

1978

# Searle Brothers, A Partnership, Diamond Hills Motel, A Partnership, Rance W. Searle, Rhett A. Searle and Randy B. Searle : Reply Brief on Appeal of Plaintiffs and Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SEARLE BROTHERS, a partnership, :  
DIAMOND HILLS MOTEL, a partnership: :  
RANCE W. SEARLE, RHETT A. SEARLE :  
and RANDY B. SEARLE, :

Plaintiffs and :  
Appellants, : Case No. 15604

vs. :

EDLEAN SEARLE, :  
Defendant and :  
Respondent. :

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REPLY BRIEF ON APPEAL OF PLAINTIFFS AND APPELLANTS

\*\*\*\*\*

APPEAL FROM FINAL ORDERS OF THE FOURTH  
DISTRICT COURT OF THE STATE OF UTAH IN  
AND FOR UINTAH COUNTY, DISMISSING  
PLAINTIFFS' AMENDED COMPLAINT WITH  
PREJUDICE, HONORABLE DAVID SAM, JUDGE

\*\*\*\*\*

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- I believe the following case is worth noting. TED
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Filed Dec. 6, 1978

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Appellants, :

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vs. :

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Defendant and :  
Respondent. :

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:

REPLY BRIEF ON APPEAL OF PLAINTIFFS AND APPELLANTS

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STATEMENT OF THE KIND OF CASE

This case involves an appeal from final orders of the lower Court, Honorable David Sam, Judge, dismissing plaintiffs' Amended Complaint with prejudice and holding that a prior judgment of the same Court, Honorable George E. Ballif, Judge, Case No. 5790 (Searle vs. Searle), is res judicata as to the claims of these plaintiffs and appellants as to an interest in real property, these plaintiffs and appellants not having been parties to said Case No. 5790.

## DISPOSITION IN LOWER COURT

The matter was submitted to the Court on stipulated facts and memoranda of authority. From an order dismissing the plaintiffs' Amended Complaint with prejudice, plaintiffs appeal.

## RELIEF SOUGHT ON APPEAL

Plaintiffs and appellants seek reversal of the Lower Court's orders dismissing plaintiffs' Amended Complaint with prejudice, wherein plaintiffs sought a determination of their ownership in real property and a partition of that interest.

## STATEMENT OF FACTS

Plaintiffs make reference to the Statement of Facts heretofore set forth in their original brief.

## ARGUMENT

### POINT I

THE SUPREME COURT SHOULD NOT CONSIDER THE STATUTE OF LIMITATIONS ON APPEAL, SINCE THAT ISSUE WAS NOT RAISED IN THE COURT BELOW.

Defendant and respondent, in her brief, has set forth a sixth point to the effect "the plaintiffs are barred by the Statute of Limitations from claiming title to the Slaughter House" (Page 16 of defendant's brief on appeal). The Statute of Limitations was not raised by the defendant in any of the proceedings.

below. (See def's. Answer, R-17; pre-trial order of the Court below, R-45; defendant's Memorandum of Points and Authorities, R-72). This Court has ruled many times that matters neither raised in the pleadings nor put in issue at the trial cannot be considered for the first time on appeal. (See In re Ekker's Estate, 19 Utah 2d 414, 432 P. 2d 45; Simpson vs. General Motors Corporation, 24 Utah 2d 301, 470 P. 2d 399; State of Utah by and through its Road Commission vs. Larkin, 27 Utah 2d 295, 495 P.2d 817).

A further reason why the Statutes of Limitations should not be considered on appeal, is the fact that Rule 8(c) of the Utah Rules of Civil Procedure requires that the Statute of Limitations be pleaded affirmatively. The defendant, having failed to plead the Statute of Limitations in the Court below, should not now be allowed to raise that matter upon appeal for the first time.

#### CONCLUSION

The Supreme Court should not consider the matter of the Statute of Limitations raised by the defendant in her brief for the first time on appeal and the relief sought by the plaintiffs in their initial brief to this Court should be granted by reversing the orders of the Court below wherein the plaintiffs' Amended Complaint was dismissed with prejudice.

Respectfully submitted,



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CERTIFICATE OF MAILING

Two copies of the foregoing Brief were mailed, postage prepaid to Ray E. Nash, attorney for defendant and respondent, 33 East Main Street, Vernal, Utah 84078, this 16<sup>th</sup> day of June, 1978.



CULLEN Y. CHRISTENSEN, Attorney