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**IN THE COURT OF APPEALS  
STATE OF NEW MEXICO**

COURT OF APPEALS OF NEW MEXICO  
FILED

JAN 15 2013

Wendy F Jones

**B.T.U. BLOCK & CONCRETE, INC.,**  
a New Mexico corporation,

Plaintiff-Appellee,

v.

**Cause No. D-0412-CV-02006-00315**

**TONY C. ORTEGA,**

Defendant-Appellant.

**Cause No. 32,092**

Appeal from:  
Fourth Judicial District Court  
County of San Miguel  
The Honorable Eugenio S. Mathis  
**Cause No. D-0412-CV-02006-00315**

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**APPELLANT'S REPLY BRIEF**

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**STATEMENT OF RULE 12-313 PAGE/WORD COUNT COMPLIANCE:**

This Brief is shorter than the 35 pages permitted. Counsel used WordPerfect with a proportionally spaced Times New Roman 14 Point typeface. The body of the document consists of 1,058 words.

## **Color of Title.**

BTU claims that color of title was established through the testimony of Edward Winston, who was qualified as an expert witness land surveyor. (Ans., p. 4.) Mr. Winston specifically testified that Tract 2 (the “80-foot strip”) was **not** part of the property described in the legal description on BTU’s Corrected Warranty Deed. (TR-11/28/07: 10:12:46-10:13:52). In the rest of BTU’s Answer Brief, there isn’t one reference to testimony or evidence that could establish color of title to the 80-foot strip. BTU failed to establish color of title to the 80-foot strip, and Mr. Winston actually testified that BTU does not have color of title to Tract 2.

BTU claims that the Court weighted “conflicting evidence” regarding color of title. (Ans, pp. 10-11, 13.) This is not true. There was no evidence presented at trial that BTU has color of title to Tract 2. In fact, the District Court acknowledged at a hearing after the trial that BTU did not have color of title to Tract 2:

We have a plaintiff that has no record title. Their claim is based entirely on adverse possession. And quite frankly . . . I’m struggling to find clear and convincing evidence to support that. I may be hinting to you where I’m heading with this decision, but claims of adverse possession are, there’s not record title in BTU.

(TR-02/07/08: 9:26:17-9:27:50). The Court decided to ignore the fact that BTU did not have color of title, and never made a finding of fact or conclusion of law that BTU had color of title. This is clear error.

BTU also argues that the District Court's findings are to be liberally construed to include a finding regarding color of title. (Ans., p. 14.) However, BTU points to no evidence that supports a finding of BTU's color of title to Tract 2. Moreover, color of title is an element of the claim of adverse possession. There is no conclusion of law by the District Court holding that color of title was established either. The District Court appears to have completely ignored one element that is required by law to establish claim of adverse possession to Tract 2. This is clear error.

### **Color of Title to Tract 1**

BTU makes more extensive arguments regarding color of title to Tract 1 by virtue of a Corrective Warranty Deed filed in 1992, purportedly to correct the omission of a legal description in the original Warranty Deed of 1983. (Ans., pp. 11-14.) However, color of title to Tract 1 is irrelevant. BTU did not claim to own Tract 1 by virtue of adverse possession. BTU claimed title to Tract 1 by virtue of its Corrective Warranty Deed. The problem with the Corrective Warranty Deed is not the legal description attached. Rather, the problem with the Corrective Warranty Deed is that it is not a document that was properly notarized and capable of recording, because the signature on it is still the original signature of 1983, not a new signature that would approve a the correction to the original Warranty Deed. Proving color of title to Tract 1 does not establish a claim to Tract 2 nor establish title to Tract 1.

## Payment of Taxes

Similar to color of title, there was no dispute that BTU did not actually pay taxes on Tract 2. BTU paid taxes on exactly the acreage described in its Corrected Warranty Deed, which its expert surveyor established was Tract 1 and not Tract 2. BTU's basic argument regarding taxes is that because the maps at the tax assessor's office aren't accurate, BTU reasonably believed it was paying taxes on Tract 2. (Ans., pp. 18-19.)

BTU cites *Pratt v. Parker*, 57 N.M. 103, 107-108, 255 P.2d 311, 313-314 (1953) in support of its argument that even though BTU was only actually paying taxes on Tract 1, BTU satisfied this element because it reasonably believed it was paying taxes on Tract 2 as well. (Ans., p. 18.) *Pratt v. Parker* is distinguishable from this case and would not support BTU's argument even were it applicable here.

In *Pratt v. Parker* the county assessor actually assessed property using the wrong section numbers. *Id.*, at 106, 255 P.2d at 312. The Court specifically held that this evidence of payment of taxes in good faith could defeat a tax sale, holding specifically:

Payment in good faith of taxes, although the assessment on which the payment is made erroneously describes the land intended to be assessed, is a defense against a sale and tax deed based upon a second assessment of the same land with a proper description.

*Id.*, at 106-107, 255 P.2d at 313.

Obviously, the case at bar is not a challenge to a tax sale. Moreover, the San Miguel County Assessor's Office in this case did not make a mistake. It assessed BTU for exactly the 19.08 acres of property BTU claimed to own by virtue of its Corrected Warranty Deed – Tract 1 and only Tract 1. (TR-11/28/07:2:35:09-2:36:02; 2:44:24-2:44:29; 2:45:00-2:45:11.) The holding in *Pratt v. Parker* does not apply to this case, nor would it support BTU if it did. BTU never paid taxes on Tract 2 and failed to satisfy this element of adverse possession with respect to Tract 2.

Similar to the Color of Title argument, there was no conflicting evidence regarding whether BTU actually paid taxes on Tract II. The evidence was clear that BTU did not pay taxes on Tract II, and BTU's principal admitted under oath that BTU did not pay taxes on Tract II. (TR-11/28/07:2:35:09-2:36:02; 2:44:24-2:44:29; 2:45:00-2:45:11.) BTU's argument is that because it reasonably believed it was paying taxes on Tract II, this satisfies an element of adverse possession. There is no legal authority to support this argument. The District Court's conclusion that this element was satisfied was clear error.

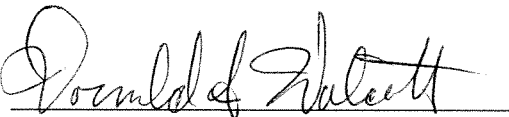
### **Conclusion.**

Because BTU failed to establish color of title and payment of taxes for Tract 2, Ortega requests that the District Court's grant to BTU of quiet title to Tract 2 by

adverse possession be reversed. Because BTU failed to establish record title or color of title to Tract 1, Ortega requests that the District Court's grant to BTU of quiet title to Tract 1 be reversed. Ortega requests that this Court mandate to the District Court that it enter a Judgment denying BTU's claims for Quiet Title.


Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of January, 2013, a true and correct copy of the foregoing Brief in Chief was delivered by first class mail to Nicolas T. Leger, 523 W. National Avenue, P.O. Box 454, Las Vegas, New Mexico 87701, and L. Helen Bennett, P.O. Box 4305, Albuquerque, NM 87196-4305, attorneys for Plaintiff-Appellee

  
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