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Leo H. Ault, Virginia Ault v. Darrell C. Holden, Patsy E. Holden : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

LEO H. AULT and VIRGINIA AULT,)	
his wife,)	
)	
Plaintiffs and Appellants,)	Case No. 20000690
vs.)	
)	Priority 15
DARRELL C. HOLDEN and)	
PATSY E. HOLDEN, his wife,)	
)	
Defendants and Appellees.)	

APPEAL FROM A FINAL JUDGMENT AND ORDER
HONORABLE DAVID S. YOUNG
THIRD JUDICIAL DISTRICT COURT IN AND FOR
TOOELE COUNTY, STATE OF UTAH

REPLY BRIEF OF APPELLANTS

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CLERK OF THE COURT

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE PARCELS TO THE HOLDENS UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.

The elements of a boundary by acquiescence claim are not in dispute: (1) occupation to a visible line marked by monuments, fences, or buildings; (2) mutual acquiescence in the line as a boundary; (3) for at least 20 years; (4) by adjoining landowners. The Holdens do not dispute that boundary by acquiescence is an affirmative defense, and that it must be established by clear and convincing evidence. (*See* Brief of Appellants at 20).

A. Acquiescence in the fence as a boundary.

As discussed at length in the Aults' opening brief, the Holdens did not, and cannot, establish the second element of their defense, acquiescence in the fence as a boundary. The Holdens acknowledge that the fence in question was not erected as a boundary (Brief of Appellees at 19), but argue that "through their indolence, the Aults acquiesced to the fence as a boundary line. The Holdens possessed the property for almost thirty years and even built structures on the property in the 1980's, yet the Aults did nothing." (*Id.* at 20-21).

The Aults have cited (and the Holdens have not refuted) case law observing that indolence occurs only when a landowner has reason to know that a claim is or may be asserted. (*See* Brief of Appellants at 25-28). The Holdens suggest, however, that the mere existence of a fence anywhere other than precisely on a boundary line automatically places landowners on notice of an adverse claim by neighbors on the other side of the

fence. (Brief of Appellees at 29). This contention would, in effect, eliminate the requirement of acquiescence in a fence or monument *as a boundary*, and instead require acquiesce only in a fence itself, contrary to half a century of judicial pronouncements. (See Brief of Appellants at 21-23, and cases cited).

In the court below, there simply was no evidence that the Aults acquiesced in the fence as a boundary, and the doctrine is inapplicable. The same conclusion is reached under the reasoning of *Wilkinson Family Farm v. Babcock*, 993 P.2d 229-232 (Utah App. 1999), which held that “parties may not, knowing where the true boundary line is, establish a boundary line by acquiescence.” (See Brief of Appellants at 23-25).¹

The Holdens’ argument that *Wilkinson* is inconsistent with *Staker v. Ainsworth*, 785 P.2d 417 (Utah 1990), errs in its assumption that consideration of actual knowledge essentially reintroduces the element of objective uncertainty into the analysis. As this Court explained in *Staker*, the short-lived “objective uncertainty” element could only be satisfied with a narrow, unworkable type of proof. A claimant had to produce “some objectively measurable circumstance in the record title or in the reasonably available survey information (or other technique by which record title information was located on the ground) that would have prevented a landowner, as a practical matter, from being reasonably certain about the true location. By the same token, a claimant cannot assert

¹ Although a holding that mutual knowledge of the true boundary precludes application of the doctrine would entitle the Aults to judgment as a matter of law, it is not necessary to reach the issue in this case because the parties’ knowledge was coupled with affirmative acts by the Holdens, including their verbal acknowledgements of the boundary and offers to exchange property.

boundary by acquiescence if he or his predecessors in title had reason to know the true location of the boundary during the period of acquiescence.” *Id.* at 421, quoting *Halladay v. Cluff*, 685 P.2d 500 (Utah 1984). If ancient surveys had disappeared, or landowners were deceased, a claim might fail as a matter of law. *Id.*

In rejecting the additional element, this Court recognized the difficulty of satisfying that high burden of proof. The Court noted that, to satisfy *Halladay*, “there must have been a particular form of dispute. The dispute may not be proved by evidence of mere differences of opinion or by a mere *lack of actual knowledge of the true location of the boundary.*” *Id.* (emphasis added).

As the Court of Appeals recognized in *Wilkinson*, this Court’s recognition of the impracticalities caused by *Halladay*’s restrictive burden in no way eliminated the significance of actual knowledge. (See Brief of Appellants at 25). Indeed, deeming actual knowledge by both parties entirely irrelevant would seem to defeat the purpose of the doctrine, which is to resolve boundary *disputes*.

In any event, the Holdens are precluded as a matter of law from claiming acquiescence, because they occupied the Ault farm pursuant to lease and management agreements. The Holdens now claim for the first time that the management agreements they had with the Aults “in reality” only covered certain portions of the farm and, conveniently, not the portions of the farm in dispute. “[T]here are no credible facts which support that any lease existed for the disputed property,” the Holdens state, ignoring the Aults’ record citations -- which consist entirely of the Holdens’ Verified Answer, Mr.

Holden's affidavit, and Mr. Holden's deposition testimony. (See Brief of Appellants at 12). For example:

- The Complaint alleged: “[The Holdens] leased the Ault Property from approximately 1972 through 1977 and again from approximately 1982 to 1977. . . . At various times during the time the Aults have owned the property in question, the Holdens have unlawfully trespassed on said property by, among other things, building structures on the Ault property, storing personal property on the Ault property without permission, and illegally entering said property.” (R. 6 ¶ 9, R. 4 ¶ 29).

The Holdens responded in their Verified Answer: “Admit so much of paragraph 9 as alleges that Darrell C. Holden leased property from Leo Ault from approximately 1972 through 1977, but deny the balance of said paragraph. Further answering paragraph 9, *Holden has managed property allegedly owned by Leo H. Ault, as an agent for Ault*, who is an absentee landowner residing in Utah County, at various times subsequent to 1977, but not pursuant to lease thereto.” (R. 19 ¶ 7) (emphasis added).

- In an affidavit, Mr. Holden repeated the foregoing statement, and added: “Affiant did not trespass *on the property allegedly owned by Ault, and could not do so because of said lease*, acknowledged in the Complaint, *and management agreements*.” (R. 137 ¶ 8, R. 392 ¶ 8) (emphasis added).

- In his deposition, Mr. Holden testified that he leased “the farm,” “the whole place,” which encompassed the entire “20-something acres” of the Aults’ property (excluding the house itself). (R. 689 line 25 - R. 684 line 9). Holden testified that the written lease terminated in 1977, and that he then had use of the property “every year

from 1982 to 1997” through a verbal agreement in which “he [Ault] asked me to manage and take care of his place.” (R. 685 line 10 - R. 684 line 25).

Nowhere in the record below was there any suggestion by the Holdens that their lease and management agreements encompassed anything but the entire Ault farm, which would include the areas in dispute. Indeed, the Holdens expressly relied upon those agreements to disclaim liability for trespass on the disputed property. In connection with their motion below, the Holdens wrote, “The trespass claim in the Fourth Cause of Action is totally without factual basis. Ault has alleged that Holden was his lessee, and *Holden agrees that he was lessee during part of the period alleged and manager of the Ault property during other periods. Holden could not, therefore, be a ‘trespasser,’* and the Court can so conclude as a matter of law.” (R. 426) (emphasis added).

The uncontroverted record is that the Holdens occupied or had permission to use the Aults’ farm from 1972 through 1977, and again from 1982 through 1997, by virtue of lease and management agreements entered into with the Aults. The Holdens do not dispute the authority, cited in Aults’ opening brief, that such permissive use cannot be deemed acquiescence. (Brief of Appellants at 27-29).

B. For at least 20 years.

In their brief, the Holdens apparently do not contest the proposition that periods of time during which they occupied the Aults’ property by virtue of a lease or management agreement cannot count toward the 20-year minimum. Rather, they merely restate their new (and unsupported) contention that the lease and management agreements

encompassed portions of the Aults' farm other than the disputed areas, which has been addressed above.

Significantly, the Holdens offer no response to the point that, if Judge Young's ruling is correct that the Aults' alleged acquiescence began in 1978, the 20 years cannot be met regardless of the lease/management agreements. It is undisputed that the Aults ordered the Holdens off their property in 1997 (*see* Brief of Appellants at 13) -- 19 years from the commencement date found by the trial court.

The Aults further submit that the period of (alleged) acquiescence recommences with each conversation between Mr. Ault and Mr. Holden in which the latter acknowledged the correct boundary. There is no Utah case law holding that a landowner must take physical, rather than verbal, action to restart the clock.

The basic principle of this case is that boundary by acquiescence was never intended to reward a party for misleading his neighbor. The Holdens consistently acknowledged over the years that the property did not belong to them. They offered to trade for it. They entered into lease and management agreements for the whole Ault farm, which included the disputed property. They signed a deed which defined their north line as the Aults' south line. They had surveys which showed the true boundary.

The facts are uncontroverted, and demonstrate the inappropriateness of invoking boundary by acquiescence principles in this case. Penalizing the Aults for believing the Holdens' representations would further no public policy, and would serve only to foster -- indeed, *require* -- distrust between landowners, who could no longer safely allow the use of their property in reliance upon their neighbor's word.

II. THE HOLDENS CANNOT CLAIM TITLE TO THE DISPUTED PROPERTY MERELY BECAUSE THE AULTS' DEED DOES NOT CLOSE, OR BECAUSE OF THE HOLDENS' ALLEGED "POSSESSORY" RIGHTS.

A. The Ault deed's failure to close is immaterial.

The Holdens continue to take the rather disconcerting position that, even if they have no legitimate claim to the disputed property otherwise, they are still entitled to have ownership transferred to them because the Aults' deed fails to close, even if the failure is in a completely different location. (The area which fails to close is in the northwest corner of the Ault property, whereas the strip is on the south side. *See* Jensen Survey, Appellants' Addendum Exhibit 7).

As an initial matter, a potentially misleading statement in the Holdens' brief should be clarified. The brief states that, by failing to close, the Ault deed describes nothing at all, "and certainly nothing adverse to or inconsistent with the Holdens' prior recorded title." (Brief of Appellees at 23). From that language, it might be inferred that the Holdens' title somehow overlaps with or includes the disputed portion of the Ault property. It is, however, undisputed that the Holdens' deed does not encompass the disputed property and, in fact, that their deed expressly defines their northern boundary as "the South line of the A. M. Ross and C. M. Plant property" (which the Holdens acknowledge is the Ault property). The Holdens have never claimed that the terms of their deed describe the disputed property; rather, they claim ownership "solely by virtue of long standing possession independent of record title." (R. 107).

With that clarification noted, the fallacy of the Holdens' argument becomes apparent. Parties who have no claim to a piece of property, either through record title or boundary by acquiescence (or adverse possession), cannot simply lay claim to another's property if they happen to find a failure to close in the other's deed. The Holdens cite no authority from Utah or anywhere else for the remarkable proposition that mere failure to close anywhere in a deed suddenly renders the landowner's property up for grabs.

Because of that principle, the Holdens' contention that the failure to close renders the Aults' deed imprecise is immaterial, but is nonetheless in error. The Holdens rely primarily upon *Howard v. Howard*, 12 Utah 2d 193, 367 P.2d 193 (1962), and *Drazich v. Lasson*, 964 P.2d 324 (Utah 1998), but neglect to address the obvious differences in those cases pointed out in appellants' opening brief. For example, the parties in *Drazich* had competing deeds with overlapping descriptions, and used as a critical marker a railroad track which could no longer be located. Obviously, those circumstances rendered the boundaries incapable of being determined with precision. Similarly, the deed in *Howard* was incomprehensible, even to the point of purporting to convey only about half the acreage that was actually involved.

The Holdens downplay *Howard's* discussion of *Losee v. Jones*, 120 Utah 385, 235 P.2d 132 (1951), and this Court's recognition in *Colman v. Butkovich*, 556 P.2d 503 (Utah 1976), that a deed that fails to close nonetheless may be sufficiently precise if reasonable inferences can be drawn, such as from the words "to the place of beginning."²

² In their brief, the Holdens seek to recharacterize the Aults' argument into a claim of

See Losee, 235 P.2d at 137. As described more fully in appellants' opening brief, the intent of the Ault deed is clear from its language. (Brief of Appellants at 33-34).

B. The "race to the registry" is irrelevant when two deeds do not conflict.

The Holdens continue to make much of the fact that their deed was recorded in 1973, whereas the Aults' deed was recorded in 1974³. Acknowledging that recording dates of the deeds is material only "as to any conflict between the two," the Holdens then fail to identify any conflict between the two.

Instead, the Holdens simply allege that "the South line of the Plant property" referred to in their deed is not really the line, but the fence. The Holdens offer no citation for that proposition, and in fact make what can only be characterized as a misrepresentation, stating: "The pleadings establish that . . . for more than sixty-nine years according to the Pehrson sworn statement (R. 396), the north boundary of the Plant property was the boundary fence." (Brief of Appellees at 28). As pointed out in appellants' opening brief, the statement of Mr. Pehrson said nothing more than that a

mutual mistake. As should be evident from their discussion of *Losee* and *Colman*, however, the Aults need not claim mutual mistake because the deed can be construed with reasonable precision, taking into account its terms "and reasonable inferences therefrom." *Colman*, 556 P.2d at 505. The Holdens then complain that the Aults seek to "construe" the deed "to close." Again, the Holdens seem to miss the Aults' point, which is that failure to close is irrelevant when a deed, including language "to the place of beginning" and other factors, is nonetheless sufficiently precise.

³ It appears that a 1975 recordation date was originally injected into the underlying litigation in error and then perpetrated, but the correct date is August 22, 1974. A copy of the Ault deed with the recorder's stamp is at R. 87.

fence had existed, not that it was the boundary and, in fact, Mr. Pehrson testified that he had “no knowledge whatsoever” where the boundary line was. (R. 251, R. 467). The mere existence of a fence, which the Holdens acknowledge was not erected as a boundary, does not support the contention that “the Holden deed describes the [disputed] property.”

III. FACT ISSUES EXISTED WITH RESPECT TO PLAINTIFFS’ OTHER CAUSES OF ACTION.

The Holdens acknowledge that the Aults’ complaint contained causes of action for unjust enrichment and conversion arising out of the Holdens’ unauthorized use of the Aults’ water rights and pipe. As noted in appellants’ initial brief, the only argument raised by the Holdens in the court below against those claims was that they could not be maintained because water belongs to the sovereign, and the pipe was capable of being retrieved. (*See* Brief of Appellants at 39-42).

On appeal, the Holdens appear to have abandoned those contentions, instead arguing for the first time that “the factual basis for these claims is very weak,” and that the Aults never undertook discovery to establish the claims. (*Id.* at 31) Of course, the Aults did not need to undertake discovery; their own eyewitness testimony at trial would have been more than sufficient. In any event, though, the Holdens cannot now raise for the first time a challenge to evidentiary sufficiency, particularly when they adduced no evidence under U.R.Civ.P 56 and the lower court made no determinations.

The Holdens also argue that the Aults’ claims for conversion and unjust enrichment of pipe were somehow subsumed in the boundary question. The claims are

factually and legally distinct. A dispute over personal property is wholly different from a dispute over real property, and the trial court erred in summarily dismissing those claims. Additionally, the Aults' trespass claim would encompass conduct occurring after the Holdens were ordered off the property in 1997. (R. 4). Unless the Holdens are awarded the disputed property, the Aults' trespass claim would remain viable.

IV. THE TRIAL JUDGE ERRED IN IMPOSING SANCTIONS AGAINST THE AULTS, BECAUSE THEIR CLAIMS WERE BOTH MERITORIOUS AND BROUGHT IN GOOD FAITH.

In seeking to justify the statutory attorney fee award, the Holdens make a raft of untrue, unsupported, and/or disputed factual assertions, all of which ignore the principle that, at the summary judgment stage, the Aults were entitled to have factual inferences resolved in their favor. Instead, the Holdens proclaim that “[t]he file is replete with bad faith by plaintiffs,” setting forth seven alleged examples:

First, the Aults' complaint shows, on its face, that they were without title for the dual reasons that the conveyance alleged failed to close and, if it had, was subject to the rights of parties in possession, the Holdens. Pursuit of a complaint not even alleging title, the basic and first element of any quiet title action is the epitome of lack of merit. (Brief of Appellees at 33).

This bald assertion has several defects. First, it is based upon an argument that was never addressed by the trial court, and was instead simply inserted by the Holdens into proposed findings and signed by the judge without any indication of the court's independent reasoning. Indeed, the court had previously *rejected* an attempt to have the complaint dismissed on these same grounds, denying the Holdens' earlier Motion for Judgment on the Pleadings. (R. 208-07, R. 809 at 28-29). The assertion also disregards the extensive legal argument and case law adduced by the Aults in support of their

position. Whether this Court ultimately agrees with the Aults' arguments is far different from suggesting that the arguments are entirely without legal basis.

Second, the Aults' complaint, together with the answers to discovery, establish the elements of boundary by acquiescence in favor of the Holdens. (Brief of Appellee at 33).

This assertion is, of course, the principal issue on appeal. Regardless of how this Court rules, several undisputed facts rendered the Aults' lawsuit reasonable, including: The Holdens were aware of surveys confirming the actual boundary; the Aults' deed encompasses the disputed land, and the Holdens' deed does not; the Holdens acknowledged to the Aults at least twice (in 1978 and 1990) that the strip belonged to the Aults, and even sought to trade for the strip; and the fence was not erected to demarcate the boundary, but rather a livestock lane. Although the Holdens disclaim it in their brief, the above assertion is nothing more than a suggestion that sanctions are available merely because they prevailed on summary judgment. This Court has rejected such a strict liability reading of Utah Code Ann. § 78-27-56. (*See* Brief of Appellants at 43-45).

Third, the file shows that the Aults' [sic] resorted to self-help prior to the filing of the complaint and resorted to self-help a second time after the filing of the complaint, in disregard of the jurisdiction of the trial court, by going on the property and removing and altering the fences. (Brief of Appellees at 33)

This assertion fails to take into account the factual circumstances surrounding these issues. With respect to the removal of part of a fence on the west on November 25, 1998, it was non-confrontational in nature, and occurred prior of the filing of litigation. With respect to the allegation that Mr. Ault attempted to remove another portion of fence on December 18, 1998, the findings submitted by the Holdens acknowledged that Mr.

Ault denied their version of events, yet essentially rendered a finding of fact in their own favor. (R. 510 ¶ 34). There was no order in effect at the time, the property was reasonably believed to be the Aults', and the Holdens had previously come onto the Aults' land and damaged their property.

The Aults' testimony, which must be assumed true at the summary judgment stage, was that the defendants fired a gunshot at the Aults' caretaker, that Mrs. Holden screamed at and threatened the caretaker, that the Holdens entered the Aults' property, pulled the Aults' large water pump into the middle of Aults' hay field and flattened its tires and otherwise disabled the pump, that the Holdens' son in the presence of Mr. Holden threatened Mr. Ault, that the Holdens' son, again with the knowledge of the defendants, jumped the fence and pounded and jerked on fence posts and shouted a profanity at Mr. Ault, and that Mr. Holden violated the court's status quo order by erecting a new fence on the property. (R. 172-70, 167-64).

An award of attorney fees cannot be justified on alleged misconduct by one party that is disputed, that has never been ruled upon by a court, and that has occurred with equal or greater frequency by the opposing party. This contention lends no support to the award.

Fourth, the trial court entered a temporary restraining order as a result of the Aults attempt at self help which direct [sic] them to not go on the property or disturb the fences. (Brief of Appellees at 33)

Citation to this ground to support an attorney fee award borders on disingenuous. The Holdens filed a motion for a temporary restraining order on December 22, 1998 --

after having been informed that the Aults' counsel was out of town until December 28 -- and obtained Judge Dever's signature *ex parte*. (R. 45 ¶ 9, R. 46 ¶ 11).

One day after returning, Aults' counsel agreed to a stipulation to retain the terms of the temporary order. (R. 67) The trial court never ruled on the merits of the motion, and no problems occurred after the stipulation. (R. 809 at 31). This assertion offers no support for the fee award.

Fifth, the Aults disregarded the temporary order by going on the property and attempting to construct a new fence, resulting in a motion for an order to show cause why the Aults should not be held in contempt. (Memorandum, p. 2).

Again, the Holdens ignore the fact that Mr. Ault's testimony, assumed true for purposes of summary judgment, was to the contrary. It is also inappropriate to cite the mere filing of a motion when no court ever ruled on it. (The Holdens acknowledged below that the motion was rendered moot by the court's order that the parties not cross the fence line pending resolution of the case. (R. 567)).

Sixth, the Aults conducted abusive discovery for the purpose of running up costs. (Brief of Appellees at 33).

This statement is mystifying. Throughout the entirety of the lawsuit, the Aults submitted a single set of 17 interrogatories and a single request for production of documents numbering 11 requests.⁴ The depositions of all fact witnesses and parties (including that of Mr. Ault taken by the Holdens) were completed in a total of one and a half days. (R. 216, 285).

⁴ Pursuant to local rules, the Interrogatories and Request for Production of Documents themselves are not in the record, but appellants do not believe the Holdens will dispute

To suggest that the Aults conducted “abusive” discovery is incomprehensible. Moreover, the correct approach for addressing such a claim would have been through U.R.Civ.P. 37, or by seeking a protective order under U.R.Civ.P. 26. *See, e.g.,* U.R.Civ.P. 11 (rule “do[es] not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37”).

Seventh, before the filing of the suit, Mr. Ault told Mr. Holden that he (Holden) could not afford to fight a quiet title action. (Brief of Appellees at 33, citing R. 566).

This averment is simply false. The Holdens offer no citation for it (R. 566 is an earlier memorandum containing the same statement, again without citation), and the omission is understandable, because it was actually *Mr. Holden* who said he would not have to incur any legal fees if a suit were filed. It was also Mr. Holden who insisted that Mr. Ault “make the first move”. Conversely, as demonstrated by a telephone conversation taped by Mr. Holden, it was Mr. Ault who reminded Mr. Holden that the Holdens had originally requested to trade another piece of their property for the disputed strip, Mr. Ault who suggested a reasonable compromise (a 50-50 division of the land at issue), and Mr. Ault who repeatedly said he would prefer to find a mutually agreeable solution to avoid litigation:

LA [hereinafter Ault]: Okay. On the line down here first thing. What do you want to do about this. At one time you were going to trade me.

DH [hereinafter Holden]: Well, I talked to my attorney and he said to go ahead and let you make the first move.

their content.

Ault: Okay. I'll file suit against you Darrell. That's going to cost us both about \$15,000 - if you want to do that.

Holden: It ain't going to cost me nothing because I've already been to Legal Aid and they'll represent me for good.

Ault: Well good. That's okay. That's fine. I'm just calling to see if you want to work something out. If you don't then I'm going to --

[Mr. Holden interrupts to begin discussion about pipe dispute.]

* * *

Ault: Okay. If you don't want to work with me here on this fine. I'll just do what I have to do.

Holden: Maybe you ought to go down and talk to my attorney.

Ault: (inaudible) - talk to your attorney. (_____) friends to you, I mean I don't want to do that, but if you want me to that's what I'll do.

(R. 586, 584).

Mr. Ault suggested that each party compromise by accepting half of the disputed 30-foot strip. That solution would allow Mr. Holden to retain the shed he had built on the property, and Mr. Ault agreed that he would deed over the half:

Ault: If you don't want to do that, then I'll just have to do what I have to do. I don't want to do that.

Holden: Why do you want a lane here?

Ault: Because I cannot take anything heavy down this (_____) part. (Inaudible).

Holden: Well, how about if I ponder on this a little bit and think about it.

Ault: That's fine. You go talk to your attorney and do whatever you want to do Darrell. (Inaudible) I'll just split the difference with you. We'll go down 15 feet. I'll miss your barn. The barn's over there 12 feet, then I go 12 feet (_____) or whatever it is. I don't want your barn, and I wouldn't want anybody to take my barn.

* * *

Ault: (Inaudible) Just talk it over -- I don't know how I could be more fair. If I go the other way it'll just mean money to me I guess. It's just an income tax deduction anyway. But I would try to get along. I don't want to take your barn. Even if I went the other way I wouldn't take your barn.

Holden: Well, let me go and talk to the wife and by Monday we can probably have a decision and then we can get with you. All right. By Monday we'll have some kind of an understanding. But you did say that if we go ahead and do this thing, you will put the fence in--

Ault: I will.

Holden: And you will go ahead and get the deeds amended to what we agree on.

Ault: I will.

(R.574, 570-69; emphasis added.)

The Holdens' implication that the Aults filed suit as some sort of economic extortion is completely baseless. The record supports a finding of neither lack of merit nor bad faith by the Aults, and the statutory fee award should be reversed.

V. THE TRIAL COURT ERRED IN ALLOWING COSTS.

A. The memorandum was untimely.

There is no dispute that judgment was entered in this case on July 18, 2000, and that the memorandum of costs was not filed until August 1, 2000, beyond the period allowed under U.R.Civ.P. 5.

The only excuse offered by the Holdens is that the court clerk sent the judge's ruling to the Holden's former counsel, who did not forward it to the Holdens until there was little time left to meet the 5-day requirement. The Holdens do not suggest that they ever checked with the court themselves (unlike the parties in *Board of Commissioners v.*

Petersen, 937 P.2d 1263 (Utah 1997)), even though they knew that their attorney had withdrawn and that the proposed judgment had been submitted to the court for signature on June 26, 2000. (R. 493-92, copied to the Holdens).⁵ (Ironically, the Holdens complain that the clerk sent the conformed judgment to Mr. Nielsen, yet a pre-addressed envelope with Mr. Nielsen's name on it had been submitted to the clerk for that very purpose.) (R. 491).

The clerk mailed out the ruling the same day the judgment was entered, July 18, 2000. Assuming a three-day mailing period, Mr. Nielsen received the notice in ample time to contact the Holdens before the Rule 5 deadline (July 26) passed. Instead, he chose to mail the ruling out to the Holdens on July 25. That decision, and that of the Holdens not to check with the court themselves, are not the Aults' responsibility. The memorandum of costs was untimely, and it should have been rejected.

B. The memorandum did not establish reasonableness or necessity.

To recover costs, a claimant must not only identify costs, but establish their reasonableness and necessity. The Holdens claim that a general averment is sufficient, but this Court has required more than mere quotation of the rule. *Peterson*, 937 P.2d at

⁵ The Aults' counsel had sent the Holdens a Notice to Appear or Appoint Counsel long before the court ruled. (R. 503). Mr. Nielsen also appeared to continue providing legal advice to the Holdens. In his letter of July 25, 2000, for example, he enclosed a proposed Notice of Judgment form for the Holdens to file. Although Mr. Nielsen told the Holdens in that letter that they were entitled to claim costs, he did not inform them that their deadline was the following day, instead advising them. "You should have your new attorney, whoever that may be, take care of that matter." (R. 550).

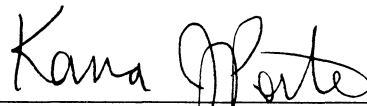
1272; *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980). The Holdens' memorandum made no such effort, and was legally insufficient on its face.

CONCLUSION

For the reasons set forth above, appellants Leo and Virginia Ault respectfully request that the order granting summary judgment be reversed and that the case be remanded. Appellants request that the trial court be directed to enter judgment for the Aults on their First Cause of Action (Quiet Title), and to allow the Aults to proceed to trial on their other causes of action.

RESPECTFULLY SUBMITTED this 6th day of March, 2001.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in cursive script, appearing to read "Karra J. Porter", written over a horizontal line.

William J. Hansen

Karra J. Porter

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of March, 2001, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were mailed, postage prepaid, to:

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