

1989

# Harry Thorsen v. Markay Johnson: Goosberry Estates v. Harry Thorsen and Donald Gates : Brief of Respondent

Utah Court of Appeals

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Ken Chamberlain; Olsen, Mciff and Chamberlain; Attorneys for Respondents.

Frederick A. Jackman; Jackman and Johnson; Attorneys for Appellant.

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SECRET

IN THE SUPREME COURT OF THE STATE OF UTAH

89-411 CA

\* \* \* \* \*

HARRY THORSEN, )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
MARKAY JOHNSON, et al., )  
 )  
Defendants. )  
 )  
\_\_\_\_\_  
GOOSEBERRY ESTATES, et al., )  
 )  
Plaintiffs-Respondents, )  
 )  
-vs- )  
 )  
HARRY THORSEN and DONALD GATES, )  
 )  
Defendants-Appellant. )

CASE NO. 880402

Category No. 14b

\* \* \* \* \*

BRIEF OF RESPONDENTS

\* \* \* \* \*

APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT OF  
SEVIER COUNTY, STATE OF UTAH  
Honorable Don V. Tibbs, District Judge

Ken Chamberlain, No. 0608  
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ATTORNEYS FOR APPELLANT THORSEN

**FILED**  
MAR 30 1989

Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

HARRY THORSEN,	)	
	:	
Plaintiff,	)	
	:	
-vs-	)	
	:	
MARKAY JOHNSON, et al.,	)	
	:	
Defendants.	)	CASE NO. 880402
	:	
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GOOSEBERRY ESTATES, et al.,	:	Category No. 14b
	)	
Plaintiffs-Respondents,	:	
	)	
-vs-	:	
	)	
HARRY THORSEN and DONALD GATES,	:	
	)	
Defendants-Appellant.	:	

\* \* \* \* \*

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ATTORNEYS FOR APPELLANT THORSEN

LIST OF PARTIES

PLAINTIFF

Harry Thorsen

DEFENDANTS

Markay Johnson and Bryce Johnson, individually,  
and Markay Johnson and Bryce Johnson, dba  
Gooseberry Estates, a partnership

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PLAINTIFFS-RESPONDENTS

Gooseberry Estates, a partnership consisting of  
TOKACO Enterprise, (a family partnership consisting  
of William T. Gardner and his children, William  
Todd Gardner, Kari Ann Gardner and Corrinna Gardner)  
and LATIGO, Inc., a corporation, Tell W. Gardner,  
Bryce Johnson, Markay Johnson, and Leonard V. Elfervig,  
all doing business as Gooseberry Estates, a Utah  
partnership

DEFENDANTS-APPELLANT

Harry Thorsen and Donald Gates

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IN THE SUPREME COURT OF THE STATE OF UTAH

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HARRY THORSEN,	)	
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Plaintiff,	)	
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-vs-	)	
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MARKAY JOHNSON, et al.,	)	
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Defendants.	)	
	:	
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GOOSEBERRY ESTATES, et al.,	)	CASE NO. 880402
	:	
Plaintiffs and	)	
Respondents,	)	
	:	
-vs-	)	
	:	
HARRY THORSEN and DONALD GATES,	)	
	:	
Defendants and	)	
Appellants.	)	
	:	

\* \* \* \* \*

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to hear this matter pursuant to the provisions of §78-2-2, Utah Code Annotated, 1953 and Rule 4, Rules of the Utah Supreme Court.

NATURE OF THE PROCEEDINGS

Respondent Gooseberry Estates, a partnership ("Gooseberry") asks this Court to affirm the Order and Judgment subject of review on the basis that the uncontradicted evidence on the hearing to reassess damages entitles the Respondents to the revised (and reduced) damages awarded by the Court below.

There remains no issue of liability -- only the question of damages.

The present proceeding is an appeal from the Judgment of the trial court in reassessing damages as directed by this Court [*Thorsen vs. Johnson, et al.*, 745 P.2d 1243 (1988)]. The trial court considered the matter on Motion and affidavits as provided in Rule 43(b) Utah Rules of Civil Procedure and entered a Judgment for Gooseberry Estates in the amount of \$38,785.00 as the difference in value of the damaged land as an entire parcel (undivided) immediately after injury as compared to its value immediately before, which value appraisers for both sides had agreed was \$1,250.00 per acre.

#### NATURE OF THE CASE

This Court in an opinion of November 5, 1987, (the Decision is found at 745 P.2d at page 1243) affirmed the trial court's holding that Appellant Harry Thorsen ("Thorsen") was liable to Gooseberry for damages but remanded the case to the District Court for the reason that the amount of damages was arrived at by an erroneous method; instructing the lower Court to reassess damages by an appropriate formula.

This Court's remanding decision (hereinafter "Thorsen I") was that the trial court had made several unjustified assumptions in calculating damages, citing the decision of 1956, *State vs. Tedesco*, 4 U.2d 248, 291 P.2d 1028. That case held and this Court re-affirmed that the value of unestablished



lots in a proposed or uncompleted subdivision could not be the basis for fixing damages since the determination of cost to achieve ultimate condition as subdivided lots was not only conjectural and considerable but also that the ability to sell the lots at a profit after paying those, selling, and marked absorption costs was impermissibly speculative. We do not take issue nor argue with that result.

What we respectfully submit is that on remand and in reassessing damages the trial court did what was directed by this Court in Thorsen I: it took the mutually agreed value of the land prior to the damage inflicted by Thorsen and deducted therefrom the value, after the damage had occurred, of the land salable as an undivided tract of 50.59 acres (the amount of land subject to this litigation) and awarded damages based upon the difference. We respectfully suggest that the trial court pursued what was the proper if not, because of the uniqueness of the property and the circumstances established by the facts, the only method of calculating damages under the clear direction of this Court.

#### ISSUES PRESENTED ON APPEAL

1. Whether Rule 43(b) Utah Rules of Civil Procedure compels affirmance of the trial court's reassessment of damages where no evidence contradicts Gooseberry's proof by affidavits.

2. Whether the trial court correctly applied the rule of before-and-after worth of the property damaged by

Thorsen's abusive entry upon and waste committed to Gooseberry's lands.

DETERMINATIVE STATUTES AND CASE LAW

1. Rule 43(b) [formerly Rule 43(e)], Utah Rules of Civil Procedure which reads:

(b) Evidence on Motions. When a Motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties\*\*\*

2. *State vs. Walker*, 743 P.2d 191, 193 (Utah 1987).

3. *Goodsell vs. Department of Business Regulation*, 523 P.2d 1230 (Utah 1974).

4. *Board of Public Instruction vs. Meredith*, 119 F.2d 712 (1941, CA5 La). (Addendum vi)

5. *Roucher vs. Traders & General Ins. Co.*, 235 F.2d 423 (1956, CA5 La). (Addendum vii)

6. *Department of Highways vs. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968).

PRIOR HOLDING OF THIS COURT

This Court held that Thorsen had committed actionable injury to Gooseberry's property for which Thorsen was liable in damages but not damages predicated upon the formula initially adopted by the trial court. This Court did not overturn the trial court's ruling that the damage was done willfully and intentionally and "\*\*\* was massive, senseless, and purposeless" [745 P.2d p.1248].

The previous opinion of this Court is of estimable assistance in narrowing the considerations basic to reassessing damages:

1. Mr. Justice Howe's analysis of the evidence observes agreement of opinion expressed by appraisers for both sides, and especially by Thorsen's own appraiser, that the land had a pre-damage value of \$1,250.00 per acre for the 50.59 acres affected (745 P.2d at p. 1246).

2. It is not proper to speculate on the amount which subdivided lots might bring or to conjecture what would be the cost of developing land into a subdivision disposable by the unit of lots; nevertheless, it is proper to inquire what the tract is worth, having in view the purpose for which it is best adapted (746 P.2d at p. 1246). That purpose is as a potential mountain subdivision. (Id.)

3. Citing the case of *Department of Highways vs. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968), this Court approved the Colorado view that "it is proper to show that a particular tract of land is suitable and available for subdivision into lots and is valuable for that purpose" (745 P.2d at p. 1246).

We do not dispute the facts to the extent they are listed in Thorsen's Brief ("Brief") except we have to add several determinations resolved in Thorsen I which are critical to plenary examination of this new appeal:

(a) The evidence fully supports the Finding of Fact and Conclusion of the Court that Thorsen

exceeded and abused his right to enter upon Gooseberry's land to clear the ditch and that he is liable for damages (*Thorsen* at 745 P.2d p. 1244 [underscored phrases omitted from Appellant's abridgment of *Thorsen I* at Brief p.5])).

(b) The Supreme Court's observation that "the ditch, as enlarged, might possibly impair access to parts of the proposed lots, but there was no evidence adduced [at the original trial on this subject". (f.n. at 1247 of 745 P.2d)]

(We submit that the uncontradicted affidavits accompanying Gooseberry's Motion to reassess damages supply, in the manner permitted by Rule 43(b) U.R.C.P., evidence admittedly not adduced respecting that subject.

(c) Recognition of the Bench ruling by Judge Tibbs that, after physically inspecting the property, he was "shocked at the damage done to the premises and [had] grave doubt \*\*\* it could even be used as a subdivision" (specific language of the trial court abstracted in the dissent, 745 P.2d at 1248).

#### STATEMENT OF THE CASE

Gooseberry agrees with that part of *Thorsen's* Statement of the Case which details the history, the course of proceedings and disposition in the Court below. Following is a

brief augmenting Statement of Facts important to the issues for review. The Appellant will be referred to as "Thorsen" and the Respondents will be referred to collectively as "Gooseberry". Reference to proceedings in the trial court at which oral testimony was taken will be made by attaching the relevant pages to this brief indicating the page number in the reporter's transcript (Addendum pp. iv and v). The affidavits filed under Rule 43(b) U.R.C.P. are reproduced in full. A map for illustrative purposes is Addendum i; the affidavits as (ii) and (iii).

#### STATEMENT OF FACTS

Upon remand to the District Court Gooseberry filed its Motion supported by affidavits and asking that damages be reassessed in compliance with the direction of this Court.

The procedure adopted was as provided in Rule 43(b) Utah Rules of Civil Procedure which reads:

(b) Evidence on Motions. When a Motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties\*\*\*

The supporting affidavits are of D. Bruce Whited, Professional Engineer and Ken Esplin, appraiser used by Gooseberry in the original trial. (Addenda ii and iii, respectively)

Appellant (Thorsen) filed no affidavits and offered no evidence whatsoever countering the Motion or diluting the grounds for the relief requested. Thorsen did file an opposing

brief with the trial court but no affidavits were attached.

Summarized, the affidavits before the trial court established the following facts which, on reassessment of damages, were considered together with the existing record of evidence and the trial Judge's personal view of the property. The affidavits will be abbreviated and organized according to affiant:

WHITED AFFIDAVIT  
(Addendum ii)

1. Qualifications. Twenty (20) years' experience as a professional engineer designing and supervising construction of municipal systems for water, sewer, street, bridge and airports, and design and supervision of development of subdivisions including those of the type planned for the property in this litigation. (Addendum ii, pp. 1, 2)

2. Examination of Property. Inspected the property and examined the extent of damage inflicted by Thorsen. (Addendum ii, p. 2)

3. Feasibility of Restoration. The cost of restoring the property to its pre-damaged condition or even to a condition capable of receiving improvements necessary for a subdivision is prohibitive. Uprooted, dislocated rocks and trees of immensity could never be incorporated into the back-fill. (Addendum ii, p. 5)

4. Even if restored without the trees the Thorsen trenching created a drainage barrier that would jeopardize the

restored area as well as all lower adjacent property.  
(Addendum ii, p. 4)

5. Economics of Continuing Subdivision Project. A highly visible swath of the Thorsen trenching scars 18 out of the 33 proposed lots. Proposed prime lots are no longer prime. The ability to realize an economic profit from the proposed project no longer exists. (Addendum ii, p. 6) This scarring, by implication, would affect prime acres both above and below the trenching.

The following are neither conclusions nor opinions but professional statements of fact declared upon the personal knowledge of this Civil Engineer:

(a) His estimates do not include the cost of reforestation. (Addendum ii, p. 3)

(b) The huge trench prominently and permanently scars the profuse, attractive forestation the land previously displayed. (Addendum ii, pp. 3, 6)

(c) A drainage barrier and erosion sluice could not withstand a storm of even moderate intensity one such of which would damage not only the restored area but also the lower adjacent property. This dredging insult derogates every lot in the proposed subdivision except numbers 10 through 21 or 12 proposed lots. Those 12 would be both less accessible because the trench blocks entrance, and utterly unattractive because of the trench's

proximity and bordering presence. (Addendum ii, p. 4)

ESPLIN AFFIDAVIT  
(Addendum iii)

1. The Character (Highest and Best Use) and Value of the Raw Land Before Thorsen Activity. The value of the 50.59 acres, without any improvements was \$1,250.00 per acre in the year 1980. This was based upon its highest and best use which was as a subdivision or a mountain lot development. The Esplin affidavit distinguishes the remainder of the land purchased by Gooseberry and not proposed as a sub-division but also states it has a value of \$1,250.00 per acre; however, that land is an abundant mountain meadow. (Addendum iii, p. 2)

2. Other Possible Uses of Land. There were no other uses for the land damaged (hill-side property) except for grazing, which was the use next highest to mountain lot development. (Addendum iii, p. 2)

3. Value of the Land Before and After Thorsen Trenching. The value of the land for its suitability and availability for subdivision into lots and as raw land capable of conversion to that purpose was \$1,250.00. Its value now is for grazing only and at a value of \$50.00 per acre. But in 1980 (apparently because of decreasing land values since 1980) the value of the raw land for grazing would have been \$100.00 per acre. (Addendum iii, p. 3)



### THORSEN'S CONTENTIONS

While admitting that both parties agreed the fair market value was \$1,250.00 per acre [Brief Par. 5(f) p.9] still Thorsen ignores the uncontradicted evidence on record that the land, deprived of its potential value as a subdivision is \$50.00 an acre now; \$100.00 per acre immediately after the damage occurred. Thorsen seems to imply that the pre-damage values were also based upon agricultural use. This is wholly inconsistent with the facts. The remainder of the 94.47 acres, after severing the 50.9 acres in issue, is a lush meadow having capacity to support many cattle or livestock during the entire Summer. The subject land is dry ground covered with native trees. Thorsen's own appraiser, at the time of trial, regarded the highest and best use value of the hillside property as subdivision development. At page 365 of the trial record Mr. Stott, testifying for Thorsen said:

[P. 365]: I tried to find properties which were-- could be used for development or were in the process of development, developed such as the subject property. (lines 22-25)

Q. -- have you (as a result of the process) found an opinion or to the fair market value of the subject property?

A. (p. 366) "\*\*\* \$1,250.00 per acre \*\*\*" (lines 9, 10)

The Affidavit of Ken Esplin attached to Gooseberry's Motion to Assess Damages states that it is not now feasible to

develop a subdivision on the property (Addendum iii, p. 2). He states that the highest and best use for the property in 1980 (or prior to the dredging committed by Mr. Thorsen) was as a "Subdivision or Mountain Lot Development" [Addendum iii, p. 2 Par. 4(c)].

The Affidavit of the engineer D. Bruce Whited states that because of the excavation the property cannot be used for its previous highest and best use. On page 5 he states: "The present condition of your [the subject] property is not suitable for subdivision. The new ditch excavation, even after restoration, has made it virtually impossible to develop the subdivision at a profit". (Whited Affidavit, Addendum ii, p.5)

Thorsen's only position is that the respective parties' appraisers agreed that the pre-damage value of the land in question was based upon its use for agricultural purposes. Nothing in the record supports this and in fact the record is unambiguous that the \$1,250.00 per acre was, as stated in the Colorado case, *Department of Highways vs. Schulhoff*, supra, based upon this particular tract of land's suitability and availability for subdivision into lots and that it is valuable for that purpose. [\$1,250.00 an acre for side-hill grazing would be an unheard of exaggeration of value.]

We have attached as Addendum i a reduced copy of the trial court's Exhibit 1 which displays the entire 94.47 acres owned by Gooseberry. From this addendum it is apparent that the whole of the original Gooseberry purchase is composed of

two contrasting qualities of land having entirely different characteristics: The west portion is an abundant meadow; the east (damaged) portion is an uncultivable side-hill forested with pine and juniper. It is this east portion which was proposed for development and which now has no value for development and limited value even as grazing. (Addendum iii, p. 2) The appraisers in the original trial valued the meadow (the "remainder" and not subject to this litigation) for its obviously useful meadow grass production. The damaged land (Brief at p. 6) is the hill-side; without value except for sparse grazing and according to both Gooseberry affidavits now not suitable for development. The uncontradicted affidavits of Whited and Esplin say that after and because of the Thorsen trenching the 50.9 acre remainder is not suitable for development and its value for grazing on the 1980 market was \$100.00 per acre.

The "diminution of value" rule on a before-and-after calculation is \$1,250.00 before, \$100.00 after, yielding net damage of \$1,150.00 per acre for 50.9 acres, or \$58,535.00 total diminution in value. The trial court reduced this to \$38,785.00 in its calculation of the amount of land affected presumably on its inference that perhaps one or more individually-located houses could be built upon remote corners of the damaged 50.9 acres. (See Addendum i) It would have been speculative what one or possibly a few more building tracts would have been worth. However, this does not affect

the uncontradicted proof that the before and after difference in value of the 50.9 acres was \$1,150.00 per acre.

As noted above, the affidavits were served with the Motion to Reassess Damages and as the best effort to accommodate the Supreme Court's formula and method(s) under which damages should have been fixed in the first instance.

#### SUMMARY OF THE ARGUMENT

1. Uncontradicted affidavits under Rule 43(b), U.R.C.P. unequivocally fix the damages.

2. Rule 43(b) is to be treated much like Rule 56, U.R.C.P. particularly subsection (e) of Rule 56 which requires a defense, if available; otherwise movant's affidavits are dispositive of the facts.

3. The trial court appropriately used a formula for determining before and after values.

4. Rule 43(b), U.R.C.P. parallels the old Federal Rule of Civil Procedure 43(e). [The Utah Rules have been modified to convert prior Rule 43(e) now to become Rule 43(b).] Two Federal cases conclude that Rule 43 is to be considered in cases, not necessarily involving Summary Judgment, in the same manner as Rule 56(e) is applied where Summary Judgment is asked. *Roucher vs. Traders & General Insurance Company*, 235 F.2d 423; *Board of Public Instruction vs. Meredith, et al.*, 119 F.2d 712.

In *Roucher* it is implied that Rule 43 is the "parent" Rule (to affidavit-proof in Summary Judgments) providing for

admissibility of evidence by affidavits made reflecting personal knowledge.

In *Board of Public Instruction vs. Meredith*, 119 F.2d 712, the Fifth Federal Circuit holds that in contested cases affidavits are sufficient to prove material facts when they conform with a rule such as Rule 43 and Rule 56 of the Rules of Civil Procedure.

#### ARGUMENT

The Affidavit of Mr. Esplin states that the next highest and best use below being developed as a subdivision or as mountain lots is grazing. [Addendum iii, p. 3 Par. 4(e)] Its highest value at the highest and best use immediately beneath subdivision or mountain development is for grazing, worth \$100.00 per acre. Esplin states that there is no intermediate use between mountain subdivision and grazing (Id. Par. 4(c)).

The Supreme Court has held that expert testimony for both sides fixed the value of the land at \$1,250.00 per acre. (745 P.2d at p. 1246) The value now is only \$50.00 per acre; however, as we recognize that values must be fixed as of the date of inflicting the damage (which was 1980) the salvage value of the land (for grazing as expressed in the Esplin Affidavit) was, in 1980, \$100.00 per acre. Deducting \$100.00 per acre from \$1,250.00 leaves \$1,150.00 per acre as damage. The Supreme Court recognized the trial court's finding that

Gooseberry contemplated subdividing 50.59 acres (745 P.2d at 1245) which, when multiplied by \$1,150.00 per acre, leaves the sum of \$58,178.50.

A condemnation case from the State of Washington (*Lange, et al. vs. State of Washington*, 547 P.2d 282) is parallel in that Thorsen's actions effectively condemn the most valuable incident of Gooseberry's property, i.e.: the right to develop it. In effect, Thorsen's unlawful action had the uncontrovertible effect of condemning the Gooseberry land because what was left after Thorsen invaded it was a severance impossible to reassemble. In the *Lange* case the Court said:

In this case, the effect of the condemnation activity was to chain appellant to his land in a falling real estate market. Once the State manifested its unequivocal intent to appropriate the Lange property, appellants were precluded from exercising their business judgment and selling the property before the market fell further. Moreover, appellants were precluded from taking any steps to counteract the market decline by making improvements on the land or otherwise changing its use. Thus, appellants were deprived of the most important incidents of ownership, the rights to use and alienate property. In addition, because the condemnation did in fact take place, appellants were prevented from holding their property, as other owners would be able to do, until economic conditions improved and market values rose again.

The findings of the trial court are not "clearly erroneous", if erroneous at all, although we suggest that the trial court should have awarded a higher amount to Gooseberry. The evidence demonstrably supports the amount of damages

reassessed. This court will examine all of the record evidence giving great weight to the findings made and the inferences drawn by the trial judge and setting them aside only if they are clearly erroneous. *State vs. Walker*, 743 P.2d 191, 193 (Utah 1987).

In *Goodsell vs. Department of Business Regulation*, 523 P.2d 1230 (Utah 1974) this Court likewise held that under several theories presented to the trial court the Appellate Court will affirm any result which finds support in the record irrespective of the theory under which that ground or basis was argued (cited at 5 C.J.S., Appeal and Error, §1464(1)).

Therefore, under any theory or method of calculating damages, the Plaintiffs are entitled to recover at the least the amount fixed by the trial court, which was the most modest of all awards possible.

#### CONCLUSION

This Court has affirmed (at pp. 1244 and 1245 of 745 P.2d) several determinations made by the District Court and pointed out rules to be followed in reassessing damages:

(1) That the evidence "fully supports the findings of fact and conclusions that Thorsen exceeded and abused his right to enter upon Gooseberry's land to clean the ditch and that Thorsen is liable for damages". (Majority opinion for Justice Howe at p. 1244 of 745 P.2d).

(2) The trenching included "a substantial widening

and deepening of the ditch whereby a large number of trees were uprooted and an excessive amount of earth and rocks were excavated" (Id. reciting holdings of lower Court).

(3) The generally accepted measure of damage for injury to real property is the difference between the value of the property immediately before and immediately after the injury ("Diminution in Value" rule).

(4) It is proper to inquire what the entire tract is worth, having in view the purpose for which it is best adapted, but it is the tract, and not the lots into which it might be divided, that is to be valued.


(5) It is proper to show that a particular tract of land is suitable and available for subdivision into lots and is valuable for that purpose (although not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof).

We respectfully submit that the uncontradicted evidence before the Court predicated upon this Court directive, is that Gooseberry was damaged by \$38,750.00 as the calculated direct damage to Gooseberry's property. The Judgment of the trial court in reassessing damages should be summarily affirmed.

Respectfully submitted,

OLSEN, McIFF & CHAMBERLAIN

By

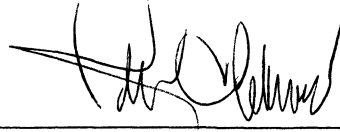
  
Ken Chamberlain

Attorneys for Respondent  
Gooseberry Estates

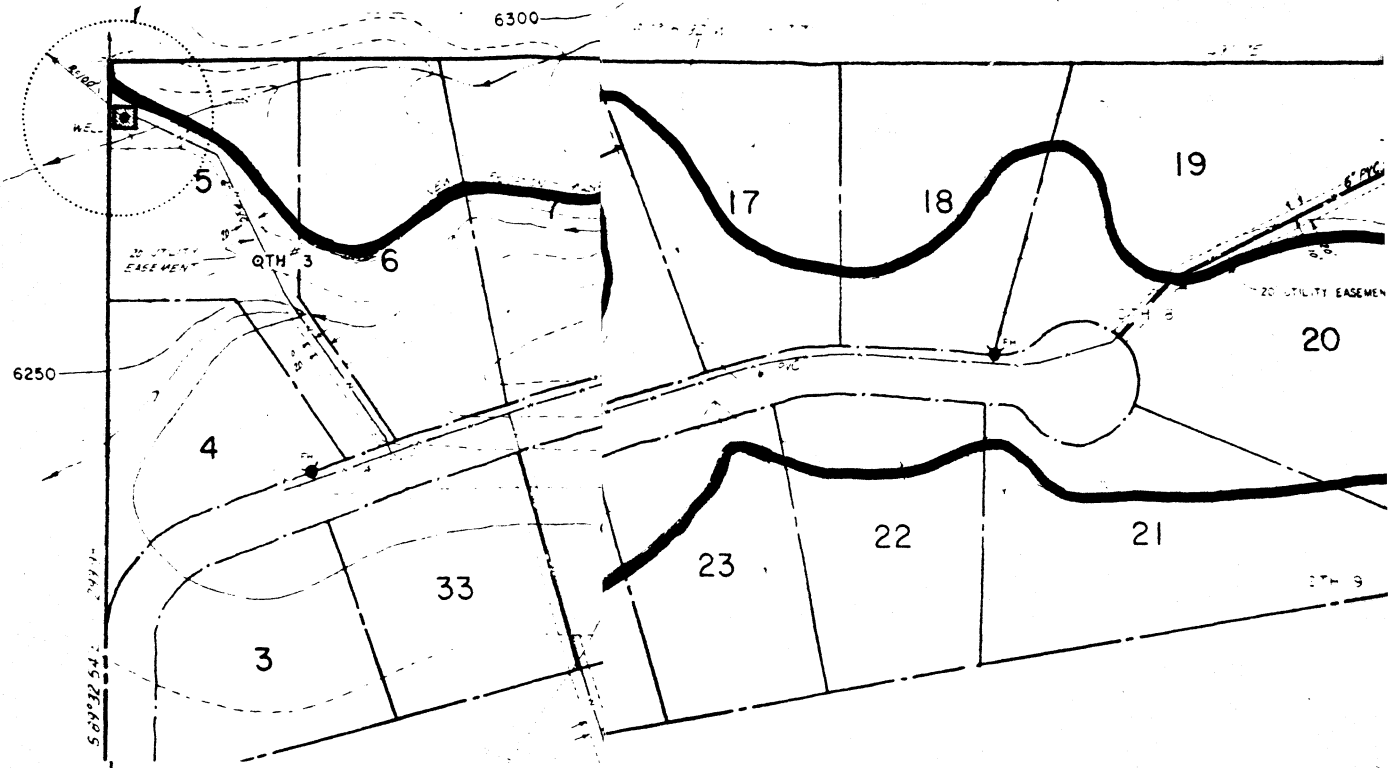


CERTIFICATE OF MAILING

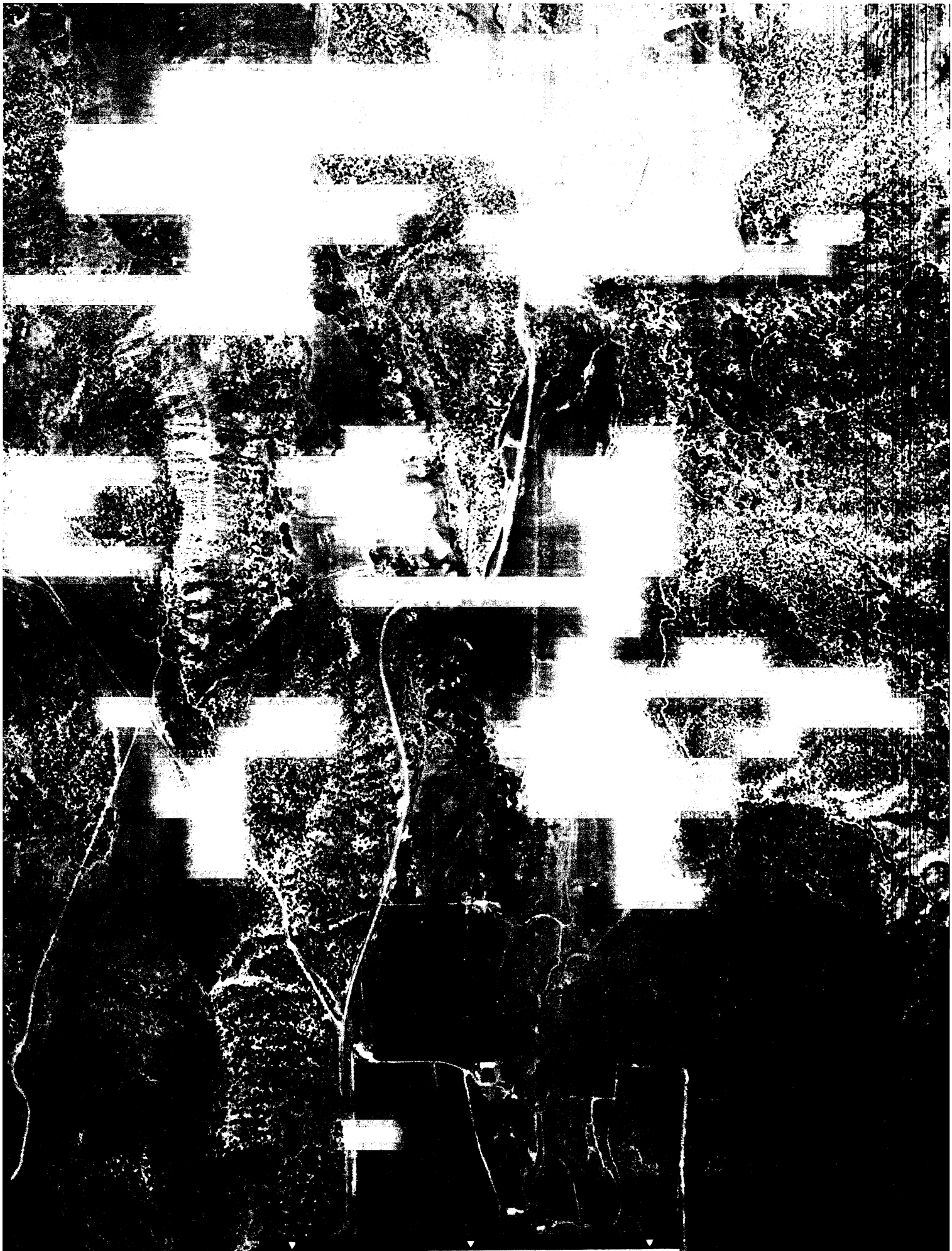
I hereby certify that four (4) copies of the foregoing Brief of Respondents were mailed to Fredrick A. Jackman of Jackman and Johnson, Attorneys for Appellant Thorsen, 1327 South 800 East, Suite 300, Orem, Utah (84058), by U.S. regular mail, postage prepaid, on this 28th day of March, 1989.

A handwritten signature in black ink, appearing to be "W. A. Jackman", is written over a horizontal line.

Proposed Plat of Johnson Property,  
Reduction of Exhibit No. 4-B



- Thorsen Excavation
- Upper Ditch (existing)



KEN CHAMBERLAIN [0608]  
OLSEN, McIFF & CHAMBERLAIN  
ATTORNEYS FOR DEFENDANTS  
76 SOUTH MAIN, P.O. BOX 100  
RICHFIELD, UTAH 84701  
TELEPHONE: 896-4461

IN THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY,

STATE OF UTAH

\* \* \* \* \*

HARRY THORSEN,

Plaintiff,

vs.

MARKAY JOHNSON, et al.,

Defendants.

GOOSEBERRY ESTATES, et al.,

Plaintiffs,

vs.

HARRY THORSEN and DONALD  
GATES,

Defendants.

AFFIDAVIT OF  
D. BRUCE WHITED  
ON DITCH RESTORATION COST  
AND SUMMARY

Civil No. 8461

\* \* \* \* \*

STATE OF UTAH

COUNTY OF

)  
: ss  
)

D. BRUCE WHITED, being first duly sworn upon oath,  
deposes and says:

That he is a duly licensed professional engineer having  
practiced in that profession since 1968. He is a graduate  
engineer from the University of Utah; and as a civil engineer was

OLSEN, McIFF & CHAMBERLAIN  
225 NORTH 100 EAST, P. O. BOX 100  
RICHFIELD, UTAH 84701

President and Manager of Canyon Lands Engineering Corporation, a Richfield, Utah engineering firm; has been a civil engineer designing and supervising the construction of municipal water, sewer, street, highway, bridge and other infra-structural systems and has designed and supervised the construction of dams and airports; that he is familiar with rules, regulations, ordinances in general or special laws related to all types of subdivisions. During the last twenty years he has supervised the development of mountain subdivisions, among them the types of development included in the captioned litigation, and has comprehensive knowledge concerning the economics of such endeavors.

D. Bruce Whited makes the following statement under oath concerning the Gooseberry Estate Subdivision:

I have physically inspected and know the past and present condition of the proposed mountain subdivision hereinafter described; have investigated the cost of restoring the land to a condition comparable to its condition before any unauthorized excavation or trenching of a ditch thereupon was made in approximately 1980 and effect thereof and the condition of said land if attempts are made to restore it to its former condition.

DITCH RESTORATION COST AND SUMMARY

PROJECT LOCATION:

Gooseberry Estates Subdivision, Sevier County, Utah

#### INTRODUCTION:

In order to determine the cost of this ditch restoration project, it is first necessary to identify the upper limits of the restoration process. The cost to totally restore the subject area to its original, undisturbed condition is not definable. There are some elements of the project which have been destroyed and can never be duplicated or replaced.

SCOPE: For the purpose of the cost estimate, I have limited the scope of project to include the restoration of the area to near, original elevations and contour. The scope does not include any of the costs involved in establishing new, suitable tree growth, nor does it address any measures required to camouflage the scar allowing the restored area to blend into the adjacent areas. The scope does, however, include the cost to properly backfill and compact the excavation, preparation of the suitable seedbed, installation of erosion control structures and the follow-up maintenance that will be required.

#### GENERAL INFORMATION:

The on-site inspection of the area revealed the following items of concern:

1. The work area is confined and will require considerable hand labor to restore it properly.
2. Proper construction methods and equipment selection by the contractor will be required in order to minimize additional damages to the area.

- 4 -

3. There are numerous large rocks and tree debris that cannot be incorporated in the backfill. This material will have to be removed from the site and properly disposed of.
4. The soil conditions vary along the length of the excavation. In those areas where bedrock and heavy clays were encountered additional fill material will be required to provide a proper seedbed.
5. The newly excavated ditch has created a drainage barrier along the entire length of the subdivision. Special preventive measures must be incorporated into the restoration process to prevent storm water from destroying the completed work. Loosely compacted soil in a confined excavation of this type is easily eroded if the ditch is not properly compacted. If erosion control structures are not installed, it is likely that a storm of moderate intensity would cause considerable damage to both the restored area as well as the lower adjacent property.

#### COST ESTIMATE

The cost to restore the excavation to its original elevation and contour are:

<u>No.</u>	<u>Item</u>	<u>Cost</u>
1.	Backfill and compacting	\$15,000
2.	Rock Removal and clean-up	4,000
3.	Seedbed preparation	3,500
4.	Seeding	1,500
5.	Erosion control structure	2,500
6.	Supervision and maintenance	5,000
7.	Contingencies at 10%	<u>3,200</u>
	Total Cost	\$34,700

#### ECONOMICS OF CONTINUING THE PROJECT UNDER EXISTING CONDITIONS

The present condition of your property is not suitable for subdividing. The new ditch excavation, even after restoration, has made it virtually impossible to develop the subdivision at a profit.

The original development cost for the 33 lots is unchanged at \$5,200 per lot. In order to cover development costs, land costs, cost of money, sales commissions and realize a profit of at least \$2,000 per lot, the average sales price needs to be \$12,000 per lot.

It is my opinion that before the ditch excavation, the majority of the lots would bring a minimum of \$12,000. I would also expect the undisturbed lots adjacent to the Meadow to sell for slightly higher amounts as they were the most desirable.



It is my opinion that because of the extensive excavation on the 11 previously undisturbed lots, 9 of which border the Meadow, lot sales will not average \$12,000. There are now 18 lots out of 33 lots which will have major, highly visible swaths cut through the center, or near center. The prime lots are no longer prime. In addition, even the undisturbed lots have been decreased in value because the general conditions and overall aesthetics of the project have been adversely effected.

In summary, the development costs (all fixed costs) have remained the same but the ability to make a profit from subdividing the property no longer exists. The overall value of the project has been decreased by an amount equal to the projected minimum of profit.

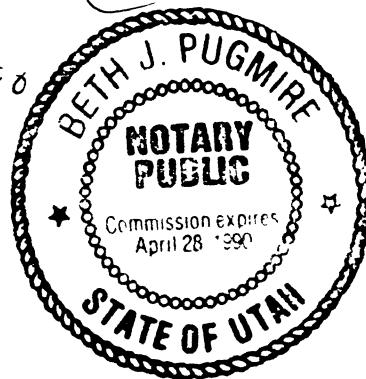
D. Bruce White  
D. Bruce White, P.E.  
License No. 3368

SUBSCRIBED AND SWORN to before me, a notary public,  
this 29<sup>th</sup> day of February, 1988.

Beth J. Pugmire  
Notary Public

Residing At: Salt Lake

My Commission Expires: April 28, 1990



KEN CHAMBERLAIN [0608]  
OLSEN, McIFF & CHAMBERLAIN  
ATTORNEYS FOR DEFENDANTS  
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IN THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY,  
STATE OF UTAH.

\* \* \* \* \*

HARRY THORSEN, )  
Plaintiff, )  
vs. )  
MARKAY JOHNSON, et al., )  
Defendants. )  
\_\_\_\_\_  
GOOSEBERRY ESTATES, et al., )  
Plaintiffs, )  
vs. )  
HARRY THORSEN and DONALD )  
GATES, )  
Defendants. )

AFFIDAVIT OF KEN ESPLIN  
CONCERNING DAMAGES

Civil No. 8461

\* \* \* \* \*

STATE OF UTAH )  
COUNTY OF IRON ) ss

KEN ESPLIN, being first duly sworn upon oath, deposes  
and says:

1. That he is the witness, Ken Esplin, who testified  
as an expert in the captioned case which was tried on the 26th  
and 27th days of August, 1982 in the Sixth Judicial District  
Court in and for Sevier County.

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2. That he repeats the same background experience, credentials and foundational statements he made as a basis for and authorizing his expressing or testifying as to an opinion concerning value of land.

3. That as he testified in the captioned case at the time to trial he has inspected the real property known as the proposed Gooseberry Estates Subdivision.

4. Using the same background, credentials and experience to which he testified in the captioned case and incorporating all the same by reference in this Affidavit he expresses the following opinions:

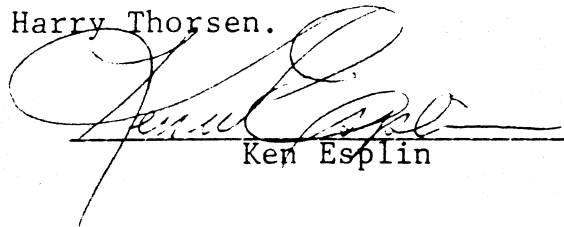
(a) He reiterates the testimony that the real property subject of litigation consisting of approximately 50.9 acres was worth, without any improvements in the year 1980 the sum of \$1250.00 per acre.

(b) That it is not economically feasible to develop the land as a subdivision or for any other purposes without a complete restoration of the soil, the surface, the vegetation (or at least a substantial degree of vegetation including trees) as would be required in order to develop the land for any purpose.

(c) He is of the opinion that the highest and best use of the property in 1980 prior to the excavation made thereon by the defendant Harry Thorsen was as a subdivision or a mountain lot development. That was the highest and best use then and there were no other uses available for the land then except for grazing.

(d) He has now reviewed evidence of D. Bruce Whited, made under oath, of the cost of restoring and the obstacles to a complete restoration of the subject property and is of the opinion that the development thereof as a subdivision is not feasible, either physically or economically.

(e) He is of the opinion that the property's next and highest best use after development as a subdivision or a mountain development was, in the year 1980 and immediately prior to the damage done to it by the defendant Harry Thorsen, \$100.00 per acre. He is of the opinion that the value of the land as of February 20th, 1988 is the sum of \$50.00 per acre and that is and was the value of said land at its highest and best use to which it could be devoted now or could have been devoted at any time after the excavation made by Harry Thorsen.

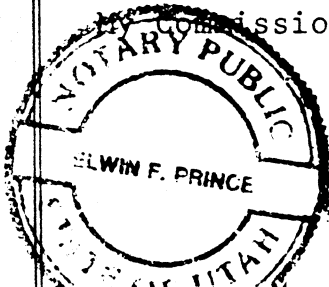
  
Ken Esplin

SUBSCRIBED AND SWORN to before me, a notary public,  
this \_\_\_\_ day of February, 1988.

\_\_\_\_\_  
Notary Public

Residing At: Cedar City, Utah

My Commission Expires: \_\_\_\_\_



1           Also, in making a comparison approach through  
2 market value, if it's possible, to do a market grid, which  
3 I tried to do and through some interpretation of that,  
4 I placed the dollar figures on the comparable sales.

5           Q       Anything else involved in your process?

6           A       In looking at the overall property and the  
7 approach to take, I did look at whether to take the  
8 approach as to a completed subdivision and I did not  
9 take this approach for a couple of reasons:

10                 First of all, there are a number of pro-  
11 perties that are in about the same stage in the county as  
12 the subject property, waiting to get approval for water  
13 and that being the major hold up on those properties.

14                 Also, in the Accord Lakes Area, I did not use  
15 any comparables there. There have been sales there-  
16 The reason being is that that is an approved subdivision,  
17 a drv subdivision, there are existing cabins there and  
18 a great deal of money and time has been spent in adver-  
19 tising and give away programs, "If you come up, we'll give  
20 you a gift just for looking at the property," and I didn't  
21 feel like that would be a good comparable so I tried to  
22 find properties which were -- could be used for develop-  
23 ment or were in the process of being developed, developed  
24 such as the subject property.

25           Q       Now, as a result of that process then, have

1       you formed an opinion as to the fair market value of the  
2       subject property?

3           A       Yes, as contained in the appraisal, I have  
4       indicated that the irrigations do affect the market value  
5       of property; however, to clean such ditches has no  
6       measurable value or effect on the market value. Each  
7       sale is considered as to time, location, physical character-  
8       istics, and condition of sale based on the market condi-  
9       tions. It is my opinion that the market value of the  
10      subject property is \$1,250.00 per acre.

11          Q       And you reduced your appraisal work to a  
12      report?

13          A       Yes.

14          Q       Have you reduced your appraisal into a writ-  
15      ten report?

16          A       Yes, I have.

17          Q       And --

18               THE COURT:       Let me just ask a question  
19      so I can understand your last answer. Are you saying  
20      that, in your opinion, this ditch doesn't make any dif-  
21      ference one way or another?

22          A       Well, I did not appraise it as a subdivision.  
23      I appraised it as 50.59 acres in an as-is condition and  
24      through the inspection that I made of the property, it  
25      was my opinion that it did, that a ditch did exist there,

**Popovich v. American Steel & Wire Co.**, 13 F.2d 381, 382, cited by appellant, does not gainsay the conclusion we have reached. On the contrary, that earlier decision of this court recognized that, by enactment of the Ohio statutes under consideration, the legislature "saw fit to extend the protection given the employee: as we conceive it—to the frequenter of the place where the employee was required to be, and to protect him too while thereafter against injury, thus affording to him collaterally the protection accorded the employee." It was held merely that an independent contractor's employee, standing on a window sill to wash windows, was not when he fell within the benefits of the statute. Judge Moorman said: "To extend the duty to a place of that kind would be an expansion of the statute beyond its intended remedial effect."

The judgment of the District Court is affirmed.



**BOARD OF PUBLIC INSTRUCTION FOR  
COUNTY OF HERNANDO, STATE OF  
FLORIDA, v. MEREDITH et al.**

No. 9803.

Circuit Court of Appeals, Fifth Circuit.  
May 15, 1941.

**1. Affidavits—18**

Usually ex parte affidavits are not sufficient to prove material facts in a contested case, but they are admissible when they conform to a statute or rule, having the same effect, permitting their introduction.

**2. Courts—354**

The purpose of federal rule regarding summary judgment is to promote prompt disposal of action in the interest of justice where there is no genuine issue regarding any material facts. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A. following section 723c.

**3. Courts—354**

Where liability of board of public instruction in bonds and interest coupons was established by decision on prior appeal and nothing remained to be shown except

that coupons were actually clipped from genuine bonds and amount for which judgment should be entered, such showing could be made by ex parte affidavit and, where a request for admission that coupons were genuine was met with answer that bond could not admit or deny genuineness, motion for summary judgment on pleadings, the request for admissions and supporting affidavits was properly granted. See *Aut. v. 1925*, c. 10685; Federal Rules of Civil Procedure, rules 36, 56, 28 U.S.C.A. following section 723c.

Appeal from the District Court of the United States for the Southern District of Florida; William J. Barker, Judge.

Suit on interest coupons by W. J. Meredith and others against Board of Public Instruction for the County of Hernando, State of Florida. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Morris E. White and Calvin Johnson, both of Tampa, Fla., for appellant.

Robert J. Pious, of Orlando, Fla., for appellees.

Before FOSTER, SIMLEY, and McCORD, Circuit Judges.

FOSTER, Circuit Judge.

Appellee brought this suit to recover on interest coupons clipped from bonds issued by the Board of Public Instruction for the county of Hernando, Florida, on June 1, 1925. An adverse decision holding the bonds and coupons invalid was reversed by us, 5 Cir., 112 F.2d 914. After the mandate went down, plaintiffs filed, under the provisions of Rule 36, Rules of Civil Procedure, 28 U.S.C.A. following section 723c, a request for admission by defendant that the coupons were genuine and attached to and delivered with the bonds bearing corresponding numbers, as indicated on the coupons. By answer, not verified, defendant, in substance, replied that it could not admit or deny this statement because it was not possible to determine from an examination of the coupons whether they were genuine or not, since the coupons had been detached from the bonds and did not bear upon their face any means of identification. Plaintiff then gave notice of a motion for summary judgment on the pleadings, the request for admission and supporting affidavits, under the provisions of Rule 36, Rules of Civil Procedure.

**WIMBERLY v. UNITED STATES**

119 F.2d 706

71

On the hearing, in support of the motion, plaintiffs filed affidavits which showed that the bonds with the coupons attached had been deposited with plaintiffs as members of a bondholders' committee; that plaintiffs had the legal title to the securities as trustees of an express trust created by a bondholders' agreement and were entitled to sue thereon; that J. Bowerman had personally clipped the interest coupons from the respective bonds for the purpose of making the coupons available for the institution of the suit; and that L. K. Stephens was competent to do so and had personally completed the amounts due upon the coupons involved in the suit, both in principal and interest, which aggregated \$29,624.87. Defendant filed no opposing affidavits or evidence of any kind to offset the prima facie showing made by the just described affidavits. Summary judgment was granted in the amount of \$29,624.87. This appeal followed.

Appellant contends that ex parte affidavits may not be received as proof of the material facts in issue in any suit and Rule 56 does not imply that this may be done; that a genuine issue of material fact was presented by the pleadings as the signatures on the coupons were printed or lithographed thereon and were not made by the hand of the officers whose names appear thereon; and that they were deprived of an opportunity to cross examine the witnesses. In support of this contention appellant cites *City of Hialeah v. Groves*, 5 Cir., 101 F.2d 951, 954. In that case we reversed the judgment in part on the ground there was no evidence to show the coupons were attached when the bonds were delivered but allowed recovery on the bonds. The decision is not in point.

It is evident that, after the original judgment was reversed and the bonds were held to be valid, the only facts remaining to be shown were that the coupons had been actually attached to the respective bonds when the bonds were issued and delivered, and the amount due in principal and interest.

[3] The act under which the bonds were issued (chapter 10685, Laws of Florida, Special Acts of 1925), provides that it shall be sufficient for each interest coupon to bear the printed or lithographed facsimile signature of the chairman and secretary of the state board. Unquestionably ex parte affidavits are not sufficient to prove material facts in a contested case. They are admissible when they conform to

119 F.2d—454

a statute or rule having the same effect permitting their introduction.

[2,3] The intent and purpose of Rule 56 is to promote the prompt disposal of actions in the interest of justice where there is no genuine issue as to any material fact. See *Holtzoff*, New Fed. Procedure, pp. 14 et seq. It provides for summary judgment on the pleadings, supported by affidavits. The contention that the coupons were not identified with the bonds from which they were detached is without merit. The liability of appellant on the bonds and coupons was conclusively established by our previous decision. Nothing remained to be shown except that the coupons were actually clipped from the genuine bonds and the amount for which judgment should be entered. It was entirely in keeping with the letter and spirit of Rule 56 that this could be done by ex parte affidavits which were not offset by opposing affidavits. *Pan of Palm Beach Dist. v. Corbally*, 5 Cir., 10 F.2d 706.

The record presents no reversible error. The judgment is affirmed.



**WIMBERLY v. UNITED STATES**

No. 888.

Circuit Court of Appeals, Fifth Circuit.  
May 18, 1941.

Rehearing Denied June 12, 1941.

**1. Contempt—63**

Under statute providing that power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in presence of the court or so near therein as to obstruct the administration of justice, the words "so near thereto" have a geographical and not a causal meaning, and if the misconduct actually interrupts the court in the conduct of its business, the offender may not be summarily punished for contempt. Fed. Code § 268, 28 U.S.C.A. § 385.

See *Wards and Turney*, *Remonstrance*, *Deletion*, for all other deletions of "The Near Thereby".

different purchasers, and not by conjectural accounting estimates alone. *Automatic Canteen Co. v. F. T. C.*, 1953, 346 U.S. 61, 68, 73 S.Ct. 1017, 97 L.Ed. 1454, it was not error to allow the jury to consider this evidence. The trial court pointed out the failure of defendant to introduce precise data, and properly discounted the weight of this evidence by advertent to "these intangible elements" as being the proper subjects of consideration only "for what they are worth."

[2] Second, plaintiff also alleges error in that part of the charge concerning the validity of the accounting procedure embodied in defendant's cost study. Since Harper had no relevant cost records for the period of 1941 to 1950, the accountant hired to prepare the study used figures for 1951, adjusted backwards on the basis of general salary rates published by the Commerce and Industry Association of New York. Although such an accounting method obviously lacks the full measure of desired precision, it appears to have been undertaken in good faith and to accord with the minimal requirements of sound accounting principles. Indeed, under the circumstances, it appears to have been the best available procedure. Both the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data derived from litigation-inspired accounting methods. See e. g., *American Can Co. v. Russellville Canning Co.*, 8 Cir., 1951, 191 F.2d 38, 59, and *In re Minneapolis Honeywell Regulator Co.*, 1948, 44 F.T.C. 361, 394. Moreover, the trial court correctly charged the jury that it was "up to you as to whether you wish to accept or reject the assumptions made by Gayle [defendant's accountant] and the conclusions which he drew from them."

A further contention of plaintiff is that the court erred in refusing to charge that defendant's cost study improperly calculated comparative costs for plaintiff and defendant's three largest jobbers, by averaging total ship-

ments on a cumulative basis for an entire year. The complaint is that this approach uses savings realized on large transactions with the favored customers to justify discrimination in their favor on transactions involving smaller quantities, equivalent to plaintiff's purchases. To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyers, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such a requirement might be to discourage all price differentials, even those actually justified by cost distinctions. Absent a showing that the lack of uniformity in the price spread had any competitive significance, the FTC has permitted the use of aggregate cost differences to justify price differentials. See, e. g., *In re Sylvania Electric Products, Inc.*, 1954, FTC Docket No. 5728, 3 CCH Trade Reg. Rep. ¶ 25,181. Such a method was permissible in this case. Furthermore, the trial court left the ultimate validity of this computation to the determination of the jury.

Third, plaintiff alleges that the court erred in charging the jury that it could deduct *pro tanto* from the amount of damages, if any, the extent of saving resulting from the transactions with the favored customers. Although one court has approved this partial justification approach, see *American Can Co. v. Russellville Canning Co.*, 8 Cir., 1951, 191 F.2d 38, 66, it is not necessary for us to consider its validity since the jury returned a verdict in favor of defendant and therefore never reached the question of the measure of damages.

[3] With respect to the alleged prejudicial comment, the plaintiff claims that the trial court in his charge to the jury unduly emphasized a letter written by plaintiff to his creditors shortly after a fire had destroyed his office building. The letter indicated that plaintiff was unable to pay his debts at that time because all available cash, including insurance proceeds, was being used to convert the building into an apartment

house. The trial judge alluded to this letter in respect to its bearing on the plaintiff's credibility as a witness, since it contradicted his oral testimony. Plaintiff's testimony was an essential ingredient of his case, as evidenced by his appearance on the witness stand on five successive days, and it was not error for the court to advert to that evidence. Great discretion is accorded federal judges in commenting on portions of the evidence, and even in expressing opinions with regard thereto, provided it is stated that the jury is the exclusive judge of the facts and need not adopt any opinion expressed. *Quercia v. United States*, 1933, 289 U.S. 466, 469-470, 53 S.Ct. 698, 77 L.Ed. 1321; *Pager v. Pennsylvania Rail Co.*, 2 Cir., 1947, 165 F.2d 56, 58; *Flint v. Youngstown Sheet & Tube Co.*, 2 Cir., 1944, 143 F.2d 923, 925. These precautions were observed by the court. Furthermore, the trial judge properly informed the jury that the plaintiff's motive for bringing the action had absolutely no bearing on his rights under the Robinson-Patman Act, but was relevant only to the extent that it bore on his credibility as a witness.

Since the trial court did not err in its instructions to the jury, but rather left to it the determination of all issues of fact after proper instructions on the law, the judgment below must be affirmed.

Affirmed.



William Edward ROUCHER  
v.

TRADERS & GENERAL INSURANCE  
COMPANY, Dallas, Texas.  
No. 10045.

United States Court of Appeals  
Fifth Circuit.  
July 20, 1956.

Automobile negligence action. The  
United States District Court for the

Eastern District of Louisiana, Herbert W. Christenberry, Chief Judge, grant summary for the defendant insurance company and an appeal was taken. The Court of Appeals, Rives, Circuit Judge held that testimony as given on a trial of a previous case, as related in an affidavit of counsel, was not admissible where neither the present plaintiff nor anyone representing him or in privity with him was a party to the previous action.

Reversed and cause remanded for trial on the merits.

#### 1. Judgment 4-822(3,32)

Where plaintiff in automobile negligence action in federal court had not been party to prior action in state court judgment of state court was not res judicata in the action in federal court.

#### 2. Negligence 4-126(8, 9)

As general rule, issues of negligence are not to be determined summarily, and question of a defendant's liability can not be determined by court as matter of law unless facts are undisputed and such that all reasonable men, in exercise of fair and impartial judgment must infer and conclude therefrom the defendant was not negligent.

#### 3. Federal Civil Procedure 4-2528

Affidavits are not admissible on motion for summary judgment unless they are made on personal knowledge. Fed. Rules Civ.Proc. rule 56(e), 28 U.S.C.A.

#### 4. Federal Civil Procedure 4-2545

Generally, admissibility of evidence on motion for summary judgment is subject to rule relating to form and admissibility of evidence generally. Fed. Rules Civ.Proc. rules 43(a), 56(e), 28 U.S.C.A.

#### 5. Federal Civil Procedure 4-2555, 2545

Generally, evidence inadmissible on hearing of a case would be inadmissible on motion for summary judgment, except that court may hear matter on affidavits. Fed. Rules Civ.Proc. rules 43(e), 56(e), 28 U.S.C.A.



## 6. Evidence 6-5380

Testimony given by a witness at previous trial, in action to which neither the instant plaintiff nor anyone representing him or in privity with him was a party, was not admissible against plaintiff under any circumstances.

## 7. Evidence 6-573

Testimony as given in a previous trial is not admissible against one who had no opportunity to cross-examine. Fed. Rules Civ. Proc. rule 43(a, e) 28 U.S. C.A.

## 8. Compromise and Settlement 6-16(2)

Automobile negligence claim against defendant and insurer was not released by settlement previously made with different insurer, where in such previous settlement plaintiff's claim against defendant had been expressly reserved. LSA C.C. arts. 2100, 2203.

Joseph A. Gladney, Baton Rouge, La., for appellant.

Calvin E. Hardin, Jr., Baton Rouge, La., Bert E. Durrett, Wallace A. Hunter, Charles H. Jameron, Baton Rouge, La., of counsel, for appellee.

Before RIVES, CAMERON and BROWN, Circuit Judges.

## RIVES, Circuit Judge.

The district court granted summary judgment for the defendant, appellee, in an automobile negligence action, apparently upon the ground that there was no genuine issue as to the negligence of the defendant's insured, Joseph H. Hicks. That conclusion the district court reached solely as the result of evidence taken upon a trial involving the same accident, and held by a Louisiana state court not to show negligence on the part of said insured. Hicks v. Tilguit, 1 A.A.M., 82 So.2d 100. The plaintiff was not a party to such former action and strenuously objected to the admissibility in this case of the evidence therein taken or of the result of such trial.

[1] It is not claimed, as of course it cannot be [See Smith v. Chadick-Hayes

Co., 19 La.App. 523, 139 So. 689; Westmoreland v. Mississippi Power & Light Co., 5 Cir., 172 F.2d 643; Park-In Theatres v. Watern, 5 Cir., 185 F.2d 193], that the judgment of the state court is res judicata of this action. The defendant would obtain the same result by having the evidence taken in the state court establish that there is no genuine issue of fact in this case.

[2] The question of defendant's liability cannot be lawfully withdrawn from the jury and determined by the court unless the facts are not only undisputed but are also such that all reasonable men, in the exercise of a fair and impartial judgment, must draw the inference and conclusion therefrom of non-negligence. Wright v. Paramount Richards Theatres, 5 Cir., 194 F.2d 303; 38 Am.Jur., Negligence, § 345. Issues of negligence are ordinarily not susceptible of summary adjudication. 6 Moore's Federal Practice, § 56117(42), p. 2232.

[3-5] For affidavits to be admissible on motion for summary judgment, they must be "made on personal knowledge." Rule 56(e), Fed. Rules Civ. Proc. 28 U.S. C.A. Generally speaking, the admissibility of evidence on motion for summary judgment is subject to the provisions of Rule 43(a); that is, evidence inadmissible on a hearing of the case would generally be inadmissible on a motion for summary judgment, except that the court may hear the matter on affidavits. Rule 43(e).

[6, 7] In the present case, there are no affidavits from the witnesses on the other trial. It was thought sufficient simply for one of the attorneys to make an affidavit in which he referred to the testimony on that trial. The testimony of witnesses as given on the trial of a case to which neither the present plaintiff nor anyone representing or in privity with him was a party could under no circumstances be admissible against him. 20 Am.Jur., Evidence, § 690; 5 Wigmore on Evidence, 3rd ed., §§ 1366, 1368. It is fundamental that the party against whom the evidence is offered

must have had an opportunity to cross-examine the witnesses. Williams v. Jancke Service, 1 A.App., 38 So.2d 400, 406, et seq., reversed 217 La. 1078, 48 So.2d 93, 96; 31 C.J.S., Evidence, § 390.

[8] The alternative contention of the defendant, appellee, that the settlement made with Maryland Casualty Company, expressly reserving plaintiff's claims against this defendant had nevertheless barred the further prosecution of this suit, is likewise not well founded under Louisiana law. LSA-Civil Code of Louisiana, Articles 2100 and 2203; see *Frudge v. Caruthers*, 156 La. 746, 101 So. 128.

The judgment is, therefore, reversed and the cause remanded for trial on its merits.

Reversed and remanded.



PACIFIC NATIONAL FIRE INSURANCE COMPANY, a corporation,  
Plaintiff,  
v.  
J. J. MICKELSON, Trustee in Bankruptcy of the Estate of Wirt Cook, an individual doing business as St. Paul Sporting Goods Company, and United States of America, Appellees.

No. 16723.

United States Court of Appeals  
Eighth Circuit.

July 10, 1956.

Rehearing Denied Aug. 10, 1956.

Trustee in bankruptcy of estate of insured brought action against insurer on fire policy, and insurer set up defense that fire was allegedly result of incendiarianism on part of insured. The United States District Court for the District of Minnesota, Dennis P. Donovan, J., 132 F.Supp. 670, entered judgment adverse to the insurer, and the insurer appealed.

235 F.2d-174

## 1. Courts 6-239

In action in federal District Court in Minnesota by trustee in bankruptcy of estate of insured against insurer of fire policy on store located in Minnesota wherein insurer contended that fire was incendiary in nature and was set by insured, Minnesota law was controlling.

## 2. Insurance 6-666(6)

In action by trustee in bankruptcy of estate of insured against insurer of fire policy, wherein insurer relied on defense that fire was incendiary and allegedly been set by insured, burden of proving incendiarianism on part of insured rested on insurer.

## 3. Insurance 6-666(4)

In action by trustee in bankruptcy of estate of insured against insurer on fire policy, wherein insurer relied on defense that fire was incendiary and had allegedly been set by insured, evidence sustained trial court's finding that insurer failed to sustain burden of proving incendiarianism on part of insured.

Samuel Levin, St. Louis, Mo. (LeRo Bowen, Minneapolis, Minn., was with him on the brief), for appellant.

W. M. Kronebusch, Minneapolis, Minn. for appellee J. J. Mickelson, trustee.

Before GARDNER, Chief Judge, and VOGEL, and VAN OOSTERHOUT, Circuit Judges.

VOGEL, Circuit Judge.

J. J. Mickelson (plaintiff-appellee) Trustee in Bankruptcy of the Estate of Wirt Cook, an individual doing business as St. Paul Sporting Goods Company brought this suit against Pacific National Fire Insurance Company, a corporation, (defendant-appellant) to recover