

1995

Micah Martin and Rachelle Martin v. Clayton F. Kearl and Nita R. Kearl; and John Does 1-5 : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT

STATE OF UTAH

MICAH MARTIN and RACHELLE
MARTIN,

Plaintiffs and Appellees,

v.

CLAYTON F. KEARL and NITA R.
KEARL; and JOHN DOES 1-5,

Defendants and Appellants.

No. 950218

940905636

950743-C7

BRIEF OF APPELLEES MICAH MARTIN AND RACHELLE MARTIN

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UTAH COURT OF APPEALS
BRIEF

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STATE OF UTAH

Defendants and Appellants.

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KEARL; and JOHN DOES 1-5,)	
)	
Defendants and Appellants.)	

BRIEF OF APPELLEES MICAH MARTIN AND RACHELLE MARTIN

I. PARTIES TO THE PROCEEDING AT THE DISTRICT COURT

The original parties to this action at the District Court were plaintiff Western Mortgage and Realty Company ("Western") and defendants/appellants Clayton F. Kearl and Nita R. Kearl (hereafter collectively referred to as the "Kearls"). After entry of the order granting Western's motion for summary judgment, the appellees Micah Martin and Rachelle Martin (collectively hereafter the "Martins" or "Appellees") acquired Western's interest in this litigation and the parcel of property the subject of this dispute. By an order entered by the District Court on June 30, 1995, the Martins were substituted for Western as plaintiffs/appellees herein.

II. JURISDICTION

This appeal arises out of an order entered by the Third District Court of Salt Lake County, Utah, granting summary judgment in favor of Western on issues related to the disputed ownership of real property located in Salt Lake County, Utah. Accordingly, this Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (1995).

III. APPELLEES' STATEMENT OF ISSUES PRESENTED FOR REVIEW

Kearls' brief sets forth seven issues for review.^{1/} All of them are various permutations of the following two issues:

1. Issue Number One. Did a typographical error within the complaint's legal description of the property at issue, later corrected in Western's motion for summary judgment, prevent entry of summary judgment? Appellants failed to raise this issue in opposition to Western's motion for summary judgement. Indeed, Kearls never even raised this issue until they asserted it for the first time as the basis for an untimely objection to the proposed final order granting Western's motion for summary judgment. (R. 186-194.)

Thus, Kearls failed to preserve this issue for appeal as required by Utah R. App. P.

24(a)(5)(B) and are not entitled to its review.

^{1/} Among the numerous issues for review set forth in Kearls' brief is an alleged issue of fact pertaining to whether a typographical error in the Complaint prevented entry of summary judgment. Appellants' brief at 3 and 4. However, a summary judgment motion, by definition, raises only questions of law. *Callahan v. Sheaffer*, 877 P.2d 1259, 1260 (Utah App. 1994).

2. Issue Number Two. Based upon the undisputed facts, did the trial court correctly rule as a matter of law that Western met all of the legal requirements to acquire the subject property by adverse possession?

Standard of Review for Issue Numbers One and Two. When reviewing orders granting summary judgment, the appellate court gives no deference to the trial court's legal conclusions, reviewing them for error. *Young v. Salt Lake City Corp.*, 876 P.2d 376, 377 (Utah 1994); *Texaco, Inc. v. San Juan County*, 869 P.2d 942, 943 (Utah 1994).

IV. STATUTES WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Code Ann. § 78-12-7 (1995). Adverse possession - Possession presumed in owner.

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

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-7.

Utah Code Ann. § 78-12-12 (1995). 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.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-12.

V. STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition.

This is a lawsuit to resolve the contested ownership of a narrow strip of real property that runs adjacent to the western side of residential real property presently owned by the Martins.^{2/} The complaint sought to quiet title to the subject property on various theories, but the central cause of action was a claim asserting that plaintiff Western had acquired the subject property by adverse possession. (R. 6-8.) Soon after all of the pleadings had been filed, Western moved for summary judgment on the adverse possession cause of action. (R. 42.) Kearls opposed Western's motion with a legal memorandum and an affidavit. (R. 82 and 94.) Western objected to Kearls' affidavit on the grounds that the affidavit's factual assertions lacked foundation and constituted inadmissible hearsay. (R. 102 and 103.) On February 16, 1995, the trial court initially denied Western's summary judgment motion, concluding in a minute entry that the affidavit submitted by Kearls created a material issue of fact (the location of the property) which prevented summary judgment. (R. 113-114.)

On April 3, 1995, after entry of the above-referenced minute entry but before Kearls had submitted a proposed order denying summary judgment, the trial court conducted a pretrial scheduling conference. (See R. at 170.) During the pretrial conference, Kearls'

^{2/} The residential property now owned by Martins was until recently owned by Western. After Western obtained summary judgment, Martins purchased from Western both the residential property and the narrow strip of property at issue in this action. This transaction necessitated Martins' substitution for Western as the real parties in interest in this action.

counsel withdrew the factual assertions in Kearls' affidavit in opposition to Western's motion for summary judgment, and stipulated that there was no dispute as to the location of the property at issue (R. 176). Based on this stipulation and the agreement of both parties that no factual issues existed regarding Western's adverse possession claim, the trial court determined that it would revisit Western's motion for summary judgment. (R. 176, 177, 183 and 184.) By a minute entry dated April 12, 1995, the trial court granted Western's motion for summary judgment, finding that Western had acquired the subject property by adverse possession. (R. 176-179.)

On April 20, 1995, Western served a proposed order upon Kearls' counsel granting summary judgment in favor of Western. (R. 181-182.) On May 1, 1995, having received no objection to the proposed order, the trial court entered the order. (R. 183-185.) One day later, Kearls filed a belated objection to the proposed order, asserting for the first time that a minor typographical error in the complaint's legal description of the subject property somehow precluded entry of summary judgment against them. (R. 186.) Western's responsive memorandum (see R. at 188-191) pointed out both the untimeliness of Kearls' objection and its lack of merit.

On May 3, 1995, Western sold and conveyed the subject Property to Martins (R. 211). Thereafter, on May 19, 1995, Kearls filed their notice of appeal. (R. 202.) On June 30, 1995, the Martins were substituted for Western as plaintiffs/appellees herein.

B. Statement of Facts Relevant to Issues Presented for Review.

Nine Hundred Sixty-Five New Hope Drive is the address of a large, ranch-style home located in Draper, Utah, identified by Salt Lake County for tax purposes as Parcel No. 28-32-177-007. At one time, Parcel No. 28-32-177-007 had the following legal description (hereafter referred to as the "Entire Parcel"):

BEGINNING 1649.15 feet South and 3079.67 feet West from the Northeast corner of Section 32, Township 3 South, Range 1 East, Salt Lake Meridian; thence South 5°42'36" East 451.1 feet; thence North 88°00'56" West 153.41 feet; thence South 5°42'36" East 50.18 feet; thence South 89°00'56" East 165.59 feet; thence Northeasterly along a curve to the left 82.9 feet; thence North 43°28'59" East 52.04 feet; thence North 24°03'50" West 25 feet, more or less; thence North 43°28'59" East 93.27 feet; thence Northeasterly along a curve to the right 8.03 feet; thence North 3°06'12" East 333.37 feet; thence North 87°59'05" West 144 feet, more or less, to the point of BEGINNING.

(R. 3, 4 and 35.) The property that is the subject of this litigation used to be part of the Entire Parcel. The record establishes that a series of unusual events resulted in a severing of that property from the Entire Parcel.

In October of 1980, Kearls owned the Entire Parcel. (R. 3, 4 and 35.) As security for a loan made by Utah Firstbank (the "Bank"), Kearls executed and delivered to the Bank a deed of trust (the "Deed of Trust") encumbering the majority of the Entire Parcel, which Deed of Trust contained the following legal description (hereafter referred to as the "New Hope Property"):

BEGINNING at a point South 1654.22 feet and West 2935.57 feet from the Northeast corner of Section 32, Township 3 south,

Range 1 East, Salt Lake Base & Meridian, running thence South 3°06'12" West 333.37 feet; thence Southwesterly 7.98 feet along the arc of a 75.00 foot radius curve to the left; thence South 43°28'59" West 147.85 feet; thence Southwesterly 62.18 feet along the arc of a 75.00 foot radius curve to the right; thence North 84°00'56" West 163.62 feet; thence North 5°42'36" East 25.09 feet; thence South 89°00'56" East 161.55 feet; thence Easterly 16.18 feet along the arc of a 55.00 foot radius curve to the left; thence North 5°42'36" East 448.18 feet; thence South 87°59'05" East 120.37 feet to the point of BEGINNING. Known as Lot 5, NEW HOPE ESTATES, Non-regular subdivision.

SUBJECT TO AND TOGETHER with the following described 50 foot right of way being 25 feet on each side of the following described center line:

BEGINNING at a point South 00°07'25" West 1676.63 feet and West 2295.33 feet and South 00°05'33" West 325.30 feet from the Northeast corner of Section 32, Township 3 South, Range 1 East, Salt Lake Base & Meridian, and running thence North 86°53'48" West 602.33 feet to a point on a 75.00 foot radius curve to the left; thence South 43°28'59" West 147.85 feet to the point on a 75.00 foot radius curve to the right; thence Southwesterly 52.18 feet along said 75.00 foot radius curve to the right; thence North 89°00'56" West 163.62 feet to the East right of way line of Fort Street.

(R. 46). The New Hope Property consists of the home and most of the other improvements that were originally part of the Entire Parcel.

The Deed of Trust, however, failed to encumber a small portion of the Entire Parcel.
This omitted parcel was a strip of property approximately 25 feet in width and contiguous to the far western side of the Entire Parcel, more particularly described as follows (hereafter the "25-foot Strip"):

BEGINNING at a point South 1649.15 feet and West 3079.67 feet from the Northeast corner of Section 32, Township 3 South, Range 1 East, Salt Lake Base & Meridian; and running thence South 5°42'36" West 451.19 feet; thence South 89°00'56" East 8.14 feet to a point on the arc of a 50.00 foot radius curve to the left; thence along the arc of said curve, through a central angle of 18°32'27", a distance of 16.18 feet; thence North 5°42'36" East 448.16 feet; thence North 87°59'05" West 23.79 feet to the point of beginning. Contains 0.246 acres.

(R. 47 and 56.) The ownership of the 25-foot Strip is at issue on this appeal.

The Bank subsequently foreclosed on the Deed of Trust and acquired the New Hope Property at the foreclosure sale. (R. 4 and 35.) The foreclosure caused a partitioning of the Entire Parcel, severing it into two separate but contiguous parcels, being the 25-foot Strip and the New Hope Property.

On August 31, 1984, the Bank sold the New Hope Property to Peter E. Johnson ("Johnson") and agreed to finance the Johnson's purchase evidenced by a promissory note from Johnson to the Bank (the "Johnson Note"). (R. 60 and 61.) As security for the loan, Johnson executed and delivered to the Bank a deed of trust which encumbered the New Hope Property (the "Johnson Trust Deed"). (R. 61.) Johnson also began physical possession of the 25-foot Strip when he purchased and took possession of the New Hope Property. (R. 61.)

The Bank subsequently failed and the Federal Deposit Insurance Corporation ("FDIC") was appointed as its receiver. (R. 6 and 35.) Thereafter, the FDIC acquired the Johnson Note and the Johnson Trust Deed. (*Id.*) Johnson defaulted and on May 31, 1990,

the FDIC commenced a judicial foreclosure action on the Johnson Trust Deed (the "Johnson Foreclosure"). (R. 6 and 36.)

In the spring of 1993, Western acquired the FDIC's interest in the Johnson Note and the Johnson Trust Deed. (R. 69.) Thereafter, Western was substituted for the FDIC as plaintiff in the Johnson Foreclosure. (*Id.*) On March 7, 1994, the Third District Court entered an Order, Judgment, Decree of Foreclosure and Order of Sale in favor of plaintiff Western and against Johnson in the Johnson Foreclosure (the "Johnson Order"). (R. 69.)

On April 26, 1994, pursuant to the Johnson Order the Salt Lake County Sheriff conducted a sheriff's sale of the New Hope Property. (R. 69) Western was the successful bidder and was issued a Certificate of Sale. (R. 6, 36 and 69.) On October 31, 1994, Western was issued a sheriff's deed to the New Hope Property, thereby succeeding Johnson as the record titleholder of the New Hope Property. (R. 69.)

From August 31, 1984 to April 26, 1994, the entire period of time that Johnson was in possession of the New Hope Property as its record titleholder, Johnson also maintained possession of the 25-foot Strip. (R. 61.) The 25-foot Strip was subsumed into the landscaping of the New Hope Property. (R. 61 and 62.) Throughout that ten-year period, the 25-foot Strip was enclosed and made part of the New Hope Property by a fence surrounding the Entire Parcel. (R. 61, 62 and 64-67.) A large storage shed located directly on the 25-foot Strip was maintained and used by Johnson. (*Id.*) The front portion of the 25-foot Strip was even included with a portion of the New Hope Property as part of a small horse pasture that was totally enclosed by a fence. (R. 61, 62 and 64-67.)

After taking possession on April 26, 1994, Western maintained possession of the 25-foot Strip in precisely the same manner that Johnson had possessed it while he owned the New Hope Property. (R. 70 and 71.) Western maintained the shed located on the 25-foot Strip. The landscaping scheme continued to integrate the 25-foot Strip into the remainder of the New Hope Property owned by Western. (*Id.*) The fences were maintained and continued to surround and intersect the 25-foot Strip, making it part of the New Hope Property. (R. 70 and 71.)

A large row of trees grows from the middle to the extreme northern portion of the 25-foot Strip. These trees, along with the shed and the fences intersecting the 25-foot Strip make it impossible to use the 25-foot strip as an ingress or egress to any other property. (R. 61, 62, 64-67, 70 and 71.) Thus, the 25-foot Strip was never used as an access to any other property while the New Hope Property was owned by Johnson or Western. (*Id.*) For all purposes, the 25-foot Strip is now part of the New Hope Property and the two parcels cannot be distinguished without performing a survey. (R. 71.)

Kearls never bothered to inform Salt Lake County of the division of the Entire Parcel into the New Hope Property and the 25-foot Strip. Thus, Salt Lake County continued to treat both parcels as one piece of property, taxing both properties as Parcel No. 28-32-177-007. (R. 48, 49 and 70.) On May 27, 1993, Western paid the property taxes on the Entire Parcel for the years 1986 through 1992. (R. 70 and 76.) Because the Entire Parcel, taxed as parcel No. 28-32-177-007, includes both the New Hope Property and the 25-foot Strip,

Western paid the property taxes on the 25-foot Strip for a seven year consecutive time period. (R. 70.)

VI. SUMMARY OF ARGUMENTS

A. A Typographical Error in the Complaint's Legal Description Does Not Invalidate the Summary Judgment.

In their brief, Kearls claim that the trial court committed error because the legal description of the 25-foot Strip as contained in the complaint is different from the legal description of the subject property in Western's motion for summary judgment. Kearls raised this issue for the first time after entry of the final order, too late to preserve it for appeal. Even if the issue were somehow properly before this Court, Martins contend that Kearls' argument is, in reality, a non-issue. The record reflects that the legal description of the 25-foot Strip, as contained in the complaint contains a typographical error. The minor typographical error was corrected in Western's motion for summary judgment. However, there was never a question in this litigation as to what property was the subject of Western's claims. Furthermore, the order quieting title in Western and from which Kearls appeal accurately and correctly describes the 25-foot Strip. The typographical error in the complaint in no way prejudiced Kearls' efforts to defend the case. Thus, the Court should disregard this red herring raised by Kearls.

B. Western Became the Owner of the 25-foot Strip by Adverse Possession.

Western set forth material facts sufficient to support the trial court's ruling on the adverse possession claims. The only material facts raised by Kearls to dispute Western's

statement of material facts were inadmissible hearsay statements that lacked foundation.

Moreover, the parties thereafter acknowledged that no factual issues existed on the adverse possession claim, permitting the trial court to rule on that claim as a matter of law. The lower court properly ruled that Western met all of the legal requirements to have acquired the 25-foot Strip by adverse possession. Based on the record before this Court on appeal, the trial court's order granting Western's motion for summary judgment must be affirmed.

VII. ARGUMENT

A. A Typographical Error in the Complaint's Legal Description of the 25-foot Strip did not Prevent Summary Judgment in Favor of Appellees.

1. Kearls Failed to Preserve the Issue for Appeal.

The complaint filed herein contains the following legal description of the 25-foot Strip:

BEGINNING at a point South 1649.15 feet and West 3079.67 feet from the Northeast corner of Section 32, Township 3 South, Range 1 East, Salt Lake Base & Meridian; and running thence South 5°42'36" West 451.19 feet; thence South 89°00'56" East 8.14 feet to a point on the arc of a 50.00 foot radius curve to the left; thence along the arc of said curve, through a central angle of 18°32'27", a distance of 16.18 feet; thence West 5°42'36" East 448.16 feet; thence North 87°59'05" West 23.79 feet to the point of beginning. Contains 0.246 acres.

(emphasis added) (R. 4.) In the process of preparing its motion for summary judgment,

Western discovered that the legal description in the complaint contained a typographical

error. Both the memorandum of points and authorities in support of Western's motion for

summary judgment and the supporting affidavit of Roy Dunker contained corrected legal descriptions of the 25-foot Strip. The corrected legal description reads as follows:

BEGINNING at a point South 1649.15 feet and West 3079.67 feet from the Northeast corner of Section 32, Township 3 South, Range 1 East, Salt Lake Base & Meridian; and running thence South 5°42'36" West 451.19 feet; thence South 89°00'56" East 8.14 feet to a point on the arc of a 50.00 foot radius curve to the left; thence along the arc of said curve, through a central angle of 18°32'27", a distance of 16.18 feet; thence **North** 5°42'36" East 448.16 feet; thence North 87°59'05" West 23.79 feet to the point of beginning. Contains 0.246 acres.

(emphasis added) (R. 47 and 57.)

Kearls had several opportunities to timely raise the adequacy of the legal description in the complaint as a defense to Western's claims. The first opportunity would have been in their answer to the complaint. Kearls failed to do so. Even in their memorandum in opposition to Western's motion for summary judgment, the record reflects that Kearls treated the legal description in the complaint and the legal description in Western's motion as one and the same. (*See* R. at 82-84.) Furthermore, on April 3, 1995, the trial court conducted a scheduling conference where both parties stipulated that the location of the 25-foot Strip was not disputed and that the court could rule on Western's adverse possession claim as a matter of law. (R. 176 and 184.) Kearls did not even raise the typographical error in the complaint as a defense to Western's claims until the day **after** the trial court had already entered its final order granting Western's motion for summary judgment. (R. 186.) *See also* Kearls' brief at 30, ¶ ¶ 20 and 21. Kearls' belated objection to the form of the final order did not preserve for appeal the adequacy of the complaint's legal description of the 25-foot Strip.

One of the most well established principles of appellate review is that matters not raised before entry of the final order cannot be considered for the first time on appeal. *Bundy v. Century Equip. Co.*, 692 P.2d 754, 758 (Utah 1984) (citations omitted); *see also Willoughby v. Edwards*, 163 P.2d 958, 960 (Okla. 1945) (failing to raise the issue of the sufficiency of the legal description of the subject property in complaint at trial, issue was denied consideration on appeal). The record is abundantly clear that Kearls never raised the existence of a typographical error in the complaint as a defense to this action until after entry of the final order. Thus, Kearls may not now raise the issue on appeal.

2. The Complaint Fully Conforms to the Requirements of Notice Pleading.

The existence of a typographical error with the complaint has no bearing on the validity of the final order. Utah R. Civ. P. 8 controls the required content of pleadings. Rule 8(a)(i) requires that pleadings set forth "a short, plain statement of the claims." Rule 8(e) states that "each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." Rule 8(f) states that "pleadings shall be so construed as to do substantial justice."

The fundamental purpose of the liberalized notice pleading requirements in Rule 8 is to permit parties a simplified means of presenting claims "subject only to the requirement that their adversary have 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" *Williams v. State Farm Ins. Co.*, 656

P.2d 966, 971 (Utah 1982) (quoting *Blackham v. Snelgrove*, 280 P.2d 453, 455 (Utah 1995)). The complaint conforms to the requirements of notice pleading.

Although the complaint contains a typographical error, it clearly states that the plaintiff seeks to quiet title to a 25-foot strip of property running north and south along the western boundary of the New Hope Property. (R. 3.) The complaint concisely sets forth adverse possession of the 25-foot Strip as the plaintiff's first cause of action. (R.7.) The record reveals that Western's motion for summary judgment corrects the typographical error in the complaint. (R. 47.) The final order contains exactly the same relief sought in the motion for summary judgment. (R. 183.)

In short, the record leaves no doubt that Western sought to quiet title to a strip of property along the west side of New Hope Drive and the trial court granted exactly the relief sought. The unfortunate existence of a typographical error in the complaint has had no prejudicial effect on the course of this litigation. The Kearls knew what property was the subject of the litigation and Western's motion and the subsequent order granting summary judgment both corrected the typographical error and contained a complete and accurate legal description of the 25-foot Strip.

B. The Trial Court Correctly Ruled that Western Acquired the 25-foot Strip by Adverse Possession.

1. The Undisputed Facts Presented to the Trial Court Established that Western Acquired the 25-foot Strip by Adverse Possession.

Utah Code Ann. §§ 78-12-7, 12 set forth the requirements for adverse possession in Utah. In its prior decisions interpreting §§ 78-12-7 and 12, this Court has already held that

to establish title by adverse possession, a claimant must satisfy only three conditions. First, the party seeking adverse possession must continuously possess the subject property for a period of seven years. *Grayson Roper Ltd. Partnership v. Finlinson*, 782 P.2d 467, 469 (Utah 1989). Second, the possession must be open, notorious and hostile. *Marchant v. Park City*, 788 P.2d 520, 524 (Utah 1990). Finally, the party seeking adverse possession must have paid all of the taxes levied on the subject property during a minimum seven year period of possession. *Marchant*, 788 P.2d at 524; *Grayson*, 782 P.2d at 471. The undisputed material facts presented to the trial court make it clear that Western met all of these requirements and acquired the 25-foot Strip by adverse possession.

a. Based on the Principle of Tacking, Western Possessed the 25-foot Strip for More Than Seven Years.

Under the doctrine of tacking, the seven-year possession period may be completed by one possessor or by a series of possessors in privity with each other. *Royal Street Land Co. v. Reed*, 739 P.2d 1104, 1106 (Utah 1987). The record indicates that Johnson began possession of the 25-foot Strip in August of 1984, when he purchased and took possession of the New Hope Property, the property immediately adjacent to the 25-foot Strip. (R. 61.) Thereafter, Johnson possessed the 25-foot Strip continuously until April of 1994. (*Id.*) In April of 1994, Western took possession of the New Hope Property through foreclosure. (R. 70 and 71.) Upon taking possession of the New Hope Property, Western also took

possession of the 25-foot Strip. (*Id.*) Western continuously maintained possession of the 25-foot Strip thereafter. (R. 70 and 71.)^{3/}

Based on these undisputed facts, it is evident that together, Johnson and Western maintained uninterrupted possession of the 25-foot Strip for a period of well in excess of the required seven years. Being in privity with Johnson, Western therefore met the seven-year period of continuous possession requirement under Utah's adverse possession statute.

b. The Possession was Open, Notorious and Hostile.

The record leaves no question regarding whether the possession of the 25-foot Strip by Johnson and Western was open, notorious or hostile. Both Johnson and Western maintained the 25-foot Strip as part of the New Hope Property. (R. 61, 62, 64-67, 70 and 71.) The landscaping of the two parcels is totally integrated. (*Id.*) The 25-foot Strip is enclosed within the New Hope Property by a fence. (*Id.*) The 25-foot Strip is intersected with fences. (R. 61, 62, 64-67, 70 and 71.) Both Johnson and Western have maintained and cultivated the 25-foot Strip as a part of the New Hope Property. (*Id.*) The two pieces of property are so completely integrated that they appear to be one single piece of property and cannot be distinguished without a survey. (*Id.*) The 25-foot Strip cannot be used as an ingress/egress to other property. (*Id.*) As evidenced by the photographs attached to the supporting affidavits (R. 64-67), the 25-foot Strip is totally subsumed by and is not distinguishable from the New Hope Property.

^{3/} Although not reflected in the record, Martins now possess and maintain the 25-foot Strip.

The facts are undisputed that the 25-foot Strip was possessed by Johnson and Western, in a manner totally adverse to the ownership interests of the Kearls. Thus, the trial court correctly ruled as a matter of law that Western (and its predecessor Johnson) met the open, notorious and hostile possession requirements.

c. Western Paid the Property Taxes on the 25-foot Strip for the Requisite Seven-Year Period.

Kearls' brief does not dispute that Western paid the property taxes assessed on the 25-foot Strip for the requisite seven-year period. Indeed, Kearls acknowledge that Western has paid the property taxes assessed on the 25-foot Strip for a seven-year period. Appellants' sole legal argument in opposition to Western's adverse possession claim is that Western cannot tack its possession period to its predecessors' possession period because Western paid the property taxes for both its period of possession and its predecessors' period of possession. Kearls' argument is totally without merit.

Utah law requires that an adverse possession claimant establish both seven years of open, hostile and notorious possession and payment of all property taxes assessed on the subject property for the same period of possession. *See* Utah Code Ann. § 78-12-12. Contrary to Kearls' argument, Western's payment of the property taxes, for the seven-year period that coincides with the period of open, hostile physical possession, perfected its adverse possession claim. Appellants' argument that tacking is conditioned upon predecessors and successors paying the property taxes for their own period of possession is not only confusing, but unsupported by any case law. In *Burbadge v. Rosen*, 400 S.W.2d

502, 504,(1966), the court held that each possessor need not pay the property taxes for his/her period of possession as long as one of the claimants paid all of the taxes assessed during the statutory period.

Kearls' argument completely contradicts the public policy underlying the doctrine of adverse possession. Adverse possession has been implemented and recognized to assure maximum utilization of land, to encourage rejection of stale claims, and to provide a means to quiet title. *Chaplin v. Sanders*, 676 P.2d 431, 435 (1984). The record is clear that the Kearls abandoned the 25-foot Strip. They never used it. They allowed it to be integrated into the remainder of the New Hope Property and used exclusively by the owner of the New Hope Property. They did not pay the assessed property taxes.

Payment of the assessed property taxes is one of the clearest indications of a claim of ownership. The fact that Kearls allowed Western to pay the taxes assessed on the 25-foot Strip for the time that Western and Western's predecessor (Johnson) possessed the 25-foot Strip is consistent with Kearls' failure to use the property and the notion that they did not claim ownership of the property. To allow the Kearls to totally abandon the 25-foot Strip for more than seven years and then reclaim the property merely because the entity who was last to be in possession of the 25-foot Strip paid the property taxes for both its own and its predecessor's possessionary period would undermine the purpose of adverse possession. Such a claim is nonsensical and undermines the statutory scheme permitting adverse possession.

The record supports the order entered by the trial court. Through the principle of tacking, Western possessed a 25-foot Strip for a continuous seven-year period. The possession was open, notorious and hostile. Western paid all property taxes assessed on the 25-foot Strip for the requisite seven-year period. Thus, Western met every legal hurdle to acquire the 25-foot Strip by adverse possession. Accordingly, the trial court's order granting summary judgment was proper.

2. Kearls Failed to Assert Admissible Material Facts to Controvert the Adverse Possession Claim.

a. The Facts Raised by Kearls to Oppose Summary Judgment Rely on Inadmissible Hearsay Evidence and Lack Foundation.

When a motion for summary judgment is properly supported by an affidavit, the opposing party has an affirmative duty to respond with affidavits or other materials allowed by Utah R. Civ. P. 56(e). *D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989). Rule 56(e) requires that affidavits in opposition to a summary judgment motion set forth facts that are admissible in evidence. *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983). The Kearls ignored this requirement. Paragraphs 2 and 3 of Mr. Kearl's affidavit (the "Kearl Affidavit") in opposition to Western's summary judgment motion attempted to rebut the results of a survey commissioned by Western to obtain a legitimate property description of the 25-foot Strip. (See R. at 54-58 and 94-97.) Western properly objected to paragraphs 2 and 3 of the Kearl Affidavit because they fail to set forth facts that are admissible in evidence.

Paragraphs 2 and 3 of the Kearl Affidavit constitute inadmissible hearsay.

Paragraph 2 states:

I personally checked the records and plat maps at the Salt Lake County Recorder's Office and according to the records and plat maps, the property described in paragraph 3 of Western's Memorandum in Support of its Motion for Summary Judgment ... is not property located along the West side of the property I once owned on New Hope Drive, in Draper, Utah.

Paragraph 3 states:

According to the records and plat maps at the Salt Lake County Recorder's Office, the property described in paragraph 3 of Western's Memorandum in Support of its Motion for Summary Judgment ... is located to the South and East of the New Hope property and is in fact New Hope Dive (sic) itself.

(R. 96.) The Kearl Affidavit offered the contents of certain, unidentified records and plat maps at the Salt Lake County Recorder's Office in an attempt to dispute the location of the 25-foot Strip. Thus, the statements constitute hearsay. *See* Rule 801(c) of the Utah Rules of Evidence.

Affidavits that rely on inadmissible hearsay statements are insufficient to create an issue of fact. *Walker v. Rocky Mountain Recreation Corp.*, 508 P.2d 538, 542 (Utah 1973). Moreover, paragraphs 2 and 3 of the Kearl Affidavit contain unsupported conclusions that lack any foundational support. Such statements cannot be used to oppose summary judgment. *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985); *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985).

Western properly objected to Kearls' attempts to offer inadmissible evidence to rebut Western's factual assertions. The only admissible evidence in the record establishes that the

25-foot Strip is located along the Western boundary of the New Hope Property. Thus, all of Appellants' assertions regarding property along the east and south end of the New Hope Property are immaterial to the claim presented in this action. Accordingly, the trial court correctly ruled that Kearls failed to raise disputed material facts in opposition to the motion for summary judgment.

b. Even if the Facts Raised by Kearls in Opposition to Western's Statement of Undisputed Facts had been Admissible, they Failed to Create Genuine Issues of Material Fact.

Western's motion for summary judgment and Kearls' opposition thereto were like two ships passing in the night. Western carefully and clearly defined the scope of this litigation as a quiet title action to a 25-foot strip of property running north and south along the western boundary of the New Hope Property and the residence thereon owned by Western (R. 45-50). As stated in Western's memorandum in support of summary judgment, **this omitted strip of property on the west boundary of the Entire Parcel is the only property at issue in this action.** (*See* R. at 47.) In contrast to Western's motion, Kearls' opposition was dedicated totally to some other strip of property running along the east and south of the New Hope Property.

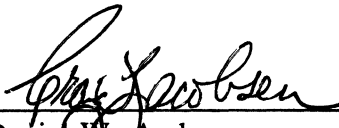
Western's supporting memorandum and affidavits clearly described the location of the 25-foot Strip at issue, using metes and bounds descriptions, offered by a licensed surveyor. In contrast, Appellants offered only a bald, inadmissible assertion to dispute the surveyor's conclusions regarding the location of the property. Such an assertion does not raise a

genuine issue of fact, material or otherwise. While attempting to cloud the issues raised in Western's motion, Kearls totally failed to address and focus on the property that was actually at issue in this litigation. Thus, Western's undisputed facts remain just that, undisputed.


VIII. CONCLUSION

The typographical error in the Complaint's description of the subject property was never objected to by Kearls and is a non-issue. It is undisputed that the descriptions in Western's motion for summary judgment and the eventual order granting that motion are both accurate and complete. Kearls knew of the location of the property and even acknowledged that no factual issues were disputed as to the adverse possession claim, leaving the trial court to rule on that claim as a matter of law. The trial court correctly ruled, according to the record, that Western met each and every requirement for adverse possession, including the time period required, nature of use and the payment of taxes. Accordingly, the Martins respectfully request this Court to affirm the Order entered by the trial court, granting summary judgment in favor of Appellees.

DATED this 11th day of October, 1995.



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