2005

CLAUDIA N. CASE, individually, and as Trustee of the Lamar West Trust dated May 6, 1993, and as Trustee of the Georgia Lamar West Trust dated January 21, 1999 v. Arnold K. West and Mary Helen West : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CLAUDIA N. CASE, individually, and as Trustee of the Lamar West Trust dated May 6, 1993, and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, Defendant/Appellant, vs. ARNOLD K. WEST and MARY HELEN WEST, Plaintiffs/Appellees.	No. 20050315-CA Priority No. 14

BRIEF OF APPELLANT

Appeal From a Final Civil Judgment of the
Fourth Judicial District Court of Utah County
Judge Taylor, Case No. 990404457

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INTRODUCTION

Defendant and Appellant Claudia N. Case, individually and as Trustee of the Lamar West Trust dated May 6, 1993 and the Georgia Lamar West Trust dated January 21, 1999, appeals from a series of orders entered by the Fourth Judicial District Court in and for Utah County, State of Utah, as follows:

a. The trial court's order of November 1, 2000 (R. 0289, attachment 1 hereto);

b. The trial court's judgment of February 16, 2001 (R. 0237, attachment 2 hereto);

c. The trial court's order clarifying judgment dated July 2, 2001 (R. 0377, attachment 3 hereto); and

d. The trial court's order of dismissal of the Third Claim for Relief entered March 21, 2005 (R. 0740, attachment 4 hereto).

Through the above-referenced rulings, the trial court held – as a matter of law, and without even giving Appellant an opportunity for oral argument, much less trial on the merits – that Plaintiffs Arnold K. West and Mary Helen West were entitled to an order, judgment and decree quieting title in and to a parcel of real property located in Utah County, State of Utah, in themselves, free and clear of any claim of right, title or interest therein by Appellant or the Trusts on whose behalf she acted, notwithstanding Appellees' open admission that they had failed to comply in full with the terms and conditions of the real estate contract entered into with the original trustor; further, finding Appellant in

breach of the real estate contract, ordering specific enforcement of the contract in the form of a warranty deed from Appellant to Appellees, and awarding Appellees their costs and attorneys' fees. Appellees' supplemental claim for slander of title was reserved for trial, but abandoned by Appellees on the eve of trial.

Ample evidence appears in the trial court record which should have precluded the entry of summary judgment herein. By Appellees' own admission, and as the trial court expressly found, they failed to perform an express covenant in the 1987 real estate contract under which they claimed title to the Subject Property: They did not pay any taxes on the property during the contract period. Their explanation for this failure is that Georgia Lamar West, the named seller under the contract, had told them that they need not pay the taxes. In separate conversations with her daughter (Appellant), however, Georgia Lamar West expressed concern that the taxes were not being paid. They likewise took the insistent step of conveying her interest in the property to the 1993 Trust. Finally, when Appellees came to her for a corrective warranty deed in 1998, claiming to have paid off the 1987 contract, Georgia Lamar West refused the conveyance – conduct clearly and consistent with having waived Appellees' obligation to pay taxes under the 1987 contract. These acts, coupled with expressions of concern to her daughter, all as set out in the lower court record, showed a precluded summary judgment.

Even if the Court were correct in finding breach, the breach should have been ascribed to the estate of Georgia Lamar West, and not to Appellant or the Trusts which

she represents. Neither Appellant nor the Trusts are property "successors" of the estate under governing case law, and should not be found in breach of the contract.

Finally, Appellant was entitled to oral argument on the various motions culminating in the final order of summary judgment herein.

JURISDICTION AND BASIS FOR APPEAL

This is an appeal from a final order of the Fourth Judicial District Court for Utah County, State of Utah, quieting title in and to a parcel of real property located in Utah County, State of Utah; finding, as a matter of law, that Defendant was in breach of her Uniform Real Estate Contract relating to that property; ordering specific performance of the Real Estate Contract, and awarding costs and attorneys' fees pursuant to the terms of the contract. Jurisdiction obtains pursuant to Utah Code Ann. § 78-2a-3(2)(j). The appeal was referred to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(5).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether the trial court erred in finding that, as a matter of law, Plaintiffs/Appellees were entitled to an order quieting title in and to the Subject Property in them, free and clear of any claim of Defendant/Appellant[1].

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[1]This issue was not addressed to the trial court on motion for summary judgment; however, to the extent that it challenges the justiciability of the claim, it goes to the subject matter jurisdiction of the court, and may therefore be raised at any point in the proceedings – *see State v. Sun Surety Insurance Co.*, 2004 UT 74, 99 P. 3d 818.

2. Whether the trial court erred in finding that, as a matter of law, Defendant/ Appellant was in breach of the 1987 Uniform Real Estate Contract through her refusal to convey, on behalf of the May 6, 1993 trust for the January 21, 1999 trust any interest in and to the Subject Property, notwithstanding Appellees' failure to pay taxes on the Subject Property during the contract period as required by the terms of the 1987 Uniform Real Estate Contract, thus entitling Plaintiff/Appellees to specific performance of the contract and an award of costs and attorneys fees[2].

3. Whether the trial court erred in finding that, as a matter of law, Georgia Lamar West had waived Appellees' obligation to taxes on the Subject Property during the period of the 1987 Uniform Real Estate Contract[3].

4. Whether the trial court erred in finding, as a matter of law, that Defendant/ Appellant was the successor-in-interest to the Georgia Lamar West and/or the Estate of Georgia Lamar West, and therefore obligated under the 1987 Uniform Real Estate Contract[4].

5. Whether the lower court erred in denying Appellant oral argument on summary judgment[5].

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[2]Preserved at R. 0199, 0300, 0336.

[3]Preserved at R. 0199, 0300, 0336.

[4]Preserved at R. 0199, 0300, 0336.

[5]Preserved at R.0190, 0241, 0299, 0326.

The standard of review for all of the foregoing issues is that applicable to orders granting summary judgment generally – the decision is reviewed for correctness, affording no deference to the trial court's decision. *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991); *Springville Citizens for a Better Community v. City of Springville,* 1999 Utah 25, 979 P.2d 332. The court reviews the record, and construes all facts in the light most favorable to defendant/appellant, and sustains the lower court's ruling only if, as a matter of law, no genuine issue of material fact existed precluding entry of summary judgment. *Winegar v. Froerer Corp.*, 813 P.2d 104 (Utah 1991); *Mountain States Telephone & Telegraph Co. v. Garfield County,* 811 P.2d 184 (Utah 1991).

CITATION OF DETERMINATIVE AUTHORITIES

Peterson v. Peterson, 190 P.2d 135, 112 Utah 554 (Utah 1948)

Hansen v. Green River Group, 748 P.2d 1102 (UT App. 1988)

Andrus v. Bagley, 775 P.2d 934 (Utah 1989)

Latses v. Nick Floor, Inc., 99 Utah 214, 104 P.2d 619 (1940)

UPC, Inc. v. ROA General, Inc., 990 P.2d 945 (UT App. 1999)

Zions Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975)

Rule 4-501(3)(C), Utah Rules of Judicial Administration.[6]

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[6]Since the effective courts' rulings in this regard, Rule 4-501, Utah Rules of Judicial Administration has been repealed and replaced by various provisions of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

Plaintiffs/Appellees Arnold K. West and Mary Helen West ("Appellees") filed this action on December 28, 1999, claiming that (1) they were entitled to a finding that Defendant and Appellant Claudia N. Case, individually and as Trustee of the Lamar West Trust dated May 6, 1993 and the Georgia Lamar West Trust dated January 21, 1999, was in breach of a Uniform Real Estate Contract dated April 8, 1987 between Georgia Lamar West and Appellees, under which Georgia Lamar West promised (pursuant to the terms and conditions of the 1987 agreement) to convey to Appellees title to a parcel of real property located in Utah County, State of Utah; (2) an order quieting title in and to the Subject Property in Appellees; and (3) a judgment in favor of Appellees and against Appellants for Appellants' slander of Appellees' title to the Subject Property.

Appellees filed a motion for partial summary judgment on July 25, 2000, seeking judgment as a matter of law on their breach of contract and quiet title claims, and reserving the slander of title claim for trial. The trial court initially denied the motion for summary judgment, finding factual disputes as to Appellees' performance of the 1987 agreement (R. 0237); thereafter, however, the court reversed itself and granted the motion (R. 0247, 0389). In entering judgment, the court quieted title to the Subject Property in Appellees; found Appellant – not the estate of Georgia Lamar West – in breach of the 1987 agreement; ordered specific performance of the 1987 agreement by Appellant; and awarded Appellees their costs and attorneys' fees.

Subsequent motion practice clarified that the award of attorneys' fees was against the Trusts represented by Appellant Claudia N. Case, and not against Claudia N. Case individually; in other respects, the court did not modify its prior ruling (R. 0377).

Appellees' remaining claim for slander of title was reserved for trial, which was scheduled to commence March 21, 2005. On that date, however, the parties presented the court with a stipulation dismissing the slander of title claim, resulting in a final order of the court as of that date (R. 0740).

STATEMENT OF FACTS

A. Underlying Facts

1. Plaintiffs/Appellees Arnold K. West and Mary Helen West are individuals who reside at 3660 West 100 North, American Fork, Utah County, State of Utah. (Complaint, R. 0015; Answer, 0024.)

2. Defendant/Appellant is an individual who, at the times relevant to this action, has also been a resident of Utah County, State of Utah. (Complaint, R. 0015; Answer, 0024.)

3. Defendant and Plaintiff Mary Helen West are sisters, and daughters of Georgia Lamar West (formerly known as Lamar Nerdin). The children of Georgia Lamar West are as follows:

Lewis L. Dade;
Georgia LaRay Christensen;
Marion William Dade;
Mark Ernest Dade;

Mary Helen West;
Joseph William Nerdin;
Betty Jo Nerdin West; and
Defendant Claudia Nerdin Case.

(May 6, 1993 Trust Agreement, R. 0152)

4. On or about April 8, 1987, Appellees entered into a Uniform Real Estate Contract with Georgia Lamar West ("1987 Agreement"), pursuant to the terms of which Appellees agreed to purchase, and Georgia Lamar West agreed to sell, a parcel of land located in Utah County, State of Utah, at 386 West Pacific Drive, American Fork, Utah, more particularly described as follows:

> Parcel 2: Beginning 378.50 feet West along the monument line and 333.45 feet South from the American Fork City monument at the center line intersection of 300 West Street and 300 North Street; thence North 84°30′ West 30.00 feet; thence South 16°59′15″ West 176.14 feet to the North Right-of-Way line of Union Pacific Railroad Company; thence South 63°23′ East 89.29 feet along said Right-of-Way line; thence North 0°25′ East 205.68 feet to the point of beginning. Containing 0.25 acres.
>
> Parcel 3: Beginning 378.50 feet West along the monument line and South 333.45 feet from the American Fork City monument at the center line intersection of 300 West Street and 300 North Street; thence South 0°25′00″ West 205.58 feet to the North Right-of-Way line of the Union Pacific Railroad Company; thence South 63°23′00″ East 55.40 feet along said Right-of-Way line; thence North 0°25′00″ East 225.61 feet along the fence line; thence North 84°30′00″ West 49.91 feet to the point of beginning. Containing 0.246 acres.

("Subject Property"). (Complaint, R. 0015; Answer, 0024; 1987 Agreement, R. 0157)

5. The 1987 Agreement provided in part as follows:

> The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this Agreement. The Seller hereby covenants

and agrees that there are no assessments against said premises except the following:

a. Buyer and the Seller mutually agree that the Seller is to retain exclusive ownership of the usage of an existing flowing well located on Parcel 2 as named above and that the Buyer is not purchasing by this Agreement any rights appurtenant to the usage of the well or any water flowing from said well.

(May 6, 1993 Trust Agreement, R. 0152)

6. The Agreement further provided in part as follows:

In the event of the failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within thirty (30) days thereafter, the Seller, at his option shall have the following alternative remedies:

a. Seller shall have the right, upon failure of the Buyer to remedy the default within five (5) days after written notice, to be released from all obligations in law and in equity to convey said property, at all payment which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land, shall become property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

b. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorney's fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereafter in the event of a subsequent default); or

c. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and to proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain.

(May 6, 1993 Trust Agreement, R. 0152)

7. The parties to the 1987 Agreement agreed that time was of the essence to the performance thereof. (May 6, 1993 Trust Agreement, R. 0152)

8. On the same date as the 1987 Agreement, Lamar West executed a Warranty Deed, with herself as Grantor and Appellees as Grantees, conveying the subject property to Plaintiffs, and placed the same in escrow pending full payment under the contract. (Complaint, R. 0015; Answer, R. 0024; 1987 Warranty Deed, R. 0154)

9. Between 1987 and 1998, Appellees made payments under the contract; Appellees never, however, paid taxes assessed against the subject property by Utah County. (Affidavit of Claudia Case, R.0188, at ¶ 8)

10. Before the trial court, Appellees maintained that, during her lifetime, Georgia Lamar West told them that "they did not have to worry about paying the property taxes on the property and that she would pay the property taxes for the time period that the warranty deed was to be held in escrow" (see Supplemental Affidavit of Mary Helen

West, R. 210, at ¶ 4); Appellees never maintained, however, that their obligation to pay taxes under the 1987 contract was waived in writing.

11. On or about May 6, 1993, Georgia Lamar West created the Lamar West Trust. (May 6, 1993 Trust Agreement, R. 0152)

12. The express purpose of the Lamar West Trust was for the primary benefit of Lamar West during her lifetime, and her family thereafter. (May 6, 1993 Trust Agreement, R. 0152)

13. The 1993 Trust designated Georgia Lamar West as original Trustee thereof, and Appellees as replacement Trustees in the event of (and for the period of) any incapacitation of Georgia Lamar West. (May 6, 1993 Trust Agreement, R. 0152)

14. Also on May 6, 1993, Georgia Lamar West executed a quitclaim deed which purported to convey all of her right, title and interest in and to, *inter alia*, the subject property to the 1993 Trust. (Complaint, R. 0015; Answer, R. 0027; R. 0133)

15. Between the date of the 1987 Agreement and November 20, 1997, Appellant performed numerous care services for Georgia Lamar West, including purchase of groceries and supplies, transportation, healthcare, and other similar services; however, Georgia Lamar West began to express concerns to Appellant, and other family members, over the manner in which Appellees took the checkbook away from her and took her mail away from her. According to Georgia Lamar West, checks drawn on her account were not always signed by her. She expressed concern on several occasions that she was

concerned that Appellees were going to place her in a nursing home, and was under great fear that she would in fact be placed in a nursing home. (See Defendants' Answers to Plaintiff's First Set of Requests for Admissions, Interrogatories, and Request for Production of Documents, R. 0666, at Answer to Interrogatory No. 9, p. 6 thereof.)

16. During the same conversations, Georgia Lamar West expressed concern to Appellant that taxes on the property were not being paid. *Id.*

17. On November 20, 1997, Georgia Lamar West executed an amendment to the 1993 Trust, which, among other changes, removed Appellees as named successor trustees, and appointed Defendant and her sister, Betty Jo Nerdin West, as successor co-trustees thereunder. (R. 0123)

18. On March 30, 1998, Appellees sought and received, from the escrow handling the 1987 contract, notification that all payments due under the 1987 contract had been paid, and presenting the 1987 Warranty Deed for recording. (Complaint, R. 0015; Answer, R. 0024)

19. Upon recording of the 1987 Warranty Deed, however, Appellees received a Notice of Discrepancy from the Office of the Utah County Recorder, noting that, as of that date, the Grantor was not vested with title, rather, that title had been conveyed to the 1993 Trust with Lamar West as Trustee. (Complaint, R. 0015; Answer, R. 0024)

20. Appellees thereupon prepared a replacement Warranty Deed, and made demand upon Georgia Lamar West to execute the same on behalf of the 1993 Trust. (Complaint, R. 0015; Answer, R. 0024)

21. Georgia Lamar West, on behalf of herself and the 1993 Trust, refused to execute Appellees' proposed Warranty Deed in 1998. (Complaint, R. 0015; Answer, R. 0024)

22. On January 21, 1999, Georgia Lamar West established the Georgia Lamar West Trust of that date ("1999 Trust"). (R. 0126)

23. By its terms, the 1999 Trust "amends in its entirety any other Trust I may have." (R. 0126)

24. The 1999 Trust had, as its stated and express purpose, the provision for Marion William Dade during his lifetime, and after his death, the distribution of trust assets among the children of Georgia Lamar West as provided therein. (R. 0126)

25. Pursuant to the terms of the 1999 Trust, Georgia Lamar West, as Trustor, expressed her intent to transfer all property in the 1993 Trust to the 1999 Trust. (R. 0126)

26. Claudia N. Case was named as Trustee of the 1999 Trust. (R. 0126)

27. Georgia Lamar West died March 1, 1999. (R. 0015)

28. Appellant thereafter executed a quit-claim deed dated June 9, 1999. (R. 0098)

29. By the quit-claim deed, Appellant transferred, from the 1993 Trust to the 1999 Trust, all of the 1993 Trust rights, title and interest in and to the following described parcel of real property:

> Beginning at a fence corner, which point is South 165.14 feet and west 361.08 feet from the Southwest corner of Block 36, Plat "A", American Fork City survey of building lots; Thence North 89°33'33" West along a fence line, 217.23 feet to a fence corner; Thence South 0°31'39" West along a fence line, 153.42 feet to a fence corner; thence South 81°51'18" West along a fence, 9.53 feet to a fence line; thence South 5°33'26"West along a fence line, 162.79 feet to the North line of the Union Pacific Railroad Right-of-Way; Thence South 63°33'33" East along said Right-of-Way, 270.54 feet to a fence line: Thence North 0°12'36" East along said fence line, 435.59 feet to the point of beginning area-1.979 acres.

("Quit-Claim Deed Property"). (R. 0098)

30. Appellant was given to understand that there were two purposes for the 1999 Quit-Claim Deed:

a. Utah County had advised that there were discrepancies in the legal descriptions, and the deed was intended to correct such discrepancies; and

b. The Deed was part of a general transfer of assets (including money and CDs) from one Trust to the other.

(Affidavit of Claudia Case, R. 0364 at ¶ 3.)

B. Course of Proceedings Before the Trial Court

31. Plaintiffs/Appellees filed a Complaint herein on December 28, 1999. (R. 0015)

32. In the Complaint, Appellees sought an order quieting title in and to the Subject Property in themselves, free and clear of any claim by Appellant or the Trusts which she represents; further, a judgment for breach of contract by Appellant; finally, for damages due to an alleged slander of the title to the property. (R. 0015)

33. Appellees moved the court for partial summary judgment on July 25, 2000, and requested oral argument as of that same date. (R. 0065)

34. Appellees' reply memorandum in support of their motion for partial summary judgment filed September 5, 2000, attached additional and supplemental affidavits, raising new allegations of fact which Appellees did not have the opportunity to address. (R. 0234)

35. The trial court's initial memorandum decision, entered September 6, 2000 (R.0237), denied Appellees' motion for summary judgment; thereafter, by memorandum decision dated October 2, 2000 (R. 0247), the court reversed itself and granted summary judgment quieting title in and to the Subject Property in Appellees, finding Appellant to be successor-in-interest under the Uniform Real Estate Contract, and liable to Appellees for breach of that agreement; and ordering specific performance of the agreement in the form of a warranty deed from Appellant to Appellees. No hearing was afforded in this regard. The court's October 2, 2000 memorandum decision was reflected in an order dated November 1, 2000. (R. 0389)

36. On November 13, 2000, Appellant moved for an amendment of the Court's order and for reconsideration, requesting oral argument thereon. (R. 0302)

37. By memorandum decision dated January 18, 2001, the trial court denied Appellant's motion, and again refused to grant oral argument. (R. 0340)

38. The court's memorandum decision was reflected in an order dated February 15, 2001. (R. 0345)

39. The trial court entered judgment on February 16, 2001 in favor of Appellees and against Appellant in the amount of $1,537.50 for attorneys' fees. (R. 0347)

40. By order dated July 2, 2001, the trial court clarified its prior rulings in the case, holding that all judgments entered therein were against the Defendant trust and not against Claudia N. Case individually. (R. 0377)

41. Pursuant to Stipulation dated March 21, 2005, Appellees' remaining cause of action (slander of title) was dismissed by court order of that same date. The court's order was entered as a final adjudication of all issues in the case on the merits effective as of that date. (R. 0740)

RELATED OR PRIOR APPEALS

There are no related or prior appeals relative to this action.[7]

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[7] In a separate and unrelated proceeding, styled *Gordon Case & Company, a Utah business entity, Plaintiff, v. Arnold West, an individual, and Mary Helen West, an individual, Defendants* (Case No. 030200433), Gordon Case, husband to Appellant, sought eviction of Appellees from the Subject Property following a non-judicial foreclosure of a deed of trust on the Subject Property. The trial court dismissed the

SUMMARY OF ARGUMENT

Appellees' Complaint did not make out a cause of action under the Utah Quiet Title Act, Utah Code Ann. § 78-40-1, *et seq.* Appellees did not allege, and have not shown facts to establish, that they were defending their title in and to the Subject Property against an adverse claim; rather, they were claiming a contract right to *receive* a conveyance of title under a Uniform Real Estate Contract. Under governing law, the order quieting title was therefore inappropriate.

In compelling specific performance of the 1987 agreement, the trial court overlooked evidence of record establishing the existence of genuine issues of material fact. Specifically, the trial court disregarded the fact that, in petitioning for specific performance of the 1987 agreement, Appellees had failed to perform a material covenant under that agreement – they failed to pay the taxes on the property during the contract period, a payment expressly incumbent upon them under the terms of the agreement. The trial court's observation that Georgia Lamar West, the trustor of both Appellant Trusts, had "waived" the tax payment requirement was clearly not sustainable as a matter of law – both by words to Appellant Claudia N. Case and by her conduct in transferring title to the 1993 Trust, and in refusing to convey title to Appellees when they claimed to have

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action, from which Plaintiff Gordon Case appealed to this Court (Appeal No. 20040135-CA).

performed the 1987 agreement in full, Georgia Lamar West evidenced an intent *not* to waive the requirements of the agreement.

Even if the Court were to find that Georgia Lamar West was in breach of the 1987 agreement (when, in 1998, she refused to convey title to the property), that breach should not be ascribable to the Appellant or the Trusts she represents. Neither Appellant nor the Trusts are "successors-in-interest" within the meaning of governing case law. The party in breach (if any) should be the estate of Georgia Lamar West.

Appellees' proffered evidence concerning "waiver," in fact, consisted of their testimonies that, prior to her death, Georgia Lamar West actually volunteered to make tax payments *herself,* rather than asking Appellees to honor their contractual commitment to do so. As such, the suggested "waiver" is actually a modification of the terms of the 1987 agreement; since the agreement itself is required to be in writing under Utah's Statute of Frauds, any claimed verbal modification thereof is invalid, and should not have formed the basis of summary judgment.

Finally, Appellant was entitled (pursuant to both procedural rules in effect at the time, and those which have replaced them) to oral argument on Appellees' motion for partial summary judgment, and on motions brought subsequent to the court's ruling thereon. Yet the court ruled in each instance without affording the parties a chance to present argument.

ARGUMENT

POINT I APPELLEES' CLAIMS WERE NOT PROPERLY BEFORE THE COURT IN AN ACTION FOR QUIET TITLE, AND DEFICIENT UNDER RULE 12(b)(6), Utah R. CIV. P.

Appellees' Second Claim for Relief was pled, and urged on motion for partial summary judgment, as one to quiet title in and to the Subject Property and Appellees, free and clear of Appellant's claim. Appellees' supporting allegations, however, did not make out a quiet title claim; rather, they sought specific enforcement of a contract *to acquire* title to the Subject Property. As such, Appellees' Complaint did not state a quiet title claim, and was deficient under Rule 12(b)(6), Utah R. Civ. P.; for the same reason, the trial court erred in granting the requested relief.

An action to quiet title is a statutory proceeding – its bases are established, and its remedies limited, by legislation. *Jack B. Parson Companies v. Nield,* 751 P.2d 1131 (Utah 1988). Utah's quiet title statute, Utah Code Ann. § 78-40-1, *et seq.*, establishes the bases and parameters of a quiet title action. Utah Code Ann. § 78-40-1 defines a quiet title action:

> An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

In the case of *State, et al. v. Santiago,* 590 P.2d 335 (Utah 1979), the court held that the quiet title statute could not be relied upon by a holder of a lien on real property:

> [A] quiet title action, as its name connotes, is one to quiet an *existing* title against an adverse or hostile claim of another and not one brought to *establish* title. One seeking such equitable relief must establish title, entitlement to possession, and that the estate or interest claimed by others is adverse or hostile to the alleged claims of title or interest. Hence it is to be seen that the effect of a decree quieting title is not to *vest* title but rather is to *perfect* an existing title as against other claimants.

590 P.2d at 337 (emphasis in original). Similarly, in *Jack B. Parson Companies v. Nield,* cited *supra*, the Utah Supreme Court held that an action in quiet title could not sustain claim by a vendor under a Uniform Real Estate Contract against the assignee of the vendee's interest thereunder, for damages due to refusal to release title to property.

Appellees' Complaint in this matter (R. 0015) nowhere asserts that they hold title to the Subject Property. Rather, they assert contract rights to *receive* title to the property, having claimed total performance under the contract; they then claimed that Appellant's failure to transfer title is wrongful. In short, Appellees' claims in this action do not make out a cause of action under the quiet title statute. The relief afforded by the trial court thereunder was therefore improvident, and should be reversed.

POINT II GENUINE ISSUES OF FACT PRECLUDED THE TRIAL COURT'S RULING THAT, AS A MATTER OF LAW, APPELLEES WERE ENTITLED TO SPECIFIC ENFORCEMENT OF THE 1987 REAL ESTATE CONTRACT

There is no more fundamental rule of law than the proposition that summary judgment should never be entered in the presence of genuine issues of triable fact. *Lovendahl v. Jordan School District*, 2002 Utah 130, 63 P.3d 705; *Jackson v. Mateus*, 2003 Utah 18, 70 P.3d 78; *Couris v. Utah Highway Patrol*, 2003 Utah 19, 70 P.3d 72. A

motion for summary judgment must assume facts as asserted by the opposing party, and granted only where, given that assumption, there is still no way that the opposing party could prevail. *Gadd v. Olson*, 685 P.2d 1041 (Utah 1984). Even a single sworn statement is sufficient to preclude summary judgment–*Webster v. Sill*, 675 P.2d 1170 (Utah 1983).

The record before the trial court clearly establishes the presence of a pivotal issue of fact, which should have precluded the entry of summary judgment on Appellees' quiet title/specific performance claim. As such, the ruling of the lower court should be reversed.

A. Appellees Failed to Perform in Full the Requirements of the 1987 Real Estate Contract, and Were Thus Precluded From Seeking Specific Enforcement Thereof.

The first claim for relief in Appellees' complaint sought an order of this court declaring that Appellant, although not a party to the 1987 real estate contract (see below) was in breach thereof, and entering "an order of specific performance requiring Defendant to properly execute a warranty deed to Plaintiffs giving them an unencumbered title to the property in question" (Complaint, R.0015, ¶ 28). In response to Appellees' motion for summary judgment, the lower court initially recognized the impropriety of finding in their favor as a matter of law:

> The court believes there are genuine issues of material fact in this case, such as whether Plaintiffs successfully completed the escrow conditions.

(Court's ruling of September 6, 2000, R.0237, p. 1). On motion for reconsideration, however, the trial court entered its October 2, 2000 Memorandum Decision (R.0247), reversing its prior holding and finding that, as a matter of law, Appellees were not in breach of the 1987 agreement (or that any such breach had been waived by Georgia Lamar West prior to her death–*see* (B), below), and entered an order of specific performance of the contract.

Specific performance is an equitable remedy (*Romrell v. Zions First National Bank*, 611 P.2d 392 (Utah 1980)). As such, a party seeking specific performance is seeking equity, and must "do equity" by performing his/her obligation under the agreement, in order to merit the requested relief. *LHIW, Inc. v. DeLorian*, 753 P.2d 961 (Utah 1988).

Appellees' 1987 bargain with Georgia Lamar West was clear and specific in its terms: upon full payment of the entire purchase price–*including all assessed taxes*–Appellees were entitled to conveyance of Georgia Lamar West's right, title and interest in and to the subject property:

> The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this Agreement.

By Appellees' own admission, they paid no taxes whatever on the subject property at any time during the contract period, their own express covenant to do so notwithstanding. Their own sworn testimony establishes this fact–supplemental affidavit

of Mary Helen West (R.0210) at ¶ 4 and 5; supplemental affidavit of Arnold Kay West (R.0213) at ¶ 4 and 5; the Court's ruling granting summary judgment (R. 0247) acknowledged as much.

Having failed to perform according to the contract (unless such performance is excused–see below), Appellees came before the trial court with unclean hands, and were not entitled to the remedy of specific performance.

B. Reallocation of Appellees' Tax Payment Obligation to Lamar West Would Constitute a Material Modification of the 1987 Agreement, and Is Therefore Barred by Operation of the Statute of Frauds.

The trial court's dismissal of Appellees' admitted failure to pay property taxes on the Subject Property during the contract period was based on the doctrine of "waiver." Setting aside, for the moment, that a significant fact question existed concerning the applicability of the waiver doctrine in this case (see Subpoint C, below), it is submitted that the trial court disregarded the express terms of the contract, and Appellees' aversion of the facts concerning the "waiver" claim.

In their supplemental affidavits before the court (R. 0210 and 0213), Appellees' both testify as follows:

> On several occasions over the course of several years, Lamar West stated to me and my husband [/wife] that we did not have to worry about paying the property taxes on the property *and that she would pay the property taxes for the time period that the warranty deed was held in escrow.*

(Supplemental Affidavit of Mary Helen West, R. 0210 at ¶ 4; Supplemental Affidavit of Arnold K. West, R. 0213 at ¶ 4; emphasis added.) In other words, even accepting

Appellees' controverted testimony, Lamar West not only *waived* Appellees' performance under the 1987 agreement concerning tax payment, but affirmatively offered to *assume* their obligation in this regard.

The urged testimony, in short, constitutes a material modification of the terms of the contract, transferring a significant obligation away from the purchasers and onto the vendor. It is well established that, where a contract falls within the operation of Utah's Statute of Frauds, any material modification of its terms, like the contract itself, must be in writing. This was established in the case of *Zion's Properties, Inc. v. Holt,* 538 P.2d 1319 (Utah 1975), in which the Supreme Court stated the following:

> It is elementary that when a contract is required to be in writing, the same requirement applies with equal force to any alteration or modification thereof [citing Utah Code Ann. § 25-5-1].

538 P.2d at 1322.

It is beyond dispute that the 1987 agreement was a contract for conveyance of an interest in land, and fell squarely within Utah's Statute of Frauds. Appellees' reliance upon a verbal modification of the terms of that agreement, and a transfer of responsibility thereunder from purchaser to vendor, or, in this case, to Appellant (see below) clearly falls afoul of the Statute of Frauds. For this reason, it should have been disregarded by the lower court, and summary judgment denied.

C. Appellees' Performance Under the Real Estate Contract Was Not Excused as a Matter of Law Under the Doctrine of Waiver.

In reversing its own prior order recognizing the existence of genuine issues of material fact precluding summary judgment herein, the lower court determined that, as a matter of law, Appellees' contractual obligation to pay taxes on the property during the contract period had been waived. Observing that "Plaintiff's concede that they did not pay taxes on the property while the warranty deed was in escrow" (court's memorandum decision of October 2, 2000, R.0247, at p. 2), the court concluded that, by her conduct, Georgia Lamar West had waived the tax obligation under the contract; the court further concluded that such waiver had been established as a matter of law, and that no genuine issue of material fact existed thereon which would justify trial (or even oral argument – *see* Point III, below). R.0245

The court's ruling, however, flatly overlooked the following:

i. As noted above, while Appellees filed affidavits declaring that Georgia Lamar West had stated that they "did not have to worry about paying the property taxes on the property and that she would pay the property taxes for the time period that the warranty was held in escrow" (R.0210 and 0213), the record is devoid of any evidence that the 1987 real estate contract was ever modified in writing to reflect such waiver.

ii. Appellees' suggestion that Georgia Lamar West blithely volunteered to pay real estate taxes on their behalf (in the place of having required Appellees to

do so by contract) is flatly contradicted by Lamar West's declarations to Appellant, the designated trustee of both the 1993 and 1999 trusts, expressing concern that the taxes were not being paid – Defendants Answers to Plaintiff's First Set of Requests for Admissions, Interrogatories and Requests for Production of Documents (R.0666) at p. 6.

iii. Lamar West's declarations to Appellant, moreover, were consistent with her other expressions of concern regarding Appellees' treatment of her, including reports that Appellees were forging checks on her account, and were threatening to place her in a nursing home – *Id.*

iv. Most important, Lamar West's clear lack of intent to waive the property tax requirement is most clearly emphasized by the fact that, in 1993, she conveyed her right in and to the subject property to the 1993 trust; further, that upon Appellees' demand for issuance of a corrective deed, Georgia Lamar West – *by Appellees own admission* – flatly refused the requested conveyance (Complaint, R.0015, at ¶ 13).

Waiver of a contracted-for right may only be found from words or conduct evincing the deliberate relinquishment of a known right. To constitute waiver, one's actions or conduct must be distinctly made, must evince in some unequivocal manner an intent to waive, and must be inconsistent with any other intent – *Hunter v. Hunter*, 669 P.2d 430 (Utah 1983). Georgia Lamar West's words are in dispute between the parties;

her conduct most definitely is not. Had she intended to waive the tax requirement when asked for a corrective deed in 1998, why would she refuse? Why would she thereafter direct conveyance of the property from the 1993 trust to the 1999 trust? The trial court's finding of waiver, in light of the foregoing uncertainties, was clearly error, and should be reversed.

POINT III APPELLANT SHOULD NOT HAVE BEEN FOUND IN BREACH OF THE 1987 REAL ESTATE AGREEMENT

It is undisputed that Appellant, Claudia N. Case, was not a party to the 1987 real estate agreement, either individually or in her capacity as trustee of either the 1993 or the 1999 trust. Nevertheless, the lower court found that, as a matter of law, Appellant was in breach of that agreement for failure to disregard her mother's clear intent and convey the Subject Property to Appellants without their having fulfilled the terms of the agreement. Given the undisputed (much less the Appellant's version of disputed) facts in this matter, the finding was clearly in error.

The October 2, 2000 memorandum decision (R.0247) concluded, without much explanation, that the 1987 contract was binding on the "heirs, executors, administrators, successors and assigns" of Lamar West – and leapt therefrom with the conclusion that Appellant was in breach of the agreement, notwithstanding the fact that her mother, not herself, had been responsible for conveyance of the property into the first trust, and from the first trust to the second trust, in defiance of any obligation under the 1987 agreement. Even assuming that the withholding of title to the Subject Property from Appellants was

wrongful, the act is ascribable to Georgia Lamar West (and thereafter to her estate), and not to the trusts or to Appellant as trustee thereof.

At Appellees' urging, the lower court disregarded this distinction, citing the case of *Oquirrh Associates v. First National Leasing Company*, 888 P.2d 659 (Court of Appeals, Utah 1994). The court's reliance in this regard, however, was misplaced.

It is important to remember that the Lamar West Trust obtained its interest in the subject property by quit-claim deed, not by inheritance. In *Oquirrh*, addressing contractual language very similar to that in the instant case, the court held that such a conveyance does not impose liability upon the successor under the contract:

> Oquirrh argues that by accepting the quitclaim deed, Forthcoming became a direct "successor" of the Loiselles in accordance with the terms of the Oquirrh-Loiselle contract and thus, became contractually bound to the terms of that agreement.
>
> However, Oquirrh's claim fails for several reasons. First, the language in the Oquirrh-Loiselle contract referring to "heirs, executors, administrators, successors and assigns" of the parties can only refer to those who succeed to one party's interest *in the contract* through inheritance, assignment, or the like. A quitclaim deed is generally defined as "[a] deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which the grantor may have *in the premises*." Black's Law Dictionary 1251 (6th ed.1990) (emphasis added). Furthermore, such a deed "purports to transfer nothing more than [an] interest which [the] grantor *may* have. *Id.* (emphasis added).

888 P.2d at 663. Thus, the Oquirrh decision holds that an entity which receives title by quit claim deed is <u>not</u> a successor to the contract.

Numerous other decisions confirm that the grantee of a buyer's interest under a contract does not become bound to perform any of the obligations of the contract. In *Hansen v. Green River Group*, 748 P.2d 1102 (Utah Ct. App. 1988), Hansens sold a motel to Synvest Corporation. Synvest immediately conveyed its interest to a partnership known as Green River Group, which included some of the same principals as Synvest. The contract signed by Green River Group included the following clause: "Buyer agrees to abide and be bound by the conditions that appear in all underlying contract [sic]." 748 P.2d at 1104. Hansens attempted to hold Green River Group liable for breaches of contract by Synvest. The claim was stronger than that in the instant case because Green River Group had arguably agreed to be bound by the terms of the underlying contract. The court nonetheless held that Hansens had only privity of estate and not privity of contract with Green River Group and could not be held liable for any breach of contract to Hansens.

Similarly, in *Andrus v. Bagley*, 775 P.2d 934 (Utah 1989), Dolans conveyed property to Bagleys, who conveyed it to Hayeses, who conveyed it to Andrus. After Andrus paid off the contract, he sought to obtain a warranty deed fro his predecessors in title. Dolans were nowhere to be found, so he sought a judgment against Bagleys for failing to deliver the deed. Andrus sought, and the trial court awarded, attorney fees against Bagleys. The Utah Supreme Court reversed, holding that the Bagley-Hayes

contract was not assigned to Andrus and he was not a third-party beneficiary under that contract.

In *Latses v. Nick Floor, Inc.*, 99 Utah 214, 104 P.2d 619 (1940), Latses purchased property in which Nick Floor was an existing tenant and attempted to evict Nick Floor. The trial court held Nick Floor had a valid long-term lease and denied the eviction, but also awarded Nick Floor $500.00 as attorney fees against Latses. The award of attorney fees was based on the lease between Nick Floor and Latses' predecessor in title. The Utah Supreme Court reversed the attorney fee award:

> The lower court in deciding in favor of respondent awarded it $500 as attorney's fees. Appellants take exception to this allowance on the ground that there is no privity between them and respondent, and that this covenant is not one running with the land. We are of the opinion that appellants are correct in their version of this part of the case. This was purely a personal covenant as between the parties to the contract. Though appellants purchased the property subject to the tenancy, they did not expressly agree to abide by the terms of the lease.

104 P.2d 619 at 624.

Appellant was not joined in this action as Lamar West's heir, or as the personal representative of her estate. She was sued as trustee of two trusts, each of which held title to the subject property, in turn, by quit claim conveyance, not by inheritance or assignment. As such, no remedy should have been afforded against Appellant on the trust's behalf.

POINT IV APPELLEES SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT WITHOUT AFFORDING APPELLANT A HEARING

As demonstrated by the attached orders, the trial court entered numerous interim decisions before finally deciding this matter (at one point completely contradicting itself) – all without granting to Appellant her repeated request for oral argument on the issues before the court. In the face of Appellees' motion for summary judgment, Appellant requested oral argument (R.0190); when the court subsequently reversed itself upon Appellees' request for clarification (again requesting oral argument–R.0241), Appellant moved for an amendment to the order and for reconsideration, again asserting her right to oral argument (R.0299). Upon submittal of her motion for decision, Appellant renewed her request for oral argument (R. 0326). That the trial court entered each of the attached orders without affording either party a hearing on their contentions.

Rule 4-501(3)(C), Utah Rules of Judicial Administration, in effect at the time of the lower court's rulings, expressly granted to Appellant the opportunity for oral argument before entry of an order granting a dispositive motion;

> In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principle memorandum in support of or in opposition to a motion may file a written request for a hearing. . . such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues

governing the granting or denial of the motion has been authoritatively decided.[8]

The trial court made no finding that Appellant was frivolous in her opposition to Appellees' motion for summary judgment, or that the issues underlying the motion had been "authoritatively decided". Indeed, the trial court itself first found in Appellant's favor, and reversed itself only upon subsequent motion. It is submitted that, under these circumstances, the affording of an oral argument was incumbent on the lower court, and its refusal constituted reversible error.

CONCLUSION

Regrettably, the pivotal fact in this case – the intentions of Georgia Lamar West concerning the rights of one daughter over her remaining children – rest with the words and intents of a deceased witness. The trier of fact, under such circumstances, must piece together the decedents desires and intents from the remaining evidence: her words to others, and her conduct.

It is respectfully submitted, however, that the lower court disregarded completely the presence of clear issues of triable fact in concluding that Appellees were entitled, as a matter of law, to a conveyance of title in and to the subject property, as well as an award of costs and attorney's fees against the Appellant in her representative capacity.

---

[8]In 2003, Rule 4-501 of the Utah Rules of Judicial Administration was repealed, and its requirements incorporated into a revision of Rule 7, Utah Rules of Civil Procedure; recorded requirements for oral argument on a dispositive motion are now contained at Rule 7(e), Utah Rules of Civil Procedure.

Appellees' failure to live up to the terms of the contract, supported by nothing more than their self-serving declarations concerning verbal waiver by a deceased parent, should not have been sufficient to withstand a challenge to the motion for summary judgment, as the trial court itself initially found.

For the foregoing reasons, it is submitted that the entry of summary judgment by the trial court should be reversed, and this matter remitted for trial on the merits.

DATED this 27th day of June, 2005.

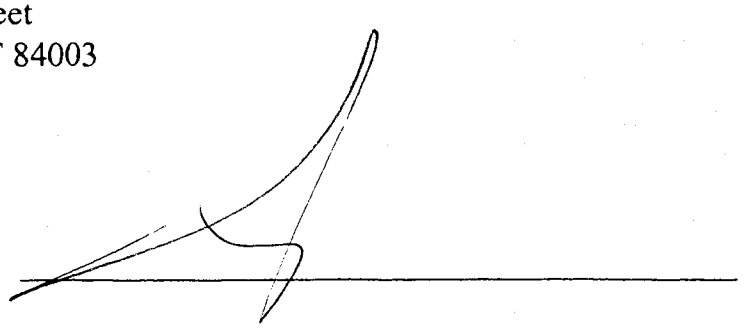
JONES WALDO HOLBROOK & McDONOUGH, PC

By_____
Vincent C. Rampton
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to the following this 27th day of June, 2005:

James "Tucker" Hansen
James "Tucker" Hansen, P.C.
306 West Main Street
American Fork, UT 84003



Tab 1

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH

ARNOLD K. WEST and MARY HELEN WEST, Plaintiffs, vs. CLAUDIA N. CASE, individually, and as Trustee of the Lamar West Trust dated May 6, 1993 and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, Defendant.	ORDER Case No. 990404457 Judge Gary D. Stott

This matter came before the Court on Plaintiffs' Motion for Partial Summary Judgment against Defendant Claudia N. Case, as Trustee of the Lamar West Trust dated May 6, 1993 and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, on Plaintiffs' first two causes of action alleged in their Complaint, Breach of Contract and Quiet Title. Plaintiffs were represented by Bruce R. Murdock and Defendant was represented by Don R. Peterson. After having reviewed the memoranda submitted by the parties in support of and in opposition to the motion, the accompanying affidavits and exhibits, and all other relevant documents in the file,

the Court makes the following ORDER:

1. Plaintiffs' Motion for Partial Summary Judgment against Defendant Claudia N. Case, as Trustee of the Lamar West Trust dated May 6, 1993 and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, is granted. Defendant is Lamar West's successor pursuant to the terms of the Uniform Real Estate Contract (hereafter "Contract") entered into between Lamar West and Plaintiffs in early 1987. By failing to deliver a proper warranty deed to Plaintiffs, as required by paragraph 19 of the Contract, Defendant is in breach of the Contract.

2. Title is quieted in Plaintiffs Arnold K. West and Mary Helen West in the Contract property, which is properly described as follows:

> Parcel 2; Beginning 378.50 feet West along the monument line and 333.45 feet South from the American Fork City monument at the centerline intersection of 300 West street and 300 North street; thence North 84°30' West 30.00 feet; thence South 16°59'15" West 176.14 feet to the North Right-of-Way line of Union Pacific Railroad Co.; thence South 63°23' East 89.29 feet along said Right-of-Way line; thence North 0°25' East 205.68 feet to the point of beginning. Containing 0.25 acres.
>
> Parcel 3; Beginning 378.50 feet West along the monument line and South 333.45 feet from the American Fork City monument at the centerline intersection of 300 West street and 300 North street; thence South 0°25'00" West 205.58 feet to the north Right-of-Way line of the Union Pacific Railroad Co.; thence South 63°23'00" East 55.40 feet along said Right-of-Way line; thence North 0°25'00" East 225.61 feet along a fence line; thence North 84°30'00" West 49.91 feet to the point of beginning. Containing .0246 acres.

3. Defendant is ordered to execute and deliver a proper Warranty Deed to Plaintiffs for the property described in paragraph 2, which deed shall be prepared by Plaintiffs'

counsel. Defendant is ordered to execute and deliver this deed within ten days from the date of this Order. If Defendant does not execute and deliver the deed to Plaintiffs within ten days from the date of this Order, the clerk of the court is authorized to execute the deed on behalf of Defendant.

4. Plaintiffs are awarded their reasonable attorney's fees and court costs pursuant to paragraph 21 of the Contract in the amount of $156.00 in court costs and $6,146.50 attorney's fees, as established by the Affidavit of Bruce R. Murdock, for a total award of $6,302.50, and Plaintiffs are entitled to judgment against Defendant in this amount.

DATED this 1 day of November, 2000.

BY THE COURT:

Gary D. Stott
Fourth Judicial District Court Judge

Approved as to form:

Don R. Petersen
Attorney for Defendant

MAILING CERTIFICATE

I certify that I sent by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Order this 13 day of October, 2000 to the following:

Don R. Petersen
Howard, Lewis & Petersen
120 East 300 North
P.O. Box 1248
Provo, Utah 84603

Secretary

Tab 2

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

ARNOLD K. WEST and MARY HELEN WEST, Plaintiff, vs. CLAUDIA N. CASE, individually, and as Trustee of the Lamar West Trust dated May 6, 1993 and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, Defendant.	**ORDER DENYING DEFENDANT'S MOTION FOR AMENDMENT OF ORDER AND FOR RECONSIDERATION AND DEFENDANT'S REQUEST FOR ORAL ARGUMENT** Case No. 990404457 DIVISION# 4

THE ABOVE-ENTITLED MATTER having come before the above-entitled court, Defendant's Motion for Amendment of Order and for Reconsideration and Defendant's Request for Oral Argument, and the Court having reviewed the relevant memoranda on file herein, and the Court having taken the matter under advisement,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Defendant's Motion for Amendment of Order and for Reconsideration, and Defendant's Request for Oral Argument are hereby denied, and Plaintiffs are hereby granted Judgment against the Defendant

for their reasonable attorney's fees incurred in having to respond to the above Motion and as set forth more fully in the attached Affidavit of Attorney's fees filed herewith.

DATED this 15 day of February, 2001.

BY THE COURT:

JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **ORDER DENYING DEFENDANT'S MOTION FOR AMENDMENT OF ORDER AND FOR RECONSIDERATION AND DEFENDANT'S REQUEST FOR ORAL ARGUMENT,** postage prepaid by first-class mail, on this 1st day of February, 2001, to the following:

Don R. Petersen
HOWARD, LEWIS& PETERSEN
Attorneys for Defendant
120 East 300 North
P.O. Box 1248
Provo, Utah 84603

Dorothy Woodcox
SECRETARY

Tab 3

DON R. PETERSEN (2576) and
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Our File No. 25,469

Attorneys for Defendant

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

ARNOLD K. WEST and MARY HELEN WEST, Plaintiffs, vs. CLAUDIA N. CASE, individually, and as Trustee of the Lamar West Trust dated May 6, 1993 and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, Defendant.	**ORDER CLARIFYING JUDGMENT** Case No. 990404457 Judge Steven L. Hansen Division #7

Defendant's Motion for Order Clarifying Judgments filed March 5, 2001, came regularly before the Court for consideration. No party opposed the motion and the time for response has expired. The Court therefore grants the motion.

Based on the motion of defendant and good cause appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order entered November 1, 2000, and the

Judgment entered February 16, 2001, do not impose any monetary judgment against Claudia N. Case individually.

DATED this 7 day of June, 2001.

BY THE COURT:

STEVEN L. HANSEN
District Judge

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST COURT-UTAH COUNTY

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 11th day of June, 2001.

James "Tucker" Hansen, Esq.
Duval, Hansen, Witt & Morley
306 West Main Street
American Fork, UT 84003

SECRETARY

F:\LWS\CASE-CLA.ORD

Tab 4

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Attorneys for Defendant Claudia N. Case

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

ARNOLD K. WEST and MARY HELEN WEST, Plaintiffs, vs. CLAUDIA N. CASE, individually, and as Trustee of the Lamar West Trust dated May 6, 1993, and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, Defendant.	**ORDER OF DISMISSAL OF THIRD CLAIM FOR RELIEF** Civil No. 990404457 Division 7 Judge James E. Taylor

Based on the stipulation of the parties, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiffs' claims for slander of title in the above entitled action, as pled at the Third Cause of Action in Plaintiff's Complaint herein, be and hereby are dismissed with prejudice.

This Order, coupled with (1) this Court's Order of November 1, 2000; (2) this Court's Judgment of February 1, 2001, and (3) this Court's Order Clarifying Judgment of July 2, 2001,

all entered in this action, shall constitute final judgment on the merits of all issues in this action pursuant to Rule 54(b), Utah Rules of Civil Procedure.

DATED this 21 day of March, 2005.

BY THE COURT

James E. Taylor
District Judge

APPROVED AS TO FORM:

James "Tucker" H. Hansen