

2002

Michael F. Nyman, Plaintiff/Appellee vs. Anchor Development, L.L.C., a Utah limited liability company Donald R. Simon and Kathleen J. Simon, Individuals Richard N. Miller, an individual, and ALL OTHER PERSONS UNKNOWN, claiming any right title, estate, or interest in, or lien upon, the real property described in the pleadings adverse to the ownership of Plaintiff, or clouding Plaintiff's title thereto, Defendants/Appellants : Reply Brief

Utah Supreme Court

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MICHAEL F. NYMAN,  
Plaintiff/Appellee,  
vs.  
ANCHOR DEVELOPMENT, L.L.C., a  
Utah limited liability company  
DONALD R. SIMON and KATHLEEN J.  
SIMON, individuals RICHARD N.  
MILLER, an individual, and ALL  
OTHER PERSONS UNKNOWN, claiming  
any right title, estate, or  
interest in, or lien upon, the  
real property described in the  
pleadings adverse to the  
ownership of Plaintiff, or  
clouding Plaintiff's title  
thereto,  
Defendants/Appellants.

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: REPLY BRIEF OF APPELLANT  
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: Appeal No. 20020077-SC  
: Priority No. 15  
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: ORAL ARGUMENT REQUESTED  
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MICHAEL F. NYMAN,  
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REPLY BRIEF OF APPELLANT

Appeal No. 20020077-SC  
Priority No. 15

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE SUMMARY JUDGMENT ENTERED BY THE THIRD DISTRICT COURT, SUMMIT COUNTY, UTAH, HONORABLE ROBERT K. HILDER PRESIDING

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The Appellant, Michael F. Nyman, by and through his attorneys, respectfully submits the following Reply Brief in further support of his appeal.

**RESPONSE TO APPELLEE'S STATEMENT OF ADDITIONAL FACTS**

The Appellant denies that he failed to adequately marshal the relevant facts. In response to the numbered paragraphs set forth by the Appellee, the Appellant states as follows:

1. The statement that none of Appellant's tax notices make specific reference to Lot 17 assumes that Summit County's conveyance to Appellant in 1937 did not have the legal effect of a severance of that portion of Lot 17 occupied by Appellant's predecessors. Moreover, this is one of the key issues in this appeal. The Appellee's statement presumes that these tax notices are *complete* legal descriptions. Such a presumption is unwarranted.

2. In response to paragraphs 2, 3 and 4 of the Appellee's Statement of Relevant Facts, the Appellant informs the Court that these facts, as far as they are relevant to this appeal, have previously been set forth in Appellant's Statement of Facts paragraph numbers 9, 10 and 12.

3. In response to paragraphs 5, 6 and 7 of the Appellee's Statement of Relevant Facts, the Appellant agrees with the statements contained therein. However, these statements are not relevant to the issues as they are presented on appeal. This

portion of Appellant's chain of title is not at issue.

4. In response to paragraph number 8, the Appellant agrees that the current garage may have been built in 1948. However, the Appellant asserts that other structures and the perimeter of the property claimed by Appellant have been established and not objected to since at least 1906.<sup>1</sup>

5. The Appellant agrees with the statement in paragraph 9 of Appellee's Statement of Relevant Fact. What the Appellant meant was that Summit County's right to the property accrued in 1930 as a result of the non-payment of property taxes by Backman.

#### SUMMARY OF ARGUMENT

The trial court wrongly granted summary judgment in favor of the Appellee. The Appellant (through his predecessors in interest) obtained his property from Summit County at a tax sale in 1937. The property acquired by Appellant in 1937 included a home and other structures, including a garage which, as it turns out, is situated on part of Lot 17 which Appellee claims he owns. Likewise, Appellee (through his predecessors in interest) obtained his property from Summit County at a tax sale subsequent to Appellant's acquisition of his property.

The Appellant maintains that when he acquired his property from Summit County in 1937, he acquired the property as it was

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<sup>1</sup> This fact was not asserted at the trial court level. This issue is a new one on appeal.

actually possessed. Thus, since he received a direct conveyance of the disputed property from Summit County, Summit County could not later convey to Appellee that which it had already conveyed to Appellant.

In the alternative, Appellant has acquired title to the property by adverse possession. The Appellant has possessed the land in the statutorily prescribed manner in excess of the statutorily required time period. Moreover, under Utah law, the Appellant can assert a claim of adverse possession against Summit County.

Finally, if the Court determines that the legal effect of the conveyance to Appellant in 1937 did not operate to create a severance of that portion of Lot 17 occupied by Appellant and the Court concludes that Appellant has not acquired title by adverse possession, the Court should find that the Appellant has a right to continued use of the disputed portion of Lot 17. The Appellant has occupied that portion of Lot 17 occupied by his garage in excess of 60 years.

#### **ARGUMENT**

##### **I. THE APPELLANT ACQUIRED HIS HOME AND REAL PROPERTY BY A DIRECT CONVEYANCE FROM SUMMIT COUNTY.**

Appellee's Brief confuses factual statements and the language of the relevant documents with conclusions of law. Appellee argues that because the tax deed to Emil Nyman in 1937 does not specifically describe property located in Lot 17, then



no interest was transferred to Nyman in Lot 17. That legal conclusion does not follow. As previously discussed in Section I, subsection B of his Brief, Appellant's predecessors received their interest in the subject property in a direct conveyance from Summit County.<sup>2</sup>

The fact is that Appellant's predecessor, Backman, originally acquired land in Blocks 75 and 76 of the Park City Survey "according to possession" R.305 (emphasis added). That land of Backman's, whatever it was, was taken by Summit County for non-payment of taxes. That same land of Backman's, whatever it was, was sold in 1937 by Summit County to Nyman. Facts do not comprise a severance; severance is a legal statement or conclusion to be drawn from the fact of the predecessors' possession and Summit County's conveyance to those predecessors. The legal conclusion, that the tax deed actually conveyed what the County took from Bachman, regardless of completeness of legal description and enumerated lot numbers, is one of the issues presented in this appeal. Appellee would have the Court believe that the County's tax assessments relate solely to that property described in the tax roll. Yet that circumstance is inconsistent with the actual assessments historically made by the County in

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<sup>2</sup> At the time of the conveyance to the Appellee, Summit County could only convey what it owned. Summit County had previously conveyed the disputed property to the Appellant's predecessors.

this case. The tax notices relating to the taxes assessed against Appellant reflect assessments against the home and outbuildings independent from the separate assessments for real estate. See R. 306-376. And, significantly, the relative values attributed respectively to the land and to the structures undeniably demonstrate that the County was not assessing only the 100-150 square feet of Lots 18 and 19 contained within the overall area possessed and controlled by the Appellant and his predecessors. It defies logic and reason to assert or to believe that the County historically has intended and effected a mismatched tax assessment scheme where structures in one location and real property in a disjointed location are intentionally assessed and taxed together under one tax identification number and account.

The extent and configuration of the land possessed by the Appellant and his predecessors is not in dispute, despite Appellee's assertions that the legal descriptions are vague and that the record lacks support. Backman's ownership related to a "... house ..., the steps leading down to said Empire Canyon ... with all outbuildings and improvements ... and sufficient space around the same for the convenient use and occupation thereof". R. 304 (emphasis added). Backman's property was also described "as Lots 27, 28, 29, 30, 31 and 32 of Block 75 and Lots 18 and 19 of Block 76 ... according to possession". R. 305 (emphasis

added). Appellant prepared and provided a survey of the property demonstrating those lines of possession. R. 303. No objection to this boundary has been presented or preserved, and no counter assertion regarding which land is at issue has been made or presented, against Appellant's factual statements establishing this boundary. No objection can now be presented that the survey does not correspond to the actual boundaries defining the property purchased by Appellant and his predecessors from the County or that the survey does not accurately set out what has been owned and occupied by Appellant's predecessors. Issues not preserved in the lower court cannot be raised on appeal. As a general matter, appellate courts will not consider an issue raised for the first time on appeal. Those issues not raised are waived and cannot be considered on appeal. *Condas v. Condas*, 618 P.2d 491, 495 n. 8 (Utah 1980).

Appellee's argument that the exclusion of any reference to "Lot 17" in the Appellant's legal descriptions precludes Appellant from obtaining any interest in disputed parcel ignores facts that the original deeds relate to property held "by possession". Appellee selectively accepts language from the deeds and assessment records which state Lot 17, on the part of Appellee, and Lots 18 and 19, on the part of Appellant, and Appellee ignores the language of the original deeds relating to property as being defined by possession. A simple inspection of

the survey itself demonstrates why the parties used that language nearly a century ago. Lot 17 in Block 76 lies parallel with, but west of, Lot 27 in Block 75. The Snyder special warranty deed (R. 305) describes a broad collection of lots, supplemented with and clarified by the language "according to possession". The likelihood that minor, minute, spillover possession into adjacent lots could occur was contemplated and addressed by the parties in this manner. It is also worth noting in this regard that the Grantor in this special warranty deed, W. I. Snyder, Trustee, is the same landowner who owned Lot 17 and who was dispossessed for tax nonpayment of taxes in Appellee's chain of title. We are now concerned with the legal effect of that particular choice of language by those ancient parties and by the long term status quo honoring that transfer of land, as demonstrated by the long term status quo possession of the property. Appellant submits that the legal effect was to sever that portion of Lot 17 possessed by Appellant's predecessors from the balance of Lot 17. Appellant further submits that the legal effect of the tax foreclosure and ultimate sale of this property by Summit County to Appellant's predecessors was to transfer that severed portion of Lot 17, ultimately, to Appellant.

## **II. APPELLANT HAS OBTAINED TITLE BY ADVERSE POSSESSION.**

In the event the Court determines that the legal effect of the earlier conveyances and tax foreclosure was not to have

effected a severance of the portion of Lot 17 in question, then Appellant asserts that he and his predecessors have established a right to title under the doctrine of adverse possession.

Appellant agrees with Appellee that in order to prevail under the theory of adverse possession, Appellant must prove that he has complied precisely with the requirements of the applicable statutory provisions. Appellant submits that he had done so. Appellant has possessed the land in the statutorily prescribed manner for more than the statutory period. Appellant has held the land adversely to the title holder. Appellant has paid all taxes legally assessed against the land for the statutory seven year period.

Appellee asserts two positions in opposition to Appellant's claim. First, Appellee asserts that in order to prevail, Appellee must show that he has paid all of the taxes assessed against the entirety of Lot 17 for the requisite period. Second, Appellee asserts that no adverse possessory rights may accrue against lands held by a political subdivision, in this case against Summit County. Both assertions are wrong.

Regarding the first assertion, that Appellant must pay all taxes assessed against the entirety of Lot 17, Appellee ignores the fact that we are concerned only with the property actually in dispute, which is a minor portion of the overall acreage of Lot 17. The statutory requirements for adverse possession are:

... the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.

UTAH CODE ANN. §78-12-12 (1953, as amended) (emphasis added).

The plain reference to be inferred from the phrase "upon such land" is to "the land [which] has been occupied and claimed". Appellant does not claim, and has not occupied, any portion of Lot 17 other than the sliver of land at issue in the underlying action. The adverse possession laws do not require claimants to have pay taxes on more property than that to which they assert a claim. The laws only require the payment of taxes upon precisely that property which the claimants have "occupied and claimed". *Id.*

Regarding the second assertion that adverse possession cannot take place against a political subdivision, Appellee cites and relies upon the inapposite case of *Averett v. Utah County Drainage District No. 1*, 763 P.2d 428 (Utah App. 1988) and the general rule analysis contained in 3 AM. JUR. 2D *Adverse Possession* § 269. These authorities deal with the *public* use of the property in question. Appellant has already addressed the issue of public versus private use and it is worth noting that Appellee also acquired his interest in Lot 17 as a result of the prior disposition of the property from Summit County into private hands. Summit County obviously felt that Lot 17 and other property in the surrounding area more appropriately belonged in

private rather than public use; Summit County was the selling grantor to the predecessors of both Appellant and Appellee, as well as other private parties.

Concerning the Appellee's citations to the state of the law in Arizona and Appellee's general arguments regarding the inapplicability of the doctrine of adverse possession against the State and its political subdivisions, both fail to address or to respond to the explicit exception contained in Utah's adverse possession statute, UTAH CODE ANN. §78-12-13 (1953, as amended). This statute is intended to deal with the question of adverse possession of public streets, ways and public use lands. This issue is distinct from the question of adverse possession against non-public use lands owned by political subdivisions of the State. Regarding the adverse possession of public lands, it is hard to imagine or to conceive, even speaking hypothetically, of a factual situation which more closely fits the exception contained in the statute than the case at bar. The statute states:

**Adverse possession of public streets or ways.** No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof, for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for valuable consideration, and that for more than seven years subsequent to such conveyance, the purchaser, his grantees or

successors in interest, have been in the exclusive, continuous and adverse possession of such real estate; in which case an adverse title may be acquired.

UTAH CODE ANN. § 78-12-13 (1953 as amended) (emphasis added).

This statute begins by establishing a prohibition against the adverse possession of lands held by the government for public use. The statute continues by creating an exception to that general rule. To trigger the exception to the statutory prohibition, one requires:

1. That the town or city or county or the corporate authorities thereof;
2. Sold, or otherwise disposed of, and conveyed;
3. Such real property;
4. To a purchaser for valuable consideration; and
5. That for more than seven years subsequent to such conveyance, the purchaser ... ha[s] been in the exclusive, continuous and adverse possession of such real estate, in which case an adverse title may be acquired.

This precisely describes the situation existing in this case. Here, Summit County sold property in 1937 to Appellant's predecessor for valuable consideration. Appellant and his predecessors have been in exclusive, continuous and adverse possession of that property since that time. For the period from 1937, the time when Summit County sold to Appellant's predecessors, through 1960, the time of the first tax assessment



against Lot 17 to Appellee's predecessors, Appellant and his predecessors paid all the taxes assessed against the garage (as well as the rest of Appellant's property) and, since no other taxes were being assessed against Lot 17, Appellant and his predecessors paid all of the taxes assessed according to law. These taxes were paid by Appellant continuously and on time from 1937 through 1953, but were paid delinquently in 1954. Nevertheless, the 14 year period from 1937 through 1953 stands at double the statutory requirement of seven years necessary to perfect the adverse title provided under the exception in the statute. Appellant has affirmatively shown that he has met the various requirements of adverse possession through precise compliance. Appellant is entitled to an award of adverse title to the 177 square feet of Lot 17 at issue in this case.

**III. EVEN IF THE COURT DETERMINES THAT APPELLANT DOES NOT HAVE TITLE PURSUANT TO A DIRECT CONVEYANCE OR ADVERSE POSSESSION, IN THE ALTERNATIVE, THE APPELLANT IS ENTITLED TO A PRESCRIPTIVE EASEMENT.**

In the event the Court determines that the legal effect of the earlier conveyances and tax foreclosure was not to have effected a severance of the portion of Lot 17 in question and the Court further determines that no adverse possession of the property in question has been established by Appellant, then Appellant asserts that he and his predecessors have established a prescriptive use or easement against that portion of Lot 17 at issue. Thus, the Appellant has a right to continued use of the

disputed area.

Appellee attempts to couch the doctrine of prescriptive use or easement in terms of some alternative form of adverse possession and then to denounce the doctrine as a circumvention of the requirements of adverse possession. This legal sleight of hand is inaccurate and incorrect.

The doctrines of adverse possession and prescriptive use or easement are two very different concepts with two very different goals. The doctrine of adverse possession addresses ownership of property and the concept of title. Its policy is to establish title to property in persons who meet the doctrine's legislatively created requirements. Its goal is to award ownership to those persons whose actions and efforts, with respect to a particular piece of property, exceed the legal thresholds establishing an entitlement or superior right to the title. Its result is a transfer of title between the parties. It establishes new legal rights and relationships.

The doctrine of prescriptive use or easement, on the other hand, has nothing to do with ownership or title. The doctrine of prescriptive use addresses the long term, unmolested use of property by non-owners and the concept of status quo. Its policy is to recognize and to maintain the long time, indeed historic, uses of property by persons who meet the doctrine's judicially created requirements. Its goal is to declare the establishment

of a status quo regarding conflicting but unchallenged property utilization by persons other than the owner of land over very long periods of time. Its result is the maintenance of the existing status quo between the parties. It does not establish new legal rights and relationships. And it certainly does not transfer title.

Appellee argues that the declaration of a prescriptive easement in this case awards all of the attributes of ownership to the prescriptive claimant. Appellee is simply wrong. Appellee still holds a significant portion of the "bundle of rights" that ownership represents. Appellee continues to own the underlying property and could include the square footage of the property in the overall square footage of his property generally for purposes of planning and zoning entitlements. Appellee retains the right to prevent the Appellant from altering his prescriptive use of the property. Appellee's continuing ownership gives Appellee standing in regards to legal proceedings concerning the property in question. And, perhaps most significantly, Appellee receives a full restoration of his "bundle of rights of ownership" to the property in question when the prescriptive use ceases. None of this is the case under an award of title pursuant to adverse possession. Simply put, Appellee's statement that "it [prescriptive rights] is a fee simple interest" is simply wrong.

Appellee also is wrong on another count. Appellee states that "Appellant is attempting to gain title to the property, underlying the garage, prescriptively without proving all of the elements necessary to acquire title by adverse possession." Appellee's Brief at 22. This is not so. Appellant is requesting that the Court declare exactly what the law provides. Appellant is not asking for the Court to grant more than the law provides. If the Appellant has demonstrated his right to title to the disputed parcel, then Appellant is entitled to that award and the Court should give it to him. If the Appellant has not demonstrated this right, then he should not receive that award. But the analysis and decision regarding maintaining the status quo between these parties is completely independent of that question of title.

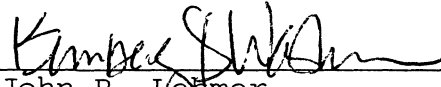
As far as the claim by Appellant for a prescriptive easement is concerned, it is this Court which established the requirements for that right. It is this Court which decided that twenty years of open and continuous use of land under a claim of right gives rise to a presumption of adverse use. *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998). It is this Court which declared that this open, continuous and adverse use of another's land under claim of right for twenty years establishes a prescriptive easement. Appellant submits that the record is clear regarding his having met these requirements. Appellant submits that,

regardless of the Court's ultimate determination on the state of the title of the disputed parcel, Appellant is entitled to an order declaring the prescriptive use and maintaining the status quo which has existed on this land for over fifty years.

**CONCLUSION AND RELIEF SOUGHT**

Based upon the foregoing and the argument and contents set forth in the Brief of Appellant, this Court should determine that the trial court erroneously concluded that the Appellant has no right to the property underlying his garage either through a direct conveyance, adverse possession or prescriptive use.

RESPECTFULLY SUBMITTED this 3rd day of July, 2002.

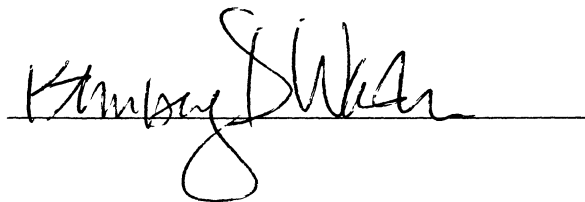
  
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John R. Lehmer  
Kimberly D. Washburn  
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were served, via first class mail, postage prepaid, upon the following:

Robert W. Adkins, Esq.  
P.O. Box 660  
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DATED this 5<sup>th</sup> day of July, 2002.

A handwritten signature in black ink, appearing to read "Kimberly S. White", is written over a horizontal line.