

DA-21-0537

IN THE SUPREME COURT OF THE STATE OF MONTANA

---

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 Hale, and Co-Trustee of the Hale Family Trust Dated 3/13/2019; HEIRS OF JACK E. HALE, DECEASED; HEIRS OF STEVE M. HALE, DECEASED; DAVID E. HALE; WINONA M. HALE; and DEEANN HALE, Trustee of the Hale Family Trust Dated 3/13/2019; UNKNOWN HEIRS OF CECIL HALE; UNKNOWN HEIRS OF VOLNEY HALE; 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 PLAINTIFF'S OWNERSHIP OR ANY CLOUD UPON PLAINTIFFS' TITLE THERETO, WHETHER SUCH CLAIM OR POSSIBLE CLAIM BE PRESENT OR CONTINGENT,

Defendants.

---

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 Hale, and Co-Trustee of the Hale Family Trust Dated 3/13/2019; and DEEANN HALE, Trustee of the Hale Family Trust Dated 3/13/2019

Counterclaimants and Appellants,

vs.

FRANK L. HART and OPAL A. HART; MONTANA DEPARTMENT OF REVENUE; 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 PLAINTIFF'S OWNERSHIP OR ANY CLOUD UPON PLAINTIFFS' TITLE THERETO, WHETHER SUCH CLAIM OR POSSIBLE CLAIM BE PRESENT OR CONTINGENT

Counter-Defendants.

---

**RESPONSE BRIEF OF APPELLEES HARTS**

---

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

---

APPEARANCES:

Ron A. Nelson  
Rachel A. Taylor  
Church, Harris, Johnson &  
Williams, P.C.  
114 3<sup>rd</sup> Street S.  
P.O. Box 1645  
Great Falls, MT 59401  
406-761-3000  
[rtaylor@chjw.com](mailto:rtaylor@chjw.com)  
[ronnelson@chjw.com](mailto:ronnelson@chjw.com)

*Attorneys for  
Plaintiffs-Appellees*

George and DeeAnn Hale  
Hale Family Trust  
P.O. Box 846  
Hilger, MT 59451  
406-366-0236  
[haletrust@post.com](mailto:haletrust@post.com)

*Pro se Defendants-Appellants*

Teresa G. Whitney  
Kristina K. Warren  
Montana Department of Revenue  
125 N. Roberts St.  
P.O. Box 7701  
Helena, MT 59604  
406-444-7990  
[twhitney@mt.gov](mailto:twhitney@mt.gov)

*Attorneys for Counter-Defendant  
Montana Department of Revenue*

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... ii

**STATEMENT OF ISSUES** ..... 1

**STATEMENT OF THE CASE**..... 1

**STATEMENT OF THE FACTS** .....5

**STANDARD OF REVIEW** .....13

**SUMMARY OF ARGUMENT** .....15

**ARGUMENT**.....15

**I. The District Court was correct in finding no dispute of fact that the Harts satisfied the elements of adverse possession.**..... 15

a. Color of Title and Actual Possession of the Property by Harts ..... 16

b. Harts’ Payment of Property Taxes for 35 years .....21

c. Unknown Co-Tenancy and Proper Ouster of the Hales .....23

**II. The District Court Did Not Err Denying Hales’ counterclaims** .....30

**III. There Was No Err in the District Court’s Findings that the Harts Possessed the Property for 5+ years Before Filing the Complaint** ...33

**CONCLUSION**.....34

**CERTIFICATE OF COMPLIANCE** .....35

**CERTIFICATE OF SERVICE** .....36

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 .....	14
<i>Arnold v. Yellowstone Mountain Club, LLC</i> , 2004 MT 284, 323 Mont. 294, 100 P.3d 137 .....	14
<i>Brown v. Cartwright</i> , 163 Mont. 139, 515 P.2D 684 (1973) .....	18, 19, 20
<i>Buckley v. Western MT. Community Mental Health Center</i> , 2021 MT 82, 304 Mont. 524, 485 P.3d 1211.....	13
<i>Dewey v. Stringer</i> , 2014 MT 136, 375 Mont. 176, 525, 1326 .....	14
<i>Fitschen Bros. Comm. Co. v. Noyes' Estate</i> , 76 Mont. 175, 246 P. 773 .....	16, 23
<i>Hawkins v. Mahoney</i> , 297 Mont. 98, 990 P.2d 776 (1999) .....	17, 18
<i>Magelssen v. Atwell</i> , 152 Mont. 409, 451 P.2d 103 (1960) .....	18
<i>Nelson v. Davis</i> , 2018 MT 113, 391 Mont. 280, 417 P. 3d 333 .....	15, 16, 17, 23, 24, 25, 29, 30
<i>Parish v. Morris</i> , 2012 MT 116, 365 Mont. 171, 278 P.3d 1015 .....	14
<i>Sprunk v. First Bank System</i> , 252 Mont. 463, 830 P.2d 103 (1994) .....	14
<i>YA Bar Livestock Co. v. Harkness</i> , 269 Mont. 239, 887 P.3d 1211 (1994) .....	16, 17, 23, 24

### Statutes

Montana Code Annotated § 70-19-401 .....	33
Montana Code Annotated § 70-19-407 .....	16, 17

Montana Code Annotated § 70-19-411 .....16  
Montana Code Annotated § 70-21-304 .....31, 32

**Rules**

Mont. R. Civ. P. 9(b) .....30  
Mont. R. Civ. P. 12 .....3  
Mont. R. Civ. P. 56 .....13, 14

**Other Authorities**

3 Am. Jur. 2d *Adverse Possession* § 13 .....18

## STATEMENT OF ISSUES

Plaintiffs and Appellees, Frank and Opal Hart (the “Harts”), by and through their counsel of record, hereby respond to the January 3, 2022 Refiled Opening Brief of Defendants and Appellants George and Deeann Hale (the “Hales”). The Harts respond herein to the issues identified by the Hales, which the District Court resolved based upon the undisputed facts of this case, and not based upon the Hales’ speculation and assumptions. The issues raised by the Hales on this appeal, as the Harts understand, are, as follows:

1. Did the District Court err in granting summary judgment on the adverse possession claim in favor of the Harts?
2. Did the District Court err in not granting the Hales’ counterclaim for declaratory relief?
3. Did the District Court err in finding that the Harts possessed the Property for more than five years prior to the commencement of this action?

## STATEMENT OF THE CASE

The Harts filed their *Complaint to Quiet Title* on September 26, 2019. *Dkt. 1 (“Complaint”)*. The *Answer and Counterclaim* of Appellant, George Hale, individually and in his capacity as personal representative of the Estate of Volney Hale and the Estate of Cecil Elmer Hale, and as Co-Trustee of the Hale Family Trust, and Appellant DeeAnn Hale as Co-Trustee of the Hale Family Trust

(collectively, the “Hales”) was filed along with a *Motion to Dismiss* on November 6, 2019. *Dkt. 22 and 23*.

The Honorable Holly Brown, who presided over this case until her retirement in early October of 2020, denied the Hales’ first *Motion to Dismiss* in an Order dated November 14, 2019, stating “Plaintiffs’ Complaint sets forth facts sufficient to state claims upon which relief could be granted, which are further supported by the deeds and other related real estate documents.” *Dkt. 24, page 3*.

The Harts filed their *Answer to George and DeeAnn Hales’ Counterclaim* on November 19, 2019. *Dkt. 27*. On December 12, 2019, the Hales filed a Second Motion to Dismiss, and a Third Motion to Dismiss on December 23, 2019. *Dkt. 36 and 45*.

Then, the Hales filed a *Motion for Leave to Amend Counterclaim and Joinder of Additional Counter Defendants* on January 27, 2020. *Dkt. 58*. The Harts had no objection and, as a result, the District Court granted leave to amend. The *Order re Amended Counterclaim* was entered on April 1, 2020. *Dkt. 73*.<sup>1</sup> The Harts filed their *Answer to the Hales’ Amended Counterclaim* on April 8, 2020. *Dkt. 75*.

The Defaults of Defendants Heirs of Jack E. Hale, Deceased (*Dkt. 122*); Heirs of Steve M. Hale, Deceased (*Dkt. 70*); David E. Hale (*Dkt. 33*); and Winona

---

<sup>1</sup> The *Amended Counterclaim* may be located at Doc. 58 or Doc. 73, but will be referenced herein as Doc. 73.

M. Hale (*Dkt. 15*), were entered by the District Court. Harts filed their *Application for Default Judgment* for the four previously defaulted Defendants on October 19, 2021 (*Dkt. 182*), which was granted in the District Court's *Final Judgment* (*Dkt. 185*).

Without a ruling on the Second and Third Motions to Dismiss, the Hales filed a Fourth Motion to Dismiss, on June 1, 2020. *Dkt. 86*. On September 23, 2020, an *Order Re: Motions to Dismiss* was entered which denied the December 12, 2019 and June 1, 2020 *Motions to Dismiss* on the grounds that the Motions were untimely filed pursuant to Mont.R.Civ.P. 12. *Dkt. 101*.

The Hales then proceeded to file a Fifth Motion to Dismiss on or about October 13, 2020 (*Dkt. 110*), which was denied by the Honorable Peter Ohman on October 28, 2020. *Dkt. 114*. The reasons cited in the October 28 Order were: 1) the Court has personal jurisdiction over Defendants; and, 2) the Court has subject matter jurisdiction over quiet title actions in general. On January 26, 2021, the Hales filed a Motion to *Reconsider the Fifth Motion to Dismiss* (*Dkt. 128*), which was denied by the District Court on August 25, 2021. *Dkt. 169*.

The Harts, on January 29, 2021, filed a *Motion for Summary Judgment and Request for Hearing* (*Dkt. 129*), *Brief in Support of Motion for Summary Judgment, including Exhibits 7-17* (*Dkt. 130*), along with the *Affidavit of Opal Hart in Support of Summary Judgment with Exhibits 1-6* (*Dkt. 131*), and the

*Affidavit of Zane Sullivan in Support of Motion for Summary Judgment*, the Harts' expert witness (*Dkt. 132*). The Harts moved for summary judgment on their quiet title claim and, in the alternative, the adverse possession claim, in addition to judgment in their favor on the Hales' fraud allegations.

After mediation on April 22, 2021 failed to resolve the case, the District Court set a hearing on the Harts' *Motion for Summary Judgment* for August 26, 2021. At the in-person Summary Judgment hearing on August 26, 2021, Judge Peter Ohman heard oral arguments and asked questions of the undersigned counsel for the Harts and of the Hales, who appeared *pro se*.

Pursuant to the District Court's oral directive at the end of the hearing, counsel for the Harts provided a proposed *Order re Summary Judgment* on September 7, 2021. *Dkt. 170.100*. After considering the evidence admitted and arguments of each party, the District Court rendered its *Order* on September 27, 2021, granting summary judgment in favor of Harts on the adverse possession claim. *Dkt. 174*. The September 27 *Order* also resolved the Hales' outstanding *Second Motion to Dismiss* (*Dkt. 36*) and *Summary Judgment Motion* (*Dkt. 135*) filed by the Montana Department of Revenue on January 29, 2021. *Dkt. 174, p. 3*. The *Final Judgment* was filed on October 19, 2021 (*Dkt. 185*), and the *Notice of Entry of Final Judgment* was entered on October 27, 2021. *Dkt. 186*. Thereafter, the Hales filed their *Notice of Appeal* on October 29, 2021. *Dkt. 188*.

## STATEMENT OF THE FACTS

At the summary judgment hearing on August 26, 2021, the District Court requested that the Harts provide a chronological flow chart of the deeds for the Property, as described below, which Harts did at Dkt. 171; *see also* Dkt. 132, Ex. A., for a chronological list of the recorded deeds on the Property.

1. The property at issue in this case is commonly known as and has an address of 1470 Trident Road, Three Forks, Montana, Gallatin County, and is described in the record as follows:

Township 2 North, Range 2 East, M.P.M.

Section 16: S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$

Section 17: The South 210 feet of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ , as previously conveyed by Deed recorded in Book 64 of Deeds, page 269

(the “**Property**”). *Dkt. 1, Complaint, Ex. N(d)*.

2. The Property first came into the Hale family through Joseph Wilkes “Kirk” Hale (“K.W. Hale”), who took title to the Property pursuant to a Sheriff’s Deed under Foreclosure, Doc. 26999 to K.W. Hale, recorded at Bk. 68, Pgs. 480-481, on October 26, 1925, in the office of the County Clerk and Recorder of Gallatin County. *Dkt. 1, Ex. A; Dkt. 73, Defendant’s Amended Counterclaim, Ex. A; Hales’ Opening Supreme Court Brief, p. 5 (hereinafter “Hales’ Opening Brief”)*.

3. In 1939, K.W. Hale transferred Section 16: S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of the

Property to Thelma Beebe, Volney Hale, and Ernest Hale pursuant to a Warranty Deed, recorded as Doc. 24076 at Bk. 82, Pgs. 321-322, on April 7, 1939, in the office of the County Clerk and Recorder of Gallatin County, Montana. *Dkt. 1, Ex. C; Hales' Opening Brief, p. 5.*

4. Later, K.W. Hale transferred Section 17 of the Property to Ernest Hale pursuant to a Warranty Deed, recorded as Doc. 27091 at Bk. 83, Pgs. 249-250, on December 12, 1939, in the office of the County Clerk and Recorder of Gallatin County. *Dkt. 1, Ex. D; Hales' Opening Brief, p. 5.*

5. Ernest Hale then transferred his 1/3 interest in Section 16 and his 100% interest in Section 17 to Volney Hale pursuant to an Indenture recorded as Doc. 93162 at Bk. 112, Pgs. 292-293, on September 24, 1953, in the office of the County Clerk and Recorder of Gallatin County. *Dkt. 1, Ex. G; Hales' Opening Brief, p. 5.*

6. In March of 1974, Volney Hale transferred the Property to himself and to Donald and Eileen Beebe (the "Beebes") as joint tenants with right of survivorship, pursuant to a Grant Deed recorded as Doc. 9330 at Bk 23, Pgs. 594-595 on March 7, 1974, in the office of the County Clerk and Recorder of Gallatin County (the "**First 1974 Grant Deed**"). *Dkt. 1, Ex. H; Hales' Opening Brief, p. 5.*

7. As of the First 1974 Grant Deed, Volney Hale was a widower due to his wife, Adadell Hale, passing away on November 23, 1958. *Dkt. 130, Ex. 11.*

8. On the same day, March 7, 1974, a second Grant Deed was recorded as Doc. 9331 at Bk. 23, Pgs. 596-597, in the office of the County Clerk and Recorder of Gallatin County, Montana, in which the Beebes transferred a 1/3 interest in the Property back to Volney Hale (the “**Second 1974 Grant Deed**”).  
*Dkt. 1, Ex. I.*

9. Also in March of 1974, after the death of Thelma Beebe in 1973, the Distribution from the Estate of Thelma Beebe of Thelma’s 33.33% interest in the Property was recorded at Doc. 12828, Bk. 25, Pgs. 1439-1444, conveying to James Beebe (1/3); Kenneth Beebe (2/9); Nita Beebe (2/9); and Donald Beebe (2/9). *Dkt. 1, Ex. J(d); Hales’ Opening Brief, p. 5.*

10. See Dkt. 1, Ex. B, for a family tree of the Beebe and Hale families.

11. On the same day, Kenneth Beebe transferred his interest in the Property to Donald Beebe, Doc. 9332, Bk. 23, Pg. 598, 3/7/1974; James Beebe transferred his interest the Property to Donald Beebe, Doc. 9333, Bk. 23, Pg. 599, 3/7/1974; and Nita Beebe transferred her interest in the Property to Donald Beebe, Doc. 9334, Bk. 23, Pg. 600, 3/7/1974. *Dkt. 1, Ex. J(a), J(b), and J(c).*

12. As a result of these transfers after the death of his mother, Thelma Beebe, Donald Beebe took title to Thelma Beebe’s 33.33% interest in Section 16 of the Property.

13. After the death of Volney Hale on June 26, 1981, an Application

for Determination of Inheritance Tax was executed by the Beebes and recorded as Doc. 121030 at Bk. 82, Pgs. 486-489 on February 24, 1984, in the office of the County Clerk and Recorder of Gallatin County (the “**Application for Inheritance Tax**”). *Dkt. 1, Ex. L.; Dkt. 73, Ex. L.*

14. The Application for Inheritance Tax was not a document of conveyance. *Hales’ Opening Brief, pgs. 6-7, 12.*

15. Also in February of 1984, the Harts entered into a Lease and Purchase Option Agreement with Donald and Eileen Beebe under which the Harts had possession of the Property with the option to purchase (the “**Lease**”). *Dkt. 131, Affidavit of Opal Hart in Support of Motion for Summary Judgment, ¶ 4 and Ex. 1.*

16. Once they leased the Property, the Harts began building a house on the Property and making other substantial improvements to the Property. *Hales’ Opening Brief, p. 12.* The Harts also began paying taxes on the Property in 1984, as agreed on Page 1, No. 2 of the Lease. *Dkt. 131, Aff. O. Hart, ¶¶ 12 & 14 and Ex. 1; Dkt. 130, Ex. 7, Depo. of Frank Hart by Rachel Taylor, June 15, 2020, p. 69, l. 23 to p. 70, l. 2; p. 82, l. 8-10; Dkt. 130, Ex. 13, Depo. DeeAnn Hale by Rachel Taylor, October 16, 2020, p. 52, l. 15-18.*

17. The Hales paid taxes on the Property in 1982 to 1983. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 43, l. 23-25, p. 44, l. 1-2, p. 52, l. 15-18; Transcript of Summary Judgment Hearing, August 26, 2021, page 22, lines 22-25 (hereinafter “Trans.”).*

18. In approximately 1989, the Harts decided to purchase the Property under a Contract for Deed and Modification Agreement, with Donald and Eileen Beebe (sellers) financing the purchase. *Dkt. 73, Ex. N.*

19. The Harts continued to pay all real property taxes and assessments on the Property, as agreed in the 1989 Contract for Deed. *Id.; Dkt. 131, Aff. O. Hart, ¶ 15, and Ex. 5; Trans., page 22, lines 22-23.*

20. The Notice of Purchaser's Interest evidencing the purchase and sale between the Harts and Beebes was recorded as Doc. 207948 at Film 109, Pgs. 2444-2445, on February 1, 1990 in the office of the County Clerk and Recorder of Gallatin County. *Dkt. 1, Ex. M.*

21. Plaintiff Opal Hart wrote many checks for lease and purchase payments, and taxes, etc., and on a check dated February 7, 1984, Opal Hart wrote in the Memo: "Hale – Beebe Property." *Dkt. 131, Aff. of O. Hart, ¶¶ 8-9 and Ex. 3.*

22. The Harts purchased an Owner's Title Policy from American Land Title Company (the "**Title Company**") dated November 19, 1990, when they entered into the 1989 Contract for Deed with Donald and Eileen Beebe (the "**Title Policy**"). *Dkt. 131, Aff. of O. Hart, Ex. 6.*

23. In 2009, after the Harts paid off the 1989 Contract for Deed, Donald

and Eileen Beebe transferred the Property to Harts in Doc. 2339793, recorded on August 14, 2009, in the record at the office of the County Clerk and Recorder of Gallatin County (the “**2009 Deed**”). *Dkt. 1, Ex. N(d)*.

24. The Harts continued to pay taxes on the Property once they received ownership of the Property pursuant to the 2009 Deed. *See* the property tax statements for the Property from 2005 through 2019, specifically listing the Harts as sole owners of the Property after the recording of the 2009 Deed. *Dkt. 131, Aff. of O. Hart, ¶ 17 and Ex. 5; Dkt. 130, Ex. 7, Depo. F. Hart, p. 82, l. 8-10.*

25. The Harts recorded a Declaration of Homestead on the Property on March 26, 2012, as Doc. 2411366, in the office of the County Clerk and Recorder of Gallatin County. *Dkt. 1, Ex. O; Trans., p. 11, lines 11-16.*

26. For 30+ years, the Harts lived on the Property full-time as their personal residence and planted trees and established a yard on the Property; built fences around the Property; moved additional buildings on to and removed buildings from the Property; added on to existing buildings; built a bridge; raised livestock on the Property; maintained a sawmill and stacked wood on the Property; fished and hunted on the Property, etc., all while paying all property taxes on the Property. *Dkt. 130, Ex. 7, Depo. F. Hart, p. 38, l. 25 to p. 40, l. 5; 41, l. 14 to p. 42, l. 4; p. 44, l. 17 to p.45, l. 2; p. 45, l. 22 to p 46, l. 11; p. 69, l. 23 to p. 70, l. 2; p. 82, l. 8-10; p. 70, l. 25 to p. 71, l. 24; p. 72, l. 18-24; p. 100, l. 11 to p. 101, l. 25; p. 103, l.*

25 to p. 104, l. 5; p. 106, l. 1-11; p. 109, l. 4-12; p. 114, l. 9-17, plus photos of Property, attached to the Depo. of F. Hart, which include pgs. 3-5, 7, 9-10, & 21 of Ex. 1, pgs. 1-2 of Ex. 3<sup>2</sup> and Ex. 4; Dkt. 130, Ex. 12, Depo. Opal Hart by Rachel Taylor, June 15, 2020, p. 37, l. 2-18; p. 43, l. 15 to p. 45, l. 15; p. 47, l. 7-13; p. 50, l. 19 to p. 51, l. 8; p. 84, l. 11-13; p. 99, l. 23 to p. 106, l. 16; p. 114, l. 25 to p. 115, l. 15; Dkt. 130, Ex. 13, Depo. D. Hale, p. 111, l. 23 to p. 112, l. 18 with photos of Property attached to D. Hale's Depo. as Exs. 3&5 & 15-16, (p. 98, l. 23 to p. 99, l. 19; p. 109, l. 24 to p. 112, l. 12.

27. The Hales admit they knew of the Harts' possession, ownership, and improvements to the Property since 1984. *Dkt. 130, Ex. 13, Depo. of D. Hale, p. 111, l. 23 to p. 112, l. 18; Hales' Opening Brief, pgs. 6 & 8.*

28. In 2018, George Hale recorded the following documents in the record of the office of the County Clerk and Recorder of Gallatin County:

- a. Warranty Deed dated 5/29/2018 - Estate of Cecil Hale to George Hale, David Hale, Jack Hale, Winona Hale, and Steve Hale, recorded as Doc. 261842 on 5/29/2018.
- b. Warranty Deed dated 5/29/2018 - Estate of Cecil Hale to George Hale, water rights to the Property, recorded as Doc. 261843, on 5/29/2018.
- c. Warranty Deed dated 6/5/1958 - Volney and Adadell Hale to Cecil Hale, recorded as Doc. 2614844, on 5/29/2018 (the "**1958 Deed**").

---

<sup>2</sup> Exhibits 1 and 3 used during the Depo. of F. Hart are the same exhibits used in the Depo. of O. Hart. However, only those portions of those exhibits used for this Brief are attached to the Depo. of F. Hart.

*Dkt. 1, Ex. P(a), P(b), and P(c); Hales' Opening Brief, p. 6.*

29. The above-mentioned documents arise from the 2018 probate of Cecil Hale's Estate, son of Volney (and Adadell) Hale. Cecil Hale died on October 1, 1962. *Dkt. 130, Ex. 14.*

30. The 1958 Deed was recorded in 2018 (*Hales' Opening Brief, pg. 9*), and therefore was not recorded prior to the death of Cecil Hale (1962) or prior to the death of Volney Hale (1981).

31. Defendants George Hale, David Hale, Winona Hale, Steve Hale Hale (deceased), and Jack Hale (deceased) are the children of Cecil Hale and the grandchildren of Volney Hale. *Dkt. 1, Ex. B.*

32. Upon Volney's death in 1981, George Hale and his brother Jack Hale obtained certain personal belongings of Volney Hale and Cecil Hale from the Property, which included a family Bible. Jack Hale kept the Bible from 1981 until his death on March 17, 2011. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 23, l. 7 to p. 28, l. 16.*

33. At some point between the death of Jack Hale in March 2011 and March 17, 2013, George Hale obtained the Bible that George and Jack had previously found in 1981. On March 17, 2013, George Hale opened the family Bible and found the 1958 Deed. *Id.*

34. After filing the documents in 2018, George Hale filed a Warranty

Deed conveying the Property from the Estate of Volney Hale to himself, recorded on March 27, 2019, as Doc. 2640883 in the record of the office of the County Clerk and Recorder of Gallatin County. *Dkt. 1, Ex. Q.*

35. Also on March 27, 2019, George Hale then conveyed the Property to George W. Hale and DeeAnn Hale, Trustees of the Hale Family Trust, in a Warranty Deed recorded as Doc. 2640884, in the record of the office of the County Clerk and Recorder of Gallatin County, Montana. *Dkt. 1, Ex. R.*

36. The Harts first learned of the Hales' recording of the deeds describing the Property in 2018, when the Water Rights Division of the Department of Natural Resources (“DNRC”) notified them that George Hale filed for water rights on the Property, after which time they consulted an attorney. *Dkt. 130, Ex. 12, Depo. of O. Hart, p. 62, l. 8 to p. 65, l. 25; Dkt. 131, Aff. O. Hart, ¶ 20.*

### **STANDARD OF REVIEW**

The Montana Supreme Court reviews a grant of summary judgment *de novo*, and applies the same method of evaluation as the district court pursuant to Montana Rule of Civil Procedure 56. *Buckley v. Western Montana Community Mental Health Center*, 2021 MT 82, ¶ 12, 403 Mont. 524, 485 P.3d 1211. The district court's conclusion that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law is a conclusion of law

which the Supreme Court reviews for correctness. *Parish v. Morris*, 2012 MT 116, ¶ 10, 365 Mont. 171, 278 P.3d 1015 (citations omitted).

The terms of Rule 56(c) make it clear that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (construing the identical federal Rule 56(c)); see also M.R.Civ.P. 56(c)(3). “A ‘material’ fact is a fact that involve[s] the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, 100 P.3d 137.

The party opposing summary judgment must set forth specific facts to determine the existence or non-existence of a genuine issue of material fact, and cannot rely on speculation, fanciful, or conclusory statements. *Sprunk v. First Bank System*, 252 Mont. 463, 466-467, 830 P.2d 103,105 (1992). What the party opposing summary judgment “thinks” happened and their “subjective beliefs” about an event do not rise to the level of a material fact. *Dewey v. Stringer*, 2014 MT 136, ¶ 16, 375 Mont. 176, 525 P.3d 1326. “Summary judgment cannot be defeated by offering mere speculation.” *Id.*

## SUMMARY OF ARGUMENT

The undisputed material facts establish that the Harts have held an interest in the Property since February of 1984; have possessed and substantially improved the Property since February of 1984; have held a claim for color of title and an ownership interest in the Property since 1990; have been the record owners of the Property since 2009; and have paid taxes on the Property since 1984. The Hales' argument is, at most, a compilation of their own personal opinions and speculation in an effort to create disputed facts, coupled with a misunderstanding of applicable law.

This Court should affirm the District Court's grant of summary judgment finding that the Harts satisfied the elements of adverse possession.

## ARGUMENT

The undisputed facts established by the documents of record, admissions from the Hales themselves, and clear Montana law show the District Court's determination that there were no issues of material fact is correct and Plaintiffs are entitled to judgment as a matter of law.

### **I. The District Court was correct in finding no dispute of fact that the Harts satisfied the elements of Adverse Possession.**

“For a claim of adverse possession [], the claimant must prove that the property was claimed under color of title or by actual, visible, exclusive, hostile and continuous possession for the full statutory period of five years.” *Nelson v.*

*Davis*, 2018 MT 113, ¶ 14, 391 Mont 280, 417 P.3d 333, citing *YA Bar Livestock Co. v. Harkness*, 269 Mont. 239, 244, 887 P.2d 1211, 1213 (1994). “In addition, the claimant must have paid all taxes due on the property during the statutory period.” *Nelson* at ¶ 14, citing Montana Code Annotated § 70-19-411.

**a. Color of Title and Actual Possession of Property by Harts.**

A party enters into possession under claim of title sufficient for 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* at ¶ 14, quoting *Fitschen Bros. Comm. Co. v. Noyes’ Estate*, 76 Mont. 175, 196, 246 P. 773, 779 (1926), citing Mont. Code Ann. § 70-19-407.

The Hales assert that “no deeds are in the title to record, which purports to convey all interest to Frank and Opal Hart.” *Trans.*, pg. 21, lines 14-16. This is a misstatement of undisputed fact which is supported by the public record. Nineteen years prior to the 2009 vesting deed to the Property for the Harts, the Notice of Purchaser’s Interest evidencing the agreement between the Harts and Beebes was recorded in the public record on February 1, 1990. *Dkt. 1, Ex. M*. The 2009 Deed from the Beebes to Harts conveying the entirety of the Property was then recorded upon the Harts satisfaction of the contract for deed. Although unknown to them until 2018, the Harts do not dispute that Volney Hale owned an interest, as

cotenants with the Beebes, in the Property at the time of his death. *Dkt. 144, Defs. ' Brief Opposing Summary Judgment, Section I, ¶ 10; Trans., pg. 16, line 23 to pg.17, line 1.* Even still, the 2009 Deed from the Beebes satisfied the color of title element for adverse possession. *Nelson v. Davis*, 2018 MT 113, ¶¶ 14 and 16, 391 Mont. 280, 417 P.3d 333, citing Mont. Code Ann. § 70-19-407, and *YA Bar Livestock Co.* 269 Mont. 239, 248, 887 P.2d 1211, 1216 (1994).

Even without color of title, the Harts have occupied and maintained the Property as their primary personal residence from approximately 1984 to present. *Dkt. 130, Ex. 7, Depo. F. Hart, p. 70, l. 25 to p. 71, l. 24; p. 72, l. 18-24; and pgs. 4, 7 & 9-10 of Ex. 1 attached thereto; Dkt. 130, Ex. 12, Depo. O. Hart, p. 8, l. 11-13; p. 43, l. 15 to p. 45, l. 15; p. 99, l. 23 to p. 106, l. 16; Dkt. 130, Ex. 13, Depo. D. Hale, p. 111, l. 23 to p. 112, l.18, Exs. 5 & 15-16.* This is undisputed by the Hales' own admissions that they knew of the Harts' possession, ownership and improvements to the Property since 1984. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 111, l. 23 to p. 112, l. 18 and Exs. 15-16 attached thereto; Dkt. 144, Section I, ¶ 12; see also Hales' Opening Brief, pgs. 6&8.*

The Hales, from their personal assumption and misapplication of the case law, try to add a conscious "intent" requirement to adversely possess property. *Hales' Opening Brief, pgs. 15 and 16.* As precedent, the Hales cite two distinct cases, *Hawkins v. Mahoney*, 1999 MT 296, ¶ 13, 297 Mont. 98, 990 P.2d 776, and

*Brown v. Cartwright*, 163 Mont. 139, 515 P.2d 684 (1973), for the rule statement: “The question of adverse possession is one of intention.” “The intention must be discovered from all the circumstances of the case.” *Hawkins and Brown*, citing *Magelssen v. Atwell*, 152 Mont. 409, 414, 451 P.2d 103, 105 (1969).

Upon a complete review of the above cases, the *Hawkins* case dealt with the abandonment of personal property and only made reference to adverse possession when concluding that the “intent to acquire title” is the same in the context of abandonment as in adverse possession. *Hawkins*, ¶ 13.

In *Brown*, the elements for adverse possession of 8.8 acres of pasture were established where defendant grazed cattle, accepted money for granting a power easement that Brown watched the power company install, and fenced the 8.8 acres separate from Brown’s adjoining property, which Brown approved. *Brown* at 142, 515 P.2d at 686. Defendant also paid taxes on the property, which Brown was aware of after being informed the taxes were being assessed to defendant. *Id.* Finally, Defendant offered to sell the property to Brown and the contract owner under a contract for deed with defendant modified a road and put a house on the property all within view of Brown’s house. *Brown* at 142-143, 515 P.2d at 686-687.

In the decision, the Montana Supreme Court looked to 3 Am.Jur.2d *Adverse Possession* § 13, p. 91, when evaluating the question of intention, which states “as

a general rule that the claimant's possession must be such as to indicate his exclusive ownership of the property.” *Brown* at 149, 515 P.2d at 690. Thus, it was important that Brown grazed the 8.8 acres prior to defendant’s fencing if Brown’s cows wandered onto the property from his adjoining 700 acres. Also, the period of nine years that Brown stood by taking no action to protect his alleged interest with full knowledge of defendant’s claim of ownership was crucial in the reasoning. *Brown* at 152, 515 P.2d at 692. The Court concluded that, based upon all circumstances, including the character of the land, the multiple acts of the parties and from defendant’s use and occupancy of the property, defendant clearly intended to claim ownership of the property. *Brown* at 150-151, 515 P.2d at 691.

Similar to the defendant’s conduct of using, improving and claiming exclusive ownership of the agricultural property in *Brown*, the Harts built a permanent residence on the Property (*Hales’ Opening Brief, p.12; Dkt. 130, Ex. 7, Depo. F. Hart, p. 82, l. 8-10; Dkt. 130, Ex. 12, Depo. O. Hart, p. 84, l. 11-13*); planted trees and established a beautiful enclosed yard around their house on the Property. (*Dkt. 130, Ex. 7, Depo. F. Hart p. 100, l. 11 to p. 101, l. 25 and photos at pgs. 3 & 10 of Ex. 1 and Ex. 3 attached thereto; Dkt. 130, Ex. 12, Depo. O. Hart, p. 47, l. 7-13; p. 99, l. 23 to p. 106, l. 16*). The Harts built a greenhouse on the Property, (*Dkt. 130, Ex. 7, Depo. F. Hart, p. 103, l. 25 to p. 104, l. 5*); and a storage shed that Plaintiff Opal Hart received from her dad was moved onto the

Property. *Id.* at p. 41, l. 14 to p. 42, l. 4, and photo references at pgs. 5&7, and 21; *Dkt. 130, Ex. 12, Depo. O. Hart, p. 37, l. 2-18; p. 50, l. 19 to p. 51, l. 8.* The Harts also improved an existing block shed on the property by adding a carport for their vehicles. *Dkt. 130, Ex. 7, Depo. F. Hart, p. 38, l. 25 to p. 40, l. 5; p. 45, l. 22 to p. 46, l. 11 and photos at pgs. 3, 7 & 9 attached thereto.*

Additionally, Plaintiff Frank Hart maintained a functioning sawmill near his house on the Property and a woodpile is still present at the end of the driveway throughout the year. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 112, l. 4-8; Dkt. 130, Ex. 7, Depo. F. Hart, p. 9, l. 2-7; p. 41, l. 14 to p. 42, l. 4; and photos at pgs. 3 & 5 and also Ex. 4 attached thereto.* The Harts raised a few cattle and horses on the Property (*Dkt. 130, Ex. 7, Depo. F. Hart, p. 109, l. 4-12*), and the Harts and their close family and friends enjoy hunting and fishing on the Property. *Id.* at p. 106, l. 1-11; *Dkt. 130, Ex. 12, Depo. O. Hart, p. 114, l. 25 to p. 115, l. 15.* Recently, Frank Hart built a bridge across the creek on the Property. *Dkt. 130, Ex. 7, Depo. F. Hart, p. 100, l. 11 to p. 101, l. 25; see referenced on Ex. 4 thereto.*

The Harts' visible maintenance and major improvements to the Property while living on the Property as their private residence for over 30 years evidences their exclusive ownership of the Property and intention to adversely possess the Property. The Hales, like Brown who sat idly by for 9 years in the *Brown* case,

cannot now maintain the argument that the Harts lacked intent to possess the Property for the last three decades.

**b. Hart's Payment of Property Taxes for 35 years.**

The Hales admit the Harts have paid taxes on the Property since 1984 when Harts began leasing the Property from the Beebes. *Dkt. 130, Ex. 13, Dep. D. Hale, p. 52, l. 15-18; Dkt. 144, Section II, ¶ 24; Trans, p. 22, l, 22-23.* The Hales also admit George Hale only paid taxes on the Property from 1981-1983 or 1984. *Trans., p. 22, lines 23 to p. 23, line 1; Dkt. 130, Ex. 13, Depo. of D. Hale, p. 43, l. 24-25.* Now the Hales try to argue that George Hale paid taxes on the Property from 1981-1988. *Hales Opening Brief, p. 5.* The Hales offer no support for payment of real estate taxes on the Property after 1983 and cannot now change their argument on appeal.

On occasion, the Hales mention a 1988 County Tax Receipt for the Property. *Dkt. 144, Ex. A; Trans., p. 18, line 23 to p. 19, line 1.* As far as the argument can be pieced together, the Hales suspect that because the 1988 Tax Receipt includes Volney Hale and the Beebes as the owners of the Property, and that because this 1988 receipt was in the Hart's possession, the Harts knew Volney Hale held an interest in the Property and/or the Hales were paying taxes on the Property in 1988. These subject beliefs are not sufficient to withstand summary judgment.

First, the Harts did not know any member of the Hale family had or claimed an ownership interest in this Property prior to 2018, as described below. Second, the Harts do not recall how they obtained the 1988 Tax Receipt but believe they received most tax documents prior to 1990 from Donald Beebe, as the record owner at that time. *Dkt. 144, Unmarked Exhibit after Ex. J to Defs.’ Brief Opposing Motion for Summary Judgment, Depo. of Opal. Hart by Hales, October 15, 2020, pg. 36, l. 15-19.* Finally, after the recording of the 1990 Notice of Purchaser’s Interest, the County Tax Receipts for the Property show the Beebes and the Harts as the owners of the Property. *Dkt. 131, Aff. Of O. Hart, ¶¶ 15-17 and Ex. 5,*

The Hales further allege that the Harts’ payment of “taxes was on behalf of all knowing cotenants of the Property.” *Trans. p. 22, lines 22-23.* As established by applicable case law and undisputed facts in the section below, the Harts were unknowing cotenants. For this reason, it cannot be disputed that the Harts paid taxes on the Property after their sole ownership of the Property pursuant to the 2009 Deed. *Dkt. 131, Aff. O. Hart, ¶¶ 12, 16-17 and Ex. 4-5 attached thereto; Dkt. 130, Ex. 13, Depo. D. Hart, p. 52, l. 15-18; Dkt. 144, Section II, ¶ 24.* The property tax statements for the Property from 2009 through 2019 list the Harts as sole owners of the Property. *Dkt. 131, Ex. 4-5.* Thus, at the latest, the Harts

extinguished any ownership interest of the Hales in 2015, three (3) years before George Hale ultimately decided to record the 1958 Deed in May 2018.

**c. Unknown Co-Tenancy and Proper Ouster of the Hales.**

The Harts, as unknowing co-tenants, complied with the ouster element by claiming and exhibiting exclusive ownership of the Property. To adversely possess against a cotenant, the claimant must meet the requirements for adversely possessing against a stranger, and also ‘oust’ the cotenant from the property. While it is true that the actual ouster of a cotenant must occur, this does not necessarily imply an actual physical ouster, but it is sufficient if a grantee claims exclusive ownership, and by his conduct denies the right of others to any interest in the property. *YA Bar Livestock Co. v. Harkness*, 269 Mont. 239, 245, 887 P.2d 1211, 1214, citing *Fitschen*, 246 P. 773, 779. Where one goes into possession of property under deed or deeds executed by a cotenant, and purporting to convey the entire property, such possession is hostile to that of the out-of-possession cotenant, and the out-of-possession cotenant is charged with knowledge of the hostile character hereof. *Nelson* at ¶ 15, citing *Fitschen*, 76 Mont. 175, 199, 246 P. 773, 779.

Nelson, discussing the *YA Bar* case, found that son received a fractional interest in property from his mother’s estate. “As the executor of his mother’s estate, [son] knew that he held [the] property in a cotenancy with four siblings and

six nieces and nephews.” *Nelson* at ¶ 16. Years later, the son “purported to convey the entirety of [the property] to [the corporation],” of which he was the president and majority shareholder. *Id.* at ¶ 17, discussing *YA Bar* at 249, 887 P.2d at 1216. Based upon these facts, the Supreme Court reversed the lower court and held that the corporation could not assert a claim of adverse possession, in good faith (*YA Bar* at 249, 887 P.2d at 1216-2017). The corporation “could not demonstrate that it ousted its cotenants either through taking possession under color of title or by providing actual notice that its possession was hostile to its cotenants’ interests.” *Nelson* at ¶ 16, citing *YA Bar* at 248, 887 P.2d at 1215-1216.

The facts of the 2018 *Nelson* case are more similar to the present facts. Prior to the Nelsons’ ownership of the property, and after multiple deaths and transfers of the subject property in fractional interests by intestate, Rose Bisceglia owned a  $\frac{1}{2}$  interest in the property at issue and Rose’s brother, Angelo Bisceglia, owned the remaining  $\frac{1}{2}$  interest. *Nelson*, ¶ 3. Upon the death of Rose Bisceglia,  $\frac{1}{4}$  of her interest transferred to her daughter and the remaining  $\frac{1}{4}$  interest transferred to her husband George Salituro by intestate succession. *Id.* at ¶ 4. Angelo Bisceglia and Rose Bisceglia’s daughter “did not realize that George Salituro took an interest in the [p]roperty upon Rose’s death.” *Id.* at ¶ 5. As a result, a year after the death of Rose Bisceglia, Angelo Bisceglia and Rose Bisceglia’s daughter conveyed the

entirety of the property to Rose Bisceglia’s grandchildren – Mary Jo Davis and Anthony Palese (“Davis and Palese”). *Id.*

For about nine (9) years, Davis and Palese leased the property for grazing and farming, enrolled the property in the Conservation Reserve Program (“CRP”) and paid the real property taxes on the property. *Id.* at ¶ 6. While Davis and Palese owned the property, George Salituro died intestate and therefore, his ¼ interest transferred to his children (from a marriage prior to Rose Bisceglia) – George Salituro, Jr. and Rose Salituro (the “Salituros”). *Id.* at ¶ 7. Davis and Palese then sold the property to the Nelsons, who continued to use the property for grazing in the CRP program. *Id.* at ¶ 6. Upon learning of the interest of the Salituros from a title search, the Nelsons sought to quiet title to the property. *Id.* at ¶ 1. The Supreme Court affirmed the District Court’s verdict, holding that “Davis and Palese [] extinguished the Salituros’ interest [] through adverse possession before transferring [the property] to the Nelsons...”, because Davis and Palese took title under a recorded deed that purported to convey the entirety of the property. *Id.* at ¶¶ 8, 18

Parallel to Davis and Palese’s lack of knowledge of another owner of the property in *Nelson*, the Harts had no knowledge of any claimed co-tenant when they became owners of the Property. *Dkt. 130, Ex. 12, Depo. O. Hart, p. 109, l. 1-7; p. 75, l. 15 to p. 76, l. 4; p. 77, l. 11 to p. 79, l. 10; P. 131, l 3 to p.132, l. 2; Dkt.*

130, Ex. 7, Depo. F. Hart, p. 78, l. 13 to p. 80, l. 14. All that Harts knew was that upon the death of Volney Hale, the Beebes owned the Property. Dkt. 130, Ex. 7, Depo. F. Hart, p. 78, l. 13 to p. 80, l. 14. At the outset of their ownership, the Harts do recall an individual watching the Harts at the Property and also recall an individual near the chicken coop on the Property, but after decades passed, they cannot say for sure if it was George Hale or not. Dkt. 144, Section II, ¶ 1. Additionally, the Harts only learned, in the course of this litigation, that Daniel Hale may have contacted them via telephone. Dkt. 144, Section II, ¶ 5; Trans. p. 22, line 13-18. However, the individual who called the Harts never identified himself or herself, so the Harts never knew who was alleging they owned the Property. Dkt. 130, Ex. 12, Depo. O. Hart, p. 19, l. 14 through p. 20, l. 3; p. 115, p. 16 through p. 118, l. 17.

Frank Hart admitted he knew Volney Hale previously owned an interest in the Property, but Frank, not trained in reviewing property conveyances nor trained in the law regarding property ownership, relied on the Title Policy which revealed no ownership interest in the Property by Volney Hale or by his heirs, and found title to the Property was vested solely with the Beebes. Trans. p. 18, line 13-18; Dkt. 144, Section I, ¶ 23; Dkt. 144, Depo. F. Hart by Hales, October 15, 2020, p. 6, l. 25 through p. 7, l. 1-9 (unmarked Exhibit after Exhibit J); Dkt. 131, Aff. O. Hart, ¶¶ 19-21 and Ex. 6. The Harts were not aware of and did not see the title

search until discovery in this case. *Dkt. 144, Ex. I; Hales' Opening Brief, p. 8.* The Hales' interpretation of the chain of title for the Property prepared by the Title Company before issuing the Title Policy is not a disputed fact, but just a different interpretation of facts that does not create a material fact issue.

Finally, Frank Hart stated that until the 1958 Deed was recorded in 2018, there was no indication to him that anyone else was asserting an ownership interest in the Property. *Dkt. 144, Section II, ¶ 4; Dkt. 144, Depo. F. Hart by Hales, p. 35, l. 6-16 (unmarked Exhibit after Exhibit J to Defendants' Br. in Opposition).* The Harts only learned of the Hales alleged interest in 2018, after George Hale recorded the deeds describing the Property, when the Water Rights Division of the DNRC notified them that George Hale filed for water rights on the Property. *Dkt. 131, Aff. O. Hart, ¶ 20; Dkt. 130, Ex. 12, Depo. O. Hart, p. 62, l. 12 to p. 65, l. 25.*

There is no evidence to show any use or occupation of the Property by the Hales. In fact, the Hales have multiple recent photos of the Property, but none of themselves, their family or any people on the Property. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 86, l. 9 to p. 87, l. 1; p. 90, l. 15 to p. 91, l. 15.* It appears that the Hales merely took photos of the Hart's Property from the public road or just inside the driveway on the Property for the purposes of this case only. *Id.*, photos 2-3 & 5. The Hales admit that they did not, and do not, treat the Property as their own when

parking off the Property and not driving past the Hart's house "because [the Hales] figured that was their driveway." *Id. at p. 58, l. 24 to p. 59, l. 11.*

The Hales also seek to assert that they gave permission to the Harts to occupy and improve the Property because Frank Hart stated that Volney Hale and George Hale never objected to the Harts' possession of the Property. *Dkt. 144, Section II, ¶ 2; Dkt. 144, Depo F. Hart by Hales, p. 29, l. 19-22 (unmarked Exhibit after Exhibit J to Brief in Opposition).* At the August 26, 2021 Summary Judgment hearing, George Hale made the representation that the Harts knew George Hale represented Volney Hale's interest in the Property because when Volney Hale died in 1981 a lock was placed on certain personal property of Volney Hale remaining on the Property. *Trans. p. 22, lines 5-7.* First, Volney Hale could not object to the Harts' possession of the Property in 1984 because Volney Hale died in 1981, and the Harts could not put a lock on any Hale personal items because they did not take possession of the Property until 1984. *Dkt. 131, Aff. O. Hart, ¶ 4; see also Trans. p. 23, line 22 to p. 24, line 2.* Second, George Hale did not object to the Harts' possession and ownership of the Property or assert his alleged ownership interest in the Property for close to four (4) decades after the death of Volney Hale. The Hales' silence to the Harts, as unknowing cotenants, does not qualify as giving Harts "permission" to occupy the Property.

In addition, the Hales rely on a line of questioning they asked the Harts about “never infring[ing]” (*Dkt. 144, Section II, ¶¶ 3-4*) on the alleged rights of the Hales and about “notice...[to] the Hales of the Hart’s claim of sole ownership.” *Id. at ¶ 6; Trans. p. 22, lines 9-12*. Frank Hart admits that he could not have infringed on the rights of George Hale because Frank Hart did not know George Hale asserted rights in the Property. *Dkt. 144, Section II, ¶ 3; Dkt. 144, Depo. F. Hart by Hales, p. 34, l. 6-15 (unmarked Exhibit after Exhibit J)*. Opal Hart agreed, and testified she did not know the Hales asserted an interest in the Property and accordingly, did not see the need to notify the Hales, or anyone else, about the Harts’ ownership of the Property. *Dkt. 144, Section II, ¶ 6; Dkt. 144, Depo. O. Hart by Hales, p. 35, l. 5-11 (unmarked Exhibit after Exhibit J)*. The Harts had no actual or constructive notice that they may be cotenants with anyone.

Also, similar to Davis and Palese’s lease of the property and enrollment in CRP in *Nelson*, the Harts made their exclusive possession visibly adverse to all others, by building a home and continuously occupying the Property. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 111, l. 23 to p. 112, l.18 and Exs. 5 & 15-16 attached thereto; Dkt. 130, Ex. 7, Depo. F. Hart, p. 70, l. 25 to p. 71, l. 24; p. 72, l. 18-24; and pgs. 4, 7 & 9-10 of Ex. 1 attached thereto; Dkt. 130, Ex. 12, Depo. O. Hart, p. 8, l. 11-13; p. 43, l. 15 to p. 45, l. 15; p. 99, l. 23 to p. 106, l. 16*.

Comparable to the unknowing co-tenants exclusive use and occupancy of certain property under color of title sufficient to oust co-tenant heirs, in *Nelson*, the Hales are also charged with knowledge of the recorded Notice of Purchaser's Interest (*Dkt. 1, Ex. M*), and finally, the 2009 Deed purporting to convey a 100% interest in the Property to the Harts. *Dkt. 1, Ex. N(d)*. For these reasons, the Harts satisfied the elements of adverse possession and ouster as an unknowing co-tenant when their ownership became hostile upon recording of the 2009 Deed, along with the substantial improvements and occupancy of the Property by the Harts.

## **II. The District Court did not err denying Hales' counterclaims.**

The District Court correctly analyzed the Hales' allegations of fraud to find the Hales' presumed facts for the elements of fraud did not prevent adverse possession. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Mont.R.Civ.P. 9(b).

The Hales attempted argument for constructive fraud is difficult to follow, but in sum, the claim is based upon the Hales' speculation that the Harts do not assert adverse possession in good faith. *Hales' Opening Brief, p. 13*. The Hales develop this opinion based on certain immaterial facts.

The Hales assert unsubstantiated assumptions of fraud from checks that Opal Hart signed in 1984. *Dkt. 73, Count II, pgs. 7-8, ¶ 14, and Ex. O thereto; Dkt. 131, Aff. O. Hart, ¶¶ 8-11, and Ex. 3 thereto*. There is no dispute that Opal Hart signed

and wrote “Hale – Beebe Property” on Check # 5795 dated February 7, 1984 (*id.* at ¶¶ 8-9); and then wrote only “Beebe Property” on Check # 6318 dated November 9, 1984. Checks written in 1984 by Opal Hart cannot indicate the Harts knew of the Hales’ supposed inherited interest in the Property after Cecil Hale died in 1962 and Volney Hale died in 1981. *Dkt. 144, Section I, ¶ 5.*

Further, the Hales somehow justify their reasoning that the Harts knew of the Application for Inheritance Tax (*Dkt. 1, Ex. L*) and all deeds recorded (*Dkt. 144, Section I, ¶ 14*) by misinterpreting Opal Hart’s testimony that she did not see or does not recall seeing the Application for Inheritance Tax when the title search was conducted. *Dkt. 144, Depo. O. Hart by Hales, p. 27, l. 22-25 and p. 28, l. 1-18, (attached as unmarked Exhibit after Exhibit J).* The Harts had no knowledge of the Application signed by the Beebes until this litigation (*Dkt. 131, Aff. O. Hart, ¶ 11*). Still, the Harts agree that the Application for Inheritance Tax is not a document of conveyance. *Hales’ Opening Brief, pgs. 6-7, 12.*

The 1958 Deed is not a valid Deed conveying the Property. A conveyance of real property is void against a subsequent purchaser who has no notice of a prior conveyance, and whose conveyance is recorded first. Mont. Code Ann § 70-21-304. It cannot be disputed that the 1958 Deed was recorded after the documents of conveyance between Volney Hale and the Beebes, and after the conveyance documents between the Beebes and the Harts. *Hales’ Opening Brief, pg. 9; Dkt.*

132, *Aff. Sullivan*, ¶¶ 40 and 57; Mont. Code Ann. § 70-21-304 (2019). As a result, the 1958 Deed is void against those subsequent conveyances. In any event, Volney Hale's co-tenancy interest does not exist by virtue of the 1958 Warranty Deed, but rather due to the Second 1974 Deed.

The Hales also try to invent a set of facts to show bad faith by arguing that the First 1974 Grant Deed from Volney Hale to the Beebes was forged because it says Volney Hale is an unmarried man. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 10, l. 1-11; p. 20, l. 18 to p. 21, l. 1-4*. Volney Hale's wife, Adadell Hale, passed away on November 23, 1958. *Dkt. 130, Ex. 11*. Therefore, Adadell Hale's death means that Volney was a widower, and thus, an "unmarried man", as stated in the First 1974 Grant Deed. The Hales then claim that Volney Hale's signature on the First 1974 Grant Deed was forged because, in George Hale's opinion, on the microfilm it looks like Volney Hale's signature is "shadowed" and "raised" up off the paper. *Dkt. 130, Ex. 15, Depo. George Hale by Rachel Taylor, October 16, 2020, p. 83, l. 17 to p. 84, l. 11*. In her deposition, DeeAnn Hale said Volney Hale's signature on the deed looked forged "[b]ecause he never signed his name that way." *Dkt. 130, Ex. 13, Depo. D. Hale, p. 42, l. 2-6; p. 61, l. 16 to p. 62, l. 9*. The Hales' theories about alleged forgery are merely speculation with no particular factual support or consultation with a handwriting expert.

The Hales allege no facts with any sort of particularity regarding constructive fraud and therefore, there is no dispute of fact that the Harts purchased the Property and occupied the same adversely in good faith. For this reason, the District Court was correct in determining that the Hales' fraud claim and request for declaratory judgment does not prevent summary judgment in favor of the Harts.

**III. There Was No Error in the District Court's Findings that the Harts Possessed the Property for 5+ years Before Filing the Complaint.**

“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.” Mont. Code Ann. § 70-19-401. The Hales would like this statute to be a statute of limitations. However, Montana Code Annotated § 70-19-401 only requires the Harts to be in possession of the Property for 5 years prior to filling the *Complaint*.

As established above, the Harts have openly and exclusively possessed the Property under the 2009 Deed. The Hales do not dispute that the Harts have occupied and maintained the Property for at least the five years prior to Harts' filing the Complaint in this action in 2019, and at most, for the 37 years since the Harts began leasing, constructing a residence, and paying taxes on the Property. *Dkt. 130, Ex. 13, Depo. D. Hale, p. 111, l. 23 to p. 112, l. 18 and Exs. 5 & 15-16*

*attached thereto; Dkt. 130, Ex. 7, Depo. F. Hart, p. 70, l. 25 to p. 71, l. 24; p. 72, l. 18-24; p. 82, l. 8-10; and pgs. 4, 7 & 9-10 of Ex. 1 attached thereto; Dkt. 130, Ex. 12, Depo. O. Hart, p. 8, l. 11-13; p. 43, l. 15 to p. 45, l. 15; p. 84, l. 11-13; p. 99, l. 23 to p. 106, l. 16.*

As stated by the Hales, “a claim for adverse possession is the only claim of action brought, which, if proven, can gain interest in property from a rightful owner.” *Trans. p. 23, lines 7-10.* For the reasons stated above, the District Court did not err in finding the Harts satisfied the elements of adverse possession as a matter of law, establishing that the Harts own the entirety of the Property.

### **CONCLUSION**

The Harts respectfully request this Court affirm the judgment of the Eighteenth Judicial District Court, in favor of Plaintiffs and Appellees Frank and Opal Hart, specifically the *Order* of the Honorable Judge Ohm, issued on September 27, 2021. The Harts also respectfully request the District Court’s award of costs (*Dkt. 185*) be affirmed and that the costs of this appeal be awarded.

DATED this 2<sup>nd</sup> day of February, 2022.

CHURCH, HARRIS, JOHNSON & WILLIAMS, P.C.

/s/ Rachel A. Taylor

RACHEL A. TAYLOR

*Attorneys for Appellees Frank and Opal Hart*

## CERTIFICATE OF COMPLIANCE

This is to certify that this Response Brief is formatted with double line spacing and a proportionately spaced Times New Roman typeface in 14-point font and to further certify that this brief contains 8864 words as calculated by my Word processing system excluding the Table of Contents, Table of Authorities, and Certificates of Service and Compliance.

DATED this 2<sup>nd</sup> day of February, 2022.

/s/ Rachel A. Taylor  
RACHEL A. TAYLOR

## CERTIFICATE OF SERVICE

This is to certify that on the 2<sup>nd</sup> day of February, 2022, the foregoing document was served by U.S. Mail or e-Service through the Montana Court's e-filing system upon the individuals whose names and addresses appear below:

George and DeeAnn Hale Hale Family Trust P.O. Box 846 Hilger, MT 59451	Teresa G. Whitney Kristina G. Warren Montana Department of Revenue 125 N. Roberts St. P.O. Box 7701 Helena, MT 59604
---	---

/s/ Rachel A. Taylor  
RACHEL A. TAYLOR

## CERTIFICATE OF SERVICE

I, Rachel Ann Taylor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-02-2022:

Teresa Grace Whitney (Attorney)  
125 N. Roberts  
PO BOX 7701  
Helena MT 59624-7701  
Representing: Revenue, Department of  
Service Method: eService

George W. Hale (Appellant)  
P.O. Box 846  
Hilger MT 59451  
Service Method: Conventional

Deeann Hale (Appellant)  
P.O. Box 846  
Hilger MT 59451  
Service Method: Conventional

Electronically signed by Eileen Dolphay on behalf of Rachel Ann Taylor  
Dated: 02-02-2022