

ORIGINAL

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01/03/2022

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 21-0537

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Case No. DA 21-0537

Frank L. Hart and Opal A. Hart,

Plaintiffs and Appellees,

vs.

George W. Hale aka George William Hale,  
Individually and as Personal Representative of the  
Estate of Cecil Elmer Hale, Personal Representative  
of the Estate of Volney E. Hale, and Co Trustee of the  
Hale Family Trust Dated 3/13/19, and DeeAnn Hale,  
Co Trustee of the Hale Family Trust Dated 3/13/19,  
And ALL OTHER PERSONS  
UNKNOWN, CLAIMING OR WHO MIGHT CLAIM  
ANY RIGHT, TITLE, ESTATE OR INTEREST IN  
OR LIEN OR ENCUMBRANCE UPON THE REAL  
PROPERTY DESCRIBED IN THE COMPLAINT  
ADVERSE TO THE PLAINTIFFS' OWNERSHIP  
OR ANY CLOUD UPON PLAINTIFFS'  
TITLE HERETO, WHETHER SUCH CLAIM OR  
POSSIBLE CLAIM BE PRESENT OR  
CONTINGENT,

Defendants and Appellants.

FILED

JAN 03 2022

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

**APPELLANTS BRIEF**

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On appeal from the Montana Eighteenth Judicial District Court,  
County of Gallatin,  
Cause No. DV-19-1105A  
Honorable Peter Ohman Presiding

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APPELLANTS

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ATTORNEY FOR APPELLEES

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## **JURISDICTIONAL STATEMENT**

**This is an appeal from the district court granted summary judgement and final order in favor of plaintiffs for adverse possession arising out of a quiet title action and counter claims of constructive fraud and declaratory relief involving the parties Frank and Opal Hart, the Montana Department of Revenue, plaintiff-appellees and George and DeeAnn Hale, Hale Family Trust, defendants-appellants.**

## **STATEMENT OF ISSUES**

- 1. Did the district court error in granting summary judgement in favor of plaintiffs by not considering genuine issues of material facts raised by defendants?**
- 2. Did the district court error in not granting defendant's counterclaim for declaratory relief when justifiable controversy exists between the parties where plaintiff's adverse possession claim does not exist?**
- 3. Did the district court error in not considering defendant's defense which limits adverse possession where plaintiffs never intended to adversely possess the subject property while never possessing the property exclusively for any five year statutory time?**

## SCOPE OF REVIEW

Issue 1 present issues of law, Summary judgment is appropriate only when “the pleadings, depositions, answers to interrogatories, and admissions on file” together with any affidavits, demonstrate that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. *Brothers v. Home Value Stores, Inc.*, 2012 MT 121, ¶ 6, 365 Mont. 196, 279 P.3d 157 (quoting *M. R. Civ. P. 56(c)*). Once the moving party meets its burden, the opposing party “must present substantial evidence essential to one or more elements of its case to raise a genuine issue of material fact.” *Tin Cup Co. Water v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.

Issue 2 explores the fact that the district court abused its discretion not granting defendant’s claim for declaratory relief of the parties absent a valid claim of adverse possession by the plaintiffs irrespective of defendant’s counterclaim. Applicable to the issue we assert that the district court erred as a matter of law when it held that the cause of action by the Hales did not present a justiciable controversy, and that the district court abused its discretion when it did not render a declaratory judgment in favor of the Hales pursuant to § 27–8–201 and –202, MCA

Issue 3 explores a statute of limitations on the claim of adverse possession, “An action for the recovery of real property or for the possession of real property may not be maintained unless it appears that the plaintiff or the plaintiff’s ancestor, predecessor, or grantor was seized or possessed of the property in question within 5 years before the commencement of the action.” 70-19-401 MCA. When possession is open, notorious and continuous, the one whose land is encroached upon

has a cause of action that must be exercised within the time permitted under statute. *Thibault v. Flynn*, 133 Mont. 461, 325 P.2d 914 (1958).

### STATEMENT OF THE CASE

The Hales have been record owners of the subject property since 1939 and called it the Hale Ranch since which was originally acquired by our ancestor Joseph Kirk Wilks Hale and granted to Volney Elmer Hale, H. Ernest Hale and Thelma Beebe and they held title as a tenancy in common. H. Ernest Hale conveyed his interest in the subject property to Volney Elmer Hale. Volney Hale and Thelma Beebe were tenants in common until her death in 1973, Donald Beebe inherited Thelma's interest. Volney Elmer Hale held interest in the subject property until 1981, his grandson and heir George William Hale then became tenants in common with Donald and Eileen Beebe, the Beebes subsequently conveyed their interest to Frank and Opal Hart in 2009. George William Hale having paid taxes on the subject property approximately 1981 to 1988, thus making the Harts cotenants throughout their lease agreement with the Beebes. George William Hale did not have constructive notice of the details or intent of those agreements. The Harts along with their attorney John T. Flynn, a cousin of the Hales who was skilled in the law knowing the Hale's interests, filed a realty transfer certificate to remove the name of Volney Hale et al from the title based on the Application for Determination of Inheritance Tax acting in concert with Donald Beebe's first forged 1974 Grant Deed attempting to terminate the Hale's interest in the property by rights of survivorship, in favor of the Harts, not open and notorious consistent to a adverse possession claim brought in good faith. John T Flynn assisted the Harts to obtain title insurance using an alternate legal description. The legal effect of the Application of

Determination of Inheritance tax document was not apparent to the Hales not skilled in the law to determine until discovery. The Harts filed for water rights with the DNRC when they learned that the Hales held the water rights on the subject property, which evidences the Hale's interrupted the Harts alleged exclusive ownership, which is still reflected by the Montana Bureau of Mines and Geology, Ground Water Information Center. George William Hale filed a wild deed owning to the Hale family, known by the Harts as valid upon Volney Hale's death conveying ownership interest in the property held as a tenancy in common, however the Department of Revenue failed to recognize the Hales as record owners based on the Application for Determination of Inheritance Tax. Even though the Hale family have possessed and had quiet enjoyment of the property throughout the years, with the help of the District Court, George William Hale still opened the estate of his late father and grandfather to assert all his rights over the property. The Hales expressed their permission and praise to the Harts of their occupation and improvements on the property in 2013 and the Harts never intended to adversely possess the Hale's interest or deny the Hales of any rights, furthermore, George William Hale never objected to the Harts occupation. The title was at all times consistent with a co ownership. The Harts filed a Quiet title action for adverse possession and declaratory relief and the Hales counter claimed with a claim of constructive fraud and declaratory relief. The District Court erred in granting final judgement in favor of the Harts based on adverse possession which by given many facts of the case cannot be established.

## STATEMENT OF FACTS

Volney E. Hale and subsequently George William Hale, the heirs of Volney and the Beebes were tenants in common, therefore when the Harts took interest in the subject property in 1984, and purported title in 2009 they became co-owners of the property, a fact the district court affirms see *Order filed September 27th, 2021 (page 10)*. The Application for Determination of Inheritance Tax was not a conveyance of property, *Order filed September 27th, 2021 (page 5)*, however it was used by the Department of Revenue as a basis to unlawfully deny George William Hale as a record owner, see *Montana Department of Revenue's Motion to Dismiss, Affidavit of Pam Moor (page 2, line 7)*. The Harts acknowledge that the 1958 Warranty Deed was in fact valid because Volney Hale owned a interest in the property at the time of his death, see *Plaintiff's Reply Brief in Support of Motion for Summary Judgement (pages 5 & 6)*. The Harts knew that Volney E. Hale thought that George William Hale had interest in the property if he paid the taxes, *Deposition of Opal Hart by Rachel Taylor, (Page 122, line 15), Plaintiffs' Brief in Support of Motion for Summary Judgment*. It is clear, that the absence of a valid claim of adverse possession by the Harts we can confirm the Hales own a majority interest in the property by declaratory relief, see *Affidavit of Zane Sullivan in Support of Plaintiffs' Motion for Summary Judgment (page 15 line 59)*.

The tenancy in common was apparent to the Harts having seen all the recorded deeds, see *Deposition of Opal Hart by DeeAnn Hale (Page 23, Line 15), included with Counterclaimants /Defendant's Response Opposing Plaintiff's Motion for Summary Judgment therewith Brief Opposing Plaintiff's Motion for Summary Judgement*, coupled with the title search ordered in 1989 by Opal Hart, on its face was "without regard to the sufficiency of the title in the vestee [Donald and Eileen Beebe]",

see *Brief Opposing Plaintiff's Motion for Summary Judgment*, "Exhibit H", provided by Opal Hart during discovery in addition to the 1988 tax receipt evidencing Volney E. Hale et al, "Exhibit A" of *Counterclaimants / Defendant's Response Opposing Plaintiff's Motion for Summary Judgment*. The title abstract provided by the American Land Title Company and Opal Hart during discovery clearly shows interest belonging to the Hales since 1939 to present, see "Exhibit I" in *Counterclaimants/ Defendants Brief Opposing Plaintiff's Motion for Summary Judgment*. Donald and Eileen Beebe could not convey entire interest of the property to the Harts by virtue of the co-ownership.

The Harts knew years prior that George William Hale did in fact claim interest in the property as an heir of Volney E. Hale by paying the taxes, see *Plaintiffs' Notice in Errata to Brief in Support of Motion for Summary Judgment*, "Exhibit 7" *Deposition of Frank Hart by Rachel Taylor*, (pages 81, 82 & 83). The Harts spoke to John T. Flynn about the Hale's claim on the property years prior -long before their quiet title action (John T. Flynn died in 2012), see "Exhibit 12" *Deposition of Opal Hart by Rachel Taylor* (pages 65 & 66) included in *Plaintiffs' Brief in Support of Motion for Summary Judgment and Sworn Statement of DeeAnn Hale & Sworn Statement of Daniel Hale included with Counterclaimants /Defendant's Response Opposing Plaintiff's Motion for Summary Judgment therewith Brief Opposing Plaintiff's Motion for Summary Judgment*. The Harts knew George William Hale claimed ownership in the property in 1984, see *Deposition of Opal Hart by Rachel Taylor* (page 111) included in *Plaintiffs' Brief in Support of Motion for Summary Judgment*.

George William Hale never objected to the Hart's possession of the property, the Harts had permission and had a co ownership for years with no objections, see *Deposition of Frank Hart by DeeAnn Hale* (Page 29,

*Line 19) included with exhibits filed with Counterclaimants /Defendant's Response Opposing Plaintiff's Motion for Summary Judgment therewith Brief Opposing Plaintiff's Motion for Summary Judgement.*

“The parties do not dispute that the Hales occasionally walked onto the property over the years...” see *Order filed September 27th, 2021 (Page 14)*. Photos and video provided by the Hales during discovery evidenced the Hales possession of the property, see *Deposition of Frank Hart by DeeAnn Hale (page 6) included exhibit Counterclaimants /Defendant's Response Opposing Plaintiff's Motion for Summary Judgment therewith Brief Opposing Plaintiff's Motion for Summary Judgement, Deposition of Frank Hart by Rachel Taylor “Exhibit 7” (Page 40, 41) included with Plaintiffs' Brief in Support of Motion for Summary Judgment.*

The Hales have occupied the property throughout the years and offered sworn statements, taken photos on the property, provided testimony of use and occupation that prove their possession of the property see *Deposition of DeeAnn Hale by Rachel Taylor and Sworn Statement of Daniel Hale included with Counterclaimants /Defendant's Response Opposing Plaintiff's Motion for Summary Judgment therewith Brief Opposing Plaintiff's Motion for Summary Judgement, Deposition of Opal Hart by Rachel Taylor, (Pages 46-51)*

The Hales recorded the 1958 Warranty Deed on the subject property in 2018 and held the water rights. The Harts filed for water rights with the DNRC when they learned that the Hales held the water rights on the subject property before litigation, see *Affidavit of Opal Hart in Support of Summary Judgement with Exhibits 1-6, (Page 5 Line 20 & Page 6) filed with Plaintiff's Motion for Summary Judgment.*

Plaintiffs know the Hale family and are not strangers, Volney E. Hale, George and DeeAnn Hale including Archie Huenergardt, the father

of DeeAnn, see *Plaintiffs' Answer to George and DeeAnn Hale's Counterclaim*, (page 5, line 19 and page 6 line 20). The Harts never infringed on the rights of the Hales or intended to deny the rights of the Hales at any time before the 1958 Warranty Deed was recorded, see *Deposition of Frank Hart by DeeAnn Hale* (pages 34, 35) included with *Counterclaimants /Defendant's Response Opposing Plaintiff's Motion for Summary Judgment and Brief Opposing Plaintiff's Motion for Summary Judgement*.

It was the understanding of the Hales that the plaintiffs could not have claimed entire interest in the property held as a tenancy in common, see *Deposition of DeeAnn Hale by Rachel Taylor*, (Page 89 line 4) "Exhibit 12" in *Plaintiffs' Brief in Support of Motion for Summary Judgement*. The Harts never gave the Hales any notice they solely owned the property, interests were consistent with co-ownership, see *Plaintiffs' Notice in Errata to Brief in Support of Motion for Summary Judgement*, "Exhibit 7" *Deposition of Frank Hart by Rachel Taylor*, (page 99).

The Harts admit it was not George William Hale who was asked to leave the property upon discovering a person near the Hart's chicken coop, see *Plaintiff's Reply Brief In Support of Motion for Summary Judgment, Response to Defendants' Second Discovery Requests Admission & Interrogatories And Request for Production* (Page 4). The Hales expressed their permission to the Harts for their possession and occupation in 2013, see *Sworn Statement of Daniel Hale therewith Counter-Claimants /Defendants' Response Opposing Plaintiffs' Motion for Summary Judgement acknowledged by DeeAnn Hale in Deposition of Opal Hart by DeeAnn Hale* (Page 18 line 11). Daniel Hale did in fact call and contact the Harts on behalf of the Hales including the Hart's daughter Lynnette, that is confirmed by *Deposition of Opal Hart by Rachel Taylor* (Pages 131, 132).

## SUMMARY OF ARGUMENT

In order for the plaintiffs to succeed in their motion for summary judgement there can be no genuine issues of material facts, the Hales clearly demonstrated and asserted countless material facts pertaining to the elements of their causes of action in pleadings that should have been considered thus defeating the plaintiffs' motion for summary judgement. The Hales should have prevailed over summary judgement considering facts asserted by both parties that counter plaintiffs' claim of adverse possession but also considering the Hale's defense regarding a statute of limitations on adverse possession. The court erred by not considering the Hale's declaratory relief cause of action irrespective of their claim of constructive fraud.

## ARGUMENT

### Constructive Fraud

The Application for Determination of Inheritance Tax was not filed upon Volney E. Hale's death in June of 1981. Its purpose was not in place for the proper procedure in accordance with Montana Code Title 72, Chapter 16, Part 4 (repealed in 2000). On its face the document evidenced it was filed February 24th 1984 and a past due balance of tax interest incurred in the amount of \$204.75. The purpose of the tax document was to pave the transaction between the Beebes and Harts Lease with Option to Purchase Agreement executed February 27th, 1984 just days prior by avoiding a tax lien and attempting to remove Volney Hale's interest in the property not only because Volney Hale died intestate but also because of

the parties known interests held by the Hales. The Application for Determination of Inheritance Tax was not a conveyance of property. Volney Hale nor his heirs never signed any Quitclaim deeds on the subject property.

The Department of Revenue represented that the Hales had no interest in the property pursuant to the Application of Determination of Inheritance Tax. The chain of title clearly shows material facts that the Hales still own interest in the property and the Department's representation was false. The Harts were knowledgeable of the Hale's interests evident by the title abstract provided by the American Land Title Company, the 1989 title search conducted by Thomas Cahill provided by the Harts in discovery, the 1988 tax receipt evidencing the Hales payment of taxes after Volney's death, the fact the Hales occupied the property over the years and that the parties are not strangers coupled with the Harts spoke to their attorney John T. Flynn (a relative of the Hales), about the Hale's claim of the property demonstrates their ignorance of the truth. The Hales believed Donald Beebe could convey a fractional interest in the property but were ignorant of any legal effect of the Application of Determination of Inheritance Tax document or that the first or second 1974 Grant Deeds created defects in the title, however they relied on "good faith" of all cotenants, knowing the Hart's built a house on the property in 1984, all this led to the Hales being disadvantaged and denied rightful ownership by the Department of Revenue especially since the Harts used the property to establish title insurance in order to bring a quiet title action. The Hale's prima facie counter claim directly arises out of the Hart's quiet title action. To make out a prima facie case of constructive fraud the Hale's established the following elements: a representation; the falsity of that representation; the materiality of that representation; the Hart's knowledge of that representation's falsity; the

Hale's ignorance of that representation's falsity; the Hale's reliance upon the truth of that representation and right to rely upon that representation; and the Hales consequent and proximate injury or damage caused by reliance on that representation. *White v. Longley*, 2010 MT 254, ¶ 28, 358 Mont. 268, 244 P.3d 753 (citing *Town of Geraldine v. Mt. Municipal Ins. Auth.*, 2008 MT 411, ¶ 28, 347 Mont. 267, 198 P.3d 796).

Constructive fraud is defined by statute: "any breach of duty that, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under the person in fault by misleading another person to that person's prejudice or to the prejudice of anyone claiming under that person; or any act or omission that the law especially declares to be fraudulent, without respect to actual fraud." 28-2-406 MCA. Consider that good faith is a element of adverse possession or any claim of action, "A person enters into possession under claim of title pursuant to the statute governing adverse possession when the person holds land under any instrument purporting to convey the land or the right to its possession, provided the claim is made thereunder in good faith." *Nelson v. Davis*, 417 P.3d 333, 391 Mont. 280 (2018). The Harts claim of adverse possession lacks color of title and good faith. The Harts had a duty to disclose their knowledge of the Hale's interest in the property, a material fact when they were silent, the Hales relied on the Harts to act in good faith in their agreements with the Beebes as cotenants and their title insurer which prejudiced the Hales as co-owners which led to the Hale's disadvantage.

The Hales presented substantial evidence essential to several elements of their cause for constructive fraud to raise a genuine issues of material facts, Rule Civ. Proc., Rule 56, however the district court erroneously deemed "speculative and conclusionary". The Hales have provided substantial evidence essential to one or more elements of their

case to raise a genuine issue of material fact. Tin Cup Co. Water v. Garden City Plumbing & Heating, Inc., 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.

#### Plaintiffs Adverse Possession Claim

We will explore further material facts that exist asserted by the parties which clearly demonstrates that the Harts cause of action for adverse possession does not exist, where the Hales again have established further genuine issues of material facts.

#### Color of Title

Volney E. Hale and subsequently George William Hale, the heirs of Volney and the Beebes were tenants in common, therefore when the Harts took interest in the subject property in 1984, and purported title in 2009 they became co-owners of the property this coupled with the facts that interests were consistent with a co-ownership and the Harts knew years prior that George William Hale did in fact claim interest in the property as an heir of Volney E. Hale by paying the taxes and even acknowledge that the 1958 Warranty Deed was in fact valid, in addition the Harts knew George William Hale claimed ownership in the property in 1984 as a tax payer, clearly evidences that the Harts did not enter possession pursuant to their 2009 Beebe to Hart deed under color of title, these facts negate the Hart's claim for adverse possession under color of title, especially since it was the understanding of the Hales that the plaintiffs could not have claimed entire interest in the property held as a tenancy in common. Donald and Eileen Beebe could not convey entire interest of the property to the Harts by virtue of the co-ownership, this was known by the Harts as they spoke to John T. Flynn about the Hale's claim on the property years prior -long before their quiet title action,

consider “We held that a grantor could not create color of title by conveying land that he did not own.” quoting YA Bar Livestock Co., 269 Mont. at 249, 887 P.2d at 1216. All material facts we draw from the record the district court failed to weigh, the Harts adverse possession claim lacks validity under color of title or claim of right. Consider also the following facts pertaining to adverse possession, which evidences the Harts claim of adverse possession fails:

#### **Actual and Visible Possession**

The Harts and Hales have occupied the property by actual and visible consistent with a co-ownership. The Hales have provided evidence of their occupation, hunting fishing and using the land as owners for recreation, the parties do not dispute that the Hales occasionally walked onto the property over the years which was actual and visible, and the Hales acknowledge permission of the Harts occupation and improvements of the property. Actual and visible factors of the Harts claim do not put the Hales on notice of a exclusive or hostile claim adverse to the Hale’s ownership interest.

“The question of adverse possession is one of intention, and intention must be discovered from all the circumstances of the case.” Hawkins v. Mahoney, 297 Mont. 98, 990 P.2d 776, (1999), Brown v. Cartwright, 163 Mont. 139, 515 P.2d 684 (1973). The Harts had no intention of adverse possession at any statutory time.

#### **Continuous**

The Harts knew George William Hale claimed ownership in the property since 1984. The Hales recorded the 1958 Warranty Deed and other conveying documents on the authority of the district court on the subject property and held the water rights, the rights of the Hales possessed was always continuous since the Harts knew of these rights, in any case the Harts do not dispute that the Hales occasionally walked onto

the property over the years, interrupting any possible exclusive possession, these facts prove the Harts possession claim was never continuous for any 5-year statute of time. The Harts may have attempted a claim years prior but did not-they had no intention. When possession is open, notorious and continuous, the one whose land is encroached upon has a cause of action that must be exercised within the time permitted under statute. *Thibault v. Flynn*, 133 Mont. 461, 325 P.2d 914 (1958). The Harts do not meet the requirement of adversely possession continuously another missing element from their failed adverse possession claim.

#### Exclusive and Hostile

The Harts knew George William Hale claimed ownership in the property since 1984 and the Harts had no reason to believe a co tenancy did not exist other than claiming under the forged 1974 Grant Deed or acting in concert with the Application of Determination of Inheritance Tax elements of constructive fraud. The Harts never infringed on the rights of the Hales or intended to deny the rights of the Hales at any time before the 1958 Warranty Deed was recorded therefore, we quote, "The question of adverse possession is one of intention, and intention must be discovered from all the circumstances of the case." *Hawkins v. Mahoney*, 297 Mont. 98, 990 P.2d 776, (1999), *Brown v. Cartwright*, 163 Mont. 139, 515 P.2d 684 (1973), *Magelssen v. Atwell*, 152 Mont. 409, 451 P.2d 103 (1969). The Harts never intended to adversely possess the property another missing element of their claim. The parties do not dispute that the Hales occasionally walked onto the property over the years coupled with the understanding of the Hales that the plaintiffs could not have claimed entire interest in the property held as a tenancy in common evidences that the Harts claim of adverse possession does not exist. The Harts admit it was not George William Hale who was asked to

leave the property upon discovering a person near the Hart's chicken coop, and therefore could not oust the Hales consider "A cotenant must give his or her fellow cotenants notice that possession of the land is no longer consistent with the cotenancy and that he or she asserts a claim as sole owner of the property." quoting *Y A Bar Livestock Co. v. Harkness*, 269 Mont. 239, 887 P.2d 1211 (1994). Plaintiffs know the Hale family and are not strangers to Volney E. Hale, George and DeeAnn Hale including Archie Huenergardt, the father of DeeAnn, and their attorney John T. Flynn (a cousin of the Hales), consider "Additionally, adverse possession by one cotenant against another cotenant requires an even higher standard than adverse possession against a stranger. To adversely possess against a cotenant, the claimant must meet the above requirements and also "oust" the cotenant from the property. This additional requirement is necessary because any possession of land by one cotenant is considered to be consistent with and in recognition of the cotenancy.", quoting *Fitschen Bros. Comm. Co. v. Noyes' Estate*, 76 Mont. 175, 246 P. 773 (1926). The Harts had not provided actual notice to the known cotenants, the Hales, that their occupation of the property was hostile to their claims in any way ever. Thus, the Hart's adverse possession claims fails because they could not demonstrate that they ousted the Hale cotenants either through taking possession under color of title or by providing actual notice that their possession was hostile to the Hale cotenants' interests. *YA Bar Livestock Co.*, 269 Mont. at 246, 248, 887 P.2d at 1215, 1216.

#### Adverse

The Harts never infringed on the rights of the Hales or intended to deny the rights of the Hales at any time before the 1958 Warranty Deed was recorded coupled with the fact that the Hales expressed their permission to the Harts to occupy the property in 2013 and George

William Hale never objecting to the Hart's possession of the property, the Harts had permission and had a co ownership for years with no issues, therefore the Harts do not meet any element to adversely possess the property another missing element of their claim.

#### Payment of Taxes

The Hales and Harts paid taxes on behalf of all co owners, consider, "All acts done by a cotenant and relating to or affecting the common property, are presumed to have been done by him for the common benefit of himself and the others. The relation between him and the other owners is always supposed to be amicable rather than hostile; and his acts are therefore regarded as being in subordination to the title of all the tenants, for by so regarding them they may be made to promote the interests of all...", *Y A Bar Livestock Co. v. Harkness*, 269 Mont. 239, 887 P.2d 1211 (1994). Any payment of taxes by the Harts does not meet the requisite to claim adverse possession under a co-tenancy, another missing element of the Harts claim.

Both prescriptive easements and title by adverse possession are established in a similar manner, the Hart's must show use that is open, notorious, exclusive, adverse, continuous, and uninterrupted, payment of taxes for the statutory five-year period, *Habel v. James*, 68 P.3d 743, 315 Mont. 249 (2003), demonstrated by facts of the case, however they cannot, "A claimant's failure to prove any element for the full prescriptive period is fatal to the entire claim." *Ray v. Nansel*, 311 Mont. 135, 53 P.3d 870, (2002). The Harts fail to prove all full elements required to prove the full prescription of adverse possession and therefore their claim fails and thus the Hales own the subject property by declaratory relief.

#### Parties Declaratory Relief Claims

The district court failed to recognize that the Hales have a claim not just for constructive fraud but also declaratory relief.

Volney E. Hale and subsequently George William Hale, the heirs of Volney and the Beebes were tenants in common, therefore when the Harts took interest in the subject property in 1984, and purported title in 2009 they became co-owners of the property. The Application for Determination of Inheritance Tax was not a conveyance of property; however it was used by the Department of Revenue as a basis to unlawfully deny George William Hale as a record owner these facts we draw from the pleadings constitutes the Hale's distinguished existing rights over the Harts declaratory relief claim. In the absence of a valid adverse possession claim by the Harts, the district court abused its discretion in not granting a rightful claim to the Hales, when it could have effectively operated by declaring the obvious rights of the Hales in the justifiable controversy, even so we demonstrate facts constituting constructive fraud are also evident. It is clear that the absence of a valid claim of adverse possession by the Harts we can confirm the Hales own a majority interest in the property by declaratory relief, § 27-8-201 and – 202, MCA. The court abused its discretion in not considering material facts that negate the Hart's adverse possession claim irrespective of the Hale's claim of constructive fraud.

## CONCLUSION

The Hales presented substantial evidence essential to several elements of their case to raise a genuine issue of material facts. *Tin Cup Co. Water v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60, Rule Civ. Proc., Rule 56, however the district court erroneously deemed “speculative and conclusionary”, which should have been considered. The Hales should have prevailed over a

motion for summary judgement riddled with disputed issues of material facts cloaked as “undisputed” facts. The Harts adverse possession claim, both prescriptive easements and title by adverse possession are established in a similar manner, the Hart’s must show use that is open, notorious, exclusive, adverse, continuous, and uninterrupted, payment of taxes for the statutory five-year period, *Habel v. James*, 68 P.3d 743, 315 Mont. 249 (2003), which they cannot, consider “A claimant's failure to prove any element for the full prescriptive period is fatal to the entire claim.” *Ray v. Nansel*, 311 Mont. 135, 53 P.3d 870, (2002). The Harts had 37 years to bring a claim for adverse possession having knowledge of the Hale’s interests, therefore the plaintiffs should be barred from summary judgement consider, “When possession is open, notorious and continuous, the one whose land is encroached upon has a cause of action that must be exercised within the time permitted under statute.” *Thibault v. Flynn*, 133 Mont. 461, 325 P.2d 914 (1958). Therefore, the district court must rely upon the claims of declaratory relief irrespective of the parties’ other causes of action, which is very clear the Hales own a majority interest in the property by declaratory relief, see *Affidavit of Zane Sullivan in Support of Plaintiffs’ Motion for Summary Judgment (page 15 line 59)*. The district court erred in not considering the Hales substantial rights. *Montana Petroleum Tank Release Compensation Bd. v. Crumley's, Inc.*, 174 P.3d 948 (Mont. 2008). We consider the Fourteenth Amendment “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws.”. No state shall enforce any law to deprive the Hales of property without due process of law, by excluding material facts of evidence in summary judgement, U.S. Const. amend. XIV, § 1. The district courts final judgement should be reversed.

DATED: this 28<sup>th</sup> day of December in the year 2021,

RESPECTIFILY SUBMITTED,

George W. William Hale  
George William Hale

DeeAnn Hale  
DeeAnn Hale

## CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11(4)(e) of the Montana Rules of Appellate Procedure, we certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the count of 5,816 words on 21 pages, calculated by Microsoft Word, excluding certificate of service and certificate of compliance.

Dated this 28<sup>th</sup> day of December, 2021.

George Williamson Hale

Dee Ann Hale

Signed Appellants

### CERTIFICATE OF SERVICE

We hereby certify that we have filed a true and accurate copy of the foregoing APPELLANTS BRIEF with the Clerk of the Montana Supreme Court; and that we have served true and accurate copies of the foregoing upon each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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Dated this 28<sup>th</sup> day of December, 2021.

George William Hale  
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