

2004

H.C. Massey and Betty Massey v. Kenneth A. Griffiths, BKB LLC, 12 X 12 L.L.C., Aaron B. Buttars, Brenda L. Buttars, Adele B. Lewis : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

H.C. MASSEY and BETTY  
MASSEY,

Plaintiffs/Appellants.

vs.

KENNETH A GRIFFITHS, BKB  
LLC, 12 X 12 L.L.C., AARON B.  
BUTTARS, BRENDA L. BUTTARS,  
ADELE B. LEWIS,

Defendants/Appellees.

**BRIEF OF THE APPELLEES  
AARON B. BUTTARS, BRENDA L.  
BUTTARS AND ADELE B. LEWIS**

Appellate Court No. 20040650-CA

APPEAL FROM JUDGMENT OF THE SECOND DISTRICT COURT,  
WEBER COUNTY, JUDGE ROGER S. DUTSON

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## **STATEMENT OF JURISDICTION**

The Appellees, Aaron B. Buttars, Brenda L. Buttars and Adele B. Lewis, (hereinafter referred to collectively as the "Appellees") agree that jurisdiction is properly placed in this court inasmuch as it is an appeal from a final ruling and Order of the Second District Court wherein the trial court granted summary judgment in favor of Appellees resulting in the "Order Quieting Title in 12 X 12, L.L.C., and in Aaron B. Buttars and Brenda L. Buttars."

## **STATEMENT OF THE ISSUES**

Pursuant to the Utah Rules of Appellate Procedure, Rule 24(b)(1), Appellees are satisfied with the Statement of Issues made by Appellants and hereby incorporate said Statement of Issues as part of Appellees' brief.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

There are no constitutional provisions, statutes, ordinances, rules nor regulations whose interpretation is determinative of this appeal or of such central importance as to require their inclusion here.

## **STATEMENT OF THE CASE**

An action to quiet title and for trespass and waste to real property were commenced by Appellants H.C. Massey and Betty P. Massey in the Second District Court. Masseys' first amended complaint also alleged a cause of action for adverse possession. However, the adverse possession cause of action was dismissed and is not at issue on appeal. Masseys' claim of title to the real property is based upon tax deeds conveyed by Weber County.

Responses to Massey's complaint were filed by all Defendants. Responses to Massey's claims were filed in letter form by Appellees Aaron B. Butters, Brenda L. Butters [hereinafter referred to collectively as "Appellees Butters"] and Adele B. Lewis, acting pro se at the time R. at 115-121. Appellees' defenses to Appellants' claims included: that there has been an unbroken chain of title since the time the real property was conveyed to private owners by the United States Government, that Appellee Adele B. Lewis had owned and occupied said property since 1953, and that Appellees Butters had done the same since they purchased the same real property from Appellee Adele B. Lewis in December 1994. R. 115-116.

Following various surveys and other discovery, Defendants filed motions for summary judgment supported by memoranda and various exhibits, including affidavits. R. 601-83, 785-96 and 852-50. Masseys purported to dispute many of the facts propounded by Defendants. R. at 815-851. However, Masseys conceded many facts as well. R. at 815-851.

The motions were submitted without oral argument and the Court entered its "Ruling Conditionally Denying Summary Judgment." R. at 962-67. At a subsequent telephonic hearing between the Court and counsel and based upon certain concessions of fact made by Massey's attorney, the Court verbally granted the Defendants' motions for summary judgment and directed counsel for Defendants to prepare appropriate findings of fact, conclusions of law and a final order. R. at 1014. The final findings of fact and conclusions of law prepared by Defendants' counsel incorporated by reference the Court's earlier conditional

ruling. R. at 984-99. Copies of the trial court's initial ruling, the transcript of the subsequent telephonic hearing, and the findings of fact, conclusions of law and final order are included in the Addendum to Appellants' brief. Appellants' Addendum, §1-4.

### STATEMENT OF FACTS

1. This case involves real property located in the Southeast Quarter of Section 24, Township 6 North, Range 2 West in Weber County, Utah.
2. Masseys purchased four separate parcels located in the Southeast Quarter at a tax sale. Two of the parcels were purportedly conveyed to the Masseys by tax deeds dated June 12, 1986, and recorded June 13, 1986. R. at 989-90. The other two parcels were purportedly conveyed to the Masseys by tax deeds dated June 8, 1992, and recorded June 10, 1992. R. at 990-91. The four "parcels" were contiguous. R. at 839.
3. On February 19, 1953, Defendant Adele B. Lewis and her husband, James H. Lewis, purchased Parcel Number 15-063-0014 in Weber County, State of Utah, which is located at 1597 South 1200 West, in Marriott-Slaterville, Utah 84404. The legal description of the property is:

Part of the northeast quarter of the southeast quarter of section 24, township 6 north, range 2 west, salt lake meridian, U.S. survey. Beginning at a point 20 chains south and 14.56 chains west of the northeast corner of said quarter section, thence west 75.04 feet, thence north 23° 08' west 250 feet, thence north 155 feet, thence east 5.44 chains thence south

7.5 chains to the place of beginning. Containing 3.1 acres, more or less. R. at 789, 823.

4. On January 26, 1993, Defendant Adele B. Lewis' husband passed away, but Defendant Adele B. Lewis continued to own, use and occupy all of the ground on the above-mentioned parcel until she sold the property to her daughter and son-in-law, Aaron B. and Brenda L. Buttars. R. at 790, 825.
5. Defendant Adele B. Lewis sold the above-mentioned property to her daughter and son-in-law on December 5, 1994. By way thereof, Defendant Adele B. Lewis sold all of her right, title and interest in the Property to Defendants Aaron B and Brenda L. Buttars. Although Defendant Adele B. Lewis sold the property to the Defendants Buttars, she continues to live on that same property. R. at 790, 825.
6. The Defendants, Kenneth A. Griffiths[Griffiths], BKB, LLC [BKB] and 12 X 12, L.L.C. [12X12] are each successors in interest to a parcel of real property [hereinafter referred to as the Griffiths Property] also located in the Southeast Quarter of Section 24. R. at 604-05. The Griffiths Property was conveyed to Griffiths by Warranty Deed dated September 10, 1993, and recorded on September 23, 1993. R. at 643-44. Griffiths conveyed the Griffiths Property to BKB by Warranty Deed dated and recorded January 24, 1994. BKB conveyed the



Griffiths Property to 12X12 by Quit Claim Deed dated October 26,

2000, and recorded November 1, 2000. R. at 987.

7. The Griffiths Property, now owned by 12X12, is located north of the Buttars' Property. R. at 839. A "very old fence" serves as the occupation line between the Griffiths Property and the Buttars Property. R. at 818. The legal description of Masseys' tax deed properties straddles the old fence and overlaps the historical occupation of the Griffiths Property and the Buttars' Property. R. at 819. The Defendants and their predecessors in interest have occupied the area of their respective properties up to the "very old fence" for more than 20 years immediately preceding the initiation of the above-entitled action. R. at 818, 987-8. Said Defendants and their predecessors have paid taxes on legal descriptions contained in the tax notices issued to them by Weber County for a period of more than 20 years immediately preceding the initiation of the above-entitled action. R. at 987, 989, 1014, p. 10.
8. An expert surveyor has concluded that Weber County did not have any interest in the property to be conveyed at the tax sale and that the deeds to property allegedly conveyed were based on a conveyance made by an earlier grantor possessing no interest in the real property to be conveyed. R. at 607-609 and R. at 760-761, and 763.
9. Appellants' own expert witness, Cynthia L. Segriff, a registered land surveyor, stated in her affidavit that "the real property conveyed in the

tax deeds does overlap and conflict with the occupation of the properties by Defendants BKB, LLC, Questar Gas Company, Aaron B. Buttars, Brenda L. Buttars and Adele B. Lewis, or their successors.” R. at 274-5.

10. Ms. Segriff stated in her report and/or at her deposition that:
  - a. “I believe that these deeds not only cloud the title of record but also convey a fraud (fraud order).” R. at 755-6.
  - b. “I believe the tax deeds sold the property to Massey in which Weber County – they may have had an interest in it for the tax notices, the tax money that they were expecting to receive, but they did not own the property to sell it.” R. at 756.
  - c. “I believe that Weber County conveying it to the Masseys and it being overlaid the way it is, the county not having acknowledgment as to where that property actually lay before making up the deeds and selling them, was – and I do believe that this was very strong language, but...I say I do believe it was very strong language, but I do think that it was rather fraudulent in – or misrepresented, okay? Misrepresenting what the – what the property was and the county selling the property like they did...” R. at 757.
11. Defendants’ Expert John B. Stahl, stated in his affidavit that:

- a. The tax deeds conveyed to Appellants were based “upon a quit claim deed dated September 25, 1979 purporting to convey property within which no interest was held by the grantor.” R. at 761.
  - b. “The BKB, Questar and Buttars properties are contiguous. (See Pgs. 4 and 25, Survey Findings Report).” R. at 762-3.
12. Appellants, by and through their attorney, have conceded the following:
- a. “No doubt the fences in the area have existed for a long period of time.” R. at 818.
  - b. “...12 x 12, Questar and Buttars, or their predecessors in interest, have occupied the respective parcels up to the old existing fence lines for a substantial period of time.” R. at 818.
  - c. “...the property in question that we claim under the tax deeds has historically been occupied by the defendants and their predecessors in interest together with the --- the Questar Gas property and their predecessors in interest. It’s one of the three parties have occupied all of that property which we are claiming under our tax deeds. ...For at least twenty years.” R. at 1014, Appellants’ Addendum, §2, p. 9, lines 7-15.
  - d. “I would concede that they [the Defendants] have paid taxes on the tax notices that were issued to them by the county.” R. at 1014, Appellants’ Addendum, §2, p.10, lines 13-14.

## SUMMARY OF ARGUMENTS

The trial court appropriately granted Appellees' Motion for Summary Judgment viewing the facts in the light most favorable to the non-moving party Appellants and finding no dispute as to **material** facts. The Findings of Fact and Conclusions of Law resulting in the "Order Quietening Title to Real Property in 12 X 12, L.L.C., and in Aaron B. Buttars and Brenda L. Buttars" are appropriately supported by the pleadings and supporting documents submitted in the trial court's summary judgment proceedings.

First, Appellants did not take title to the disputed property because Weber County did not have any title to convey. A prerequisite to holding a tax sale is that the owners of the property be delinquent in paying taxes for said property. Appellees believe that under Utah law, the tax sale is therefore of no effect. Additionally, purchasers of Tax Deeds take title subject to and along with the infirmities in the grantor's title, such as a boundary by acquiescence claim. The taxes for the properties in question were all paid in full by Appellees and current at the time of the tax sale. All of the Appellees and their predecessors in interest had paid the property taxes assessed and had occupied the disputed property for at least 20 years prior to commencement of this action. Therefore, Weber County did not possess title to the properties and could not convey title to said properties by Tax Deed and Appellants' Tax Deeds are null, void, and of no effect.

Second, even if the Court finds that Weber County was able to convey title to the land described in the Tax Deeds to Appellants, title to the property held by

Appellees is superior to that of Appellees under Utah statute and case law. For an unrecorded interest in real property to be void as against any subsequent purchaser of said real property, the subsequent purchaser must: 1) purchase the property in good faith, that is, without actual or constructive notice of the possibility of any other unrecorded interest in the property and 2) record their document first. Moreover, Appellees and their predecessor interest holders have occupied said properties continuously for at least 20 years prior to this action (as conceded by Appellants), and this continuing adverse possession. It has also been conceded by Appellants that Appellees and their predecessor interest holders have all paid the taxes due as for the property described by tax notices received by Appellees for at least 20 years prior to this action. Appellants, as subsequent purchasers were on actual, or at the very least, constructive notice of the possibility of a problem with the title to the property held by Weber County. Therefore, Appellants are precluded from taking in good faith and Appellees therefore are the lawful owners thereof.

### ARGUMENT

#### **I. The Tax Deeds Conveyed No Title To Appellants Because Weber County Had No Title To Convey.**

Appellant's claims herein are based upon four tax deeds, two of which are dated June 12, 1986 and two of which are dated August 12, 1992. These tax deeds are null and of no legal force or effect to convey any title to Appellants because Weber County did not have or hold any title that it could convey. Under Utah law,

lawful tax sale proceedings can only be based upon a failure to pay the taxes assessed against the property sold and no validity attaches to any tax sale of property concerning and for which the taxes have been paid and that never became delinquent. *Tintic Undine Mining Co. v. Ercanbrack*, 74 P.2d 1184, 1189 (Utah 1938); *Hayes v. Gibbs*, 169 P.2d 781, 786 (Utah 1946); *Thirteenth South Ltd. v. Summit Village Inc.*, 866 P.2d 257, 259 (Nev. 1993). That is, a tax sale of property for which the taxes have been paid in full and have never become delinquent must be invalid *ab initio*. Appellants have not shown that Appellees' taxes were even delinquent. Rather, they have conceded full payment of the taxes by all Appellees. Utah law further provides that a person claiming title to real property by reason of a tax deed is chargeable with notice of and takes subject to the full record chain of title. *Hayes*, 169 P.2d 781 at 784; *See Also, Salt Lake County v. Metro West Ready Mix, Inc.*, 89 P.3d 155, 157-158, 2004 UT 23; Utah Recording Act, UCA §57-3-21(1). Additionally, in the case of *Mason v. Loveless*, 24 P.3d 997 (Utah 2001), the Court of Appeals held that purchasers of Tax Deeds take title subject to and along with all of the infirmities of the prior owner. For example, in *Mason*, the Tax Deeds did not extinguish the preexisting boundary by acquiescence claim of the neighboring property owner. *Mason*, 24 P.3d 997 at 1003.

The record title to and possession of the Buttars' property have continuously been held and maintained by the Buttars and their predecessors in interest at all times since the real property, of which the Buttars' property is a part,

was patented to Caleb Parry and Thomas Joyce. The Buttars and their predecessors in interest have paid all of the real property taxes related to the Buttars' property, whose legal description is contained in the tax notices sent by Weber County. There is nothing in the record that would support any claim to the contrary.

The same is true with respect to the 12X12 and Questar Properties. They and their predecessors in interest have also possessed and paid all taxes related to their respective properties over a period of more than 20 years. 12X12 and its predecessors in interest have been in possession and paid said taxes since at least 1980. Questar has been in possession since at least 1929. Accordingly, there have been no unpaid real property taxes that could have provided Weber County with any lawful basis for issuing the Tax Deeds to Appellants. Simply stated, the Tax Deeds did not and cannot convey real property never owned by Weber County and which Weber County never had a right to sell. Therefore, Appellants received nothing from the tax sale because Weber County had nothing to sell or convey relating to the aforementioned tax deeds.

## **II. The Title Conveyed By Tax Deed To Appellants Was Not Superior To That Held By Appellees.**

In the alternative, if Weber County did, in fact, convey title the real property described in the Tax Deeds held by Appellants. Appellants' arguments must also fail because such title held through the Tax Deeds was not and is not superior to and does not trump the title held by Appellees in this action. As noted

above, Utah law provides that a person claiming title to real property by reason of a tax deed is chargeable with notice of and takes subject to the full record chain of title. *Hayes*, 169 P.2d 781 at 784; *Metro West*, 89 P.3d 155 at 158; UCA §57-3-21(1) According to Utah’s Recording Statute, UCA §57-3-21(1):

- “Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:
- (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and
  - (2) the subsequent purchaser’s document is first duly recorded.

UCA §57-3-21(1). In *Metro West*, the Utah Supreme Court in discussing this issue with respect to a “wild deed” or “one executed by a stranger to the record title,” held that to be a good faith purchaser, “a subsequent purchaser must take the property without notice of a prior, unrecorded interest in the property.” *Metro West*, 89 P.3d 155 at 158, citing *Ault v. Holden*, 2002 UT 33, ¶ 31, 44 P.3d 781; *Metro West*, at 159. “In addition, to be in good faith a subsequent purchaser must also take the property “without notice of any infirmity in his grantor’s title.” *Metro West*, 89 P.3d 155 at 158, citing *Pender v. Bird*, 119 Utah 91, 96, 224 P.2d 1057, 1059 (1950). Said notice can be actual notice or constructive notice, by record or inquiry. *Metro West*, 89 P.3d 155 at 158. Record notice “results from a record or which is imputed by the recording statutes.” *Metro West*, 89 P.3d 155 at 158, quoting *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 837 (Utah 1998). Inquiry notice “is presumed because of the fact that a person has knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact.” *Id.* If the subsequent purchaser is found to have had either



actual or constructive notice, then they are precluded from having taken the property in good faith and the prior unrecorded interest in the property takes. *Metro West*, 89 P.3d 155 at 158.

In the *Metro West* case, the Supreme Court of Utah was faced with the issue of whether or not a purchaser who obtains title to property through a wild deed is a bona fide purchaser under Utah's recording statute. In that case, Salt Lake County received title to a 15-acre parcel in 1878 but failed to record its deed to that parcel until 1998. In the meantime, an intervening purchaser came in and purchased that property from purported owners in 1989. *Metro West* and the county became involved in litigation to resolve the dispute. After going through the trial court and the Court of Appeals, the Supreme Court of Utah found that because the 1989 transfer resulted from a conveyance where the Grantors had no record title that it was accomplished through a "wild deed". The Court defined wild deed as one executed by a stranger to the record title. The Utah Supreme Court concluded "that a purchaser whose chain of title is founded on a wild deed cannot be a bona fide purchaser" because that purchaser "is charged with notice of what is shown by the records of the county recorder in the county in which the property is situated". See *Crompton v. Jenson*, 70 Utah 55, 1 P.2d 242, 247 (Utah 1931) "and by implication charged with notice of what the records should show but do not..." The Court went on to say:

"[W]e hold that by definition a purchaser whose title is founded on a wild deed is on notice that his grantor had no record title to the property purportedly being conveyed. This is true in instances where, as in this case,

the subsequent purchaser has obtained actual notice of this absence by searching the records. Moreover, it is also true even when the purchaser has no actual notice of the title defect, since all grantees of wild deeds are necessarily charged with constructive record notice by virtue of the recording statutes. Accordingly, a purchaser who acquires property through a wild deed will be held to have been on notice of a defect in his grantor's title and will not qualify as a subsequent purchaser in good faith for purposes of Utah's recording statute." (See *Metro West* at 159).

In the case at hand, it is clear that the tax deeds that are the subject of this action are, in essence, wild deeds, under *Metro West*, in that they are deeds "executed by a stranger to the record title." *Metro West*, 89 P.3d 155 at 159. Thus, if a prior unrecorded interest in property has a better position than the purchaser of a wild deed certainly a prior recorded interest in the property (that of 12 X 12 and Buttars') has a better position than the purchaser of a wild deed. It is clear and Appellants have conceded the fact that even the Appellees and their predecessors in interest, including the Buttars and Adele B. Lewis, have all occupied their respective properties, including the area up to the "very old fence" lying between said properties, for more than twenty years. Additionally, it is clear from the record and Appellants have conceded that all of the Appellees have paid the taxes assessed by the County for the property whose legal description is contained on the tax notices received. Finally, it is also clear that a visit to the property by Appellants or Weber County would have put them on actual or, at least, constructive notice of "the possibility of the rights of another." *Metro West*, 89 P.3d 155 at 158, quoting *Paldevco Ltd. P'ship v. City of Auburn Hills*, No. 202134, 1998 WL 1988569, \*2, 1998 Mich. App. LEXIS 626, at \*5

(Mich.Ct.App. Dec. 18, 1998) (unpublished per curiam decision). Because Appellants had actual, or, at the very least, constructive notice of a prior unrecorded interest in the property, their purchase is not in good faith and, therefore, are precluded from taking the property over Appellees.

### **III. Appellants' Argument That Tax Deeds Enjoy Paramount**

#### **Title Constitutes Poor Public Policy**

Appellants' main argument is that tax deeds are entitled to a high degree of protection (Appellants' Brief page 9). Appellant has collected random comments from Utah case law concerning tax deeds and their sanctity. While tax deeds have a significant place in Utah real property law and they should not be treated lightly, Appellant urges the court to hold that tax deeds are paramount to all other title. Under Appellants' theory, a county could theoretically issue tax deeds and sell them to the public to increase tax revenues and thereby deprive long-standing property owners of their property right without even providing them with notice. Certainly if the court finds in favor of Appellants', Appellees' next course of action is likely to bring an action against the county for deprivation of their property without due process because the Appellees did not receive notice of these tax sales. Appellants have never submitted any evidence that Appellees received such notice.

It is unfortunate that Masseys purchased a tax deed which is traced back to a wild deed, but they had constructive notice of this fact. Certainly the county cannot do away with the defect in the chain of title simply by holding a tax sale. If

this were the case, then such would fly in the face of sound real property law. Property law is founded upon the long-term course of events relating to real property, the recording statutes and the recorded deeds. Because the Appellees had title to the property in question and occupied the same, Appellants were on notice of this fact and should be held to that standard. Moreover, they should not be able to show up at a tax sale and deprive other legitimate landowners of their property rights through the back door.

In conclusion, the findings of fact and conclusions of law which were entered by the trial court are appropriate. They are based upon sound principles of law and should not be disturbed. In the alternative, the *Metro West* case provides solid grounds for upholding the court's ruling.

In addition, Appellants have relied upon the *Kemmerer Coal Company v. Brigham Young University*, 723 F.2d 54 (Utah 1983) case. The holding in said case was based upon statute of limitations and not based upon facts which are anywhere similar to the facts at hand. In fact, *Kemmerer* is supportive of the Appellees' position because it finds that the land claimant purchased its interest after having record notice of a competing claim. Thus, the *Kemmerer* case is distinguished on its facts and is not persuasive authority supporting Appellants' position.

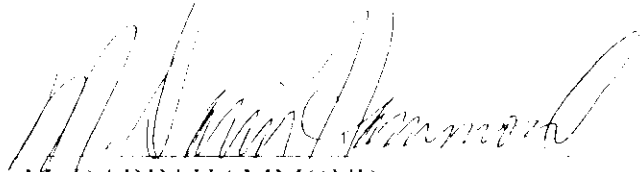
### CONCLUSION

The trial court appropriately granted Appellees' Motion for Summary Judgment viewing the facts in the light most favorable to the non-moving party

Appellants and finding no dispute as to **material** facts. The title held by Appellants by Tax Deed are not superior to title held by Appellees. To make such a finding would not only be incorrect, but poor public policy as well. Additionally, the title held by Appellants is subject to any infirmities in Grantor's title which, when the chain of title is reviewed, is completely defective. Moreover, such as boundary by acquiescence and adverse possession are doctrines which are very helpful to Appellees. Appellants have conceded the facts that Appellees and their predecessors in interest have occupied the disputed property for more than 20 years prior to commencement of this action and have paid the taxes assessed for their property for at least 20 years prior to commencement of this action. Appellant's claims also fail under Utah law because they purchased with notice, both actual and constructive, and are, thereby, precluded from being a good faith purchaser and voiding any pre-existing interests in the disputed property. The Findings of Fact and Conclusions of Law resulting in the "Order Quieting Title to Real Property in 12 X 12, L.L.C., and in Aaron B. Buttars and Brenda L. Buttars" are, therefore, appropriately supported by the pleadings and supporting documents submitted in the trial court's summary judgment proceedings. This Court should find that the Findings of Fact and Conclusions of Law appropriately supported, affirm the lower court's ruling granting summary judgment to the Appellees as well as the Order Quieting Title to Real Property in 12 X 12, L.L.C., and in Aaron B. Buttars and Brenda L. Buttars.

DATED this 14 day of April, 2005.

SMITH KNOWLES, P.C.

A handwritten signature in cursive script, appearing to read "M. Darin Hammond".

M. DARIN HAMMOND

Attorney for Appellees Aaron B. Buttars,  
Brenda L. Buttars and Adele B. Lewis

**CERTIFICATE OF MAILING**

I hereby certify that on this 14 day of April, 2005, I served a copy of the foregoing BRIEF OF THE APPELLEES AARON B. BUTTARS, BRENDA L. BUTTARS AND ADELE B. LEWIS, to the following:

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Legal Assistant

## ADDENDUM

In accordance with Utah Rules of Appellate Procedure, Rule 24(b)(2), Appellees hereby incorporate Appellants addendum as part of Appellees' brief. Appellees also hereby submit additional materials attached hereto as part of the addendum to Appellees' brief.



Tab A

09:59 1 Q No?

2 A (The witness shook her head from side to  
3 side.)

4 Q Did you perform a field survey?

09:59 5 A Yes, I did.

6 Q Did you locate the monuments determined from  
7 your preliminary analysis you should use?

8 A Yes, sir.

9 Q Did you locate the fence lines that are noted  
09:59 10 in the various deed descriptions?

11 MR. WARNER: What was that question? I'm  
12 sorry.

13 Q (BY MR. MARTINEAU) Did you locate the fence  
14 lines that are noted in the various deed descriptions?

10:00 15 A Various?

16 Q Any of the deed descriptions that you  
17 reviewed.

18 A On -- on that plat, I located those fence  
19 lines. I'm not sure what deed variations you're  
10:00 20 talking about. There must be a hundred deeds,  
21 Mr. Martineau.

22 Q Okay. Are you aware of any fence lines  
23 located on or in the vicinity of the property that  
24 we're concerned about other than as you have indicated  
10:00 25 on your Exhibit 4?

10:00 1 A You have to say that again for me.  
2 MR. MARTINEAU: Would you repeat it.  
3 (The requested portion of the record was  
4 read.)  
10:01 5 THE WITNESS: Am I aware of any other fence  
6 lines?  
7 Q (BY MR. MARTINEAU) Yes.  
8 A No, I'm not aware of any other fence lines  
9 other than what I've shown.  
10:01 10 Q And did you determine that the fence lines as  
11 you've indicated on Exhibit 4, in fact, existed?  
12 A Yes. By field measurement, I've gone out and  
13 tied in those fences.  
14 Q And did you make any effort to determine how  
10:01 15 long those fence -- fences had existed in their present  
16 location?  
17 A No, I haven't.  
18 Q Okay. Did you make any effort to determine  
19 that at all?  
10:02 20 A Other than looking at the fence and noting  
21 that it was a very old fence standing there. That's  
22 about it. 740  
23 Q Were those fence lines in reasonable repair?  
24 What condition did you find those fence lines to be in?  
10:02 25 MR. WARNER: Are you referring to all of the

14:03 1 Q Okay. Looking at the lis pendens, it's dated  
2 1944; is it not?  
3 A Yes.  
4 Q The answer's yes?  
14:04 5 A Yes.  
6 Q Would you believe, based on that, that the  
7 present fence lines have been in place since at least  
8 1944?  
9 A Oh, yeah. All of these fences have been in  
14:04 10 place since then.  
11 Q Continuing your narrative on Page 2,  
12 Paragraph 3, you say: Unfortunately, the above-stated  
13 tax deeds are conveying these rights to H.C. Massey.  
14 Do you see where it says that?  
14:05 15 A No, I don't.  
16 MR. WARNER: What was your reference again,  
17 Mr. Martineau?  
18 MR. MARTINEAU: I believe on Page 2,  
19 Paragraph 5.  
20 MR. LOVE: Off the record.  
21 (A discussion was held off the record.)  
22 Q (BY MR. MARTINEAU) Did you find that?  
23 A No, I haven't. Maybe you can point it out to  
24 me. I had to read the little part in the front of it  
14:06 25 first.

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14:17 1 Q You believe they had an interest?

2 A Uh-huh (affirmative).

3 Q And could you tell us what interest you  
4 believe they had?

14:17 5 A They had interest -- they believed that they  
6 had interest because they were having tax notices that  
7 were unpaid for. The tax notices were sent out to the  
8 people or the persons. They did not receive the tax  
9 money, so they had an interest in getting rid of it.

14:18 10 Q Do you have an opinion as to what priority  
11 those tax deeds would have over the other property in  
12 the area that was being occupied?

13 MR. WARNER: I'm going to object to the form  
14 of the question because I think it calls for a legal  
15 conclusion beyond the expertise of this witness.

16 MR. MARTINEAU: I'll ask her to answer.

17 THE WITNESS: I'm not sure at this time.

18 Q (BY MR. MARTINEAU) Pardon me? You're not  
19 sure?

14:18 20 A I'm not sure at this time.

21 Q One way or the other? You're not sure  
22 whether -- well, never mind.

23 Okay. Reading the last paragraph on Page 3,  
24 you state, quote, I believe that these deeds not only  
14:19 25 cloud the title of record but also convey a fraud,

14:19 1 parentheses, fraud order, end of parentheses, end of  
2 quote.

3 Do you see where your narrative says that?

4 A Yes, sir.

4:19 5 Q The answer's yes?

6 A Yes, sir.

7 Q What deeds are you referring to where you say  
8 "believe that these deeds"?

9 A Talking in respect to the tax deeds.

4:19 10 Q Okay. What do you mean by the terms "fraud"  
11 or "fraud order"?

12 A I believe that they sold the property. I  
13 believe the tax deeds sold the property to Massey in  
14 which Weber County -- they may have had an interest in  
4:20 15 it for the tax notices, the tax money that they were  
16 expecting to receive, but they did not own the property  
17 to sell it.

18 Q Okay. Now, when you say "not only cloud the  
19 title of record," do you -- can you tell us what that  
4:20 20 means if different than what you've already testified  
21 to?

22 A I think that when you're saying that you're  
23 clouding the title, you're clouding the title on  
24 prospective properties, showing someone else has  
4:21 25 another additional interest in that property.

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16:33 1 Q Were you asked by Mr. Massey?

2 A No, no conclusions.

3 Q Go ahead. What did you mean then when you  
4 used the terminology it was a fraud or a fraud order?  
16:33 5 What was on your mind when you put that in your  
6 narrative?

7 MR. MARTINEAU: I object to that. That's  
8 been asked and answered.

9 Q (BY MR. WARNER) Go ahead and answer.

10 MR. LOVE: And speaks for itself.

11 Q (BY MR. WARNER) Go ahead and answer.

12 A I believe that Weber County conveying it to  
13 the Masseys and it being overlaid the way it is, the  
14 county not having acknowledgment as to where that  
16:34 15 property actually lay before making up the deeds and  
16 selling them, was -- and I do believe that this was  
17 very strong language, but . . .

18 MR. MARTINEAU: I'm sorry?

19 THE WITNESS: I say I do believe it was very  
16:34 20 strong language, but I do think that it was rather

21 fraudulent in -- or misrepresented, okay?

22 Misrepresenting what the -- what the property was and  
23 the county selling the property like they did, and that

24 was my only perspective in saying what the deeds were.

16:34 25 The deeds show a cloud on the -- cloud of title of that

16:34 1 area to a surveyor.

2 MR. WARNER: I have no other questions.

3 MR. MARTINEAU: I have a couple.

4 MR. LOVE: I have one.

5 FURTHER EXAMINATION

6 BY MR. LOVE:

7 Q After Mr. Martineau finished his examination  
8 and before Mr. Hammond began his -- or any other time  
9 after Mr. Mr. Martineau -- strike that.

16:35 10 After Mr. Martineau finished his examination,  
11 did you have any discussion with Mr. Warner about  
12 clarifying your testimony as to what you meant by  
13 fraud, this afternoon?

14 A No. I knew that I was going to have to tell  
16:35 15 you what I meant by fraud earlier. Once I -- once I  
16 knew that all three of my pages went to all of you  
17 prior to me adjusting the narrative, then I knew that I  
18 had to explain my other two pages, okay?

19 Q Prior to today, did you know your original  
16:36 20 narrative had gone to any of the other parties in this  
21 litigation?

22 A I think that I had realized that all three  
23 pages of my narrative had gone to all of you on our  
24 first meeting with Mr. Warner about a week ago.

16:36 25 Q That's when you realized that those three

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Tab B

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IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY,

OGDEN DEPARTMENT, STATE OF UTAH

---

H.C. MASSEY and BETTY MASSEY

Plaintiff,

v.

KEN GRIFFITHS, et al.

Defendant

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AFFIDAVIT OF JOHN B. STAHL

Case No. 9609000027

Judge Roger S. Dutson

I, JOHN B. STAHL, being first duly sworn under oath, state as follows:

1. I am a registered land surveyor duly licensed to practice in the state of Utah and am currently in good standing. I am the owner of Cornerstone Professional Land Surveys, Inc., and am able to make this affidavit based upon my personal knowledge of the matters contained herein.

2. Cornerstone Professional Land Surveys, Inc. was requested by Kira E. Macfarlane (now Kira E. Slawson) of Blackburn & Stoll, LC to search and examine the public, quasi-public and private records as could be obtained concerning property owned by BKB, L.L.C. located at 1515 South 1200 West Street, Ogden, Utah. The request consisted of three purposes: 1) review the record title to the property for completeness, 2) review the survey history to determine the positions of the boundaries of the property, and 3) determine the effect of a series of tax deeds upon the subject property.

3. Based upon my review of the records, it is my opinion that 1) the chain of title to the BKB, L.L.C. property is continuous and unbroken from the original US of A patent dated May 1, 1872 to the present. 2) documentation of private and public surveys consistently reflect the locations of the boundary lines as presently occupied, 3) the root

of title for the tax deeds conveyed to H.C. Massey and wife, Betty P. Massey are founded upon a Quit Claim Deed dated September 25, 1979 purporting to convey property within which no interest was held by the grantor, and 4) if the Massey Tax Parcel is found to be located north of the BKB property fence, that subsequent tax sale foreclosures by Weber County were unfounded and unwarranted. The basis of my opinion is as follows:

a. All of the properties in dispute share a common source in title held by Caleb Parry by virtue of a Patent from the US of A dated May 1, 1872 and a Warranty Deed from Thomas Joyce dated February 28, 1894. (See Pg. 7, Survey Findings Report, May 15, 1998 by John B. Stahl, PLS)

b. Caleb Parry divided the property by the conveyance of nine separate and distinct parcels over a period of time from 1874 to 1929. Two parcels were conveyed by the administrator of the Estate of Caleb Parry in 1939 and 1950. (See Pgs. 8-15, Survey Findings Report)

- (1) Three key parcel conveyances create the boundaries of the parcels in dispute. The first was conveyed by Warranty Deed to Moroni S. Marriott on July 12, 1880 recorded in Book M at Page 600 amended in Book O at Page 598. (See Parcel A6, Survey Findings Report.) The second parcel, conveyed also to Moroni S. Marriott by Warranty Deed November 13, 1894, adjoins the first parcel on the north. (See Parcel A7, Survey Findings Report) The third parcel, conveyed by Warranty Deed June 26, 1929 to the Wasatch Gas Company is consistently located adjoining on the north of the second parcel and on the west side of the county road. (See Parcel A9, Survey Findings Report)

The southerly two parcels are currently owned by Aaron B. and Brenda L. Buttars, the northerly parcel still being owned and operated as a natural gas distribution facility by Questar Gas. (See Pg. 17, Survey Findings Report)

- (2) On September 4, 1943 the remainder of the Caleb Parry estate lying west of the County Road was conveyed by Frances S. Parry, wife of Caleb Parry, to Lucile P. Donhue, Myrtle P. Wells, Oscar Leland Parry and C. Royal Parry as tenants in common each with 1/4 interest. (See Pg. 18, Survey Findings Report)

c. The Willard Canal right of way was surveyed in 1960-1961 and acquired by the United States of America March 24, 1964. (See Pg. 19, Survey Findings Report)

d. On October 22, 1963, the remainder of the Caleb Parry estate lying east of the Willard Canal, west of the county road, and south of the Central Pacific Railroad right of way was surveyed and subdivided into four parcels by E. Paul Gilgen, a registered land surveyor. The survey described and identified each of the four tracts as being Tract 1 on the north and Tract 4 on the south.

On October 28, 1963, title to Tract 1 was conveyed to Joseph A. Donahue and wife, Fern L. Donahue, title to Tract 2 was conveyed to Myrtle P. Wells, and title to Tracts 3 and 4 was conveyed to Oscar L. Parry and Frances F. Hanks. Title to Tracts 1 and 2 are currently held by Beryl J. Griffiths while title to Tracts 3 and 4 are currently held by BKB, L.L.C. (See Pgs. 21 -24, Survey Findings Report)

e. The south boundary of the subdivision was described by E. Paul Gilgen as:

"being West 942.09 feet and South 487.89 feet from the East Quarter Corner of said Section 24, and running thence South along [the center of 1200 West Street]187 feet; thence West **along a fence** 183 feet; thence South **along a fence** 40 feet; thence West **along a fence** 202 feet; thence South **along a fence** 289.80 feet to the east line of the Willard Canal right-of-way; thence Northwesterly along said east line as follows: ..."

The fence line referred to above is the common fence between the property occupied by BKB, L.L.C. and the properties occupied by Questar Gas and Aaron B. and Brenda L. Buttars. The first two courses refer to the Questar property fence and the subsequent two courses refer to the Buttars property fence. (See Pg. 22, Survey Findings Report)

f. The Weber County Surveyor's office has documented evidence indicating numerous positions for the location of the East Quarter Corner from which the properties are located. The position of the East Quarter Corner utilized by the Gilgen survey is consistent with the Willard Canal survey. It is apparent from retracement of other surveys in 1911 that the position of the East Quarter Corner has been moved in excess of 80 feet in the north-south direction. (See Pg. 30, Survey Findings Report)

g. False assumptions of common corner positions and common basis of bearings used in 1880 with those used in 1963 mislead leaving the impression that a 110 foot high (north-south) parcel exists between the BKB and Questar/Buttars properties. These false assumptions also result in a 26 foot wide (east-west) by 290 foot high (north-south) parcel between the BKB and Buttars property. Proper deed interpretations and boundary survey retracement techniques reveal no such

property exists. The BKB, Questar and Buttars properties are contiguous. (See Pgs. 4 and 25, Survey Findings Report)

h. The tax parcels foreclosed upon by Weber County were based upon a Quit Claim Deed executed by Myrtle P. Wells to Oscar Leland Parry and Frances E. Hanks on September 25, 1979. The dimensions contained in the tax parcel descriptions originate from the conveyances of record for Tract 4 of the Gilgen survey as well as the Questar and Buttars property descriptions. The tax parcels had no interest in the property described on the Quit Claim Deed. The Quit Claim Deed description is founded upon the dimensions originating from improper interpretation of the descriptions of record. The property described is occupied by Questar and Buttars. The following indicates:

- (1) The language of the Quit Claim Deed is as follows:

"Part of the Southeast Quarter of Section 24, Township 6 North, Range 2 West, Salt Lake Meridian: Beginning 20 chains East and 714.89 feet South of the Northwest corner of said Quarter Section and running thence South 110.11 feet, thence East 176 feet; thence North 40 feet, thence East 150 feet, thence South 40 feet; thence East to a point West 942.09 feet from the East line of said Quarter Section; thence North 150.11 feet; thence West 183 feet; thence South 40 feet; thence West 194.91 feet to the point of beginning

ALSO: Part of the Southeast Quarter of Section 24, Township 6 North, Range 2 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point 1291.37 feet West and 1040.37 feet south of the East Quarter corner of said Section 24; thence North 325.49 feet; thence West 35.71 feet; thence South 289.80 feet; thence South 45°01' East 50.49 feet to the place of beginning."

- (2) The first course to the point of beginning is "20 chains East" from the northwest corner, not the east quarter corner as contained in the record. Twenty chains is equivalent to 1320 feet which, when combined with the 1320 feet contained in the Buttars deed, equals the ideal quarter section dimension of 2640 feet or precisely one-half mile. A condition rarely found in reality. Washington Jenkins determined the dimension in this case to be 2753.8 feet. A difference of 113.8 feet.
- (3) The second course to the point of beginning is "714.89 feet South" from the Quarter Section Line. This dimension is revealed by combining the Gilgen survey point of beginning tie, 487.89 feet, and the frontage for Tract 4, 187 feet, with the frontage of the

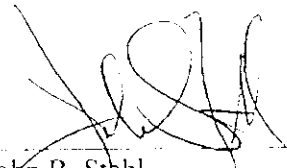
Questar property, 40 feet. The indication is that the north line of the tax parcel is coincident with the south lines of the Questar property and Tract 4. The tax parcel must, therefore, be located south of the BKB property.

- (4) The third course, "South 110.11 feet" is precisely the dimension left over from combining the total dimension of 1320 feet South with 7.5 chains North (495 feet ) contained in the Buttars deed and 714.89 feet North contained in the BKB and Questar deeds. The south line of the tax deed is coincident with the north line of the Buttars deed. The tax parcel must, therefore, be located north of the Buttars property.
- (5) Similar comparison of the remaining courses in the Quit Claim Deed and subsequent comparison with the courses contained in the tax deed descriptions reveal findings consistent with those recited above. The deeds attempt to describe property lying between the BKB and Questar/Buttars properties which, in fact, do not exist.

- i. Taxes were, at all times, paid on all the property north of the fence line by the owners of Tract 4. No five year lapse of payment has transpired on any of the property north of the fence line.

4. Further, it is my professional opinion, based upon the above, that 1) the Massey Tax Parcel does not exist on the ground, 2) if the Massey Tax Parcel is located on the ground, it must lie south of the fence line marking the southern boundary of Tract 4 as surveyed and described by E. Paul Gilgen and subsequently conveyed to BKB, L.L.C. and 3) that if the Massey Tax Parcel is located north of the fence line marking the south line of Tract 4, the tax notice and subsequent sale were improperly conceived and executed.

Dated this 22<sup>nd</sup> day of March, 2002

  
 \_\_\_\_\_  
 John B. Stahl

SUBSCRIBED and SWORN before me this 22<sup>nd</sup> day of March, 2002

  
 \_\_\_\_\_  
 NOTARY PUBLIC

