

1989

Velma Marchant, Elma Winterton, Leora Robinson, Wanda Penrod, Mona Lichty, Merle anderson v. Park City, a municipal corporation, and the State of Utah : Respondents' Brief in Opposition to Petition for a Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

890139

UTAH SUPREME COURT

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|-------------------------------------|---|-----------------|
| VELMA MARCHANT, ELMA WINTERTON,     | ) |                 |
| LEORA ROBINSON, WANDA PENROD,       | ) |                 |
| MONA LICHTY, MERLE ANDERSON,        | ) |                 |
|                                     | ) | Case No. 890139 |
| Plaintiffs and Appellants,          | ) |                 |
|                                     | ) |                 |
| vs.                                 | ) |                 |
|                                     | ) |                 |
| PARK CITY, a municipal corporation, | ) |                 |
| and THE STATE OF UTAH.              | ) |                 |
|                                     | ) |                 |
| Defendants and Respondents.         | ) | Priority 13     |

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE SUPREME  
COURT OF UTAH FROM THE UTAH COURT OF APPEALS

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MAY 13 1993

UTAH SUPREME COURT

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### QUESTIONS PRESENTED FOR REVIEW

1. Were the lower courts correct in ruling that the statute of limitations for tax titles was inapplicable?

2. Was the statutorily required element of payment of taxes for a seven-year period to ripen adverse possession waived by this Court in Park West Village v. Avise, 714 P.2d 1137 (Utah 1986)?

3. Was the Utah Marketable Record Title Act applicable in this case to either parties' claim of superior title?

4. May one who fails to prove all of the necessary elements for adverse possession obtain all of the attributes of ownership through the doctrine of prescriptive easement.

5. Is Park City Municipal Corporation liable for the independent acts of a known third party.

### STATEMENT OF THE CASE

Velma Marchant, Elma Winterton, Leora Robinson, Wanda Penrod, Mona Lichty and Merle Anderson (hereinafter collectively, "Plaintiffs"), brought a quiet title action in the Third Judicial District Court of Summit County (Case #7174) against Park City Municipal Corporation (hereinafter "Park City") and the State of Utah (hereinafter "State") claiming title to the parcel of real property in dispute (hereinafter "subject property") under alternate theories of superior title, adverse possession,



prescriptive easement or boundary by acquiescence.<sup>1</sup> Plaintiffs also sought damages from Park City for the destruction of the shack on the property.

After the trial on May 6, and 7, 1987, the Third District Court, Hon. Leonard H. Russon presiding, issued a memorandum decision<sup>2</sup> and thereafter entered judgment<sup>3</sup> quieting title in the State and dismissing with prejudice all of Plaintiffs' claims to the subject property and for damages. Plaintiffs appealed the Trial Court's judgment to the Utah Supreme Court (Case No. 870320). Pursuant to Rule 4A, RUSC, the Supreme Court transferred this matter to the Utah Court of Appeals (Case No. 880131-CA).

The Court of Appeals issued its unanimous Opinion<sup>4</sup> on March 13, 1989, affirming in whole the decision of the Trial Court. The petition for Certiorari followed.

#### **STATEMENTS OF FACT**

##### **1. Subject Property, Title and Chain of Conveyances.**

###### **(a) State's Chain of Title**

The subject property, which is described in Plaintiffs'

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<sup>1</sup>. Boundary of acquiescence was dismissed by the trial court granting Park City's partial motion for summary judgment. Plaintiffs did not appeal on this issue.

<sup>2</sup> Memorandum decision is reproduced as Exhibit 2 of Appendix.

<sup>3</sup> Judgment along with Findings of Fact and Conclusions of Law are reproduced as Exhibit 3 of Appendix.

<sup>4</sup> Reported as 104 Utah Adv. Rep. 23, reproduced as Exhibit 1 of Appendix.

complaint, is a parcel of real property in Summit County located in Park City. The chain of title through which the State claims ownership of the subject property through the following documents, all of which were recorded, and all, except numbers 3, 4, and 5 contained a metes and bounds description which included the subject property (Ex. 25):

1. A patent from the United States government, containing the property in question, to George Snyder on April 5, 1882. (Exhibit 27.)

2. A deed from George Snyder to the Park City Smelting Company, dated November 14, 1883. (Exhibit 28.)

3. A deed from the Park City Smelting Company to Lewis H. Withey and Clay H. Hollister on September 21, 1912. The deed did not contain a metes and bounds description, but described the conveyed property as "all of the real property or rights or interest in real property belonging to the Park City Smelting Company and situated in the County of Summit, Utah." (Exhibit 29.)

4. A deed from the executors of Lewis H. Withey's estate to Silver King Coalition Mines Company on November 5, 1926. The deed did not have a metes and bounds description, but conveyed "all the estate, right, title, interest, property, claim and demand whatsoever of the said Lewis H. Withey . . . [of] the property above described." (Exhibit 30.)

5. A trustee's deed from Clay Hollister, Withey's tenant in common, to Silver King Coalition Mines on February 18, 1927. The deed did not contain a metes and bounds description but described the property as "all other real property or rights or interests in real property . . . belonging to Park City Smelting Company. and situated in the County of Summit, State of Utah." (Exhibit 31.)

6. A deed from Silver King Coalition Mines Company to United Park City Mines Company, dated May 8, 1953. (Exhibit 32.)

7. A deed from United Park City Mines Company to Park City, dated April 2, 1969. (Exhibit 33.)

8. A deed from Park City to the State of Utah, dated June 7, 1982. (Exhibit 34.)

**(b) Plaintiffs' deeds**

The Plaintiffs offered four deeds as evidence of their purported chain of title. The deeds are, as follows:

1. A quit claim deed from Dan and Belle McPolin to Jesse McCarrell dated March 19, 1906, for "that certain one-story framed, three-room dwelling house situated on the easterly side of Silver Creek and about 100 feet easterly from the lumberyard of the Summit Lumber Company." (Exhibit 4.)

2. A quit claim deed from Summit County to William Rolph [sic] dated June 10, 1914, for \$28.68 for "[i]mprovements East U.C. Tracks, Park City, Utah." (Exhibit 5.)

3. A quit claim deed from Summit County to William Rolfe dated June 21, 1917, for \$1.00 for "that certain frame dwelling house by Lumber Yard in Park City, Summit County, Utah, assessed to William Rolfe in the year 1912." (Exhibit 6.)

4. A tax deed from Summit County to Charles Rolfe dated June 13, 1963, for "house in lumber yard." (Exhibit 7.)

**2. Extrinsic Evidence Regarding Deeds**

Plaintiffs did not introduce any extrinsic evidence regarding the deeds dated 1906, 1914, 1917 (Ex. 4, 5, 6) except that said deeds were found among family and legal papers (Tr. 34, 36). There was no evidence as to the location of the property the deeds referred to.

The County Auditor, Reed Pace, who executed the 1963 deed (Ex. 7) on behalf of Summit County and was Summit County Treasurer from 1954 to 1962 and Clerk/Auditor from 1954 to 1986, testified that the 1963 tax deed executed by him was a deed solely to improvements to real property and not a deed to real property (Tr. 184-186), and that Charles Rolfe, the grantee, had purposely not paid taxes on the same improvements in order to obtain a deed from Summit County and strengthen his claim of

title. (Tr. 183-184.)

Both Mr. Pace and Deputy Summit County Assessor Steven Martin testified that it was a common practice for Summit County, both currently and in the past, to assess real property and improvements constructed upon the real property separately if the improvements and underlying property were separately owned, (Tr. 179-180, 200-201). Mr. Pace also testified that if taxes became delinquent on the separately owned improvements, it was the practice of Summit County to treat the improvements like real property and sell the improvements at tax sale and issue a tax deed, (Tr. 189-190), and that when improvements were sold at the tax sale, the intent of Summit County was to convey only the improvements and not the underlying real property, (Tr. 182).

**3. Possession and Abandonment of Subject Property by Plaintiffs**

All possession by Plaintiffs' claimed predecessors ceased when the shack was abandoned in approximately 1964, (Tr. 66-67). Plaintiffs never possessed the subject property, (Tr. 65-66). From 1964 until this action was brought in 1982, the subject property was abandoned by Plaintiffs. The shack was vacant and appeared to be abandoned, the yard was unkempt and overgrown with weeds, and there was no discernible property use according to all four witnesses, including one of the Plaintiffs, who testified to have observed it, (Tr. 66-67; 109-110; 217-218; Vol. 2 P. 6).

Park City building official, Ron Ivie, a certified building inspector with 23 years experience, (Tr. 108-9), testified that

when he inspected the shack on the subject property in 1981, it appeared abandoned and did not appear as though someone was attempting to rehabilitate it, (Tr. 109-110).

#### **4. Taxation of Subject Property**

Deputy Summit County Assessor, Steven Martin, testified that according to the records of the Summit County Assessor's Office, beginning in 1931, the subject property could be identified in the tax records. Prior to 1931, the Summit County Assessor's records do not contain a locatable legal description for the subject property, (Tr. 208). A summary of the County Assessor's records was admitted at trial, (Ex. 43). The summary and testimony of Mr. Martin showed that from 1931 to 1953, taxes for a parcel of real property which undisputedly includes the subject property were assessed to and paid by the State's predecessor-in-interest, Silver King Coalition Mines Company, and that the assessment was for the real property and no taxes were assessed for improvements, and that said taxes were paid, (Tr. 203-5) (Ex. 43) (Ex. 25).

From 1954 to 1969, real property taxes on the subject property were assessed to State's predecessor, United Park City Mines Company, under a slightly different legal description which also encompassed the subject property and were also paid every year, (Ex. 43) (Tr. 206). From 1969 to the present, no taxes were paid on the subject property because of its ownership by Park City from 1969-1982, and the State from 1982 to the present, (Tr. 206).

Ed Osika, Vice President, Secretary-Treasurer of United Park City Mines Company testified that according to the records of United Park City Mines Company, it paid the real property taxes assessed to the United Park City Mines Company against the subject property for the year 1953-1969, (Tr. 167-169). Records of such tax payment were admitted as Exhibit 35.

The only evidence of payment of any taxes by the Plaintiffs, or any of their predecessors, was the testimony of Plaintiff Merle Anderson. Ms. Anderson only had knowledge of payment in 1982 and two years prior to 1982, (Tr. 69), and she had no knowledge of payment of taxes prior to 1966 (Tr. 70). The Plaintiffs introduced no records of testimony from the Summit County Assessor's office and Deputy Assessor, Steve Martin, testified that he had no knowledge of any payment of taxes by the Plaintiffs or their predecessors, (Tr. 212).

##### **5. Destruction of Shack on Subject Property**

No evidence was admitted that Park City had any involvement in the destruction of the shack on the subject property other than to issue a demolition permit to a third party.

The Park City Fire Marshall/Chief Building Official, Ron Ivie, who is responsible for abatement of dangerous structures which are public nuisances testified that Park City did not destroy the shack on the subject property, (Tr. 198). Mr. Ivie, also testified that a demolition permit for the shack on the subject property was issued to Lloyd Brothers Construction, (Ex. 38) (Tr. 94), and the shack was demolished to the best of his

knowledge by Lloyd Brothers Construction, which was not working for Park City and was employed by a third party, (Tr. 93).

Mr. Ivie also testified that the procedure for issuance of a demolition permit does not require the applicant to prove ownership of the property (Tr. 96), but is issued upon the signature of the applicant that the applicant has the right to demolish the structure.

Ross Lloyd, an owner of Lloyd Brothers Construction, testified that he was familiar with the demolition of the shack on the subject property, (Tr. Vol. 2 Pg. 2). Mr. Lloyd testified that the Lloyd Brothers Construction installed a water line through the subject property for Deer Valley Resort Company and that Deer Valley Resort Company and not Park City ordered the shack on the subject property demolished. (Tr. Vol. 2 Pg. 5)

### **ARGUMENT**

#### **POINT I**

#### **COURT OF APPEALS PROPERLY RULED THAT SPECIAL TAX TITLE STATUTE OF LIMITATIONS IS INAPPLICABLE.**

The Utah Court of Appeals held that the special tax title statute of limitations, Utah Code Ann. §78-12-5.1, (1986), as amended, does not apply when a taxpayer fails to pay taxes when due and subsequently obtains a tax deed. (Court of Appeals decision, p. 4). To allow the taxpayer to strengthen his title by such an action is an abuse of the property taxation system. This was clearly the holding in Dillman v. Foster, 656 P. 2d 974, 979 (Utah 1982). Dillman at 979 cited Crofts v. Johnson, 6 Utah

2d 350, 313 P.2d 808 (1957) for its holding that:

This court has recognized the generally accepted principle that one who is under a duty to pay taxes cannot shirk that duty and then take advantage of it by purchasing the land at tax sale, and that if he does so it will not strengthen his title.

The Utah Court of Appeals properly affirmed the trial court in concluding that the four-year statute of limitations for tax sale properties found in Utah Code Ann. §78-12-5.1, (1987), does not apply. First, Plaintiffs claim through a 1906 non-tax deed. Subsequent tax deeds from Summit County do not, pursuant to Dillman, entitle Plaintiffs to the special tax title statute of limitations.<sup>5</sup> Second, William Rolfe (whom the Plaintiff-Appellants "claim through" was not a record titleholder to the real property. The Court of Appeals recognized the practice of Summit County to assess separately improvements and real property.<sup>6</sup> Even if Rolfe obtained quitclaim deeds after paying delinquent taxes, the most he would have received is title to the improvements described in the deeds. (Court of Appeals decision, pp. 4-5). To limit the conveyance to the deed description is consistent with the holding in Harman v. Polter, 592 P.2d 653 (Utah 1979), that a description in a deed is prima facie evidence

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<sup>5</sup> The 1917 tax deed to William Rolfe states that taxes had previously been assessed to William Rolfe (Ex. 6), and Reed Pace testified that Charles Rolfe had purposely failed to pay taxes to obtain the 1963 deed.

<sup>6</sup> This Court also recognized the practice of Summit County to separately assess real property & improvements and treat improvements like real property in Park West Village, Inc. v. Avise, 714 P.2d 1137 (Utah 1986).



of what is to be conveyed.

The Plaintiffs, and not the Court of Appeals, have greatly misinterpreted the holding in Dillman. Dillman is controlling law, as the trial court and the Utah Court of Appeals so found. Even if the tax debtor was in possession of the property, the failure to pay the taxes when due clearly does not entitle Plaintiffs to the protection of the special tax title statute of limitations as against third-party record titleholders.

The application of Utah Code Ann. §78-12-5.1 (1987) urged by Plaintiffs is undoubtedly unconstitutional. In Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), the United States Supreme Court held that a tax foreclosure and sale was void for denial of due process<sup>7</sup> when all of the lienholders did not receive actual notice. Subsequently, the Third Circuit in Benoit v. Pathaky, 780 F.2d 336 (3rd Cir. 1985) held that the failure to give the required notice was a jurisdictional defect and rendered a tax title statute of limitations, like §78-12-5.1, Utah Code Ann., 1987, as amended, inapplicable. There was no evidence submitted before the trial court that the State's predecessors-in-interest received any notice of the foreclosure proceedings precedent to issuance of a tax deed. In fact, clearly, United Park City Mines Company had no notice of the 1963 tax sale (which really only related to the improvements anyway) since it paid

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<sup>7</sup> Due process of law is guaranteed both by 5th and 14th Amendments to the United States Constitution and Article I, §7 of the Constitution of the State of Utah.

taxes on the underlying real property both before and after the issuance of the 1963 tax deed to Charles Rolfe.

## POINT II

### PLAINTIFFS ARE NOT RELIEVED FROM PROVING ALL STATUTORY ELEMENTS OF ADVERSE POSSESSION.

Plaintiffs wrongly contend that Park West Village v. Avise, 714 P.2d 1137 (Utah 1986), somehow relieves them from compliance with the statutory elements for adverse possession. This simply is not the holding in Avise.

Plaintiffs argue that they obtained title to the property, inter alia, by adverse possession. In Utah, adverse possession is statutory. The elements necessary to prove adverse possession are found in Utah Code Ann. §78-12-7 to 21, (1987). The statutory elements of adverse possession are:

1. Possess land in a statutory manner, for the statutory period of seven years;
2. Hold the land adversely to the title owner;
3. Pay all taxes legally assessed for the seven year period of possession.

The party claiming adverse possession "has the burden of pleading and proving full compliance with the statute."

Homeowners' Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160, 166 (1943) reaffirmed Neeley v. Kelsch, 600 P.2d 979 (Utah 1979). In 1987, this Court held: "One who seeks to acquire title to real property other than by conveyance must comply **precisely** with the statutory elements for doing so." United Park City Mines v. Estate of Clegg, 737 P.2d 173 (Utah 1987). (Emphasis added.) In

order to prevail on adverse possession Plaintiffs had the burden of proving precise compliance with all of the statutory elements.

Plaintiffs simply failed to identify or prove any seven-year period where they, or their predecessors, paid taxes legally assessed against the land or improvements. Payment of taxes for the seven year period is an indispensable element without which adverse possession cannot be shown, Dudley, supra.

Furthermore, purchasing improvements at a tax sale, the only claimed payment by Plaintiffs or their predecessors prior to 1931, does not qualify as payment of taxes for adverse possession pursuant to Utah Code Ann. §78-12-12, Utah Code Ann., (1987), Bowen v. Olsen, 2 Utah 2d 12,268 P.2d 983 (1954).

Despite Plaintiff's claim, Avisé does not relieve Plaintiffs from their burden of proving payment of taxes for the seven year period. The holding in Avisé was that if the only taxes assessed are those on the improvements then payment of the taxes on the improvements for seven years, coupled with the other elements of adverse possession, will ripen the adverse possession. In Avisé the successful adverse possessor had paid all taxes assessed for a period of 23 years. Similarly, in Royal Street Land Co. v. Reed, 739 P.2d 1104 (Utah 1987), the successful adverse possessor paid all taxes assessed on the surface estate or improvements for a period of seventeen years. Plaintiffs cannot point to a single instance where the continuous 7-year period for payment of taxes was waived by this Court. The Court of Appeals properly distinguished the instant action from Avisé. (Ct.App.Dec. pp. 5-6.)

### POINT III

#### **COURT OF APPEALS PROPERLY RULED THAT MARKETABLE RECORD TITLE ACT IS INAPPLICABLE TO PLAINTIFFS**

Plaintiffs assert in their petition that the Utah Marketable Record Title Act, (hereinafter the "Act"), Utah Code Ann. §57-9-1 through 10, 1986, as amended, insulates their "title" from challenge by Park City or the State of Utah. This is based upon a total misreading of the Act. In fact, the Act insulates the title that was obtained by Park City and conveyed to the State.

The Act requires "an **unbroken** chain of title of record to any interest in land **for forty years or more. . .**". §57-9-1, Utah Code Ann. (1986). (Emphasis added.) An unbroken chain of title is defined in §57-9-1 as when the recorded conveyances relied upon create an interest in (1) the person claiming such interest, or (2) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest.

The root deed that Plaintiffs rely upon is a deed to William Rolfe from Summit County in June 1917. There are no subsequent conveyances from William Rolfe to anyone else, including the Plaintiffs. As indicated above, the Marketable Record Title Act requires a continuous chain of title for at least 40 years. Plaintiffs clearly cannot meet this requirement to invoke the Act. Secondly, there are recorded conveyances in State's chain of title in 1926, 1927, 1953, 1969, and 1982, which purport to divest Plaintiffs of any interest in the subject property.

It is entirely fallacious for Plaintiffs to be challenging the District Court decision and the affirming thereof by the Utah Court of Appeals by relying upon the Marketable Record Title Act, because the Act protects the title obtained by Park City and conveyed to the State of Utah, since none of Plaintiffs deeds contain a locatable description.

The State has more than forty years of continuous record title which should be protected by the Act from by the challenge of the Plaintiffs. Therefore, the Utah Court of Appeals properly affirmed the trial court decision by not granting the Plaintiffs' relief under the Act.

#### **POINT IV**

##### **PLAINTIFFS CANNOT OBTAIN ATTRIBUTES OF OWNERSHIP BY CLAIMING AN EASEMENT**

Perhaps the most novel of the claims by Plaintiffs is the claim to a prescriptive right to the subject property which they failed to obtain title by deed, adverse possession or boundary by acquiescence. Plaintiffs would have this court rule that if a person seeking adverse possession fails to establish all of the elements for adverse possession, he may obtain all of the attributes of ownership by prescriptive easement.

Both the trial court and court of appeals recognized the fundamental and fatal flaw in Plaintiffs' position. Plaintiffs would have this Court so blur the universally recognized distinction between fee title ownership and easement as to make such terms interchangeable. Not only would such a ruling render

statutory elements necessary to ripen adverse possession meaningless, but it would also ignore hundred of years of Anglo-American common law development which recognizes important distinctions between fee title and easements.

The Court of Appeals, in dismissing Plaintiffs' prescriptive easement claim, cited North Union Canal Co. v. Newell, 550 P.2d 178 (Utah 1976), where this Court recognized and upheld the important differences between an easement and fee title. Similarly, Colorado in Osborn & Claywood Ditch v. Green, 673 P.2d 380 (Colo. 1983), refused to allow misuse of the doctrine of easements to dispossess the fee owner.

As authority, Plaintiffs cite only Zollinger v. Frank, 110 Utah 514, 175 P.2d 764 (1946), However, Zollinger is a traditional use easement case and does not support the Plaintiffs' desire to misapply the easement doctrine to obtain all of the attributes of fee ownership, i.e., right to exclusively maintain a house and yard.

#### **POINT V**

#### **PARK CITY IS NOT LIABLE FOR DESTRUCTION OF THE SHACK**

Plaintiffs contend that Park City somehow has liability for the actions of a third party. Despite Plaintiffs' misrepresentation of the record, Park City did not have "Deer Valley Resort bulldoze Plaintiffs' home so that the new road to Deer Valley could be built across this lot." (Plaintiffs' brief, Pg. 9.) The only involvement of Park City in the destruction of

the shack was the issuance of a demolition permit<sup>8</sup>. The demolition permit was issued to Lloyd Brothers Construction which was not working for Park City but for Deer Valley Resort. Building and demolition permits are issued by Park City on the representation of authorization by those procuring the permit.

As legal authority for this novel claim that Park City is liable for the independent acts of third parties Plaintiffs only cite Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987). In Ault the Court found that a tenant is liable for damages by unknown vandals which occur to property while it is under the tenant's possession and control. The facts of the instant matter are inapposite. Park City was not the tenant of the Plaintiffs and in fact, Plaintiffs claimed at trial that they and not Park City were in possession of the shack when it was torn down. Finally, the shack was not torn down by vandals but by an entity that is known to Plaintiffs, who Plaintiffs simply failed to sue.

The relevant law controlling this situation was enunciated by the Court in Rolfe v. Village of Falconer, 467 N.E.2d 516 (N.Y. App. 1984). In Rolfe damages were sought from the village because it had issued a permit. The Court held that the village had no duty to ascertain if the permittee was authorized by the owner and the Village had no liability for the actions of the Permittee. The facts in the instant matter are identical to

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<sup>8</sup>. Plaintiffs admitted at trial that they were asserting no claim for destruction of the shack against the State of Utah. (Tr. Vol. 2 P. 14.)

Rolfe. And the Court of Appeals correctly applied the law to the facts. The Utah Court of Appeals, by affirming the trial court, accepted its position in regard to the destruction of the subject home. This is clear from page 1 of the Utah Court of Appeals decision where it states that "Accordingly, they claim entitlement to \$20,000.00 in damages for the destruction of the residence on the property. We affirm." Plaintiff-Appellants have failed to establish any error by upholding the trial court's finding that Park City is not liable for the issuance of a properly applied for demolition permit.

#### CONCLUSION

The petition for a writ of certiorari should be denied. The Court of Appeals properly decided all of the issues raised by the Plaintiffs in said petition.

The four-year statute of limitations for tax deeds is clearly inapplicable since Plaintiffs cannot strengthen their title by their failure to pay taxes and a subsequent purchase at a tax sale.

The Utah Court of Appeals' decision was consistent with Park West Village, Inc. v. Avise, 714 P.2d 1137 (Utah 1986). In this case, unlike Avise, the Utah Court of Appeals properly noted that there was insufficient evidence that the Plaintiffs' predecessors had paid taxes on the property for seven continuous years and that there was evidence of a property tax assessment on the land as well, which was proven to have been paid by other parties such as the Silver King Coalition Mines Company.



The Utah Marketable Title Act is not applicable in this case, where record title is not continuous for at least forty years. In fact, the Act protects the title of the State.

Notwithstanding the above issues raised by the Plaintiff-Appellants, there are other matters that the trial court decided and the Utah Court of Appeals affirmed which support the overall decision that title be quieted to the State of Utah. No notice of claim, as required by the Utah Governmental Immunity Act, Utah Code Annotated §63-30-1, et. seq. (1986), was filed against the State of Utah. Therefore, the matter was dismissed as against the State, which was an indispensable party. Additionally, §78-12-5, Utah Code Annotated (1987), states that:

No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action.

The District Court and the Utah Court of Appeals, by affirming, found that Plaintiffs did not meet this seven-year statute of limitation.

Plaintiffs attempt to persuade this Court that the future decision in Sweeney Land Company v. Kimball, Supreme Court No. 880485, certiorari granted March 23, 1989, may necessitate review of the subject case. Upon reviewing the Sweeney Petition for Writ of Certiorari and the brief in opposition thereto, the issues raised therein are not relevant to the subject case.

Based on the foregoing, we respectfully request that this Court deny the subject Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of May, 1989.

WHEATLEY & RANQUIST

By


  
J. CRAIG SMITH

Attorneys for Defendant-  
Respondent Park City  
Municipal Corporation

UTAH ATTORNEY GENERAL

R. PAUL VAN DAM

BY

  
ALAN S. BACHMAN

Assistant Attorney General  
Attorney for Defendant-  
Respondent State of Utah

CERTIFICATE OF SERVICE

I do hereby certify that I served the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Utah by mailing four (4) true and correct copies thereof via United States Mail Service, postage prepaid, to Robert Felton, Attorney for Plaintiff, at his address of record, on this 16th day of May, 1989.

  
\_\_\_\_\_  
J. CRAIG SMITH, Esq.

## APPENDIX

EXHIBIT 1

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

FILED

MAR 13 1989

*Mary Noonan*  
Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

Velma Marchant, Elma  
Winterton, Leora Robinson,  
Wanda Penrod, Mona Lichty,  
Merle Anderson,

Plaintiffs and Appellants,

v.

Park City, a municipal  
corporation, and the State  
of Utah,

Defendants and Respondents.)

OPINION  
(For Publication)

Case No. 880131-CA

-----  
Third District, Summit County  
The Honorable Leonard H. Russon

Attorneys: Robert Felton, Salt Lake City, for Appellants  
J. Craig Smith, James W. Carter, Park City,  
for Park City  
Alan Bachman, Salt Lake City, for the State  
of Utah

-----  
Before Judges Davidson, Greenwood and Orme.

GREENWOOD, Judge:

Appellants challenge the trial court's ruling that they did not have vested title to certain real property in Park City and thus were not entitled to recover damages for destruction of the home on the property. Appellants claim that they have title to the property through adverse possession, deeds or alternatively, that their use was prescriptive. Accordingly, they claim entitlement to \$20,000 in damages for the destruction of the residence on the property. We affirm.

In August of 1981, Park City issued a demolition permit to Deer Valley Resort to remove a building. The building was demolished by Lloyd Brothers Construction Company between August 4 and September 7 of 1981 allegedly to build an access road Deer Valley Resort. Appellants brought this action seeking to quiet title to the real property and to recover damages for the destruction of the home located on the property.

According to appellants, their grandfather, William Rolfe, possessed the home and yard on the property from 1910 until his death in 1939. After his death, his wife continued to occupy the property until 1946. She died in about 1949. William Rolfe's son, Charles Rolfe, rented out the house from 1949 until about 1964. Charles Rolfe died in 1966 and his wife, Ethel Rolfe, died in 1981. Charles Rolfe's daughters, appellants, claim to have visited the property at least once a year since 1964. In support of their claim that they have vested title to the property, appellants rely on the following documents:

1. A quit claim deed from Dan and Belle McPolin to Jesse McCarrell dated March 19, 1906 for "that certain one-story framed, three-room dwelling house situated on the easterly side of Silver Creek and about 100 feet easterly from the lumberyard of the Summit Lumber Company."

2. A quit claim deed from Summit County to William Rolph [sic] dated June 10, 1914 for \$28.68 for "[i]mprovements East U.C. Tracks, Park City, Utah." The quit claim deed states that the deed is "made from title secured from a ~~tax~~ sale in the year 1909 and by an Auditors deed to Summit County, dated May 1st, 1914."

3. A quit claim deed from Summit County to William Rolfe dated June 21, 1917 for \$1.00 for "that certain frame dwelling house by Lumber Yard in Park City, Summit County, Utah, assessed to William Rolfe in the year 1912."

4. A letter from the Summit County Treasurer to Charles Rolfe dated May 16, 1957 stating that in 1938 the county issued a quit claim deed to Charles Rolfe's father. The letter also stated that from 1940 to 1954, taxes were taken care of by widows abatement and that Charles Rolfe paid taxes of \$8.06 in 1955 and \$7.33 in 1956.

5. A tax deed from Summit County to Charles Rolfe dated June 13, 1963 for "House in lumber yard," stating "[t]his conveyance is made in consideration of payment by the Grantee of the sum of \$12.53 delinquent taxes, penalties, interest and

costs, constituting a charge against said real estate for the year 1958 in the sum of \$7.81."

The State of Utah claims chain of title through a series of documents, all of which were recorded, and all, except numbers 3, 4 and 5 below, contained a metes and bounds description of the property. The documents are as follows:

1. A patent from the United States government, undisputedly containing the property in question, to George Snyder on April 5, 1882.

2. A deed from George Snyder to the Park City Smelting Company, dated November 14, 1883.

3. A deed from the Park City Smelting Company to Lewis H. Withey and Clay H. Hollister on September 21, 1912. The deed did not contain a metes and bounds description, but described the conveyed property as "all of the real property or rights or interest in real property belonging to the Park City Smelting Company and situated in the County of Summit, Utah."

4. A deed from the executors of Lewis H. Withey's estate to Silver King Coalition Mines Company on November 5, 1926. The deed did not have a metes and bounds description, but conveyed "all the estate, right, title, interest, property, claim and demand whatsoever of the said Lewis H. Withey . . . [of] the property above described."

5. A trustee's deed from Clay Hollister, Withey's tenant in common, to Silver King Coalition Mines on February 18, 1927. The deed did not contain a metes and bounds description but described the property as "all other real property or rights or interests in real property . . . belonging to Park City Smelting Company, and situated in the County of Summit, State of Utah."

6. A deed from Silver King Coalition Mines Company to United Park City Mines Company, dated May 8, 1953.

7. A deed from United Park City Mines Company to Park City, dated April 2, 1969.

8. A deed from Park City to the State of Utah, dated June 7, 1982.

There was no evidence that anyone other than William Rolfe paid taxes on the property until 1931. From 1931 to 1953, the real property in question was assessed as part of Silver King Coalition Mines Company. From 1954 to 1969, real



property taxes were assessed to and paid by United Park City Mines.

The trial court found that appellants' chain of title was discontinuous and, at best, conveyed title to improvements on the property only. The court concluded that the State's claim to title of the property was superior to that of appellants and, therefore, quieted title in the State of Utah and dismissed appellants' complaint.

On appeal, appellants assert that: 1) the trial court erred in finding that they did not have vested title to the property by deed or adverse possession; 2) even if appellants do not have title to the property, they established prescriptive use; 3) respondents are barred from challenging appellants' tax title by the statute of limitations set forth in Utah Code Ann. § 78-12-5.1 (1987); and 4) respondents' claims are barred by laches and estoppel.

#### Vested Title

Appellants first claim on appeal that the trial court erred in concluding they did not have vested title to the property by deed. Appellants assert they obtained tax title to the property by virtue of the 1914 quit claim deed and the 1963 tax deed from Summit County, and any action challenging that title is barred by the four year statute of limitations set forth in Utah Code Ann. § 78-12-5.1 (1987). In addition, they claim title under the Marketable Record Title Act, Utah Code Ann. § 57-9-1 through -10 (1986), commencing with the 1917 quit claim deed as the "root" of title. The trial court concluded that the tax deeds under which appellants claimed title did not convey title to the underlying real property.

In reviewing the trial court's conclusions of law, we apply a correction of error standard with no deference to the trial court. Creer v. Valley Bank and Trust Co., 97 Utah Adv. Rep. 12, 12 (Dec. 9, 1988). A person who has a duty to pay taxes cannot fail to pay taxes and subsequently purchase the land at a tax sale and thereby attempt to strengthen his title to the property. Dillman v. Foster, 656 P.2d 974, 979 (Utah 1982); Crofts v. Johnson, 6 Utah 2d 350, 313 P.2d 808, 810 (1957). In addition, one who has a tax deed but does not hold title to the property cannot assert the special statute of limitations contained in Utah Code Ann. § 78-12-5.1 (1987). Dillman, 656 P.2d at 978-79.

In this case, there is no indication that William Rolfe was the record titleholder. Even assuming he received quit claim deeds from Summit County in 1914, 1917 and 1957 after

paying delinquent taxes, we agree with the trial court that, at most, he received title to the improvements described in the deeds. The 1963 tax deed, similarly, conveyed only the improvements, not the underlying real property. Taxes at that time were apparently separately assessed on improvements and real property in Summit County, and the State's predecessor in title, United Park City Mines, paid real property taxes from 1954 to 1969. The deeds did not strengthen Rolfe's title to the property, but merely indicated that he paid delinquent taxes on the property. The State's title, on the other hand, while flawed, is clearly superior to that of appellants. Therefore, we hold that the trial court did not err in concluding that appellants failed to establish title to the property by deed and that the tax deed statute of limitations was inapplicable.

#### Adverse Possession

Appellants' second assertion of error is that the trial court erred in finding that appellants did not have title to the property by adverse possession. The proponent of an adverse possession claim has the burden of proving full statutory compliance, including the payment of all taxes levied and assessed. Neeley v. Kelsch, 600 P.2d 979, 982 (Utah 1979). However, if a party in possession of property and his predecessors have paid taxes based on the value of improvements on the property and no taxes have been levied based on the valuation of the land, the party has established title to the property by adverse possession if all other elements of adverse possession are met. Park West Village, Inc. v. Avise, 714 P.2d 1137, 1140-41 (Utah 1986); see also Royal Street Land Co. v. Reed, 739 P.2d 1104, 1106 (Utah 1987).

In Avise, the trial court found that Mrs. Lake failed to acquire title to property because she failed to pay taxes on the property. The Utah Supreme Court reversed, stating that the trial court's finding that Mrs. Lake failed to pay taxes on the property was contrary to the evidence. The court noted that an employee of the Summit County assessor's office testified at trial that he had searched the records in that office and could find no evidence that any taxes had been assessed on the land prior to 1975. The undisputed evidence established that Mrs. Lake received a tax notice every year and paid the tax that was levied. Although those taxes were based only on the value of the improvements on the property, the Utah Supreme Court held that because no other taxes were levied, Mrs. Lake had "paid all taxes levied and assessed" in accordance with Utah Code Ann. § 78-12-12 (1977). The court also noted that there was no evidence that there were any delinquent taxes owing on the land for the years prior to 1975

or that the land had been sold by the County for failure to pay taxes for those years.

Appellants claim that this case is indistinguishable from Avisé. We disagree. In Avisé, unlike this case, Mrs. Lake established that she had paid taxes on the improvements to the property for twenty-three years. In this case, however, the only evidence that appellants' predecessors had paid taxes on the property for seven continuous years were quit claim and tax deeds and a letter from Reed Pace to Charles Rolfe. There was no evidence that taxes were paid prior to delinquency. At best, the deeds and letter indicate that William Rolfe paid delinquent taxes on the personal property at various tax sales. Further, appellants established that Charles Rolfe paid taxes on improvements on the property in 1955, 1956 and 1958, but it was also proven that real property taxes were paid by Silver King Coalition Mines Company those same years. Thus, unlike Avisé, appellants failed to prove that they paid taxes on the home or on the underlying land for a continuous seven year period. See Utah Code Ann. § 78-12-7.1 (1987). Payment of delinquent taxes at a tax sale cannot be used to establish the payment of taxes necessary to a successful claim of adverse possession. Otherwise, anyone purchasing property at a tax sale would be able to claim the number of years taxes had gone unpaid as a credit on the seven year period required for adverse possession. In addition, in contrast to Avisé, the quit claim deeds themselves establish that taxes were assessed and not paid during the years appellants claim to have established title by adverse possession. Therefore, we hold that appellants failed to sustain their burden of proving payment of taxes for the requisite seven year period, and the trial court correctly concluded that appellants did not acquire the property by adverse possession.

#### Prescriptive Easement

Appellants also assert that even if they do not have fee title to the property by adverse possession or chain of title, they have a prescriptive easement. Appellants are unclear as to what they claim flows from the alleged prescriptive easement. If they claim that a prescriptive easement, if established, would give them ownership rights in the underlying property, they err. See Osborn & Caywood Ditch Co. v. Green, 673 P.2d 380, 382 (Colo. Ct. App. 1983). A prescriptive easement does not result in ownership, but allows only use of property belonging to another for a limited purpose. North Union Canal Co. v. Newell, 550 P.2d 178, 179 (Utah 1976). A prescriptive easement "arises under our common law from a use

of the servient estate that is 'open, notorious, adverse, and continuous for a period of 20 years.'" Crane v. Crane, 683 P.2d 1062, 1064 (Utah 1984) (quoting Jensen v. Brown, 639 P.2d 150, 152 (Utah 1981)). The trial court concluded that appellants had not established a prescriptive easement.<sup>1</sup> A claimant of prescriptive easement must establish the necessary elements by clear and convincing evidence. Garmond v. Kinney, 91 N.M. 646, 579 P.2d 178, 178 (1978). Appellants not only had the burden of proof at trial, but on appeal are similarly required to marshall all evidence supporting the trial court's findings and then to demonstrate that the evidence, when viewed most favorably to the trial court, is insufficient. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Appellants have not marshalled the evidence supporting the trial court's findings in connection with the issue of prescriptive easement. It further follows that on appeal, appellants are required to marshall evidence which would support each element required to prove their claim of prescriptive easement. For example, the trial court found that appellants' predecessors in interest worked for Silver King Coalition Mines Company, and were given permission by the company to build a house on the property in question. Appellants claim that this finding is not supported by the evidence but they do not provide other argument or reference to the trial record to establish that the use was "adverse," one of the required elements for prescriptive easement. Similarly, appellants have not compiled evidence which establishes the other necessary elements and have further failed to analyze what rights or claims to damages might flow from the alleged prescriptive easement. We will not consider conclusory arguments without citation to either the record or cases involving pivotal issues. Randall v. Salvation Army, 100 Nev. 466, 686 P.2d 241, 244 (1984). Therefore, we find that appellants did not establish a prescriptive easement to the property.

#### Laches and Estoppel

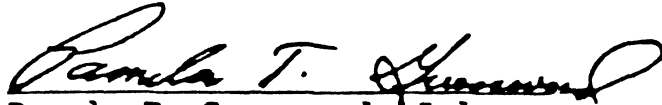
Finally, appellants assert that Park City is barred from claiming ownership of the property by laches and estoppel. Those issues were not raised in the trial court and, therefore,

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1. The court also concluded that the prescriptive easement claim was barred by Utah Code Ann. § 78-12-5 (1987). However, in Morris v. Blunt, 49 Utah 243, 161 P. 1127 (1916), the Utah Supreme Court held that the predecessor section to the present code does not apply to actions for prescriptive easements.


we decline to reach them. See James v. Preston, 746 P.2d 799,  
801 (Utah Ct. App. 1987).

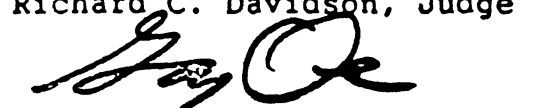
Affirmed.

  
Pamela T. Greenwood, Judge

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WE CONCUR:

  
Richard C. Davidson, Judge

  
Gregory K. Orme, Judge

COVER SHEET

CASE TITLE:

Velma Marchant, et al.,  
Plaintiffs and Appellants,

v.

Court of Appeals No. 880131-CA

Park City, a municipal corporation,  
Jack Coppedge, and the State of Utah,  
Defendants and Respondents.

PARTIES:

Robert Felton (Argued)  
Speciale & Felton  
Attorney for Plaintiffs and Appellants  
310 South Main Street, Suite 1309  
Salt Lake City, UT 84101

J. Craig Smith (Argued)  
James Carter  
Attorneys at Law for Defendants and Respondents, Park City Municipal  
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Park City, UT 84060

R. Paul Van Dam  
State Attorney General  
Donald S. Coleman, Chief,  
Physical Resources Division  
Assistant Attorney General  
Alan Bachman (Argued)  
Assistant Attorney General  
Attorneys at Law for Defendants and Respondent, State of Utah  
B U I L D I N G   M A I L

TRIAL JUDGE:

Honorable Leonard H. Russon

March 13, 1989. OPINION (For Publication)

This cause having been heretofore argued and submitted, and the  
Court being sufficiently advised in the premises, it is now  
ordered, adjudged and decreed that the judgment of the trial  
court herein be, and the same is, affirmed.

Opinion of the Court by PAMELA T. GREENWOOD, Judge; RICHARD C.  
DAVIDSON, and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of March, 1989, a true  
and correct copy of the foregoing OPINION was mailed or personally  
delivered to each of the above parties.

  
Case Manager

TRIAL COURT:

Third District Court, Summit County. #7174

EXHIBIT 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

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|                             |   |                     |
|-----------------------------|---|---------------------|
| VELMA MARCHANT, et al.,     | : | MEMORANDUM DECISION |
| Plaintiffs,                 | : | CIVIL NO. 7174      |
| vs.                         | : |                     |
| PARK CITY, a Municipal      | : |                     |
| corporation, JACK COPPEDGE, | : |                     |
| and the STATE OF UTAH,      | : |                     |
| Defendants.                 | : |                     |

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The above case was tried, commencing May 6, 1987. The Court received evidence by way of testimony, exhibit, and stipulation, and after hearing final arguments of counsel, took the matter under advisement. The Court has now reviewed the evidence and law in this matter, and renders its Memorandum Decision as follows:

1. The defendants' title to the underlying property in question, even with the claimed Michigan Trust Company gap, is superior to the title line claimed by the plaintiffs. The defendants' title is traceable to the patent of the United States Government. Plaintiffs' title is insufficient in description and continuity. The plaintiff does not have title to the underlying property. Plaintiffs' title, if any, was to the house or improvements on the underlying property.



2. The underlying property in question was owned by the mining company, who allowed certain miners to build houses on the said property. Summit County assessed taxes against the underlying property separately from against the improvements thereon. If the owner of the improvements (house) failed to pay taxes, legal process eventually led to a tax sale only as to that improvement. Anyone who purchased at the tax sale acquired only that property that had been so assessed and levied against.

3. The various tax deeds did not give plaintiffs' predecessors more than they already had.

4. Plaintiffs' predecessors never paid taxes on the underlying property, but only on that which had been assessed against them, the improvements.

5. The defendants' predecessors paid all assessed taxes on the underlying property.

6. The plaintiffs' predecessors did not obtain the underlying property by adverse possession, since they never paid taxes on the same, and did not hold the same adversely against the true owner who did pay taxes on the said property.

7. The plaintiffs did not obtain the underlying property by adverse possession, since such cannot be had against a political subdivision of the State of Utah. In any case, they did not have possession for more than seven years before filing of the Complaint, they did not pay all assessed taxes on the property

in question, and their claims are barred by the statute of limitations.

8. For more than seven years prior to the filing of the Complaint, the property in question was not possessed by plaintiffs, rather it was abandoned. It was empty and open. It was in a state of deterioration. Those rare visits claimed by defendant did not constitute possession.

9. The tax deeds conveyed only the house and not the underlying property.

10. Prescriptive easement is not applicable, inasmuch as it applies only to use, and not to title claims to the fee simple.

11. The house which had been owned by plaintiffs' predecessors was removed or demolished by a third party, not a party to this legal action. Because the house was abandoned, open, and considered a nuisance, Park City demanded of owners to abate the same. On application for permit, Park City granted such permit allowing demolition of the house. Park City did not participate in destruction of the house, and cannot be liable thereof.

12. The granting of a demolition permit by Park City to a contractor, based on proper application, does not impose liability on Park City if the permit was wrongfully obtained or the work therein unlawfully performed.

13. Plaintiffs make no claim against the State of Utah for removal or destruction of the house.

14. Even if plaintiffs had established liability on a party hereto for destruction of the house in question, the evidence of such damage is insufficient for an award to be made. There was no evidence presented as to the value of this old building, and no finding could be made without gross speculation in regards thereto.

15. Furthermore, the plaintiffs' claims are barred by the Utah Governmental Immunity Act, Section 63-30-1, et seq. No notices of claim were filed within one year after the claim arose as required by that Act. The plaintiffs were aware of the destroyed building prior to Labor Day 1981. No notice of claim was ever filed against the State of Utah. Notice of claim was filed against Park City on September 20, 1982, more than one year after the plaintiffs learned of the destruction of the building. The very latest the claim could arise was at that time.

16. Title to the land in question is quieted in the defendants (State of Utah). Plaintiffs are not entitled to damages against these defendants.

Attorney for the defendant Park City will prepare the appropriate Findings of Fact, Conclusions of Law, and Judgment, and

submit the same to plaintiffs' attorney for approval as to form before submitting them to the Court for final signature.

Dated this 22 day of May, 1987.

LS/ Leonard H. Russon  
LEONARD H. RUSSON  
DISTRICT COURT JUDGE

EXHIBIT 3

J. CRAIG SMITH, #4143  
JAMES W. CARTER, #0586  
Park City Municipal Corporation  
445 Marsac Avenue  
P.O. Box 1480  
Park City, Utah 84060  
Telephone: (801)649-9321

IN THE THIRD DISTRICT COURT OF  
SUMMIT COUNTY, STATE OF UTAH

|                         |   |                             |
|-------------------------|---|-----------------------------|
| VELMA MARCHANT, et al.  | ) |                             |
| Plaintiffs,             | ) |                             |
|                         | ) |                             |
|                         | ) |                             |
| v.                      | ) | FINDINGS OF FACT AND        |
|                         | ) | CONCLUSIONS OF LAW          |
|                         | ) |                             |
|                         | ) |                             |
|                         | ) | Civil No. 7174              |
| PARK CITY, a municipal  | ) |                             |
| corporation, JACK       | ) | Honorable Leonard H. Russon |
| COPPEDGE, and the STATE | ) |                             |
| OF UTAH,                | ) |                             |
| Defendants.             | ) |                             |

This matter came on regularly for Trial on May 6, 1987 before the Court, the Honorable Leonard H. Russon, District Judge presiding. The parties appeared through and were represented by their respective counsel, J. Craig Smith, Esq., Assistant City Attorney and James W. Carter, Esq., City Attorney for Defendant Park City Municipal Corporation, Alan Bachman, Esq., Assistant Attorney General for Defendant State of Utah and Robert Felton, Esq., for the Plaintiffs,

Velma Marchant, Leora Robinson, Wanda Penrod, Mona Liechty and Merle R. Anderson.

At the Trial the Court received evidence by way of testimony, exhibit and stipulation and heard argument by counsel representing the respective parties.

Having given full consideration to all of the testimony heard and evidence admitted and having reviewed the legal memoranda and heard the oral argument, and now being appraised as to all and singularly the law and the facts of the matter, the Court herewith makes and enters its:

#### FINDINGS OF FACT

1. The real property in question which was the subject of this action is described as follows:

Beginning at a point which is North 407.38 feet West 41.39 feet of the Southwest corner of the Southeast one-quarter of the Northeast one-quarter Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian thence North  $36^{\circ}40'9''$  West 71.46 feet; thence North  $57^{\circ}29'15''$  East 77.50 feet; thence South  $18^{\circ}58'45''$  East 70.93 feet; thence South  $55^{\circ}6'25''$  West 55.77 feet to the point of beginning.

2. The chain of title through which Defendant State of Utah claims title to the real property in question is traceable to the patent derived from the United States Government.

3. The real property in question was previously owned by Silver King Coalition Mines Company. It was a common

practice for Silver King Coalition Mines Company to allow miners to construct houses on real property the Company owned.

4. Plaintiffs' predecessors in interest worked for Silver King Coalition Mines Company and were permitted to construct a house on the real property in question.

5. The underlying real property in question was assessed by Summit County separately from the house located thereon claimed by Plaintiffs.

6. Defendant's predecessors in interest paid all real property taxes assessed against the underlying real property in question.

7. Neither Plaintiffs nor their predecessors in interest paid any taxes on the underlying real property in question.

8. Plaintiffs did not have possession of the real property in question for a period in excess of seven years prior to filing their complaint; it was abandoned, empty and open and in a state of deterioration and was rarely visited by Plaintiffs.

9. The chain of title through which Plaintiffs claim title to the real property in question is discontinuous.

10. The tax deeds through which Plaintiffs claim title were given by Summit County pursuant to unpaid tax delinquencies on the improvements located on the underlying real property in question.



11. The house which had been owned by Plaintiffs' predecessors was removed or demolished by a third party, not a party to this action.

12. Because of the abandoned and deteriorated nature of the house on the property Park City granted a demolition permit for the demolition of the house, on proper application, to a third party claiming ownership of the house.

13. There was no evidence presented as to the value of the house and no finding as to the value can be made without gross speculation.

14. Plaintiffs were aware of the destruction of the house prior to September 7, 1981.

15. No notice of claim was ever filed by the Plaintiffs against Defendant State of Utah.

16. Notice of claim was filed against Defendant Park City on September 20, 1982, more than one year after the Plaintiffs learned of the destruction of the house.

#### CONCLUSIONS OF LAW

1. The chain of title through which the Defendant State of Utah claims title is superior to the chain of title through which Plaintiffs claim title.

2. Plaintiffs' claim to title by deed to the underlying real property in question, fails due to insufficient descriptions in the claimed deeds and a lack

of continuity of Plaintiffs' claimed chain of title. Plaintiffs' title, if any, was to the house or improvements located upon the real property in question.

3. The tax deeds under which Plaintiffs claim title to the real property conveyed improvements only and had no effect on title to the underlying real property in question.

4. The tax deeds under which Plaintiffs claim title to the underlying real property in question add nothing to the title of the Plaintiffs'.

5. Adverse possession cannot be had against Defendant Park City, a political subdivision of the State of Utah, or against Defendant State of Utah pursuant to Utah Code Annotated § 78-12-13, 1953 as amended.

6. Plaintiffs' claim of title to the real property in question by adverse possession and claim of easement by prescription are barred by the applicable statute of limitations pursuant to Utah Code Annotated § 78-12-5, 1953 as amended.

7. Plaintiffs' claim against the State of Utah is barred by Plaintiffs' failure to comply with the Utah Governmental Immunity Act, Utah Code Annotated § 63-30-1, et. seq.

8. Plaintiffs' claims against Defendant Park City Municipal Corporation are barred by Plaintiffs' failure to comply with the Utah Governmental Immunity Act, Utah Code Annotated § 63-30-1, et. seq.

9. Plaintiffs' claim of adverse possession of the real property in question fails, pursuant to Utah Code Annotated § 78-12-12, 1953 as amended, for failing to show payment of all taxes which have been levied and assessed upon the real property in question according to law.

10. Plaintiffs' claims of adverse possession of the real property in question and of prescriptive easement fail since possession by Plaintiffs' predecessors in interest was not adverse to the interests of Defendants' predecessors in interest.

11. Plaintiffs' claim of prescriptive easement to the entire area of the real property in question fails as inapplicable to the facts of the case and concerns only use rather than possession of or title to real property.

12. Defendant Park City is not liable to Plaintiffs for issuing a demolition permit, based on proper application, notwithstanding whether the permit was wrongfully obtained or the demolition work unlawfully performed.

13. Plaintiffs have stated no claim against the State of Utah for the destruction of the house.

14. Plaintiffs' complaint, and each cause thereof, should be dismissed with prejudice and title to the real property in question should be quieted in the State of Utah free and clear of any interest, lien, easement, or encumbrance by Plaintiffs.

15. Plaintiffs are not entitled to any damages against Defendants.

Wherefore, let judgment be entered in favor of the Defendants and against the Plaintiffs in accordance with these findings of fact and conclusions of law.

Dated this 6th day of June, 1987

By the Court

s/ Homer  
Leonard H. Russon  
District Court Judge

Approved as to form:

J. G. Smith  
J. Craig Smith, Esq.  
Attorney for Defendant  
Park City Municipal Corporation

Alan Bachman  
Alan Bachman, Esq.  
Attorney for Defendant  
State of Utah

Robert Felton  
Robert Felton, Esq.  
Attorney for Plaintiffs

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Park City Municipal Corporation  
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P.O. Box 1480  
Park City, Utah 84060  
Telephone: (801)649-9321

IN THE THIRD DISTRICT COURT OF  
SUMMIT COUNTY, STATE OF UTAH

|                         |   |                             |
|-------------------------|---|-----------------------------|
| VELMA MARCHANT, et al.  | ) |                             |
| Plaintiffs,             | ) |                             |
|                         | ) |                             |
|                         | ) |                             |
| v.                      | ) | JUDGMENT                    |
|                         | ) |                             |
|                         | ) |                             |
|                         | ) |                             |
| PARK CITY, a municipal  | ) | Civil No. 7174              |
| corporation, JACK       | ) | Honorable Leonard H. Russon |
| COPPEDGE, and the STATE | ) |                             |
| OF UTAH,                | ) |                             |
| Defendants.             | ) |                             |

This matter came regularly for Trial on May 6, 1987 before the Court, the Honorable Leonard H. Russon presiding, the Trial concluded on May 7, 1987, after all parties had fully presented all evidence and argued their respective positions. The parties appeared through, and were represented by, their respective counsel, J. Craig Smith, Esq., Assistant City Attorney, and James W. Carter, Esq., City Attorney, for Defendant Park City Municipal Corporation, Alan Bachman, Esq., Assistant Attorney General

for Defendant State of Utah, and Robert Felton, Esq., for Plaintiffs, Velma Marchant, Leora Robinson, Wanda Penrod, Mona Liechty and Merle R. Anderson.

Evidence was received in the form of testimony, exhibit and stipulation, oral argument on the facts and law were made by respective counsel and legal memoranda were submitted.

Having given full consideration to the evidence admitted, the legal memoranda submitted, and the oral argument made, the Court having entered a Memorandum Decision and entered its Findings of Fact and Conclusions of Law does hereby Order, Adjudge and Decree as follows:

1. Plaintiff's Complaint, and each cause thereof, is dismissed with prejudice.

2. Fee ownership of the real property in question, which is particularly described as:

Beginning at a point which is North 407.38 feet West 41.39 feet of the Southwest corner of the Southeast one-quarter of the Northeast one-quarter Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian thence North  $36^{\circ}40'9''$  West 71.46 feet; thence North  $57^{\circ}29'15''$  East 77.50 feet; thence South  $18^{\circ}58'45''$  East 70.93 feet; thence South  $55^{\circ}6'25''$  West 55.77 feet to the point of beginning.

is quieted in the State of Utah free of any interest, lien, easement, or encumbrance of Plaintiffs.

3. Each party is to bear its own attorney's fees and costs of court.

4. This is a final and appealable judgment.

DATED this 4 day of <sup>July</sup>~~June~~, 1987.

BY THE COURT

/s/ Homer F. Wilkinson

Leonard H. Russon  
District Court Judge

Approved as to Form:

J. Craig Smith  
J. Craig Smith, Esq.  
Attorney for Defendant  
Park City Municipal Corporation

Alan Bachman  
Alan Bachman, Esq.  
Attorney for Defendant  
State of Utah

Robert Felton  
Robert Felton, Esq.  
Attorney for Plaintiffs

EXHIBIT 4



AMENDMENTS  
TO THE  
CONSTITUTION OF THE UNITED STATES

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**AMENDMENT V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT XIV**

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# CONSTITUTION OF UTAH

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## ART. I, § 7

### **Sec. 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

## **CHAPTER 12**

### **LIMITATION OF ACTIONS**

#### **78-12-5. Seizure or possession within seven years necessary.**

No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action.

#### **78-12-7. Adverse possession — Possession presumed in owner.**

In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.

#### **78-12-9. What constitutes adverse possession under written instrument.**

For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

- (1) where it has been usually cultivated or improved.
- (2) where it has been protected by a substantial inclosure.
- (3) where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry, or for pasturage or for the ordinary use of the occupant.
- (4) where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the part improved and cultivated.

#### **78-12-10. Under claim not founded on written instrument or judgment.**

Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

## LIMITATION OF ACTIONS

### **78-12-11. What constitutes adverse possession not under written instrument.**

For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

- (1) where it has been protected by a substantial inclosure.
- (2) where it has been usually cultivated or improved.
- (3) where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands amounting to the sum of \$5 per acre.

### **78-12-13. 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 a 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.

### **78-12-12. Possession must be continuous, and taxes paid.**

In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that 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.