

1997

Louise A. Drazich v. Alan Lasson, Mary D. White, and Darrell L. White : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS DOCKET NO. 970333-CA

LOUISE A. DRAZICH, aka LOUISE
ANN DRAZICH, as an individual, and
LOUISE A. DRAZICH, as Trustee of
the Will of MARKO N. DRAZICH,
deceased,

Plaintiffs/Appellants

v.

ALAN LASSON, MARY D. WHITE,
And DARRELL L. WHITE, individuals,

Defendants/Appellee

CASE NO. 970333-CA

District Court Case No. 940906967

BRIEF OF APPELLEE

AN APPEAL FROM THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY

THE HONORABLE WILLIAM B. BOHLING, JUDGE

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ARGUMENT PRIORITY CLASSIFICATION: 15

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COURT OF APPEALS

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PRELIMINARY STATEMENT:

In this Brief, “T” refers to the transcript of the proceedings from trial. There are three volumes of transcript. “T1” refers to volume one, “T2” refers to volume two, and “T3” refers to volume three. “R” refers to the Record of the District Court, and “Ex” refers to an exhibit, followed by the exhibit number.

Defendants Mary D. White, Darrell L. White and David A. White are no longer parties in this action.

STATEMENT OF JURISDICTION:

Appellee adopts by this reference the Appellant’s Statement of Jurisdiction appearing on page 1 of Appellants’ Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS FOR REVIEW:

ISSUE ONE:

IN A QUIET TITLE ACTION, DOES THE PLAINTIFF HAVE
THE BURDEN OF PROVING THE VALIDITY OF ITS TITLE?

Standards for Review:

- (1) On appeal the appellate court will not upset the trial court's findings and judgment unless the evidence were such that all reasonable minds must necessarily so find, and the appellate court will review evidence and all reasonable inferences fairly to be drawn therefrom in the light favorable to the trial court's findings and judgment. Butler, Crockett and Walsh Development Corporation v. Pinecrest Pipeline Operating Co., 909 P.2d 225, 228 (Utah 1996); Olsen v. Park Daughters Investment Company, 511 P.2d 145, 146 (Utah 1973); Lamkin v. Lynch, 600 P.2d 530 (Utah 1979).
- (2) A trial court's conclusions of law in civil cases are reviewed for correctness and therefore no deference is given to the trial court's ruling on questions of law. State v. Pena, 869 P.2d 932 (Utah 1994); United Park City Mines Co. v. Greater Park City Co., 870 P.2d 932 (Utah 1993).

ISSUE TWO:

DOES A CONVEYANCE TO A RAILROAD COMPANY OF AN INTEREST IN REAL PROPERTY FOR USE AS A RAILROAD SPUR LINE CONSTITUTE A CONVEYANCE OF A FEE SIMPLE INTEREST OR MERELY AN EASEMENT, SUBJECT TO ABANDONMENT, WHERE THE LOCATION OF THE REAL PROPERTY IS NOT DEFINED IN THE CONVEYANCE?

Standards for Review:

See standards for Issue One above.

ISSUE THREE:

DOES A “STRAY” OR “WILD” DEED WHICH DOES NOT CREATE OR CONVEY A VALID INTEREST IN REAL PROPERTY CREATE A “TITLE TRANSACTION” SUFFICIENT TO ELIMINATE *MARKETABLE RECORD TITLE ACT* PROTECTIONS?

Standards for Review:

See standards for Issue One above.

ISSUE FOUR:

IN APPELLANTS’ BRIEF, IS THE INCLUSION OF ISSUES NOT FOUND IN THE TRIAL COURT’S CONCLUSIONS OF LAW OR JUDGMENT APPROPRIATE TO BE CONSIDERED BY THE APPELLATE COURT, OR IS SUCH INCLUSION A VIOLATION OF RULE 24 (j) OF THE UTAH RULES OF APPELLATE PROCEDURE?

Standards for Review:

Under the Utah Constitution, the appellate court has rule making power, and primary responsibility to promulgate and enforce rules relating to the practice of law. Utah Constitution,. Art. VIII, Section 4; Barnard v. Sutliff, 846 P.2d 1229, 1237 (Utah 1992).

DETERMINATIVE STATUTES:

QUIET TITLE ACTION STATUTE

78-40-1 Utah Code Annotated. SEE APPELLEE’S ADDENDUM
“Action to determine adverse claim to property—authorized.”

MARKETABLE TITLE ACT STATUTES

57-9-1 Utah Code Annotated. SEE APPELLANTS’ ADDENDUM
“What constitutes marketable record title.”

57-9-2 Utah Code Annotated. SEE APPELLANTS’ ADDENDUM
“Right and interests to which marketable record title is subject.”

57-9-3 Utah Code Annotated. SEE APPELLANTS’ ADDENDUM
“Marketable record title held free and clear of interests, claims and charges.”

RULES OF APPELLATE PROCEDURE

Utah Constitution, Art. VIII, Section 4. SEE APPELLEE’S ADDENDUM

Rule 24 (j), *Utah Rules of Appellate Procedure*. SEE APPELLEE’S ADDENDUM

STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This action was originally brought as a quiet title action by Appellants Drazich (hereinafter “Drazich”) to resolve a dispute over ownership of a parcel of land approximately 78 feet in length and of varying widths of approximately 11 to 22 feet. The area in dispute (hereinafter referred to as the “Subject Property”) forms a portion of the north boundary of lands claimed by Drazich and the south boundary of the Lasson land. The legal descriptions in their current deeds of conveyance overlap.

Drazich claims an interest in the Subject Property on the basis of an 1882 Indenture granted to the Denver & Rio Grande Western Railroad Company (the “Railroad”) which allowed the Railroad to use certain property as part of its rail system in Salt Lake County, over which a spur track was maintained until 1904, at which time the track was removed and the Railroad ceased paying taxes on the property.

On or about September 3, 1958, the Railroad issued a special warranty deed to Building Supply Center, which deed was conditioned upon and made subject to existing fence lines and other competing interests found on the property. By mesne deeds of record, Drazich claims an interest in the Subject Property.

Lasson claims his interest in the Subject Property from a chain of title dating back to a homestead patent issued to James Bell in 1875. The present legal description of the Lasson parcel has been used consistently by Salt Lake County taxing authorities since 1927 and appears in mesne deeds of record since 1951 down to the 1993 warranty deed to Lasson.

The issues at trial included the Utah *Marketable Record Title Act*, adverse possession, boundary by acquiescence, and trespass. The trial court’s ruling deals solely with the issues relating to the *Marketable Record Title Act* protection of the Lasson title, which issues include Lasson’s unbroken chain of title, the nature of the original interest conveyed to the Railroad, the acts of abandonment by the Railroad, and the validity and effect of the 1958 deed from the Railroad to Building Supply Center under which Drazich claims an interest in the Subject Property.

Since the trial court made no ruling on the issues of adverse possession and boundary by acquiescence, those issues are not properly before this Court and will not be argued in this Brief.

B. COURSE OF THE PROCEEDINGS:

This case was tried without jury before the Honorable William B. Bohling in the Third District Court for Salt Lake County, in September and November, 1996.

C. DISPOSITION AT TRIAL COURT.

The respective parties submitted proposed findings and conclusions, and the court took the matter under advisement. The court ruled that Lasson had acquired title to the Subject Property and that the Lasson Title was protected under the *Marketable Record Title Act*. The court adopted the findings and conclusions of the defendant Lasson. A Judgment and Order, dated January 3, 1997, was signed and entered by the court. No post-judgment motions relating directly to the case were made, and the judgment by the court is a final judgment for purposes of this case and this appeal.

STATEMENT OF FACTS

1. Lasson acquired title to his property by a warranty deed dated October 25, 1993. (Ex 3-P).
2. Drazich obtained a warranty deed to his property in December 1993. (Ex 1-P).
3. The description contained in the deed to Drazich overlaps and extends into the Lasson property to the extent of approximately 22 feet at the easterly end and 11 feet at the westerly end, for an average width of approximately 15 feet. The precise description of said overlap is not identified by a metes and bounds description.
4. Title to the area in dispute has a common origin of title by virtue of a Patent issued by the United States Government to James Bell. (Ex 15-P).

5. The Patentee, James Bell, conveyed fee title to Abraham Helm by a certain “Indenture” recorded in Book L, page 283-284 in the official records of Salt Lake County. (Ex 15-P).

6. Abraham Helm, by a certain “Indenture” dated August 29, 1882, conveyed to The Denver & Rio Grande Railway Company (the “Railroad”) an interest in a strip of land which extended from the main line of the Railroad’s tracks, in a northeasterly direction, over and across the lands owned by Helm. The description contained in said Indenture describes the lands to which the interest related as being a corridor two rods (33 feet) in width, lying 16 ½ feet on either side of the center line of an existing railroad track. The actual location of the Railroad’s track is not described in the Indenture. (Ex 17-D). The transaction between Helm and the Railroad was a private transaction. No condemnation or government grants were involved in the conveyance to the Railroad. (Ex 17-D)

7. The railroad tracks lying within the corridor were removed in approximately 1904, and no precise legal description of the location of the tracks or of the corridor in which the tracks were located was ever recorded. Credible evidence at trial demonstrated considerable discrepancy and confusion as to the exact location of the Railroad’s tracks. (Ex 5-P; T1 at 66-69; T2 at 15-22).

8. The Railroad ceased paying taxes on the corridor lands in 1904 (T1 at 152-153; Ex 22-D and 23-D), ceased using the land for railroad purposes at that time, and commenced quit claiming its interest in the corridor lands as early as 1926 (T1 at 150; Ex 21-D).

9. In 1958, the Railroad employed Coon and King Engineers (“Coon and King”) to attempt to survey the corridor of land upon which the tracks had existed and to establish a legal

description for the corridor which had been imprecisely described in the 1882 Indenture. (Ex 12-D).

10. The survey prepared by Coon and King revealed the existence and location of a fence lying several feet south of what Coon and King believed to be the northerly boundary of the historic railroad right-of-way. (Ex 12-D). No clear evidence was presented at trial demonstrating that the Coon and King survey accurately reflected the historic location of the Railroad's tracks or the corridor through which they traveled. (T1 at 66-69; T2 at 15-22). The location of the fence and evidence of its long-term existence evidences that the fence may have been built along the northerly boundary of the Railroad's right-of-way. (R at 234; Ex 19-D and 20-D).

11. Based solely upon the Coon and King Survey, on September 3, 1958, the Railroad issued a special warranty deed to Building Supply Center, which was recorded in the official records of Salt Lake County on November 26, 1958. (Ex 2-P). The legal description contained in the special warranty deed includes the Subject Property.

12. The special warranty deed contained exceptions and conditions, one of which being the "...outstanding rights for any and all...fences...now existing upon, under, along, over or across the described premises." (Ex 2-P).

13. The legal description contained in the Drazich deed dated December, 1993, contained that portion of the land described in the 1958 special warranty deed which is in dispute in this case. (Ex 1-P).

14. The legal description contained in Lasson's warranty deed dated October 25, 1993 (Ex 3-P), which was recorded approximately two (2) months earlier than the Drazich deed (Ex 1-P) also covers the entire area in dispute, and said legal description has been consistently and

continuously used in taxing the Lasson property since 1926 (T1 at 155-156;Ex 24-D) and in conveyances of the Lasson property since at least 1951. (T1 at 158;Ex 8-P).

15. Both Lasson and Drazich claim title to the Subject Property.

SUMMARY OF ARGUMENTS

POINT I:

APPELATE REVIEW OF CIVIL ACTIONS SHOULD BE LIMITED
TO QUESTIONS OF LAW AND NOT OF FACT, AND THE PLAINTIFF
(APPELLANTS DRAZICH) HAS THE BURDEN OF PROOF IN
QUIET TITLE ACTIONS

During the course of the trial both sides presented evidence and testimony in support of their respective positions, with the plaintiff, Drazich, being required to shoulder the burden of proof. By law, the District Court is the trier of fact and great deference should be given by this Court to the factual determinations made by the District Court. Based upon the facts presented and adopted by the District Court, the conclusions of law issued by the District Court are well founded and should be upheld.

POINT II:

AN INTEREST IN REAL PROPERTY CONVEYED TO A RAILROAD
FOR RAILROAD PURPOSES, WHICH DOES NOT IDENTIFY THE
LAND TO BE USED, MUST BE DEEMED AN EASEMENT, SUBJECT
TO ABANDONMENT, AND NOT A FEE SIMPLE INTEREST.

Regardless of the language contained in an instrument purporting to convey an interest in real property, if the instrument fails to adequately describe the property which it purports to convey, and the nature of the use to which the property is put is consistent with a right-of-way or easement, the conveyance will be deemed as a matter of law a conveyance of a right-of-way or easement, subject to abandonment. The actions and inactions of the Railroad demonstrate that it viewed the conveyance as that of a right-of-way or easement and that it intended to and in fact

did abandon its property interest prior to 1958. Once the interest is abandoned, it cannot be revived.

POINT III:

A “STRAY” OR “WILD” DEED WHICH DOES NOT CONVEY AN EXISTING AND VALID INTEREST IN REAL PROPERTY CANNOT HAVE THE EFFECT OF ELIMINATING THE PROTECTIONS OF THE UTAH *MARKETABLE RECORD TITLE ACT*.

The *Marketable Record Title Act* is clear that the protections afforded thereunder are not affected by a “stray” or “wild” deed which does not convey an existing and valid interest, such as the 1958 deed to Building Supply Center. Similarly, the protections of the *Marketable Record Title Act* are not adversely affected by a deed which, by its terms, recognizes the superior title interests of others.

POINT IV:

THE ISSUES OF ADVERSE POSSESSION AND BOUNDARY BY ACQUIESCENCE ARE NOT PROPERLY BEFORE THIS COURT.

The District Court’s ruling in favor of Lasson was based solely upon issues relating directly to Lasson’s *Marketable Record Title Act* protections. The issues of adverse possession and boundary by acquiescence were and are immaterial to the District Court’s findings and judgment and this appeal. Drazich’s attempts to argue these points clouds the issue before this Court and is in direct violation of Rule 24 (j) of the Utah *Rules of Appellate Procedure*.

ARGUMENT

I.

APPELLATE REVIEW OF CIVIL ACTIONS SHOULD BE LIMITED TO QUESTIONS OF LAW AND NOT OF FACT, AND THE PLAINTIFF (APPELLANTS DRAZICH) HAS THE BURDEN OF PROOF IN QUIET TITLE ACTIONS.

It is clear in Utah as in most jurisdictions that the scope of appellate review of civil actions is focused on the law applied by the trial court and not on the credible facts upon which the trial court makes its decision. See Zions First National Bank v. First Security Bank of Utah, N.A., 534 P.2d 900, 902 (Utah 1975); Olsen v. Park Daughters Investment Co., 511 P.2d 145,146 (Utah 1973). Only under the circumstances where the facts relied upon by the trial court are “clearly erroneous” will the appellate court review those facts. In the case of Butler, Crockett and Walsh Development Corp, supra., at 228, Justice Zimmerman, speaking for the Utah Supreme Court stated:

We begin by noting the standard of review in this almost exclusively factual case. We reverse a trial court’s findings of fact only if they are ‘against the clear weight of the evidence,’ *In re Estate of Bartell*, 776 P.2d 885, 886 (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). In making such a determination, we consider the evidence in a light most favorable to the trial court’s finding, and we recite the facts in accordance with that standard. *Van Dyke v. Chappel*, 818 P.2d 1023, 1024 (Utah 1991).

As will be discussed hereafter, the facts (or lack thereof) presented at trial by Drazich mandated the decision made by the District Court in favor of Lasson.

In bringing this quiet title action, Drazich had the burden of proving that its chain of title was superior to that of Lasson, and it utterly failed to do so. (See Olsen, supra., at 146, and Colman v. Butkovich, 538 P.2d 188 (Utah 1975)). In order to demonstrate superior chain of title, Drazich had to prove at trial (1) that the conveyance to the Railroad was a conveyance of a valid and continuing fee simple interest in the Subject Property and (2) that the 1958 deed from

the Railroad to Building Supply Center conveyed a valid interest in the Subject Property. As will be discussed below, Drazich presented no credible evidence demonstrating that the 1882 Indenture to the Railroad contained a legal description of the property purportedly conveyed to the Railroad sufficient to meet the requirements of a fee simple conveyance. Further, as will be discussed below, Drazich presented no evidence refuting Lasson's evidence that the Railroad abandoned whatever interests it may have had in the Subject property by, at the latest, 1926. Drazich also failed to provide evidence that the exceptions and conditions shown on the 1958 Coon and King survey and described in the 1958 deed from the Railroad to Building Supply Center did not exempt out the Subject Property.

In short, Drazich failed to prove to the satisfaction of the trier of fact that any valid or continuing interest in the Subject Property was conveyed to it or its predecessors in interest. Without such proof, the 1958 deed, upon which Drazich relies for its root of title (which has an age less than the forty (40) years required under the Utah *Marketable Record Title Act*), is totally without legal effect under the plain language of the Utah *Marketable Record Title Act* and Utah property law generally. (See Section 57-9-1, Utah Code Annotated; Olsen, *supra.*, at 147-148).

The District Court found that Drazich did not meet its burden of proof based on the facts (or lack thereof) presented at trial, and this determination by the District Court should be upheld in accordance with the standards of review long established by this Court and the Utah Supreme Court.

II.

AN INTEREST IN REAL PROPERTY CONVEYED TO A RAILROAD FOR RAILROAD PURPOSES, WHICH DOES NOT IDENTIFY THE LAND TO BE USED, MUST BE DEEMED AN EASEMENT, SUBJECT TO ABANDONMENT, AND NOT A FEE SIMPLE INTEREST.

In its Brief, Drazich argues that the fact that the 1882 Indenture in favor of the Railroad contained “grant, bargain and sale” and “fee” language should be determinative of the issue of whether the conveyance is one of a fee simple interest in property or merely an easement, subject to abandonment. In support of this position, Drazich refers the Court to rather ancient case law, none of which is directly applicable to the case at bar.

In each of the cases cited by Drazich, the courts had the benefit of an instrument that not only contained “grant, bargain and sale” language but also had an understandable and locatable legal description of the property being conveyed. By contrast, in this case the Court is dealing with an Indenture that does not contain a precise or locatable legal description of the Railroad property. Drazich’s expert title witness, Gary Carlson (“Carlson”) testified at trial that the legal description contained in the Indenture was “very ambiguous.” (T1 at 93). Drazich’s expert witness, Jack L. DeMass (“DeMass”) testified at trial that neither the 1882 Indenture nor the 1910 Railroad Affidavit (the “Affidavit”) (Ex P-5) contained a legal description or drawing that could be physically tied to any point on the ground. (T1 at 66-69). Similarly, Lasson’s expert witness, M. Carl Larsen (“Larsen”), testified at trial that based upon his review of and extensive research concerning the Indenture and the Affidavit, no location of the spur line could or can be determined. (T2 at 15-22). No credible evidence was presented at trial that even the Railroad or its surveyor knew where the spur line was actually located. No one was called at trial to testify on behalf of Coon and King, the Railroad’s surveyor, as to how its survey was prepared. In fact, DeMass, Drazich’s expert surveyor witness, testified that he could not determine from his review

of the Coon and King Survey what data, if any, Coon and King used to attempt to relocate the Railroad spur in 1958. (T1 at 66-69).

In a remarkably similar case in the State of Washington, in which a county was attempting to claim ownership of property which had been originally described in an ancient deed as being "...20 feet on each side of line of said road as surveyed..." the Washington Court of Appeals ruled that the legal description of the property contained in the deed was insufficient because there was no reference in the deed to a specific survey and because there was evidence presented at trial that a surveyor could not precisely locate the property given the description contained in the deed. In making this ruling, the Appeals Court stated:

Deeds must contain an adequate legal description of the real property to be conveyed (Citations omitted). An inadequate legal description is a violation of the statute of frauds (Citations omitted). No reference was made to a specific survey and there was evidence a surveyor could not locate the property, given the description contained in the deed. The cases cited by the County are not dispositive as they hold specific reference to the second document must be made within the deed.

Sparks v. Douglas County, 695 P.2d 588, 589 (Wash. App. 1985).

Other modern case law holds that an instrument purporting to create an interest in real property which fails to provide an adequate legal description of the property which it purports to convey is either (a) invalid on its face (see Colman, supra, at 189), or (b) conveys an easement rather than a full possessory interest. (See Fetzer v. Cities Service Oil Co., 572 Fed.2d 1250 (8th Cir. 1978) (lack of clarity in land description may indicate the conveyance of an easement rather than a full possessory interest); Hutson et al. v. The Agricultural Ditch and Reservoir Co., 723 P.2d 736 (Colo. 1986) (a document purporting to convey a fee interest must at least provide a means of identifying the property conveyed); Sherman et al. v. Petroleum Exploration et al., 132

SW.2d 768, 770 (Ky. 1939) (imprecise description creates an easement only, even though warranty language is used in the conveying instrument)).

Clearly, neither the Indenture itself nor the Affidavit provides the clarity necessary to create a fee simple interest in the Railroad. In Colman, *supra*, at 189, the Utah Supreme Court held that “[u]nder no circumstances can [an] affidavit initiate title.... It is neither a conveyance nor a transfer of marketable title in any sense of the word—statutory or otherwise.”

By the admission of Drazich’s own expert surveyor witness, the actual location of the spur line cannot at this date be determined (T1 at 66-69), and there was no credible evidence presented at trial demonstrating that the Coon and King Survey upon which Drazich’s alleged root of title is based was in fact correct. (T1 at 66-69). By contrast, there was significant testimony and evidence given at trial by Lasson’s expert surveyor witness, Larsen, to the effect that it is more likely than not that the spur track was moved to a position south of its original line sometime before the track was removed in 1904. (T2 at 21). This is a key element in this Case since the location of the Railroad’s property interest under the original Indenture was tied directly to the centerline of the tracks. (Ex 7-P). The possible, and according to Larsen probable, relocation of the tracks prior to 1904 makes the “legal description” found in the 1882 Indenture even more ambiguous and confusing. Drazich introduced no evidence or testimony at trial refuting (or even responding to) this important point.

Based upon the foregoing, it is clear that the trial court was justified in determining that the location of the Railroad spur cannot be accurately or adequately determined. Without such location, the law requires that the Indenture be interpreted as either being void on its face, or at the most as creating an easement, subject to abandonment, but certainly not a fee simple interest. (See Colman, *supra*.; Fetzer, *supra*.; Hutson, *supra*.; and Sherman, *supra*).

Equally as troubling to Drazich's case at trial were the uncontested facts surrounding the Railroad's own statements and actions relative to the property interest conveyed in the Indenture. The Affidavit (Ex 5-P) refers to the interest conveyed to the Railroad as a "right-of-way" (not fee simple) and indicates (a) that the track was removed in 1904 and (b) that the right-of-way had not been abandoned as of 1910. Why would the Railroad have been so concerned about the possibility of abandonment if in fact it thought it owned a fee simple interest? Further uncontested evidence of abandonment was introduced at trial to the effect that the Railroad ceased paying taxes on the right-of-way in 1904 (Ex 22-D and 23-D; T1 at 154) and began quit claiming its interest in the spur line property as early as 1926 (Ex 21-D; T1 at 150), thus making continued use of the property by the Railroad impossible. The Railroad's own records, memoranda, and correspondence surrounding the 1958 Coon and King Survey and the 1958 deed to Building Supply Center indicate that the Railroad was not sure what it owned (if anything) (Ex 18-D) and therefore was not willing to warrant any property within existing fence lines to Building Supply Center, Drazich's predecessor in interest. (Ex 2-P).

The District Court properly took all of these factors into account in determining that the interest conveyed to the Railroad was in fact an easement, subject to abandonment, and that the Railroad had in fact abandoned the easement prior to 1958. (R at 235-236).

III.

A "STRAY" OR "WILD" DEED WHICH DOES NOT CONVEY AN
EXISTING AND VALID INTEREST IN REAL PROPERTY
CANNOT HAVE THE EFFECT OF ELIMINATING THE PROTECTIONS
OF THE UTAH *MARKETABLE RECORD TITLE ACT*.

It was uncontested at trial that Lasson has an unbroken chain of title to his property which has existed in excess of forty (40) years, thus making him eligible for protection under the Utah

Marketable Record Title Act. (Section 57-9-1 *et seq.* Utah Code Annotated (the “Act”)). Section 57-9-2 of the Act sets forth certain exceptions to the effectiveness of the Act in protecting property rights. The only exception at issue in this case appears in Section 57-9-2(4) of the Act which reads as follows:

[The marketable record title is subject to] any interest out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started, except that the recording does not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section 57-9-3. . . . (Emphasis added).

As discussed in Section II above, no credible evidence was introduced at trial locating with any precision the property in which the Railroad claimed an interest. Uncontested evidence presented at trial clearly showed action and inaction on the part of the Railroad demonstrating an abandonment of any interest which it might have once claimed. Based on these two factors alone, the District Court was justified in determining that “[n]o ‘title transaction,’ as that term is used in Section 57-9-2(4)...occurred so as to break Defendant’s (Lasson’s) chain of title...” (R at 236).

An additional basis for the District Court’s ruling is found in the facts and circumstances surrounding the preparation of the 1958 deed to Building Supply Center (in which Drazich claims his root of title to the Subject Property) and the language of the deed itself. As previously discussed, inter-company letters and memoranda executed and delivered by the Railroad prior to issuance of the 1958 deed indicated that the Railroad was unsure of the exact location of the right-of-way (Ex 18-D; T1 at 104,106) and was concerned about the effect of a fence line shown on a map prepared by the Railroad prior to the preparation of the Coon and King Survey (Ex 18-D; T1 at 107-110).

Prior to issuance of the 1958 deed and as a result of inter-company directions regarding the sale to Building Supply Center, the Railroad retained the services of Coon and King to provide what has been described as a “certified survey.” (T1 at 105; Ex 12-P). Both of the expert surveyor witnesses, DeMass and Larsen, testified that they could not verify the accuracy of the Coon and King Survey as to the exact location of the Railroad’s spur line (T1 at 66-67; T2 at 48-49). Nevertheless, the unverified survey, when completed, showed a fence line running along the south boundary of the existing Lasson and White properties. (T2 at 25-26; Ex 12-P).

After the Coon and King Survey was completed, the Railroad authorized the issuance of a special warranty deed to Building Supply Center containing certain exceptions and conditions. (Ex 18-D at p. 5). Specifically, the conveyance was made subject to (and did not contain warranties as to) “...all outstanding rights for any and all...fences...existing upon ...the said described premises.” (Ex 2-P). Drazich argues in its Brief that since Building Supply Center received a special warranty deed, this conveyance must be deemed a “title transaction” disrupting Lasson’s chain of title under the Act. This simply is not the case. Since the 1958 deed cannot be tied by evidence back to the 1882 Indenture or the 1910 Affidavit, the deed, by definition, is a “stray” or “wild” deed. In reviewing Utah law relating to the effect of “stray” deeds, Judge McKay, speaking for the Tenth Circuit Court of Appeals stated:

When , as here, the relevant state law is inconclusive and ambiguous on the effect of a stray deed, we are not convinced that, as a matter of federal law, a party should be considered so unreasonable in failing to have discovered the existence of a claim that he will be charged with constructive knowledge of the claim. The doctrine of constructive notice, which creates a fiction and deals with hypothetical facts, is a harsh doctrine which should be resorted to reluctantly and construed strictly (citations omitted).

Amoco Production Company v. United States, 619 F.2d 1383, 1388 (10th Cir. 1980).

In the Amoco case, the court was dealing with the issue of constructive notice. Drazich has argued that its “stray” deed is sufficient to destroy Lasson’s protections under the *Marketable Record Title Act*. Like Judge McKay and the Tenth Circuit, Lasson contends that such an application of the ambiguous rulings of the Utah Courts in the past concerning “stray” deeds would be “harsh doctrine” and violative of the oft stated and well established principal that “...boundary lines which have long been established and accepted by those who should be concerned should be left undisturbed in order to leave at rest matters which may have resulted in controversy and litigation....” Olsen, *supra.*, at 147.

This principal is particularly relevant in the case at bar for two reasons. First, as previously discussed, the “stray” deed cannot revive or give validity to an interest which was extinguished prior to the effective date of the deed (Section 57-9-2(4)), and second, the conveyance contained in the deed itself was specifically made “subject to” the rights of others (including Lasson’s predecessors) owning or claiming lands within the existing fence lines. It is also interesting to note that during cross examination, Mr. Carlson, Drazich’s expert title witness, admitted that the “subject to” provisions raise ambiguities as to what was actually conveyed in the 1958 deed. The relevant portions of that examination are as follows:

Q. And in the 1958 deed, the Special Warranty Deed which we have discussed this morning, have you had an opportunity to review that document?

A. Yes, I have.

Q. And are you familiar with the conveyance language in that document?

A. Yes.

...

Q. You are familiar with it? Fine. In the language conveying subject to certain condition, what does that mean to you as a title examiner?

A. Well, it means that there may or may not be something there. Generally speaking, that universal-type language that's used could mean there is something there and could mean there isn't anything there.

Q. So unless you study what's actually on the ground or what parol evidence perhaps there is surrounding the deed, you really wouldn't know what was conveyed in that instrument. Is that correct?

A. That's correct.

(T1 at 90-91). Lasson's expert title witness, Arlen Taylor, agreed with Mr. Carlson and indicated that such language in the deed negatively affects the insurability of the conveyance.

(T1 at 160). Thus both expert witnesses could not verify what, if anything, was conveyed to Drazich's predecessor in interest by the 1958 deed.

Based upon the events and document surrounding the preparation of the Coon and King Survey, the unverifiable Survey itself, the clear language of the deed to Building Supply Center, and the testimony of the expert title witnesses at trial, the District Court was more than justified in holding that no conveyance of the Subject Property occurred as a result of the 1958 deed and that the deed did not constitute a "title transaction" sufficient to eliminate or lessen Lasson's protections under the Act.

IV.

THE ISSUES OF ADVERSE POSSESSION AND BOUNDARY BY ACQUIESCENCE ARE NOT PROPERLY BEFORE THIS COURT.

It is perfectly clear from the Record in this Case that the decision of the District Court in favor of Lasson was based solely on protections afforded Lasson under the Utah *Marketable*

Record Title Act. (R at 231-241). Although thoroughly briefed and argued at trial, the issues of adverse possession and boundary by acquiescence were determined by the District Court to be irrelevant and immaterial to the outcome of the case. (T3 at 41-43). Nevertheless, Drazich's counsel has taken approximately twelve pages of his Brief to reargue these points. The inclusion of these irrelevant and immaterial matters in the Appellant's Brief is in direct violation of Rule 24 (j) of the Utah *Rules of Appellate Procedure*, which states:

(j) **Requirements and Sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney's fees against the offending lawyer. (Emphasis added).

(See Appellee's Addendum). Since the issues of adverse possession and boundary by acquiescence were immaterial and irrelevant to the District Court's decision on this matter, Lasson has elected not to respond in this Brief to the arguments on these issues contained in the Drazich Brief. Should this Court desire to know of Lasson's position on these matters, the Court is directed to the Trial Brief of Defendant Alan Lasson (R at 112-161) and the Closing Brief of Defendant Alan Lasson (R at 201-215).

Further, Lasson respectfully requests that this Court impose appropriate sanctions upon Drazich's counsel for including these immaterial and irrelevant matters in his Brief by (1) striking the irrelevant and immaterial portion of the Appellants' Brief, (2) granting Lasson costs and attorney's fees incurred by Lasson in this appellate proceeding, and (3) granting such other relief as the Court may find appropriate in the premises.

CONCLUSION

This case was originally brought by Drazich to attempt to quiet title to the Subject Property which it believed it owned by virtue of a 1958 deed granted to its predecessor in interest by the Railroad. As the moving party in this action, Drazich had the burden of proving (1) that the Railroad at some point acquired a fee simple interest in the Subject Property, (2) that the property used by the Railroad could and can be accurately located, (3) that the Railroad did not abandon or otherwise forfeit its interest in the Subject Property prior to 1958, (4) that the fence line exceptions found on the 1958 Coon and King Survey and in the 1958 deed did not recognize the validity of the rights of other owners of property lying within said fence lines, and (5) that in all respects the 1958 deed accurately described and ties directly back to a portion of the property originally used by the Railroad. We submit that Drazich failed at trial to meet its burden of proof on all of these issues.

The evidence presented at trial clearly indicates that the original location of the Railroad's spur line cannot be determined, and therefore it is impossible to determine whether in fact the 1958 deed that created the overlap is accurate. The one thing that was clear at trial, and the fact upon which the District Court relied in reaching its decision on this matter, was that Lasson and his predecessors in interest held title to the entirety of the Lasson property from 1927, according to the County tax rolls (T1 at 157; Ex 24-D), and since at least 1951, according to deeds of record. (T1 at 157; Ex 8-P). Thus Lasson has and enjoys the protections of the Utah *Marketable Record Title Act*, which the unsubstantiated and unverifiable deed upon which Drazich relies for his root of title simply cannot affect.

In discussing the burden of proof of a plaintiff in a quiet title action, Chief Justice Henroid stated: "[o]ne cannot prevail on the weakness of his adversary's title, but only on the

strength of his own.” Colman v. Butkovich, 538 P.2d 188, 189 (Utah 1975). The District Court was more than justified in ruling in favor of Lasson based on the lack of evidence presented at trial by Drazich in support of its claim to title.

Therefore, the judgment of the District Court should be affirmed and costs and attorney fees of this appeal should be awarded to Appellee Lasson for the reasons herein stated.

RESPECTFULLY SUBMITTED this 8th day of October, 1997.

A handwritten signature in black ink, appearing to read "David P. Hirschi", is written over a horizontal line.

DAVID P. HIRSCHI
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CERTIFICATE OF MAILING

This is to certify that two true and correct copies of the foregoing Appellee's Brief were mailed, postage prepaid, to Brant H. Wall and Gregory B. Wall, attorneys for appellants Drazich, at Suite 800, Boston Building, 9 East Exchange Place, Salt Lake City, Utah, 84111, on the 8th day of October, 1997.



DAVID P. HIRSCHI
Attorney at Law

ADDENDUM

STATUTE

Section 78-40-1 Utah Code Annotated

CONSTITUTION

Utah Constitution, Art. VIII, Section 4

RULES OF APPELLATE PROCEDURE

Rule 24(j), *Utah Rules of Appellate Procedure*

Section		must require evidence — Con-
78-40-12.	Service of summons and conclu-	siveness of judgment.
78-40-13.	Judgment on default — Court	

78-40-1. Action to determine adverse claim to property — Authorized.

An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-1.	color of title, §§ 57-6-1 et seq., § 78-40-5.
Cross-References. — Action brought in county where property situated, § 78-13-1.	Jurisdiction in district courts, Utah Const., Art. VIII, Sec. 5; § 78-3-4.
Allowance for improvements made under	Limitations of actions, § 78-12-1 et seq.
	Tax sales of real property, § 59-2-1303 et seq.

NOTES TO DECISIONS

ANALYSIS

Adverse possession.
Due process.
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Proof of claim.
Tax titles or claims.
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What claims may be assailed.
What constitutes "claim" of "estate or interest."
Wrongful possession.

Adverse possession.

One claiming by adverse possession does not arrest the running of this section in his favor by commencing an action to quiet title. *Welner v. Stearns*, 40 Utah 185, 120 P. 490, 1914C Ann. Cas. 1175 (1911).

Due process.

Repossession of real property under a contract and the quiet title procedure did not constitute state action under the fourteenth amendment, thereby giving the vendees a right to reasonable notice prior to the destruction of their security interest, where the state did not create the rights leading to the vendees' deprivation of their interest in the contract. *Dirks v. Goodwill*, 754 P.2d 946 (Utah Ct. App. 1988).

Heirs.

Heirs could bring action to quiet title though there had been no adjudication of heirship. *Chamberlain v. Larsen*, 83 Utah 420, 29 P.2d 355 (1934).

Judgment.

Court of equity, in an action to quiet title,

may not only enter judgment quieting title, but may include in the judgment a general order restraining the defendant from asserting any claim adverse to, and in derogation of, the plaintiff's right, and may prohibit the defendant from doing any act that would tend to impair or destroy such right. *Richey v. Beus*, 31 Utah 262, 87 P. 903 (1906).

Decree in an action to quiet title can only bind the parties to the action. *Fisher v. Davis*, 77 Utah 81, 291 P. 493 (1930).

Effect of a decree quieting title is not to vest title, but to perfect an existing title as against other claimants. *State ex rel. Utah State Dep't of Social Servs. v. Santiago*, 590 P.2d 335 (Utah 1979).

Nature and scope of proceedings.

The language used in this section is very comprehensive. In terms, it authorizes an action by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. *Bullion, Beck & Champion Mining Co. v. Eureka Hill Mining Co.*, 5 Utah 3, 11 P. 515 (1886), appeal dismissed, 131 U.S. 431, 9 S. Ct. 796, 33 L. Ed. 224 (1888).

Action to quiet title is an action at law and thus either side, upon request, is entitled to a jury trial. *Holland v. Wilson*, 8 Utah 2d 11, 327 P.2d 250 (1958).

Statutory action to quiet title is an action in rem, or quasi in rem, requiring either a state or federal court to obtain jurisdiction over the property in dispute before proceeding to adjudication on the merits. *1st Nat'l Credit Corp. v. Von Hake*, 511 F. Supp. 634 (D. Utah 1981).

Option to purchase.

Validly exercised option to purchase cannot fail for the reason that funds are secured from

are presumed to be proper unless there is no substantial evidence to sustain them *Schad v Turner*, 27 Utah 2d 345, 496 P 2d 263 (1972), *Wilson v Turner*, 27 Utah 2d 368, 496 P 2d 711 (1972), *Leggroan v Turner*, 27 Utah 2d 403, 497 P 2d 17 (1972), *Zumbrunnen v Turner*, 27 Utah 2d 428, 497 P 2d 34 (1972)

Legislative enlargement or abridgement of powers.

The powers given court by this provision cannot be enlarged or abridged by the legislature *State ex rel Robinson v Durand*, 36 Utah 93, 104 P 760 (1908)

COLLATERAL REFERENCES

Journal of Contemporary Law — Judicial Socialization An Empirical Study, 11 J Contemp L 423 (1985)

Key Numbers. — Courts ⇐ 248

Sec. 4. [Rule-making power of Supreme Court — Judges pro tempore — Regulation of practice of law.]

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law

History Const 1896, L. 1984 (2nd S S), S.J R. 1

Compiler's Notes — Former Article VIII contained no comparable provisions

Cross-References. — Supreme Court rule-making process Rule 11-101 Code of Judicial Administration

NOTES TO DECISIONS

ANALYSIS

Judge pro tempore
Regulation of judicial conduct
Regulation of practice of law
Cited

Judge pro tempore.

Appointment of a judge pro tempore to hear and decide a divorce action does not violate the provisions of § 30-3-4, since a properly appointed pro tempore judge becomes the equal in every respect to the regular judge *Harward v Harward*, 526 P 2d 1183 (Utah 1974)

Circuit judge appointed by state court administrator to serve temporarily as a district judge pursuant to § 78-3-24 and former § 78-4-15 was not a judge pro tempore and was not subject to the legal restrictions pertaining to that status *Cahoon v Cahoon*, 641 P 2d 140 (Utah 1982)

Regulation of judicial conduct.

The Supreme Court is constitutionally obligated to review the Judicial Conduct Commission's proceedings, but the court has no authority to undertake initial review of matters related to compliance with the judicial canons of ethics *In re Greenwood*, 135 Utah Adv Rep 27 (1990)

Regulation of practice of law.

This section gives the Supreme Court the power to govern the practice of law and to discipline bar members This power necessarily includes control over the procedures used to discipline bar members *In re Crandall*, 784 P 2d 1193 (Utah 1989)

Cited in *Stewart v Coffman*, 748 P 2d 579 (Utah Ct App 1988)

Rule 23B. Motion to remand for determination of ineffective assistance of counsel.

(a) **Grounds for motion; time.** A party to an appeal in a criminal case may move the court to remand the case to the trial court for the purpose of entering findings of fact relevant to a claim of ineffective assistance of counsel. The motion shall be available only upon an allegation of facts constituting ineffective assistance of counsel not fully appearing in the record on appeal. The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

(b) **Content of motion; response; reply.** The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. A response shall be filed within 20 days after the motion is filed. Any reply shall be filed within 10 days after the response is filed.

(c) **Order of the court.** Upon consideration of the motion, affidavits, and memoranda, the court may order that the case be temporarily remanded to the trial court for the purpose of entering findings of fact relevant to the claim of ineffective assistance of counsel. If it appears to the appellate court that the attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) **Effect on appeal.** Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

(e) **Proceedings before the trial court.** Upon remand the trial court shall conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact.

(f) **Preparation and transmittal of the record.** At the conclusion of all proceedings before the trial court, the clerk of the trial court and the court reporter shall prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) **Appellate court determination.** Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this

rule are reviewable under the same standards as the review of findings of fact in other appeals.
(Added effective October 1, 1992.)

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown.

(h) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(i) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(j) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(k) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

(Amended effective October 1, 1992; July 1, 1994; April 1, 1995.)

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except as all parties otherwise consent, an amicus curiae or guardian ad litem shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support, unless the court for cause shown otherwise orders. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

Rule 26. Filing and service of briefs.

(a) **Time for service and filing briefs.** Briefs shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellant shall serve and file a brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13, unless a motion for summary disposition of the appeal or a motion to remand for determination of ineffective assistance of counsel has been previously interposed, in which event service and filing shall be within 30 days from the denial of such motion. The appellee, or in cases involving a cross-appeal, the appellee/cross-appellant, shall serve and file a brief within 30 days after service of the appellant's brief. In cases involving cross-appeals, the appellant shall serve and file the second brief described in Rule 24(g) within 30 days after service of the appellee/cross-appellant's brief. A reply brief may be served and filed by the appellant or the appellee/cross-appellant in cases involving cross-appeals. If a reply brief is filed, it shall be served and filed within 30 days after the filing and service of the appellee's brief or the appellant's second brief in cases involving cross-appeals. If oral argument is scheduled fewer than 55 days after the filing of appellee's brief, the reply brief must be filed at least 5 days prior to oral argument. By stipulation filed