

1988

# Hans C. Rilling v. First Security Financial Corporation, and Kay M. Lewis, Esq., Trustee : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Rilling v. First Security Financial Corporation*, No. 880712 (Utah Court of Appeals, 1988).  
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DOCKET NO. 88-0712 SUPREME COURT OF THE STATE OF UTAH

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HANS C. RILLING,

Plaintiff/Appellant,

v.

FIRST SECURITY FINANCIAL  
CORPORATION, and KAY M.  
LEWIS, ESQ., Trustee,

Defendants/Respondents.

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Case No. 860499

Priority 13(b)

88-0712-0A

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REPLY BRIEF OF APPELLANT

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AN APPEAL FROM A SUMMARY JUDGMENT  
OF THE SECOND JUDICIAL DISTRICT COURT,  
WEBER COUNTY, UTAH,  
THE HONORABLE DAVID ROTH,  
JUDGE PRESIDING.

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DEPOSITED BY THE  
STATE OF UTAH

AUG 17 1990

**FILED**

MAY 7 1987

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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HANS C. RILLING,	:	
	:	
Plaintiff/Appellant,	:	
	:	
v.	:	Case No. 860499
	:	
FIRST SECURITY FINANCIAL	:	
CORPORATION, and KAY M.	:	Priority 13(b)
LEWIS, ESQ., Trustee,	:	
	:	
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES . . . . .	iii
STATEMENT OF ISSUES SET FORTH IN REPLY BRIEF . . . . .	iv
STATEMENT OF CASE . . . . .	1
STATEMENT OF FACTS . . . . .	1
SUMMARY OF ARGUMENT . . . . .	2
ARGUMENT	
POINT I	
A. . . . .	2
B. . . . .	5
POINT II . . . . .	6
CONCLUSION . . . . .	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>UTAH CASES CITED</u>	
<i>Hidden Meadows Dev. Co. v. Mills,</i> 590 P.2d 914 (Utah 1978) . . . . . 1244	2, 3
<i>Neeley v. Kelsch,</i> 600 P.2d 979 (Utah 1979) . . . . .	7
 <u>OTHER JURISDICTIONS CITED</u>	
<i>Arapahoe Land Title, Inc., v. Contract Financing, Ltd.,</i> 472 P.2d 754 (Colo. App. 1970) . . . . .	4
<i>Cheyenne National Bank v. Citizens Savings Bank,</i> 391 P.2d 933 (Wyo. 1964) . . . . .	3, 4
<i>Luthi v. Evans,</i> 233 Kan. 622, 576 P.2d 1064 (1978)	5
 <u>OTHER AUTHORITIES CITED</u>	
Am. Jur. 2d, <i>Boundaries</i> , § 64 . . . . .	6, 7
 <u>STATUTES CITED</u>	
Section 78-40-2, <i>Utah Code Ann.</i> (1953) . . . . .	3, 4, 5

STATEMENT OF ISSUES SET FORTH IN REPLY BRIEF

ISSUE I

THE PROPERTY DESCRIPTION IN RILLING'S LIS PENDENS  
DOES COMPLY WITH UTAH STATUTORY REQUIREMENTS.

ISSUE II

THE STRUCTURE OF UTAH'S RECORDATION SYSTEM  
DOES NOT REQUIRE THAT A LIS PENDENS CONTAIN  
LEGAL DESCRIPTIONS OF THE PROPERTY AFFECTED.

ISSUE III

FIRST SECURITY WAS ALERTED TO FACTS THAT  
SHOULD HAVE CAUSED IT TO HAVE DISCOVERED  
RILLING'S CLAIM.

IN THE SUPREME COURT OF THE STATE OF UTAH

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HANS C. RILLING,	:	
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Plaintiff/Appellant,	:	
	:	
v.	:	Case No. 860499
	:	
FIRST SECURITY FINANCIAL	:	
CORPORATION, and KAY M.	:	
LEWIS, ESQ., Trustee,	:	Priority 13(b)
	:	
Defendants/Respondents.	:	

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REPLY BRIEF OF APPELLANT

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STATEMENT OF CASE

As originally set forth in Appellant's Brief, this case involves a request for declaratory judgment. Appellant seeks review of the trial court's award of summary judgment and its ruling that First Security Financial Corporation's Trust Deed has priority over Rilling's interest in a portion of property upon which Rilling's marital residence was located.

STATEMENT OF FACTS

1. Rilling's reversal of the legal descriptions of the two parcels of property, as reflected in his Statement of Facts, was an inadvertent error made in connection with the preparation of

his Brief, but that error in no way affects the issues presented for review.

2. First Security Financial's Statement of Facts makes one misstatement. Contrary to its allegations, First Security Financial did have notice of Rilling's claim when First Security made a loan and secured its interest against property located at 2810 Fillmore Avenue, Ogden, Utah, because Appellant's lis pendens was a matter of public record.

#### SUMMARY OF ARGUMENT

Rilling's lis pendens was properly recorded. The recital of the street address in the document, in conjunction with the legal description of one of the two parcels of property comprising a single residence which was also set out in the document, was sufficient to give notice to First Security of Rilling's interest in all of the property on which the marital residence was located.

#### ARGUMENT

##### POINT I

##### A.

THE PROPERTY DESCRIPTION IN RILLING'S LIS PENDENS DOES COMPLY WITH UTAH STATUTORY REQUIREMENTS.

The purpose of a lis pendens is to give constructive notice of potential claims of interest in real property by third parties. This policy was clearly spelled out in Hidden Meadows

Development Co. v. Mills, 590 P.2d 1244 (Utah 1979), when this Court stated, "the sole purpose of recording a lis pendens is to give constructive notice of the pendency of proceedings which may be derogatory to an owner's title or right to possession." Id. at 1248. Utah Code Annotated, Section 78-40-2, outlines the necessary steps to accomplish this purpose. The recorded notice must only contain three things: (1) the names of the parties; (2) the object of the action or defense; and (3) a description of the property affected. There is no dispute between the parties that Rilling's lis pendens complied with the first two requirements. The final requirement was satisfied as well, and the description of land given was sufficient to impart notice of his interest in the entire marital residence.

First Security disagrees, and argues the description used was not in strict compliance with the statutory requirements. In so arguing, First Security basically relies on two cases for its policy argument that, in order to constitute constructive notice, strict statutory compliance is required. Rilling does not disagree with this statement of policy, but does take issue with First Security's representation of what is necessary to fulfill this obligation of strict compliance. First Security first cites Cheyenne National Bank v. Citizens Savings Bank, 391 P.2d 933 (Wyo. 1964). In Cheyenne National Bank, the court gave priority to a second mortgagee because the first mortgagee completely failed to comply with one of two express statutory requirements.

Under Wyoming law, the holder of an encumbrance was required to (1) file notice of his interest, and (2) concurrently deliver the certificate of title to the clerk for notation of the encumbrance. The first mortgagee neither could nor did satisfy the second requirement because its mortgagor did not have title to the trucks at issue in the case. Consequently, Cheyenne National Bank is inapplicable to the case before us because Rilling did comply with all the statutory requirements of Section 78-40-2, and the issue then becomes the sufficiency of the steps taken.

First Security also relies on Arapahoe Land Title, Inc., v. Contract Financing Ltd., 472 P.2d 754 (Colo. App. 1970), as authority that strict compliance is required for the successful imparting of constructive notice. However, in Arapahoe, the Colorado Court of Appeals went on to define the level of required notice:

The kind of notice required is one 'reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action.' Id. at 756.

The notice under the facts in Arapahoe was such that it "could not be indexed in a manner that would reasonably enable persons without actual knowledge of the violation to learn of their existence." Id.

In the present case, Rilling's lis pendens satisfies the Arapahoe standard of sufficient notice as it was reasonably calculated, given the circumstances, to apprise First Security of

the pendency of a divorce action that would undoubtedly affect the entire marital residence. The use of the street address and the legal description of one parcel reasonably enabled First Security to learn of Rilling's interest, and, as a result, First Security had notice, as required by statute, of Rilling's interest in the entire piece of property. Therefore, Rilling did strictly comply with the requirements of Section 78-40-2.

B.

THE STRUCTURE OF UTAH'S RECORDATION SYSTEM  
DOES NOT REQUIRE THAT A LIS PENDENS CONTAIN  
LEGAL DESCRIPTIONS OF THE PROPERTY AFFECTED.

Utah Code Annotated, Section 78-40-2 and its pertinent judicial interpretations require a description of property sufficient to give constructive notice of an interest in that property to subsequent parties. For its proposition that this description must be a legal description, Respondent cites Luthi v. Evans, 223 Kan. 622, 576 P.2d 1064 (1978). However, Rilling's lis pendens satisfies Luthi's requirement in that:

It identifies the property or affords the  
means of identification within the instrument  
itself. Id. at 1070.

While Luthi's "Mother Hubbard" clause did not satisfy this standard, Rilling's use of the street address and the legal description of one of two parcels making up a marital residence does meet this standard. The lis pendens apprised First Security that divorce proceedings were pending between its proposed borrower and her husband. This, when considered with the

descriptions in the instrument itself, was sufficient to afford them the necessary means of identification.

## POINT II

FIRST SECURITY WAS ALERTED TO FACTS THAT SHOULD HAVE CAUSED IT TO HAVE DISCOVERED RILLING'S CLAIM.

First Security argues that it had no duty to inquire further to discover Rilling's claim to Parcel B. This position is inconsistent with the fact that First Security had knowledge:

1. Of the entire street address;
2. Of a legal description of the smaller parcel;
3. Of the fact that the property was a single marital residence; and
4. Of the fact that divorce proceedings were pending between their borrower and Appellant.

First Security also argues that "the specific legal description controls in the event of any conflict or uncertainty."

(Respondent's Brief, p. 17). However, there is no conflict between the street address and the legal description in Rilling's lis pendens. First Security cites Am. Jur. 2d, Boundaries, § 64 for statement of the general rule. It is, however, important to note that before this general rule is to be applied, every effort is to be made to reconcile the two descriptions. Section 64 of Am. Jur. 2nd on Boundaries begins by stating:

All parts of the description in a conveyance should be allowed to stand if possible, and none of the calls should be rejected if they can be applied in any reasonable manner; it is only in the case of an obvious mistake or where there is such a contradiction or inconsistency as to render the conveyance unintelligible that some of the calls are to be rejected.

Respondent relies on Neeley v. Kelsch, 600 P.2d 979 (Utah 1979), for authority of its position, but in Neeley, the deeds at issue were irreconcilable. In the case at Bar, the street address and the legal description can be allowed to stand together and be consistently construed. Therefore, there is no need to apply the general rule that a specific description controls a general one. It is consistent with the lis pendens as filed to conclude that the notice given pertained to the entire marital residence and both parcels of property which comprised that residence.

#### CONCLUSION

Rilling's lis pendens fully complied with the Utah statutory requirements. The use of the street address and legal description of one of two parcels constituting a single marital residence was sufficient to give the necessary constructive notice to First Security Financial.

In addition, the action affecting the single residence was a divorce proceeding. Therefore, the description used by Rilling, coupled with the surrounding circumstances, constituted notice reasonably calculated to apprise First Security of Rilling's

interest in the entire property at issue. As a result, Rilling's interest should be given priority over that of First Security Financial.

RESPECTFULLY SUBMITTED this 7 day of May, 1987.

GUSTIN, ADAMS, KASTING & LIAPIS

By

  
KENT M. KASTING

#### CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the above and foregoing Reply Brief of Appellant were duly mailed by placing the same in the United States Mails, postage prepaid, at Salt Lake City, Utah, addressed to:

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