

1995

# Western Mortgage and Realty Company, a Washington corporation v. Clayton F. Kearl and Nita R. Kearl; and John Does 1-5 : Reply Brief

Utah Court of Appeals

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Micah J. Martin; Rachelle Martin.

Charles A. Schultz; Attorney for Appellant.

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DOCKET NO. 950743 CA

IN THE UTAH COURT OF APPEALS

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WESTERN MORTGAGE AND REALTY	:	<i>REPLY BRIEF OF APPELLANTS</i>
COMPANY, a Washington	:	<i>CLAYTON AND NITA KEARL</i>
corporation,	:	
Appellees,	:	
v.	:	
CLAYTON F. KEARL and NITA R.	:	
KEARL; and JOHN DOES 1-5,	:	Appeal No.
Appellants.	:	

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95-0743-CA

This is an appeal to this Court from the trial court's grant of summary judgment, entered on May 1, 1995, in favor of the Western Mortgage and Realty Company and against Clayton and Nita Kearl, quieting title to certain real property located in Draper City, Salt Lake County, Utah, in Western by adverse possession.

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Priority of Argument: 14

FILED

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COURT OF APPEALS

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**I**  
**PARTIES TO THE APPEAL**

The parties to this Appeal are Clayton and Nita Kearn (hereinafter, "the Kearls") and Micah J. Martin and Rachelle J. Martin (hereinafter, "the Martins"), the persons substituted in the action for the Plaintiff Western Mortgage Company (hereinafter, "Western").

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**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES, RULES, AND OTHER AUTHORITIES**

**Statutes:**

Utah Code Annotated 1953, as amended, § 78-12-12:

*Possession must be continuous and taxes paid.*

*In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.*

**Cases:**

Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991)

Bowen v. Olsen, 2 Utah 2d 12, 268 P.2d 983 (1954)

Home Owner's Loan Corporation v. Dudley, 105 Utah 208, 141 P.2d 160, 166 (1943)

United Park City Mines Co. v. Estate of Clegg, 737 P.2d 173, 176 (Utah 1987)

**V**  
**ARGUMENT**

**THE TRIAL COURT ERRED, BOTH AS A MATTER OF FACT AND AS A MATTER OF LAW, WHEN IT GRANTED WESTERN'S MOTION FOR SUMMARY JUDGMENT.**

**POINT I**

**THE TRIAL COURT ERRED IN CONCLUDING THAT THERE WERE NOT ANY ISSUES OF MATERIAL FACT WHICH PRECLUDED ENTRY OF SUMMARY JUDGMENT IN FAVOR OF WESTERN.**

The trial court erred in concluding that there were no genuine issues of material fact present in this case which precluded it from granting Western's Motion for Summary Judgment. A genuine issue of fact exists in this case as to what property Western was seeking to claim by adverse possession in this proceeding. In its Complaint, Western asserts that it seeks to quiet title to property located on the west side of the property previously owned by the Kearls. However, the property description contained in Western's Complaint is not on the west side of the property previously owned by the Kearls. Furthermore, the property described in Western's Complaint is different from the property described in Western's Motion for Summary Judgment.

The Martins assert in their Brief that the improper description of the property is irrelevant because it is "a typographical error." Typographical errors may not affect certain types of documents. However, titles to real property and descriptions of real property are dramatically and substantially affected by errors in the description

of the property.

The Martins falsely assert in their Brief that the Kearls never objected to the adequacy of the description to "the 25-foot strip" of property that is the subject of this litigation and therefore, failed to preserve the issue of the adequacy and accuracy of the description of "the 25-foot strip" for this appeal. Those assertions are knowing, deliberate and willful misstatements of fact. The Kearls disputed the description of the property from their Answer throughout the entire time the case was before the trial court. The Kearls disputed the location of "the 25-foot strip" in their Answer, and they disputed the location of "the 25-foot strip" in their Memorandum in Opposition to Western's Motion for Summary Judgment. (Record at pp. 35, 83)

Again, contrary to the assertions of the Martins, the Kearls never stipulated that "the 25-foot Strip" was on the west side of New Hope Drive. The trial court may have mistakenly assumed that the Kearls were stipulating to the location of "the 25-foot Strip", but the Kearls simply conceded at the scheduling conference that Western was asserting that "the 25-foot Strip" was on the west side of New Hope Drive. The Kearls still maintained that "the 25-foot Strip" described in Western's Complaint was not on the west side of the New Hope Drive property. When the Kearls learned, for the first time, from the trial court's minute entry, that the trial court had misconstrued the discussion at the scheduling conference, the Kearls



objected to the proposed order granting summary judgment. (Record at P. 186)

Contrary to the Martins' assertions, the Kearls did properly dispute the description of "the 25-foot Strip" and did timely and properly dispute the adequacy of the legal description of "the 25-foot Strip". (Record at pp. 35, 83) Therefore, the Kearls properly preserved the issue of the location of "the 25-foot Strip" for appeal.

The Martins' assertions that notice pleading rectifies the improper description of "the 25-foot Strip" in Western's Complaint is nonsense. The simple fact that Western describes "the 25-foot Strip" two different ways creates an issue of fact as to the location of "the 25-foot Strip." The discrepancy in the description of "the 25-foot Strip" creates a genuine issue of fact as to what piece of property Western was attempting to quiet title to. Western is not permitted to describe two different pieces of property and then choose which description it likes best. Western created the erroneous descriptions, and the Kearls are not required to read Western's mind. Therefore, Western and/or the Martins cannot take advantage of the confusion Western created by its erroneous descriptions.

Because there is discrepancy between the property described in Western's Complaint and the property described in Western's Motion for Summary Judgment, it was prejudicial and reversible error for the trial court to grant Western's Motion for Summary Judgment. Summary

the case and the moving party is entitled to summary judgment as a matter of law. See, Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991). Because the trial court committed prejudicial and reversible error, this Court must reverse the trial court's grant of Summary Judgment.

## POINT II

THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT WESTERN WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Even assuming, arguendo, that Western properly described the property it was claiming by adverse possession and that the trial court correctly ruled that there was no genuine issue of fact as to the location of "the 25-foot Strip" of land Western sought to acquire to by adverse possession, Western was not entitled to summary judgment as a matter of law.

As set forth in the Kearls initial Brief in this matter, in order for Western to prevail on its claim for adverse possession of the Kearls' property, Western must demonstrate that: 1) it has been in continuous possession of the subject property for seven years; 2) it possessed the property openly, notoriously and hostilely; and, 3) it paid all of the taxes on the property during the time of possession. Utah Code Annotated 1953, as amended, § 78-12-12. The Martins agree that in order for a party to claim property by adverse possession the party claiming title by adverse possession must satisfy all of the foregoing requirements. (Martin's Brief page 16). Because Western did not and cannot prove that it satisfied those requirements, Western

was not entitled to Summary Judgment as a matter of law, and the trial court committed prejudicial and reversible error when it granted Western's Motion for Summary Judgment.

As set forth in the Kearls' initial Brief, it is also an undisputed fact that, under Utah law, a person or entity whose possession is being tacked upon must have complied with all of the requirements of adverse possession during the time of their possession, in order for the person or entity tacking upon that possession to claim the prior possession as a part of possession time for ownership by adverse possession. See Home Owner's Loan Corporation v. Dudley, 141 P.2d 160, 166 (Utah 1943), declaring:

*The statutes for adverse possession require that possession be for a continuous period of seven years, during which period the claimant in possession must have paid all taxes levied and assessed upon the land according to law. (Emphasis added)*

"One who seeks to acquire title to real property other than by conveyance must comply precisely with the statutory requirements for doing so." United Park City Mines Co. v. Estate of Clegg, 737 P.2d 173, 176 (Utah 1987). The failure of a person claiming to hold property by adverse possession to pay the taxes assessed for a substantial period of time is strong evidence that the possessor did not in reality claim title to the property. Id.

The Martins did not, and cannot, dispute the fact that Johnson never paid any taxes on any of the New Hope Drive property during the time Johnson was in possession of the property. Yet, the Martins assert that Western could pay the taxes on the property for Johnson

some ten years after he allegedly began his adverse possession of the property and that the payment by Western, some ten years after Johnson allegedly began his adverse possession of the property fulfills Johnson's obligation for payment of taxes under Utah law for adverse possession. That assertion is directly controverted by Utah case law.

In Bowen v. Olsen, 2 Utah 2d 12, 268 P.2d 983, 985 (1954), the Utah Supreme Court specifically held that a party claiming to acquire title to property by adverse possession cannot wait any number of years and then pay the taxes in a lump sum, as Western did in this case. The Bowen Court declared that one of the purposes of the statute requiring payment of taxes in order to establish adverse possession is that by paying taxes on the land a public record is made which gives notice to the owner that his land is being claimed adversely. Id. at 985.

The facts of Bowen are very similar to the facts of this case. In the instant matter, Western waited ten years and then paid the taxes on the property in a lump some, after Johnson, upon whose possession Western seeks to tack, had paid no taxes.

The Martins cite the Court to Burbadge v. Rosen, 400 S. W. 2d 502, 504 (1966) for the proposition that each possessor need not pay property taxes during his possession of property claimed by adverse possession, so long as one of the claimants pays all of the assessed taxes. However, Burbadge, is not a Utah case and it cannot over-rule or contradict the express language and holding of Bowen, supra.

Therefore, the Martins reliance on Burbadge is misplaced, and Burbadge is of no precedential value in this case.

Because Johnson never paid any taxes on any of the New Hope Drive property, Johnson is not legally entitled to claim any of the property by adverse possession, and certainly not the Kearls' property. Bowen, supra, Home Owner's Loan Corporation v. Dudley, supra, and United Park City Mines Co. v. Estate of Clegg, supra. Because Johnson is not legally entitled to claim any of the New Hope Drive property by adverse possession, Western cannot tack onto Johnson's alleged adverse possession of any of the New Hope Drive property for its alleged adverse possession of the Kearls' property.

Western has only been in possession of the New Hope Drive property since March 1994. Because Western is not legally entitled to tack onto Johnson's alleged adverse possession of the Kearls' property for its alleged adverse possession of the Kearls' property, under Utah law, Western cannot satisfy the requirements for adverse possession of any of the New Hope Drive property. Therefore, the trial court committed prejudicial and reversible error when it granted Western's Motion for Summary Judgment. Because the trial court committed prejudicial and reversible error, this Court must reverse the trial court's grant of Summary Judgment in favor of Western and direct the trial court to enter judgment in favor of the Kearls.

POINT III  
CLAYTON KEARL'S AFFIDAVIT IS NOT BASED ON INADMISSIBLE HEARSAY EVIDENCE.

Contrary to the Martins' assertion to this Court and Western's assertion to the trial court, Defendant Clayton Kearl's Affidavit is not based on inadmissible evidence. The Martins improperly assert that Mr. Kearl's Affidavit filed with the trial court is based on inadmissible evidence, because Mr. Kearl refers to documents on file at the County Recorder's Office in his Affidavit. The Martins assert that paragraphs Nos. 2 and 3 of Mr. Kearl's Affidavit are improper because they make reference to those documents on file with the County Recorder.

The documents referred to in paragraphs Nos. 1 and 3 of Mr. Kearl's Affidavit are not inadmissible hearsay. Rule 803(8) of the Utah Rules of Evidence specifies that public records such as those filed in the County Recorder's Office are not hearsay. Therefore, Mr. Kearl's Affidavit is not based on inadmissible hearsay. Because, Mr. Kearl's Affidavit was proper, the trial court was correct in not striking it, and Mr. Kearl's Affidavit raised genuine and material issues of fact which precluded the trial court from entering summary judgment in favor of Western.

Because the trial court committed prejudicial and reversible error when it granted Western's Motion for Summary Judgment, this Court must reverse the trial court's grant of Summary Judgment in

favor of Western and direct the trial court to enter judgment in favor of the Kearls.

**VI**  
**CONCLUSION AND REQUEST FOR RELIEF**

The trial court committed reversible and prejudicial error when it granted Western's Motion for Summary Judgement. Therefore, the trial court's grant of Summary Judgment must be reversed and the trial court directed to enter judgment in favor of the Kearls.

WHEREFORE, the Kearls respectfully request that the summary judgment entered by the trial court be reversed and the trial court be instructed to enter judgment in favor of the Kearls.

Respectfully submitted this 16<sup>th</sup> day of November 1995.


A handwritten signature in black ink, appearing to read "Charles A. Schultz", written over a horizontal line.

Charles A. Schultz  
Attorney for Clayton and Nita Kearn

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of November 1995, I served a true and correct copy of the foregoing Brief to the persons at the addresses listed below by depositing a copy in the United States Mail, postage prepaid.

Micah J. Martin  
Rachelle Martin  
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A handwritten signature in black ink, appearing to read 'Charles A. Schultz', written over a horizontal line.

Charles A. Schultz