

2008

WILLIAM R. SMITH and LUDEAN A. SMITH,
as Trustees of THE SMITH FAMILY
REVOCABLE TRUST; MACK G. SMITH and
CAROLYN SMITH, as Trustees of THE MACK
G. AND CAROLYN SMITH REVOCABLE
TRUST, J. LYNN SMITH, as Trustee of THE J.
LYNN SMITH LIVING TRUST; and CINDY S.
HATCH, v. Security Investment LTD : Brief of
Appellee

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Wade R. Budge; Troy L. Booher; Chris J. Martinze; Snell .

George K. Fadel; Attorney for Defendant-Appellants.

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IN THE UTAH COURT OF APPEALS

WILLIAM R. SMITH and LUDEAN A. SMITH, as Trustees of THE SMITH FAMILY REVOCABLE TRUST; MACK G. SMITH and CAROLYN SMITH, as Trustees of THE MACK G. AND CAROLYN SMITH REVOCABLE TRUST, J. LYNN SMITH, as Trustee of THE J. LYNN SMITH LIVING TRUST; and CINDY S. HATCH,

Plaintiffs/Appellees,

vs.

SECURITY INVESTMENT LTD,

Defendant/Appellant.

Court of Appeals No. 20080790

Dist. Ct. No. 060700147

BRIEF OF APPELLEES

George K. Fadel
Fadel Associates
170 West 400 South
Bountiful, Utah 84010
Telephone: (801) 294-7777
Facsimile: (801) 294-7787

Attorney for Defendant/Appellant.

Wade R. Budge (8482)
Troy L. Booher (9419)
Chris J. Martinez (11152)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, UT 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Plaintiffs/Appellees

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George K. Fadel
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170 West 400 South
Bountiful, Utah 84010
Telephone: (801) 294-7777
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Attorney for Defendant/Appellant.

Wade R. Budge (8482)
Troy L. Booher (9419)
Chris J. Martinez (11152)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, UT 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Plaintiffs/Appellees

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Statement of the Issues and Standards of Review

Security Investment LTD (“Security”) seeks to overturn the result of a bench trial, at which the trial court ruled that a fence between properties owned by Security and Appellees (“Smiths”) constitutes the boundary between the properties under the doctrine of boundary by acquiescence. In the opening brief, Security raises six issues, but only two issues raise distinct grounds for reversal. The other issues are different versions of these two issues. For this reason, the Smiths will restate the issues on appeal.

I.

The first, fifth, and sixth issues in the opening brief present the same issue. The first issue concerns whether, under the doctrine of boundary by acquiescence, the trial court had to make a specific finding that Security believed the fence was the boundary or whether such a belief could be inferred from Security’s conduct. The fifth issue concerns whether the trial court’s finding that Security treated the fence as a boundary is sufficient to support its conclusion that Security acquiesced to the fence serving as the boundary between the properties. And the sixth issue concerns whether the trial court erred in concluding, before trial, that Security’s silence coupled with its treatment of the fence as a boundary could be sufficient evidence at trial to prove Security acquiesced in the fence serving as a boundary. The first, fifth, and sixth issues therefore present the same question:

Issue 1: Whether silence coupled with treatment of a fence as a boundary for more than 20 years is sufficient to prove acquiescence under the doctrine of boundary by acquiescence.

Standard of Review: The issue of whether silence coupled with treatment of a fence as a boundary can satisfy the doctrine of boundary by acquiescence is a question of law this court reviews for correctness. RHN Corp. v. Veibell, 2004 UT 60, ¶22, 96 P.3d 935. In contrast, the issue of whether, under the facts of this case, Security's treatment of the fence as a boundary constituted acquiescence to the fence serving as a boundary is a question of fact reviewed under a clearly erroneous standard. Id. at ¶27.

II.

The second, third, and fourth issues in the opening brief also present a single issue. The second issue concerns whether the Smiths could believe the fence was a boundary where the legal descriptions of the two parcels at issue did not follow the fence. The third issue concerns whether knowledge of the boundaries described in the county records should have been imputed to the Smiths to defeat their boundary by acquiescence claim. The fourth issue concerns whether the trial court erred in failing to make findings based upon the legal descriptions in the county records.⁹ These three issues present the same question:

Issue 2: Whether the recorded legal description of the boundary between two parcels precludes application of the doctrine of boundary by acquiescence because knowledge of the record boundary is imputed to both parties.

Standard of Review: The issue of whether the recorded legal description of the boundary precludes application of the doctrine of boundary by acquiescence is reviewed for correctness. RHN, 2004 UT 60 at ¶22.

Statement of the Case

I. Nature of the Case

This case involves a boundary dispute between two neighbors, the Smiths and Security. Since 1949, a fence has separated their parcels. (R. at 378:78-79.) The fence runs in a nearly straight line and follows, with one minor exception, the record boundary between their parcels. (R. at 31, 36.) However, two acres of the parcel described in the county records as owned by Security is located on the Smiths' side of the fence ("disputed parcel").

For more than 50 years, the Smiths (and their predecessors) have used all of the land on their side of the fence, including the disputed parcel. (R. at 24-25, 32, 64, 68, 71, 76, 82.) Until recently, the Smiths believed the fence ran along the record boundary between their parcel and the Security parcel. (R. at 57, 79, 82.) Upon learning otherwise, the Smiths brought this lawsuit to quiet their title to the disputed parcel under the doctrine of boundary by acquiescence. (R. 1-5.) After a bench trial, the trial court quieted the Smiths' title in the disputed parcel because the parties had acquiesced to the fence serving as a boundary for more than the 20 years required under the doctrine of boundary by acquiescence. (R. at 367-69.)

II. Course of Proceedings

In a survey conducted in 2005, the Smiths first learned that the record description of their parcel and the Security parcel placed the disputed parcel on the Smiths' side of the fence. (R. at 3.) Shortly thereafter, the Smiths sent to Security a proposed boundary agreement to correct the legal descriptions of their respective parcels to reflect the actual, long-observed boundary along the fence. (R. at 4.) On March 20, 2006, after Security refused to sign the boundary agreement, the Smiths filed a complaint, seeking to quiet the Smiths' title to the disputed parcel under the doctrine of boundary by acquiescence. (R. at 1-5.)

After filing the complaint, the Smiths conducted discovery. (R. at 34.) Security conducted no discovery—no document requests, no interrogatories, and no depositions. On September 6, 2007, after the period for discovery had closed, the Smiths filed a motion for summary judgment on their boundary by acquiescence claim. (R. at 48, 51.) On April 18, 2008, the trial court denied the motion on the ground that disputed issues of fact remained concerning the second of the following four elements of boundary by acquiescence: “(i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a long period of time, (iv) by adjoining landowners.” (R. at 173, 205-06.) Specifically, the court concluded that disputed issues of fact remained concerning whether the parties had acquiesced to the fence serving as a boundary, instead of a barrier. (R. at 206.)

In order to narrow the issues at trial and “salvage some result from the effort expended in the denial of the motion for summary judgment,” the trial court issued an order of partial summary adjudication pursuant to Rule 56(d) of the Utah Rules of Civil

Procedure.¹ In this order, the trial court declared that those facts set forth in the Smiths' summary judgment papers that were undisputed were deemed established for purposes of the pending trial. (R. at 207.) Specifically, the trial court determined that it was undisputed that (i) the Smiths and Security were adjoining landowners, and (ii) the fence had existed in its current location for more than 30 years. (R. at 208.) Moreover, the court had previously ruled that both parties had occupied their land up to the fence. (R. at 181.) Security never objected to these determinations.²

As a result of these undisputed facts, only the second element of boundary by acquiescence—mutual acquiescence in the fence as a boundary—remained for trial. (R. at 208). The trial court therefore ordered that the only issue to be tried was whether the parties treated the fence as a boundary during the relevant time period. (R. at 209.) The bench trial was held on June 5, 2008. (R. at 378.) Security chose not to call a single witness, and instead defended against the Smiths' boundary by acquiescence claim by

¹ Utah Rule of Civil Procedure 56(d) reads as follows:

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

² Security has never argued that the Smiths failed to establish these three elements of boundary by acquiescence. For this reason, this court should ignore Security's claim that the trial court should have tried all four elements. (AOB at 27.)

pointing to a number of documents in the county record describing the record boundaries at a location different than the location of the fence. (R. at 378:108-11, 117-21.)

On August 5, 2008, the trial court issued its findings of fact and conclusions of law. (R. at 359.) The court found that the parties had treated the fence as a boundary, not a mere barrier, for more than 20 years. (R. at 364.) Accordingly, the trial court found that the Smiths had established the second element of boundary by acquiescence. (R. at 364.) On September 4, 2008, the court entered a final order and judgment, quieting the Smiths' title to the disputed parcel. (R. 367-69.) This appeal followed.

III. Statement of Facts

During the bench trial, the Smiths called three witnesses: Scott Smith, Marvin George, and Mack Smith. (R. at 378:23, 39, and 56.) Security called no witnesses.

Scott Smith testified that he had lived on the Smiths' property since he was born in 1964, and during this time the Smiths had grazed livestock, farmed, and run a beef operation on all of the land on the Smiths' side of the fence. (R. 378:24-25.) Security (through its tenant of 44 years) had grazed cattle, horses, and buffalo on the land on its side of the fence. (R. 378:32.) Both Security and the Smiths had repaired the fence over the last 40 years. (R. at 378:29, 44.)

Scott Smith testified that the fence runs in a straight line north and south along the record boundary between a number of different properties, with the exception of a portion of the boundary between the Smith parcel and Security parcel. (R. at 378:31, 36.) Until just before this lawsuit, Scott Smith believed that the fence ran along the record boundary because the Smiths had treated it as the boundary and he would have expected Security to

object to the Smiths' using the property for more than 50

objected. (R. at 378:33, 57.)

Marvin George leased the land on Security's side of the fence since 1965. (R. at 378:58-59.) Security designated Mr. George as its Rule 30(b)(6) witness to speak for Security.³ (R. at 378:58-59.) Mr. George never used any of the land on the Smiths' side of the fence during the 44 years he leased the parcel. (R. at 378:64.) While Mr. George did maintain the fence from time to time, he never ran cattle or farmed on the Smiths' side of the fence, and Security never stored any equipment on the Smiths' side of the fence. (R. at 378:64, 68, 76.)

Importantly, Mr. George testified that (contrary to Security's position in its summary judgment papers) he could have moved the fence and used the disputed parcel, but never did. (R. at 378:72-73.) Mr. George never told "anyone," including the Smiths, that they could not use the disputed parcel. (R. at 378:76.)

Mack Smith, an owner of the Smith parcel, had been visiting the Smith parcel since 1949, when he was 11 years old. (R. at 378:77.) He testified that the fence has been in its current location since at least 1949. (R. at 378:78.) Mack Smith has always considered the fence to be the boundary between the Smith parcel and the Security parcel. (R. at 378:79, 82.) The Smiths used the land up to the fence for farming and grazing, and Security never indicated that the fence was not the boundary between the

³ Under Rule 30(b)(6), a designee is not merely testifying on behalf of himself, but instead is "speaking for the corporation." Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82, 94 (D.D.C. 1998).

two properties or that the Smiths could not otherwise use all of the land on their side of the fence.⁴ (R. at 378:82.)

Security called no witnesses, and instead proffered through its attorney a number of documents found in the county records. (R. at 378:108-111.)

Summary of Argument

The opening brief provides no grounds for reversing the trial court's finding after a bench trial that both Security and the Smiths acquiesced for 20 years to the fence between their parcels serving as a boundary. Security argues that (i) its silence, coupled with mutual treatment of the fence as a boundary, is insufficient as a matter of law to establish boundary by acquiescence; (ii) the evidence at trial is insufficient to establish that Security treated the fence as a boundary; and (iii) the record boundary should be imputed to the Smiths to defeat their boundary by acquiescence claim. All three arguments fail.

First, the opening brief fails to cite controlling Utah Supreme Court authority holding that silence alone can be sufficient to establish the mutual acquiescence element of boundary by acquiescence. RHN Corp. v. Veibell, 2004 UT 60, ¶25, 96 P.3d 935 (acquiescence may "be shown by silence"). Under RHN, Security's silence, coupled with its treatment of the fence as a boundary and the Smiths' acquiescence to the fence serving as a boundary, is legally sufficient to establish mutual acquiescence.

⁴ At the trial, Mack Smith testified about a separate two-acre parcel that may or may not have belonged to Security, but that had nothing to do with the boundary at issue in this case. (R. 378:82.) Indeed, this testimony is irrelevant given Mack Smith's clear testimony that he always considered the fence to be the boundary. (Id. at 378:79, 82.)

Second, there was ample direct and circumstantial evidence presented at trial to support the trial court's finding that Security acquiesced to the fence serving as a boundary. The finding is therefore not clearly erroneous. In fact, the evidence here is nearly identical to the facts in RHN, a case Security does not cite in the opening brief despite it being relied upon by the trial court. Security was not a passive investor who never visited the parcel, but instead (through its tenant and Rule 30(b)(6) witness) continually used its parcel up to the fence, knew the Smiths were using their parcel up to the fence, and never objected until the Smiths pointed out the discrepancy between the record boundary and the fence just before this lawsuit commenced. Security acquiesced to the fence serving as the boundary.

Third, a discrepancy between a record boundary and a fence dividing two parcels cannot defeat a boundary by acquiescence claim. Not only was Security's position squarely rejected in RHN, it makes no sense. 2004 UT 60 at ¶29 ("We reject the . . . claim that constructive notice of the true boundary via the metes and bounds description in the . . . deed precludes a showing of acquiescence"). The fact that a fence between two properties does not follow the record boundary is what gives rise to a boundary by acquiescence claim; it cannot also defeat such a claim without rendering the doctrine a nullity. Therefore, documents in the county records unearthed by Security to defend this lawsuit are irrelevant to the Smiths' boundary by acquiescence claim. This court should affirm.

Argument

I. Silence, Coupled with Treating a Fence as a Boundary, Is Legally Sufficient to Satisfy the Mutual Acquiescence Element of Boundary by Acquiescence

Security first argues that the trial court erred because it did not make a finding that Security expressly agreed, or subjectively believed, the fence was the boundary. (AOB at 11-12.) Put differently, Security argues that, as a matter of law, its silence, even if coupled with both parties' treating the fence as a boundary, is insufficient to establish boundary by acquiescence. Security's argument is without a basis in law.

The Utah Supreme Court has unequivocally held that acquiescence may "be shown by silence." RHN Corp. v. Veibell, 2004 UT 60, ¶ 25, 96 P.3d 935; see also Mason v. Loveless, 2001 UT App 145, ¶ 20, 24 P.3d 997 ("our settled case law . . . clearly provides that acquiescence may be established by silence"); Lane v. Walker, 505 P.2d 1199, 1200 (Utah 1973) ("[a]cquiescence is more nearly synonymous with indolence, or consent by silence"). Therefore, boundary by acquiescence does not require a finding that a defendant expressly agreed or subjectively believed that a fence served as a boundary.

Even if silence alone were legally insufficient, parties can acquiesce to a fence as a boundary by their treatment of the fence as a boundary. As RHN explains, the element of "acquiescence" requires only that one "recognize and treat an observable line, such as a fence, as the boundary dividing the owner's property from the adjacent landowner's property." 2004 UT 60 at ¶ 24. In other words, "acquiescence, or recognition, may be tacit and inferred from evidence, i.e., the landowner's actions with respect to a particular line may evidence the landowner impliedly consents, or acquiesces, in that line as the

demarcation between the properties.” Id. (emphasis added). Indeed, in RHN there was no evidence that either of the adjoining landowners ever expressly indicated that the fence was the boundary. Instead, just as here, silence, combined with each party’s treatment of the fence as a boundary, was sufficient. 2004 UT 60 at ¶¶ 26-27.

Instead of citing controlling Utah Supreme Court precedent, Security cites to two court of appeals decisions holding that, on the facts of those cases, silence alone was insufficient. Wilkinson Family Farm, LLC v. Babcock, 1999 UT App 366, 993 P.2d 229; Brown v. Jorgensen, 2006 UT App 168, 136 P.3d 1252.⁵ These cases do not stand for the proposition that, as a matter of law, silence coupled with both parties’ treating the fence as a boundary cannot establish boundary by acquiescence. Jorgensen expressly recognizes that acquiescence “may occur through a party’s silence.” 2006 UT App 168 at ¶15. And in Wilkinson, which predates the Utah Supreme Court’s RHN decision, the failure to object to use of disputed property was insufficient to establish a boundary by acquiescence when “both parties and their predecessors knew” the boundary between their properties was not the fence. 1999 Utah App. 366, ¶4 (emphasis added). By implication, then, Wilkinson supports the proposition that silence alone may constitute acquiescence. Regardless, RHN controls.

This court should therefore reject Security’s assertion that silence coupled with treatment of a fence as a boundary is insufficient, as a matter of law, to establish acquiescence.

⁵ The determination of whether parties acquiesce to a boundary is highly fact intensive. Accordingly, it should come as no surprise that in both of these cases the appellate court affirmed the trial court’s determinations of no acquiescence. Wilkinson, 1999 UT App 366 at ¶14; Jorgensen, 2006 UT App 168 at ¶32.

II. In this Case, Security's Silence, Coupled with Its Treatment of the Fence as a Boundary, Is Sufficient to Satisfy the Mutual Acquiescence Element of Boundary by Acquiescence

Security also argues that the evidence presented at trial does not support a finding that Security treated the fence as a boundary, and therefore, acquiesced to the fence serving as a boundary. (AOB at 29.) The trial court's finding that Security treated the fence as a boundary is a finding of fact, reviewed under a clearly erroneous standard. RHN, 2004 UT 60 at ¶27 (holding that the trial court's finding of "acquiescence [was] not clearly erroneous"). Similarly, the trial court's finding here is not clearly erroneous. There is ample evidence to support it.

Specifically, Security's tenant and Rule 30(b)(6) designee⁶ testified that (i) he used Security's property up to, but never over, the fence; (ii) he could have moved the fence to encompass all of Security's record property; (iii) he was aware that the Smiths were using all of the land on their side of the fence for farming and grazing; and (iv) he never objected to the Smiths' using the disputed parcel. (R. 378:64, 68, 72-73, and 76.) This evidence is sufficient to support a finding that Security treated the fence as a boundary.

Moreover, the trial court's findings of fact—assuming Security is not disputing them in an attempt to secure a better standard of review—are sufficient to support the mutual acquiescence element of boundary by acquiescence. As stated above, the findings of fact in this case are nearly identical to those in RHN. Here, the trial court made the following findings of fact after a bench trial:

⁶ A rule 30(b)(6) designee does not merely testify to his or her own personal knowledge; instead, the representative is "speaking for the corporation." Rainey v. American Forest & Paper Ass'n, Inc., 26 F. Supp. 2d 82, 94 (D.D.C. 1998); U.S. v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C. 1996).

1. The fence has been in its current location since 1949.⁷ (R. at 360.)
2. The fence follows a nearly straight course.⁸ (R. at 360.)
3. The fence follows the record boundaries, excepting the two-acre disputed parcel.⁹ (R. at 360.)
4. Both parties helped to maintain the fence.¹⁰ (R. at 361.)
5. The Smiths used the disputed parcel for farming and grazing for more than 20 years.¹¹ (R. at 361.)
6. Both sides used and occupied their respective land up to the fence, but never over.¹² (R. at 361.)
7. Security was silent. It never objected to the Smiths' using the disputed parcel. It never informed the Smiths that the disputed parcel belonged to Security. And Security never used the disputed parcel for any reason.¹³ (R. at 361.)
8. The Smiths have always believed that the fence was the boundary.¹⁴ (R. at 361.)

Based on these findings, the court concluded that the purpose of the fence was to serve as a boundary, and the parties treated it as such.¹⁵

⁷ Evidence supporting this finding is at R. 378:78.

⁸ Evidence supporting this finding is at R. 378:31.

⁹ Evidence supporting this finding is at R. 378:36.

¹⁰ Evidence supporting this finding is at R. 378:29, 44, 64, 79.

¹¹ Evidence supporting this finding is at R. 378:24-25, 82.

¹² Evidence supporting this finding is at R. 378: 24-25, 32, 64, 68, 71, 76, 82.

¹³ Evidence supporting this finding is at R. 378: 57, 64, 68, 76, 82.

¹⁴ Evidence supporting this finding is at R. 378: 33, 79, and 82.

¹⁵ The court also found it significant that in opposition to the Smiths' Motion for Summary Judgment, Security claimed that the fence was built as a barrier to stop its cattle from falling into a ditch that existed on the Smiths' side of the boundary line. (R. 361, Trial Court's Finding of Fact No. 9 ("There were some allegations during the litigation of the motion for summary judgment that the fence might have served as a barrier to livestock, and that the fence kept the cattle out of the drain ditch.")) However, at trial it was revealed that the fence was built before the ditch, and that the ditch posed no danger to cattle, as the Smiths allowed their cattle to wander into the ditch to drink. (R. 378:27-30 and 79.) Accordingly, the trial court correctly recognized Security's position as a moving target not based in fact. Moreover, Mr. George, Security's Rule

RHN involves virtually identical facts, confirming that these findings here are sufficient. In RHN, a fence between two properties diverged from the record boundary in such a way that part of each owner's property was located on the other side of the fence. 2004 UT 60 at ¶¶4-5. The owners of both properties used their property up to the fence for decades. Id. at ¶¶6-7. The defendants never occupied any portion of the property on the plaintiffs' side of the fence. Id. at ¶27. The plaintiffs believed the fence was the boundary. Id. at ¶7. No party objected to the use of the fence as a boundary. Id. A third party, like Scott Smith here, testified that he believed the fence was the boundary. Id. at ¶6.

In RHN, the trial court found that the parties had treated the fence as a boundary, and therefore, the mutual acquiescence element of boundary by acquiescence has been satisfied. Id. at ¶27. On appeal, the defendants, like Security here, argued that (i) the trial court had erred in concluding that the defendant acquiesced to the fence serving as a boundary; and (ii) the trial court's finding of acquiescence was unsupported by evidence because there was no direct evidence that the defendants or its predecessors "believed that the fence was the boundary." Id. at ¶26. The Utah Supreme Court affirmed, holding that "acquiescence may be inferred from the landowner's actions, [and therefore,] the absence of direct evidence of a prior owner's subjective belief concerning the boundary is not fatal to an assertion of mutual acquiescence." Id.

This result is confirmed by another case with facts similar to the trial court's findings here, Mason v. Loveless, 2001 UT App 145, 24 P.3d 997. In Mason, a fence

30(b)(6) witness, testified that notwithstanding the ditch, he could have built a fence along the entire record boundary, including the two-acre disputed parcel. (R. at 378:72-73)

near a record boundary had divided two properties for decades, and both parties had run cattle on their land up to the fence, but never over. Id. at ¶8. This court held that this evidence, coupled with defendants' failure to object to the plaintiffs' use up to the fence, was sufficient to support the trial court's finding of acquiescence. Id. at ¶24. The result should be the same here because the facts are essentially the same. The trial court's findings are not clearly erroneous and they are adequate under controlling precedent to support boundary by acquiescence. This court should affirm.

III. The Recorded Legal Description of Property is Irrelevant to the Doctrine of Boundary by Acquiescence

Before this appeal, Security's sole defense appeared to be that the recorded legal descriptions of the boundary between two properties precludes application of the doctrine of boundary by acquiescence. Consistent with this, Security conducted no discovery and called no witnesses at trial. Instead, Security's defense at trial consisted of counsel for Security proffering a number of documents in the county records that describe the record boundary between the two properties, prompting the trial court to ask whether counsel intended to provide testimony.¹⁶ (R. at 378:108-111.) Security appears to have assumed throughout that the recorded legal descriptions provide constructive notice of the true boundary, and therefore, the Smiths' reliance on the fence as the true boundary was unreasonable as a matter of law. (AOB at 18-22.)

¹⁶ On appeal, Security's counsel continues to attempt to testify by reciting a number of facts with no record support. (AOB at 7-9, 10, 20, 28-29.) The opening brief therefore does not comply with Rule 24(a)(7) of the Utah Rules of Civil Procedure, which requires that "[a]ll statements of fact and references to the proceedings below shall be supported by citations to the record."

Security's position has been squarely rejected by the Utah Supreme Court in RHN, a case that Security fails to cite in this opening brief despite the fact that it has been cited by the Smiths throughout this litigation. In RHN, the defendant argued that the plaintiff "did not acquiesce in the fence" because a deed transferring the property put the plaintiff on constructive notice of the record boundary. 2004 UT 60 at ¶20. The Supreme Court dismissed this argument: "To allow constructive notice of the true boundary in the conveying deed to negate acquiescence would unduly restrict the doctrine of boundary by acquiescence by preempting claims whenever parties mutually acquiesce in a visible line that conflicts with a record boundary contained in the conveying instrument." Id. at ¶28; see also Staker v. Ainsworth, 785 P.2d 417, 423-424 (Utah 1990) (rejecting the requirement that a claimant must prove that he or she did not have "reason to know" of the true location of the boundary because such a requirement "effectively eliminate[s] boundary by acquiescence as a viable doctrine"). For this reason, the court rejected the constructive notice argument raised in the opening brief. RHN, 2004 UT 60 at ¶29 ("We reject the . . . claim that constructive notice of the true boundary via the metes and bounds description in the . . . deed precludes a showing of acquiescence").

Security's argument is therefore precluded by controlling Utah Supreme Court authority. This court should affirm.

Request for Attorney Fees

The Smiths also request that they be awarded attorney fees for their work in responding to certain issues in the opening brief that are "not warranted by existing law." Utah R. App. P. 33. Specifically, the Smiths request an award of fees for time spent responding to issues 2, 3, and 4, all of which advance a variation of the same argument—

that the recorded legal description of the boundary between two properties precludes application of the doctrine of boundary by acquiescence. This argument is not warranted by existing law. As explained above, the Utah Supreme Court “rejected” this argument in RHN Corp. v. Veibell, 2004 UT 60, ¶29, 96 P.3d 935.

Pursuant to Rule 33(c)(1), Smiths respectfully request that they be awarded their attorney fees for time spent responding to these issues.

Conclusion

Security’s opening brief provides no grounds for vacating the trial court’s determination that Security and the Smiths acquiesced to the fence serving as the boundary for their parcels. First, the trial court correctly ruled that a defendant’s silence combined with the parties’ mutual treatment of a fence as a boundary can be sufficient, as a matter of law, to establish acquiescence. Second, the evidence presented at trial supports the trial court’s determination that the Smiths and Security acquiesced to the fence serving as the boundary of their parcels. Finally, Security argues that the recorded legal description of the boundary between two properties precludes application of the doctrine of boundary by acquiescence. This argument is not warranted by existing law. This court should affirm.

In addition, the court should award the Smiths their attorney fees for time spent responding to issues 2, 3, and 4, which have no basis in law.

RESPECTFULLY SUBMITTED this 6th day of February, 2009.

SNELL & WILMER L.L.P.

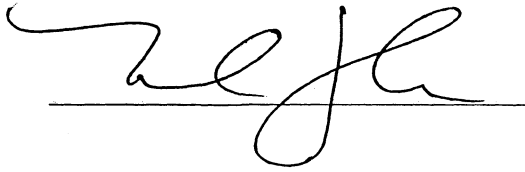


Troy L. Booher
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

This is to certify that two copies of this brief were sent via U.S. Mail, postage prepaid, this 6th day of February, 2009, to the following:

George K. Fadel
Fadel Associates
170 West 400 South
Bountiful, UT 84010

A handwritten signature in black ink, appearing to read "GK Fadel", is written over a horizontal line.