* p. 26. The claim is a tort claim. *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 315, 233 P.3d 1221, 1237 (2010). Regardless, none of the proposed amended claims against Stewart are valid.

The insured carries the burden of demonstrating the elements of bad faith, which include: "1) the insurer intentionally and unreasonably denied or withheld payment; 2) the claim was not fairly debatable; 3) the denial or failure to pay was not the result of a good faith mistake; and 4) the resulting harm is not fully compensable by contract damages." *Robinson v. State Farm Mut. Auto Ins. Co.*, 137 Idaho 173, 176-177, 45 P.3d 829, 832-833 (2002). Although DAFCO is

confused about whether such a claim is a tort claim and not a contract claim, such a cause of action rises and falls with the plain language of the contract. *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991) ("[T]he implied covenant of good faith and fair dealing cannot be inconsistent with the agreement executed by the parties."). "There is no basis for claiming implied terms contrary to the express rights contained in the parties' agreement." *Id.* at 289, 824 P.2d at 864 (quoting *First Security Bank of Idaho v. Gaige*, 115 Idaho 172, 176, 765 P.2d 683, 687 (1988)).

The primary case relied upon by DAFCO, *Weinstein, v. Prudential Property and Casualty Insurance Co.*, completely contradicts DAFCO's assertion of a breach of the duty of good faith and fair dealing. In *Weinstein*, the Court explained that "[a]lthough the tort of bad faith is not a breach of contract claim . . . there must also have been a duty under the contract that was breached." 149 Idaho at 315, 233 P.3d at 1237. Further, the "covenant requires the parties to perform, in good faith, the obligations contained in their agreement, but 'contract terms are not overridden by the implied covenant of good faith and fair dealing.'" *Id.* at 316, 233 P.3d at 1238 (citing *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 562, 212 P.3d 982, 992 (2009) and quoting *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009)) (emphasis in original) (citations omitted); *see also White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 100, 730 P.2d 1014, 1020 (1986) ("[T]he insured must show the insurer 'intentionally and unreasonably denies or delays payment . . . .'").

Weinstein has no application to the present case because DAFCO cannot clear the first hurdle of the four-prong test for bad faith claims. The district court determined the Title Policy

does not obligate Stewart to make the payment demanded by DAFCO. Tr. pp. 84-89. Thus, Stewart could not be accused of "intentionally and unreasonably" denying or withholding payment. The timeliness of a payment is not at issue when the insurer is not obligated to pay.

The provisions of the Unfair Claims Settlement Practices Act (UCSPA) cited by DAFCO also do not support DAFCO's claims. *Appellant's Brief* p. 22. The district court determined Stewart acted diligently in obtaining counsel to represent DAFCO; as a result, Section 41-1329 (2) of UCSPA is not applicable. I.C. § 41-1329(2) ("Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;"); Tr. pp. 85-90. The district court also determined Stewart satisfied its obligations under the Title Policy; as a result, Sections 41-1329(6) and (13) of UCSPA are not applicable. I.C. § 41-1329(6) ("Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;") (emphasis added) and (13) ("Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy;") (emphasis added); Tr. pp. 84-90.

The Title Policy – the only contract Stewart entered – is clear regarding Stewart's obligations and precludes DAFCO's contract claims. Section 9(a) of the "Conditions" portion of the Title Policy provides in pertinent part:

> If the Company . . . establishes the lien of the Insured Mortgage . . . it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

R. p. 69 (emphasis added). In *New Phase Investments, LLC*, this Court determined the Insured Deed of Trust was valid and held first priority over any of the New Phase deeds of trust. 153 Idaho 207, 211-212, 280 P.3d 710, 714-715. The matter was, in other words, already decided by this Court. Stewart has fully performed its obligations and is not liable for any alleged loss or damage claimed by the Plaintiffs.

DAFCO asserts without any support from the Title Policy that Stewart beached the contract because it held an "overarching duty of indemnifying the insured against actual monetary loss or damage." *Appellant's Brief* p. 27. The actual language of the Title Policy repudiates DAFCO's assertion. Section 9(b) of the "Conditions" portion of the Title Policy demonstrates that Stewart holds no liability for the alleged loss or damage claimed by DAFCO not related to the validity of the Insured Deed of Trust. R. p. 69. Section 9(b) provides:

> In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

R. p. 69 (emphasis added). In other words, until and unless the lien of the Insured Deed of Trust is adjudicated as defective, Stewart has no liability for any loss or damage.[2]

[2] Although not germane to the proposed amended claims against Stewart or AmeriTitle, DAFCO's claims against Snake River Funding appear to be invalid on the same grounds as those against Stewart. The Corporate Warranty relied upon by DAFCO only warrants against "lawful claims and causes" related to DAFCO's "interest pertaining to said premises." R. p. 549. If no claim adverse to DAFCO's interest in the property was adjudicated as superior to DAFCO's interest, the Corporate Warranty does not apply.

DAFCO argues the district court's "focus on diligent litigation efforts to the exclusion of the overall reasonableness of the time taken to fix the extent of monetary loss was error." *Appellant's Brief* p. 27. Again, DAFCO disregards the actual language of the Title Policy. Stewart held no obligation to DAFCO for any alleged damages not associated with an adjudication of an actual defect in the Insured Deed of Trust.

Finally, no support exists in the Title Policy for DAFCO's assertion that Stewart was required to compensate DAFCO by paying the policy amount as soon as the Insured Deed of Trust was challenged by New Phase. Title insurance "does not represent that the contingency insured against will not occur." *Brown's Tie & Lumber Co.*, 115 Idaho at 59, 764 P.2d at 426. When New Phase challenged the Insured Deed of Trust, Stewart successfully defended the validity and priority of the deed and fully satisfied all its obligations under the Title Policy. DAFCO supplies no argument or facts refuting the district court's determination that Stewart proceeded as reasonably as possible to retain counsel to represent DAFCO who then proceeded diligently to defend against New Phase's challenge. Tr. 89-90.

Ultimately, the cause of DAFCO's alleged losses was its decision to obtain the loan obligations of a borrower who could not repay his loan. Although Stewart insured the validity of the Deed of Trust, Stewart did not insure Snake River Funding or DAFCO that they made a wise business decision. Stewart did not guaranty the loan would be repaid, and Stewart did not insure a particular profit DAFCO may believe it deserves. The insurance policy was a title insurance policy – not a business profit insurance policy. Stewart met its obligations under the Title Policy

to insure that the Insured Deed of Trust constituted a valid lien, which is all that was required of Stewart under the unambiguous language of the Title Policy.

The Title Policy is clear and unambiguous regarding Stewart's obligations: Stewart could "institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as Insured, or to prevent or reduce loss or damage to the Insured." R. p. 69, § 5(b). Stewart did so, and this Court determined the Insured Deed of Trust was valid and held a first position priority.

b. Claims Against AmeriTitle.

i. DAFCO was not a party to the Closing Instructions, and AmeriTitle owes no duty to DAFCO that would be necessary to support a contract or tort claim.

"It is axiomatic in the law of contract that a person not in privity cannot sue on a contract. 'Privity' refers to 'those who exchange the [contractual] promissory words or those to whom the promissory words are directed.'" *Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984) (quoting Calemari and Perillo, *Contracts* § 17–1 (2d ed. 1977)). Courts in other jurisdictions have determined escrow agents do not owe a duty to a party that is not a party to the escrow agreement or closing. *Mark Properties, Inc. v. National Title, Co.*, 34 P.3d 587, 590-91 (Nev. 2001); *Pope v. Saving Bank of Puget Sound*, 850 F.2d 1345, 1353-54 (9th Cir. 1988) (holding no fiduciary relationship between escrowee and individual that was not a party to the closing).

DAFCO was not a party to the Closing Instructions and lacked privity with AmeriTitle. Tr. p. 92, Lns. 4-8. As argued more fully below, AmeriTitle owed no duty to DAFCO under the

Closing Instructions, and DAFCO cannot bring tort claims against AmeriTitle based on duties that do not exist in the Closing Instructions. Tr. p. 92, Lns. 4-8. Even if DAFCO was a party to the Closing Instructions to AmeriTitle, the Closing Instructions did not and could not require AmeriTitle to obtain the signature of Mrs. Jarvis for any party. Tr. p. 90, Lns. 4-8.

ii. The plain language of the Closing Instructions did not require AmeriTitle to obtain the signature of Mrs. Jarvis for any party.

None of the authority cited by DAFCO requires an escrow agent to comply with a duty greater than the duties set forth in the closing instructions to the escrow agent. *Appellant's Brief* pp. 19-20 and 29 (citing *All American Realty, Inc.*, 107 Idaho at 230-231; 687 P.2d at 1357-1358; I.C. § 30-901 *et seq.*; I.C. § 41-101 *et seq.*; and IDAPA 18.01.25). The primary case cited by DAFCO, *All American Realty, Inc. v. Sweet*, provides as follows:

> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement; and he may not perform any acts with reference to handling the deposit, or its disposal, which are not authorized by the contract of deposit.

107 Idaho at 230, 687 P.2d at 1357 (quoting Am. Jur. 2d *Escrow* § 16) (emphasis added). The section of IDAPA that DAFCO cites as authority for the duty owed by AmeriTitle provides the following:

> **Written Instructions**. An escrow agent shall not accept funds or papers in escrow without a dated, written instruction signed by the parties or their authorized representatives adequate to administer the escrow account and without receiving at the time provided in the escrow instructions sufficient funds and documents to carry out terms of the escrow instructions. Funds and documents deposited shall be used only in accordance with such written instruction; and if additional specific instructions are needed, the agent shall obtain the consent of

> both parties or such representatives to the escrow or an order of a court of competent jurisdiction at the expense of the escrow parties.

IDAPA 18.01.25.011.01 (emphasis added). In other words, the duties and obligations owed by AmeriTitle are only those set forth in the Closing Instructions provided by Snake River Funding and Mr. Jarvis. The district court determined as part of the Motions for Summary Judgment and the motion to amend that AmeriTitle satisfied those obligations. Tr. pp. 81-83 and 90-91.

The district court's decision was correct because the Closing Instructions do not support DAFCO's contract or tort claims against AmeriTitle. The Closing Instructions to AmeriTitle provide as follows:

> We, the undersigned, hereby instruct AmeriTitle, hereinafter referred to as "Closing Agent", when in receipt of all documents and monies as set out herein to close this transaction according to the following instructions and information.
> . . . .
> TITLE INSURANCE: Insurer AmeriTitle Order No. 10-44797
> X Extended coverage loan policy Amt. $268,000.00 in a 1st Lien Position
> . . . .
> When the closing agent has received all properly executed documents and all funds necessary for the completion of this transaction and the title insurer is in a position to issue the type of policy(s) set out above, subject only to the General Exceptions on Schedule B-Section I and Schedule B-Section 2 Special Exceptions No.'s 1-9 as set out in their commitment dated 3/10/08 and any documents recorded in connection with this transaction, the closing agent is hereby authorized and instructed to record or file all necessary documents and disburse funds deposited in accordance with the amounts shown on the closing statement.

R. pp. 508-509. DAFCO claims the foregoing language required AmeriTitle to obtain the signature of Mrs. Jarvis. It does nothing of the sort.

DAFCO reaches this conclusion based on a misreading of the Closing Instructions and the title commitment issued by Stewart. The Closing Instructions provide that AmeriTitle was

authorized and instructed to record or file all necessary documents and disperse funds when: (1) AmeriTitle received all properly executed documents and all funds and (2) the title insurer (Stewart) was ready to issue the Title Policy (Order No. 10-44797) based on the title insurer's requirements contained in the title commitment. R. pp. 508-509. There are two items to keep in mind regarding the title commitment. The title commitment expired when the Title Policy was issued. Tr. p. 48. The title commitment contained Stewart's own requirements to issue the Title Policy, not requirements for AmeriTitle to complete as escrowee.

Stewart ultimately determined it was in a "position to issue" Title Policy Order No. 10-44797. Nothing in the Closing Instructions required AmeriTitle to second guess that determination. Additionally, the language of the title commitment cited by DAFCO is requirement number "5" for issuance of the title policy. *Appellant's Brief* p. 11. Requirement number "5" is not one of the "General Exemptions" or "Special Exemptions" described in the Closing Instructions. R. pp. 434-437.

Furthermore, AmeriTitle was under no obligation to determine "legally" whether Mrs. Jarvis's signature was required. DAFCO wants the Court to believe AmeriTitle should act as an attorney and give legal advice regarding which parties should sign documents submitted to escrow. DAFCO not only asks the Court to permit the unauthorized practice of law, but to actually require it. There is no reason to take this drastic step. Particularly as this Court determined, the signature in question was not necessary for the validity or priority of the Insured Deed of Trust. It would be absurd for AmeriTitle to be bound to obtain such a signature when, as a matter of law, it was not adjudicated as necessary.

Even if the decision in *New Phase Investments, LLC* had turned out differently, Snake River Funding, the party to the Closing Instructions, clearly acknowledged that AmeriTitle had no obligation to provide legal counsel to Snake River Funding. R. pp. 503-504, ¶¶ 17-20, and 508-509. Snake River Funding knew that AmeriTitle was not acting as Snake River Funding's representative. R. pp. 503-504, ¶¶ 17-20, and 508-509. Snake River Funding also clearly acknowledged that AmeriTitle was merely acting as scrivener under the direction from Snake River Funding to provide a form deed of trust to it. R. pp. 503-504, ¶¶ 17-20, and 508-509.

The closing instructions signed by Snake River Funding provide in pertinent part:

> BY THEIR EXECUTION OF THESE INSTRUCTIONS, THE BUYER AND SELLER ACKNOWLEDGE THE FOLLOWING:
>
> 1) The closing agent is not acting as a representative of either party,
> . . . .
> 3) Any documents typed by the closing agent have been done so at our direction or the direction of our counsel,
> 4) The closing agent is not licensed to practice law and no legal advice, advice as to the content of the documents, nor advice as to the merits of the transaction has been offered by the closing agent,
> . . . .
> 8) THE CLOSING AGENT HAS ADVISED THE PARTIES HERETO TO SEEK THE ADVICE OF INDEPENDENT COUNSEL IF ANY PART OF THIS TRANSACTION IS NOT FULLY UNDERSTOOD.

R. pp. 503-504 ¶¶ 17-20, and 509 (underlined emphasis added).

Snake River Funding entered into its transaction with this clear language. AmeriTitle undertook no obligation to provide legal advice or obtain a signature that did not prevent issuance of the Title Policy by Stewart and that was determined by this Court as not necessary to uphold the validity and priority of the Insured Deed of Trust. The only instructions given to

AmeriTitle, which were contained in the Closing Instructions signed by Snake River Funding, clearly provide otherwise. DAFCO provides no explanation as to why AmeriTitle would owe a greater duty to DAFCO than the duty it owed to Snake River Funding, who was an actual party to the Closing Instructions. Accordingly, neither the tort claims nor contract claims by DAFCO based on the Closing Instructions survive a motion for summary judgment standard or the motion to amend standard for valid claims.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING THE BREACH OF CONTRACT CLAIMS AGAINST STEWART.[3]

A. DAFCO Alleges Questions of Material Fact Exist Regarding Its Bad Faith Claim Against Stewart Based on Language that Does Not Exist in the Title Policy.

DAFCO claims without support that Stewart owed a duty to indemnify DAFCO against actual monetary loss or damage regardless of whether the Insured Deed of Trust was enforceable. *Appellant's Brief* pp. 26-27. DAFCO's argument assumes that Stewart was required to pay on the Title Policy regardless of the validity of the Insured Deed of Trust. *Appellant's Brief* pp. 26-27. DAFCO then leaps to the conclusion that a question of material fact exists regarding when Stewart should have paid DAFCO. *Appellant's Brief* p. 27. As argued previously, the Title Policy does not support DAFCO's position.

DAFCO specifically cites to the "Payment of Loss" language in Section 11 of the Title Policy. *Appellant's Brief* p. 26. Section 11 of the Title Policy provides "[w]hen liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the

[3] DAFCO has not challenged the district court's dismissal of the third cause of action against Stewart in the Second Amended Complaint. *See Appellant's Brief.*

payment shall be made within 30 days." R. p. 69. DAFCO neglects to provide the Court with the language from the Title Policy that triggers an obligation by Stewart to pay under the Title Policy. Again, Section 9 of the Title Policy provides in pertinent part:

> (a) If the Company . . . establishes the lien of the Insured Mortgage . . . it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.
>
> (b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

R. p. 69 (emphasis added). In other words, Stewart is under no obligation to pay the insured for loss or damage unless and until the Insured Deed of Trust was determined unenforceable by a court of competent jurisdiction. That never occurred, so the thirty day payment deadline was not triggered. The district court properly determined Stewart diligently satisfied its obligations under the Title Policy. Tr. pp. 89-90.

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING THE BREACH OF CONTRACT CLAIMS AGAINST AMERITITLE BASED ON THE CLOSING INSTRUCTIONS.[4]

DAFCO asserts lack of privity was the district court's sole basis for granting AmeriTitle's motion for summary judgment on the Closing Instructions claims. *Appellant's Brief* p. 28. DAFCO also claims privity was raised for the first time in AmeriTitle's reply brief in support of the Motions for Summary Judgment and this somehow created confusion regarding

[4] DAFCO has not challenged the district court's dismissal of the third cause of action against AmeriTitle in the Second Amended Complaint. *See Appellant's Brief.*

the current status of the law regarding privity. *Appellant's Brief* p. 28. DAFCO's assertions are not true.

AmeriTitle raised lack of privity with DAFCO under the Closing Instructions as an issue in its initial brief filed in support of the Motions for Summary Judgment two months before the hearing on the Motions for Summary Judgment. R. pp. 481, 483. It is ironic that DAFCO complains privity was raised by AmeriTitle "in its reply brief filed only one day before the hearing on the motion." *Appellant's Brief* p. 28. As set forth at length above, DAFCO ignored virtually every deadline after new counsel appeared for DAFCO following the decision in *New Phase Investments, LLC.* Even more ironic, DAFCO's incredibly late response brief was filed on the due date of AmeriTitle's reply brief making AmeriTitle's reply brief necessarily late.

DAFCO claims it satisfies privity with AmeriTitle under the Closing Instructions in two ways: (1) as an assignee of the deed of trust and note between Snake River Funding and Mr. Jarvis and (2) as a third-party beneficiary of the Closing Instructions. *Appellant's Brief* pp. 28-29. Neither claim satisfies privity.

A. DAFCO Was Not an Assignee of the Contract It Seeks to Enforce – The Closing Instructions.

DAFCO does not explain how, even if all of its allegations made in the *Appellant's Brief* are taken at face value, an assignment to DAFCO of a deed of trust and note between Snake River Funding and Mr. Jarvis equates to assignment of the Closing Instructions and attendant escrow obligations. DAFCO claims the alleged duties for its claims arise from the Closing Instructions alone and not the note or Insured Deed of Trust. *Appellant's Brief* p. 29 ("[T]here is

at the very least a question of fact as to whether there was privity of contract between AmeriTitle and DAFCO as to the closing escrow agreement, including the Closing Instructions."). Yet, no evidence on record or even allegations made by DAFCO indicates the Closing Instructions were assigned to DAFCO. *See* R. p. 592, ¶ 20. In fact, the escrow had closed when the Insured Deed of Trust was assigned to DAFCO. R. p. 548. Thus, according to DAFCO's own allegations, which were not even part of the record before the district court when it ruled on the Motions for Summary Judgment, DAFCO was not an assignee of the document it seeks to enforce – the Closing Instructions.

B. Status as Third-party Beneficiary.

Intended third-party beneficiary status is not easy to obtain. This Court explained the elements necessary to establish a third-party beneficiary claim as follows:

> When a contract is made expressly for the benefit of a third person, the contract may be enforced by the third person at any time before the parties to the contract rescind it. *Blickenstaff v. Clegg,* 140 Idaho 572, 579, 97 P.3d 439, 446 (2004); I.C. § 29-102. "The test for determining a party's status as a third party beneficiary ... is whether the agreement reflects an intent to benefit the third party." *Idaho Power Co. v. Hulet,* 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). The third party must show the contract was made primarily for his benefit; it is not sufficient that the third party is a mere incidental beneficiary to the contract. *Id.* (quoting *Adkison Corp. v. Am. Bldg. Co.,* 107 Idaho 406, 409, 690 P.2d 341, 344 (1984)); *Fenwick v. Idaho Dep't of Lands,* 144 Idaho 318, 323, 160 P.3d 757, 762 (2007) (quoting *Dawson v. Eldredge,* 84 Idaho 331, 337, 372 P.2d 414, 418 (1962) (quoting *Sachs v. Ohio Nat'l Life Ins. Co.,* 148 F.2d 128, 131 (7th Cir.1945))). The intent to benefit the third party must be expressed in the contract itself. *Idaho Power Co.,* 140 Idaho at 112, 90 P.3d at 337 (quoting *Adkison Corp.,* 107 Idaho at 409, 690 P.2d at 344;) *Fenwick,* 144 Idaho at 323, 160 P.3d at 762 (quoting *Adkison Corp.,* 107 Idaho at 409, 690 P.2d at 344).

Partout v. Harper, 145 Idaho 683, 687, 183 P.3d 771, 775 (2008) (emphasis added).

The Closing Instructions simply do not express any intent to specifically or primarily benefit DAFCO. The only reference to DAFCO appears on an instruction from Snake River Funding and Mr. Jarvis to AmeriTitle to provide a form assignment of deed of trust to Snake River Funding. R. pp. 508-509. The Closing Instructions are otherwise silent about DAFCO. R. pp. 508-509. The loan fees were to be paid to Snake River Funding and all documents were provided to Snake River Funding.

In any event, the actual parties to the Closing Instructions – Mr. Jarvis and Snake River Funding – clearly understood AmeriTitle was merely acting as a scrivener and undertook no obligation to assure the legality of the form documents provided to Mr. Jarvis and Snake River Funding. Therefore, the district court correctly determined no issues of material fact existed regarding DAFCO's contract claims against AmeriTitle. As set forth previously, the absence of contractual obligations to DAFCO under the Closing Instructions also invalidates the tort claims that DAFCO sought to add in the proposed Third Amended Complaint.

Conclusion

The district court properly granted both Motions for Summary Judgment. No genuine issues of material fact exist regarding the contractual claims DAFCO made against Stewart. The only contract obligations of Stewart were contained in the Title Policy, and Stewart satisfied those obligations. Idaho law prohibits tort claims based on issuance of a title policy. Therefore, none of the negligence claims DAFCO sought to allege against Stewart in the Third Amended Complaint would even survive a motion to dismiss. The claim for a breach of the covenant of good faith and fair dealing (bad faith) against Stewart is unsupportable because Stewart fulfilled

its obligations in the underlying contract – the Title Policy – and no obligation to pay was ever triggered.

AmeriTitle owed no duties to DAFCO under either the Title Policy or the Closing Instructions. In the first instance, AmeriTitle was not a party to the Title Policy. In the second instance, DAFCO was not a party to the Closing Instructions and lacked privity with AmeriTitle. Moreover, the plain language of the Closing Instructions did not obligate AmeriTitle to obtain Mrs. Jarvis signature. AmeriTitle was acting as a mere scrivener in preparing the Insured Deed of Trust.

The District Court properly exercised its discretion in denying DAFCO's motion to amend. The long history of the case prior to the decision in *New Phase Investments, LLC* cannot be ignored. If DAFCO wanted to be treated as if the lawsuit only began after the decision, DAFCO should have waited until after the Claims Litigation and appeal were completed and then filed this action. Regardless, DAFCO failed to meet every court deadline after the decision in *New Phase Investments, LLC*. Its actions constituted undue delay and created real prejudice for the other parties. At some point, a district court and litigants need to be able to rely on court rules and deadlines to properly serve justice. DAFCO's motion to amend would work an injustice if granted, and the appeal should be denied with costs and attorney fees on appeal awarded to Stewart and AmeriTitle.

DATED this 1st day of October 2013.

SPINK BUTLER, LLP

By: _____
Richard H. Andrus
Attorneys for Defendants/Respondents
Stewart Title Guaranty Company and
AmeriTitle, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October 2013, I caused a true and correct copy of the above RESPONDENTS' BRIEF to be served upon the following individuals in the manner indicated below:

Stephen D. Hall
Nathan M. Olsen
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[X] U.S. Mail
[ ] Hand-Delivery by Courier
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_____
Richard H. Andrus