

2005

H.C. Massey, Betty Massey v. Kenneth A. Griffiths,
BKB LLC, Aaron B. Buttars, Brenda L. Buttars,
Adele B. Lewis : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT, STATE OF UTAH

H.C. MASSEY and BETTY MASSEY,

Appellants,

vs.

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

Appellees.

**REPLY BRIEF OF APPELLANTS
H.C. AND BETTY MASSEY**

Case No. 20051028-SC

Appeal from the Ruling of the Second District Court
The Honorable Roger S. Dutson
Granting Motion for Summary Judgment

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ARGUMENT

I. The Brief of the Griffiths Parties Misstates an Important Fact.

The Griffiths Parties state the following as an undisputed fact:

It is important to note that there is *no* disputed property on which taxes have not completely been paid. Regardless of whether the legally described or agreed upon boundary is used, taxes were paid by at least one of the Appellees on all of the disputed property. The Masseys have not established any parcel upon which taxes have not been paid.

Brief of Griffiths Parties at 4-5.

This very point was discussed during the telephone conference between the court and counsel on February 24th, 2004, where Masseys' counsel conceded that they had no evidence that would suggest that respondents had not paid taxes "on the tax notices that have been sent to them over the years." R. at 1014, pp. 3-4. The parties and the court discussed whether a stipulation should be presented in writing and Masseys' counsel suggested that the issues were sufficiently simple that their concession could be stated verbally on the record. R. at 1014, pp. 4-9. Mr. Warner, counsel for Masseys, then stated the concession for the record:

Mr. Warner: Well, I - - we - - we concede that 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.

Unidentified Speaker: For at least 20 years?

Mr. Warner: For at least 20 years.

Unidentified Speaker: And do you concede that the defendants paid taxes on all those properties?

Mr. Warner: Well, I concede that there's an issue as to what they paid taxes on, but I think the court has very - - very clearly seen our position on that, and that is, the taxes have been paid on legal descriptions which don't necessarily meet and close, and there are - -

The Court: Right, right.

Mr. Warner: - - but in - - but the court's ruling goes beyond that and says that that isn't necessary, that so long as the boundary by acquiescence is there, that solves that problem from the court's point of view in this ruling.

The Court: Okay. That - - yeah, I don't think that Mr. Warner can concede that the taxes have been paid on all the property in the le - - or - - or beyond that property which might exceed or be different than the legal descriptions. Correct?

Mr. Warner: That's - - that's precisely our point, and - -

Unidentified Speaker: We're - - we're merely asking that he concede that - - that all the defendants paid taxes on the parcels that they were issued bills on.

Mr. Warner: I would concede that they have paid taxes on the tax notices that were issued to them by the county.

Unidentified speaker: And - -

The Court: Very well.

R. at 1014, pp. 9-10.

So it is clear from the record that Masseys' position was that a gap existed between the deed descriptions of the Griffiths Parties' property and the Buttars Parties' property on

which taxes had not been paid and those gap properties were sold to the Masseys at tax sale. It is equally obvious from the foregoing that the court recognized this disputed fact.

This is an important distinction for two reasons: (1) it distinguishes this case from the *Euce* case relied upon by the Buttars parties and addressed in the next part of this argument; and (2) it demonstrates that in boundary by acquiescence cases, there may be property on which no taxes have been paid although it may have been occupied by adjoining boundary by acquiescence claimants. The County has been deprived of its tax revenue in those cases. Whether that is the case here can only be resolved by a trial to determine the disputed facts.

II. The Position of the Griffiths Parties is not Supported by Their Reliance Upon *Euce v. Gibbs*.

Euce v. Gibbs, 49 So. 2d. 843 (Fla. 1951), relied upon by the respondents, is distinguishable from the instant case. In *Euce* the two adjoining land owners were deeded the east half and the west half respectively of the northwest quarter of the northwest quarter of section 36. The exact location of the dividing line between the east and west halves was unknown but agreed to be an existing fence which was determined by the court to be the boundary by acquiescence. Further, all of the west half was sold for taxes, not just the parcel east of the boundary by acquiescence fence. As a result there was no untaxed property between the two parcels and the county was deprived of no revenue. In other words, unlike the instant case, there was no gap between the parcels on which taxes were not paid.

Further, in *Euce*, Costa, who was the owner of the west half and was a party to an agreement fixing the fence line as the boundary between the west and east halves, entered into an agreement to deed the west half to one Greenlee. Costa then permitted the property to divert to the State of Florida for non payment of taxes and thereafter repurchased the west half from the tax deed holder. Costa then conveyed title to Greenlee pursuant to the earlier agreement, and Greenlee conveyed to Gibbs who claimed that as a result of the tax sale he now owned the entire west half including that portion east of the boundary by acquiescence fence line. One of the court's primary reasons for its holding that the boundary by acquiescence fence line also controlled for purposes of the tax sale appeared to be that it was not going to allow Costa to "cleanse" his title of the boundary by acquiescence claim in this fashion.

Finally, the *Euce* case was brought under special Florida adverse possession statutes and applied Florida property tax laws that obviously differ significantly from Utah's.

III. The Respondent's Due Process argument is Not Well Founded.

The Griffiths Parties argue that a parcel number search in the county records would not reveal any conflict between the parcels they were purchasing and the Masseys' tax deed parcels. They claim that they were therefore not under any actual or constructive notice of the existence of the tax deeds and thus would be deprived of their property without due process should the court rule in Masseys' favor. This argument must fail for several

reasons. First, nothing in Utah law provides for indexing by parcel numbers. There is nothing in this record reflecting the method of keeping records in the Weber County Recorder's Office or even what Respondents mean by the use of the term "parcel number." If they are referring to the tax serial number then their argument must fail because it is contrary to law. Utah Code Section 17-21-20 permits, but does not require, a County Recorder to require the applicable tax serial number to be on an instrument before it is recorded. There is nothing in the record in this matter which reflects whether the Weber County Recorder requires such a tax serial number. And in any event Section 17-21-20 (2)(b)(iii) provides that "an error in the tax serial number does not affect the validity of the instrument or effectiveness of the recording." Further, Section 57-3-2(1) Utah Code provides: "Each document executed, acknowledged, and certified, in the manner prescribed by this title... shall, from the time of recording with the appropriate County Recorder, impart notice to all persons of their contents."

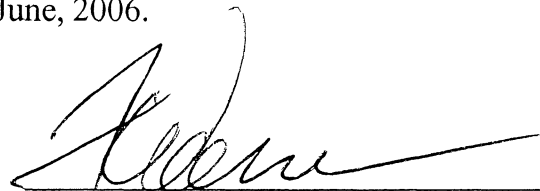
Additionally, as demonstrated in Masseys' opening brief, this court has specifically held that a party on record notice of another parties claim by virtue of a tax deed lacks standing to assert his predecessors constitutional rights and defenses. Appellants Brief on Certiorari at 13-14.

CONCLUSION

Contrary to earlier times, tax titles are favored and enjoy priority over most other interests. They are a new fee simple title issued by the sovereign. They have been held by

this court and the courts of many other states to have priority over a variety of other interests in the foreclosed property. Absent some defect in the assessment or sale process Masseys' tax titles should be granted priority over Respondents' titles based on the boundary by acquiescence doctrine. Masseys are entitled to a presumption that their tax titles are valid and Respondents have failed to demonstrate any defect in the assessment or sale process. Respondents are not entitled to claim the due process interest of their predecessors. The ruling of the Court of Appeals should be reversed and the case remanded to the district court for trial.

Respectfully submitted this 19 day of June, 2006.



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Attorney for Appellants

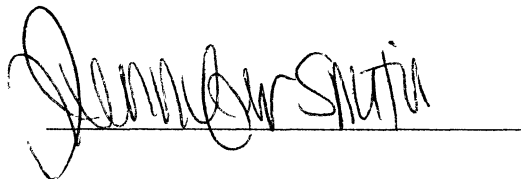
CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 19 day of June, 2006, I served a copy of the foregoing Reply brief of Appellants H.C. Massey and Betty Massey, by mailing it to him by first class mail with sufficient postage prepaid and addressed as follows:

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A handwritten signature in black ink, appearing to read "Jennifer Smith", is written over a horizontal line.