

2009

MARK C. HAIK, KEVIN TOLTON, WILLIAM
S. HOGE, JUDITH MAACK, THE BUTLER
MANAGEMENT GROUP, MARVIN A. ME v.
SANDY CITY : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

MARK C. HAIK, KEVIN TOLTON, :
WILLIAM S. HOGE, JUDITH MAACK, :
THE BUTLER MANAGEMENT GROUP, :
MARVIN A. MELVILLE, as Trustee of the :
Marvin A. Melville Trust dated December : Appeal No. 20090451
1, 1992; :

Appellees/plaintiffs below :

vs. :

SANDY CITY, :

Appellant/defendant, :
below :

An appeal from a summary judgment of the Third District Court, Salt Lake County
The Honorable Sandra N. Peuler

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

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CONTENTS

Issue on Cross-Appeal and Standard of Review.....	1
Preservation of the Cross-Appeal Issue	1
Determinative Statutes on Cross-Appeal	1
Facts on Cross-Appeal	1
Facts on Main Appeal	2
Summary of Arguments.....	4
Argument	5
<i>A. Appurtenance is not relevant to record notice of Sandy's interest in the Water Right.</i>	5
<i>B. The Haik Parties rely on inadmissible hearsay for the appurtenance argument.</i>	6
1. The Saunders letter functioned as an unsworn and therefore inadmissible affidavit.	7
2. Rule 801(d)(1) does not apply.	7
3. The Saunders letter is not a public record within the meaning of Rule 803(8).	8
4. Exception 803(5) does not apply.	8
5. Exception 803(15) does not apply.	9
<i>C. The Haik Parties purchased with record notice of Sandy's interest in the Water Right.</i>	9
<i>D. Sandy argued and thereby preserved equitable conversion.</i>	12
<i>E. The Haik Parties incorrectly interpret the Agreement of Sale.</i>	15

<i>F.</i>	<i>The trial court properly dismissed the Haik Parties' second claim.</i>	17
1.	The Haik Parties' second claim was never more than an affirmative defense to an anticipated counterclaim.	19
2.	Waiver, estoppel and laches are not defenses to Sandy's quiet title claim.	19
Conclusion		22
<i>A.</i>	<i>The Haik Parties purchased the Water Right with unambiguous record notice of Sandy's interest, defeating their claim to good faith protection under §73-1-12.</i>	22
<i>B.</i>	<i>Based on the undisputed facts, Sandy's title should be quieted.</i>	22
Certificate of Service		24
Addendum		25
1.	Letter of December 18, 1998 (R. 378-80)	

AUTHORITIES

Cases

<i>Aquagen Int'l., Inc. v. Calrae Trust</i> , 972 P.2d 411 (Utah 1998)	15, 16
<i>Bagnall v. Suburbia Land Co.</i> , 579 P.2d 914 (Utah 1978)	10
<i>Bekins Bar V Ranch v. Beryl Baptist Church</i> , 642 P.2d 371 (Utah 1982)	14
<i>Bullfrog Marina, Inc. v. Lentz</i> , 501 P.2d 266 (Utah 1972)	17
<i>Butler v. Wilkinson</i> , 740 P.2d 1244 (Utah 1987)	15
<i>CCD, L.C. v. Millsap</i> , 2005 UT 42, 116 P.3d 366	18
<i>Café Rio, Inc. v. Larkin-Gifford-Overton, LLC</i> , 2009 UT 27, 207 P.3d 1235	15, 16
<i>Capital Assets Fin. Servs. v. Maxwell</i> , 2000 UT 9, 994 P.2d 201	11
<i>Ceco Corp. v. Concrete Specialists, Inc.</i> , 772 P.2d 967 (Utah 1989)	18
<i>Chamberlain v. Larsen</i> , 29 P.2d 355 (Utah 1934)	21
<i>Chipman v. Miller</i> , 934 P.2d 1158 (Utah App. 1997)	19
<i>Classic Cabinets, Inc. v. All Am. Life Ins. Co.</i> , 1999 UT App 88, 978 P.2d 465	4
<i>Deljoo v. SunTrust Mortgage</i> , 668 S.E.2d 245(Ga. 2008)	11
<i>DeMentas v. Estate of Tallas</i> , 764 P.2d 628 (Utah App. 1988)	16
<i>Draper City v. Bernardo</i> , 888 P.2d 1097 (Utah 1995)	4
<i>Educators Mut. Ins. Ass'n. v. Allied Property & Cas.</i> , 890 P.2d 1029 (Utah 1995)	17
<i>Eliason v. Watts</i> , 615 P.2d 427 (Utah 1980).....	12
<i>Flying Diamond Oil Corp. v. Newton Sheep Co.</i> , 776 P.2d 618 (Utah 1989).....	14, 15
<i>Gasser v. Horne</i> , 557 P.2d 154 (Utah 1976)	16

<i>Hall v. Process Instruments & Control, Inc.</i> , 890 P.2d 1024 (Utah 1995)	17
<i>Haw River Land & Timber v. Lawyer’s Title</i> , 152 P.3d 275 (4 th Cir. 1998)	20
<i>Helf v. Chevron U.S.A., Inc.</i> , 2009 UT 11, 203 P.3d 962	1
<i>Jelco, Inc. v. Third Judicial District Court</i> , 511 P.2d 739 (Utah 1973)	12
<i>Johannessen v. Canyon Road Towers Owners Ass’n.</i> , 2002 UT App 332, 57 P.3d 1119	11
<i>Johns v. Shulsen</i> , 717 P.2d 1336 (Utah 1986)	4
<i>Julian v. Petersen</i> , 966 P.2d 878 (Utah App. 1998)	19
<i>Kresser v. Peterson</i> , 675 P.2d 1193 (Utah 1984)	17
<i>Lach v. Deseret Bank</i> , 746 P.2d 802 (Utah App. 1987)	12, 13, 14, 16
<i>LeBaron & Assocs. v. Rebel Enters</i> , 823 P.2d 479 (Utah App. 1991)	12
<i>Lockhart Co. v. Anderson</i> , 646 P.2d 678 (Utah 1982)	12
<i>Pacific Am. Constr. v. Security Union Title</i> , 987 P.2d 45 (Utah 1999)	20
<i>Pettersen v. Ogden City</i> , 176 P.2d 599 (Utah 1947)	18
<i>Powers v. Olson</i> , 742 A.2d 799 (Conn. 2000)	11
<i>Resource Management Co. v. Weston Ranch and Livestock Co. Inc.</i> , 706 P.2d 1028 (Utah 1985)	15
<i>Russell v. Standard Corp.</i> , 898 P.2d 263 (Utah 1995)	17
<i>Salt Lake City v. Silver Fork Pipeline Corp.</i> , 2000 UT 3, 5 P.3d 1206	21
<i>Salt Lake County v. Metro West Ready Mix, Inc.</i> , 2004 UT 23, 89 P.3d 155	20, 21
<i>Searle v. Searle</i> , 2001 UT App 367, 38 P.3d 307	12

<i>Spence v. Spence</i> , 628 S.E.2d 869 (S.C. 2006).....	11
<i>State v. Robbins</i> , 2009 UT 23, 210 P.3d 288	4
<i>State v. Tooele County</i> , 2002 UT 8, 44 P.3d 680.....	11
<i>Tangren Family Trust v. Tangren</i> , 2008 UT 20, 182 P.3d 326	17
<i>Timm v. Dewsnup</i> , 921 P.2d 1381 (Utah 1996)	10
<i>Tripp v. Bagley</i> , 276 P. 912 (Utah 1928)	20
<i>Urquhart v. Teller</i> , 958 P.2d 714 (Mont. 1998)	11
<i>Whipple v. American Fork Irrig. Co.</i> , 910 P.2d 1218 (Utah 1996).....	1
<i>Willson v. State Tax Commission</i> , 499 P.2d 1298 (Utah 1972)	12
<i>Wilson v. Schneider’s Riverside Golf Course</i> , 523 P.2d 1226 (Utah 1974).....	10
<i>Wood v. Roberts</i> , 586 P.2d 405 (Utah 1978)	17

Statutes

UTAH CODE ANN. §25-5-1	19, 20
UTAH CODE ANN. §57-1-1(2)	10
UTAH CODE ANN. §57-1-1(3)	1
UTAH CODE ANN. §57-1-13	21
UTAH CODE ANN. §57-3-2	10
UTAH CODE ANN. §57-3-101	11
UTAH CODE ANN. §73-1-10	3
UTAH CODE ANN. §73-1-10(1)(a)	3, 9
UTAH CODE ANN. §73-1-10(1)(b)	3, 9
UTAH CODE ANN. §73-1-10(1)(c)	3, 9
UTAH CODE ANN. §73-1-10(3)(a)	9
UTAH CODE ANN. §73-1-11(1)(c)	6
UTAH CODE ANN. §73-1-12	21, 22
UTAH CODE ANN. §78-22-1	15
UTAH CODE ANN. §78B-2-209	21
UTAH CODE ANN. §78B-6-1204(1)	10
UTAH CODE ANN. §78B-6-1303	10

Rules

UTAH R. CIV. P. 8(a)	19
UTAH R. CIV. P. 8(c)	19
UTAH R. CIV. P. 12(b)(6)	1, 17
UTAH R. CIV. P. 56(e)	7
UTAH R. EVID. 603	7
UTAH R. EVID. 801(d)(1)	7
UTAH R. EVID. 803(5)	7, 8
UTAH R. EVID. 803(8)	7, 8
UTAH R. EVID. 803(15)	7, 9

Other Authorities

2 LAWRENCE ON EQUITY JURISPRUDENCE 1121	18
J. CALAMARI & J. PERILLO, CONTRACTS (1970).	16
MANGRUM & BENSON ON UTAH EVIDENCE (2007-08 ed.).	9
RESTATEMENT (SECOND) OF CONTRACTS (1981).....	15

I. ISSUE ON CROSS-APPEAL AND STANDARD OF REVIEW

Issue: Whether the Haik Parties preemptive affirmative defenses of estoppel, waiver or laches as a matter of law divest or transfer title or otherwise bar Sandy from asserting ownership of the Water Right.

Standard of Review: The trial court dismissed the Haik Parties' estoppel, waiver and laches claims as individual or collective bases for barring Sandy from claiming title to the Water Right. (Cf. R. 4-5, ¶¶ 19-22 and R. 93-94). Dismissal under Rule 12(b)(6) is a legal question, reviewed in this Court de novo. *Helf v. Chevron U.S.A., Inc.*, 2009 UT 11, ¶14, 203 P.3d 962.

II. PRESERVATION OF THE CROSS-APPEAL ISSUE

Sandy's motion to dismiss is at R. 17-27. The Haik Parties opposition is at R. 66-73. Sandy's Reply is at R. 78-84. The Order dismissing the second claim is R. 93-94.

III. DETERMINATIVE STATUTES ON CROSS-APPEAL

UTAH CODE ANN. § 57-1-1(3)(relevant part)

"Real property" or "real estate" means any right, title, estate, or interest in land . . . and all water rights . . .

IV. FACTS ON CROSS-APPEAL

The essential facts concerning the cross-appeal are established by operation of law. On a 12(b)(6) motion to dismiss, the alleged facts are presumed true. *Whipple v. American Fork Irrig. Co.*, 910 P.2d 1218, 1219 (Utah 1996). The Haik Parties alleged as follows:

During the 28 years prior to recording of the Sandy Deed, Sandy has never asserted ownership of the Water Right but has instead taken various actions, including the filing of written documents, acknowledging no ownership of the Water Right and confirming instead ownership in the Plaintiffs' predecessor in title.

(R. 4 ¶19).

V. FACTS ON MAIN APPEAL

The Haik Parties' legal description of the Water Right is but one variation. (Resp. Brf. at 3). The earliest known description is in Sandy's Quitclaim, and it is repeated in one of the deeds relied on by the Haik Parties:

"1/4 of the .25 CFS, awarded to the South Despain Ditch in the Little Cottonwood Decree, Case No. 4802, June 16, 1910 equalling .0625 CFS as certificated by the Office of the State Engineer, Certificate No. A-702, for irrigation, stock-watering and domestic use, the point of diversion is located north 242 ft. E 770 ft. from the W. ¼ Corner, Section 12, T3S, R1E, SLB&M"

(R. 278 and R. 197).

Recognized by decree in 1910, the larger water right from which the Water Right is segregated predates the Little Cottonwood Subdivision by sixty-eight years. (*Cf.* R. 278 and R. 257 ¶17). The Little Cottonwood Subdivision plat was recorded on August 23, 1978, creating Lot 31. (R. 212).¹

¹ The Haik Parties did not dispute paragraphs 1, 3-5, 8-15 and 17 in Sandy's principal summary judgment memorandum in support of its cross-motion. (*Cf.* R. 257, ¶¶1, 3-5, 8-15, 17 and R. 363-65). This fact is from R. 260 ¶17.

As part of their factual predicate, the Haik Parties continue to use the phrase “official public records of the Utah Division of Water Rights” to establish their claim of a “complete chain of title.” (Resp. Brf. at 4). We explained in our opening brief why the phrase incorrectly describes the Division’s function. The only office of record for title to water rights is the county recorder. UTAH CODE ANN. §73-1-10 (1959) and current §73-1-10(1)(a)-(c). Disavowing official imprimatur for recording water right conveyances, the Division provides a Title Abstract Sheet for voluntary public use in updating water right title. That form states as follows:

No agency of the State of Utah warrants or guarantees title to certain water rights. The State Engineer’s Office serves only as an office of public record. The water right information provided here reflects that which has been filed with the State Engineer’s Office by the public. If an opinion of title assurance is desired, an attorney or other qualified professional should be retained.

(R. 421).

The Haik Parties contend at page 4 of their statement of facts that,

[i]n fact, a complete chain of title to the Water Right from Howard W. Bentley to the Haik Parties’ immediate predecessor in title, Lynn Christensen Biddulph, was established by the records of the Salt Lake County Recorder’s Office.

For support, they cite to R. 176, and presumably paragraph 2 of their summary judgment memorandum. That paragraph was flatly disputed on multiple grounds. (R. 251-53). It may be accurate to say that the county recorder showed a chain of title to Lot

31. The Haik Parties merely assume that the Water Right was appurtenant to Lot 31 and ask this Court to do the same.

VI. SUMMARY OF ARGUMENTS

The Haik Parties' argue three essential themes. They first contend that, although they had record notice of the Agreement of Sale, they did not have notice of the Sandy Deed or what they call more generally, a "conveyance." (Resp. Brf. at 12-13)("neither the Sandy Deed nor any other *instrument of conveyance* . . . was recorded at the time the Haik Parties purchased the Water Right.")(emphasis added). This argument fails because the Agreement of Sale is an "instrument of conveyance" of a property interest to Sandy.

Second, they argue that the Agreement of Sale is executory and that record notice of its contents is therefore insufficient because one cannot tell by looking at it whether the agreement was actually performed. (Resp. Brf. at 9-10).² This argument fails because, first, the Agreement is not executory. Rather, it describes in the clearest possible terms a transaction completed on January 13, 1977. Second, executory or not, the agreement transfers equitable title, itself a matter of record notice.

² The Haik Parties state that "Sandy has been unable to *definitively establish* that the purchase of the Water Right called for in the 'Agreement of Sale' was ever completed. . . ." (Resp. Brf. at 3 n.1)(emphasis added). There are three common evidentiary burdens: "preponderance of the evidence," the standard for most civil cases, *Johns v. Shulsen*, 717 P.2d 1336, 1338 (Utah 1986), "clear and convincing evidence," for fraud cases, overcoming presumptions and establishing or taking certain property and other rights, *Classic Cabinets, Inc. v. All Am. Life Ins. Co.*, 1999 UT App 88, ¶13, 978 P.2d 465, *Draper City v. Bernardo*, 888 P.2d 1097, 1099 (Utah 1995), and "beyond a reasonable doubt," reserved for criminal cases. *State v. Robbins*, 2009 UT 23, ¶16, 210 P.3d 288. Sandy doubts the existence of the "definitively establish" standard and in any event disputes its applicability here.

The Haik Parties next contend that a “complete chain of title” leading to their purchase of Lot 31 established their title. (*See, e.g.*, Resp. Brf. at 6-7, 24). In effect, this claim asks this Court to beg the central question of record notice by ignoring the Agreement of Sale and the Sandy Deed and assuming that the entire Water Right was used beneficially on Lot 31, and only Lot 31, from at least 1974 to 1983, when Biddulph acquired that ground (R. 194), despite the undisputed facts that Sandy’s Agreement of Sale and deed predate Lot 31. (*Cf.* R. 278-79 and R. 260 ¶17 (undisputed fact—*see* R. 364-65). The appurtenance argument is further based on inadmissible hearsay, namely a letter the Haik Parties substituted for sworn testimony. Sandy’s motion to exclude was determined to be moot. (R. 432-441, 522). The trial court accepted the appurtenance claim. (R. 521).³

VII. ARGUMENT

A. Appurtenance is not relevant to record notice of Sandy’s interest in the Water Right.

The trial court’s ruling and the Haik Parties’ argument is infected with the fundamentally irrelevant premise that the Water Right was appurtenant to Lot 31. (R. 521). The issue of whether and to what extent the Water Right was appurtenant to Lot 31 is a side attraction. It was not litigated below, but merely assumed. It remains dubious in light of the fact that the Haik Parties’ predecessor, Biddulph, acquired the Water Right in

³ The Haik Parties spend considerable energy insisting on what Sandy already conceded—that they were not on inquiry notice of the Agreement of Sale or the Sandy Deed. (*Cf.* Sandy Opening Brief at 13 and Response Brief at 21-24).

a separate deed, in 1999, sixteen years after she acquired Lot 31. (*Cf.* R. 194, 196), *and see* Resp. Brf. at 10-11). If she and the Haik Parties relied on appurtenance, then there was no reason for a separate deed. The parties to the 1999 Water Right deed to Biddulph were equally infected with record notice of Sandy's interest.

If the Haik Parties acquired the Water Right with record notice of Sandy's interest (acquired via the Agreement of Sale six years before Biddulph acquired Lot 31)(*Cf.* R. 275-76 and 194), and twenty-two years before Biddulph's 1999 deed to the Water Right (*Cf.* R. 275-76 and 196), then appurtenance is and always has been irrelevant. That is to say, assuming the highly questionable—that the entire Water Right, decreed at a point of diversion within what *later became* the Little Cottonwood Subdivision, was used exclusively on what *later became* Lot 31—the undisputed conveyance to Sandy by virtue of the Agreement of Sale and the properly signed 1977 Sandy Deed stripped the Water Right from the land. UTAH CODE ANN. § 73-1-11(1)(c)(appurtenant water transfers with land unless “the grantor . . . convey[ed] the water right in a separate conveyance document prior to . . . the execution of the land conveyance document” to the Haik Parties' Lot 31 predecessors.).

B. The Haik Parties rely on inadmissible hearsay for the appurtenance argument.

The Haik Parties supported the appurtenance claim with sheer repetition and inadmissible hearsay. They relied on a letter from Saunders, a principle of Saunders and Sweeney. Not even bothering to authenticate it, they used it below and here, (Resp. Brf.

Appendix 3), like a sworn statement to establish that the entire Water Right was used on Lot 31 and thus passed with that ground. (R. 373-74, 378-80). They need that claim to establish a “[chain of title] to the Water Right.” (Resp. Brf. at 6-7, 24). Sandy moved to exclude the letter on multiple grounds. (R. 435-441). The Haik Parties relied on evidence rules 801(d)(1), 803(8), 803(5) and 803(15).

1. The Saunders letter functioned as an unsworn and therefore inadmissible affidavit.

Summary judgment may be opposed with “depositions, answers to interrogatories, or further affidavits” demonstrating “a genuine issue for trial.” UTAH R. CIV. P. 56(e). The Saunders letter was used “to demonstrate that a disputed issue of fact exists in this case precluding summary judgment in favor of Sandy.” (R. 457). Admissible testimony requires an oath. UTAH R. EVID. 603. Saunders’ letter contains none.

2. Rule 801(d)(1) does not apply.

A witnesses’ prior statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant’s testimony or the witness denies having made the statement or has forgotten” UTAH R. EVID. 801(d)(1). The rule does not apply because Saunders neither forgot nor repudiated the substance of the letter. He testified that he forgot the details of the transaction with Sandy—a transaction he did not deny but did not mention in the letter. (R. 378-80; 276, 353 (depo. pp. 45-46)). Whether Saunders recalled the Agreement of Sale or the Sandy Deed (both of which he admitted signing) is

irrelevant to whether record notice defeats the Haik Parties' claim and irrelevant to whether the letter is admissible. Saunders recalled the letter's contents. It cannot, therefore, be used a "prior statement" of events he could not recall despite the letter, namely the transaction with Sandy.

3 . The Saunders letter is not a public record within the meaning of Rule 803(8).

Rule 803(8) public records are those *made by* a public office or agency concerning activities or observations it is duty-bound to make, not merely documents deposited *with* it. The rule permits "[r]ecords, reports, statements, or data compilations . . . of public offices or agencies" that contain "the activities of the office or agency, or "matters observed pursuant to duty imposed by law" The Saunders letter is none of these.

4 . Exception 803(5) does not apply.

Rule 803(5) permits hearsay in the form of a record of a matter the witness once knew but cannot later recall. The Haik Parties argued below that because Saunders could not recall "details" concerning the Agreement of Sale and Sandy Deed, the letter is admissible to explain—not those events, which the letter does not discuss and which he could not recall—but a later transfer to their Lot 31 predecessor. (R. 461). This too is a *non sequitur*. Merely because Saunders wrote a letter about one deed and could not recall its "details," does not also mean that the letter is admissible concerning the entirely separate Sandy Deed and the apparently forgotten Sandy transaction.

5. Exception 803(15) does not apply.

Reaching further, the Haik Parties argued that the Saunders letter establishes or affects an interest in property because it was provided to the Division “to update title to the Water Right.” (R. 462). Under §73-1-10(1)(a)-(c), *only* the county recorder is the office of record for title to water rights. Updating the Division, though wise but not required, includes “a report of water right conveyance. . . .” *Id.* §(3)(a). That report “update[s] water right ownership on the records of the state engineer.” *Id.* It does not affect ownership. *Cf., e.g.,* MANGRUM & BENSON ON UTAH EVIDENCE, at 639 (2007-08 ed.)(comparing Federal Advisory Committee Note, that Rule 803(15) covers recitals in “dispositive documents” such as deeds).

Accordingly, the Division does not record or effect conveyances. Plainly its public records are “update[d]” based only on what buyers and sellers send it, if they send anything at all. (*See* R. 421). The Saunders letter, which is neither a deed nor other instrument affecting real property, does not become such merely because it was delivered to the Division.

C. The Haik Parties purchased with record notice of Sandy’s interest in the Water Right.

Our opening brief describes the reach and importance of record notice. The Haik Parties resort to looking for cracks. They grudgingly acknowledge the Agreement of Sale’s contents but contend they had no record notice of a “conveyance” or of the Sandy Deed. (Resp. Brf. at 8, 12-13). Similarly, using an executory contract theory, they argue

that it is impossible to know by reading it whether the Agreement of Sale was actually performed. (Resp. Brf. at 9-10). Record notice, however, is not limited to a “conveyance” (as the Haik Parties improperly define it). Neither does it depend on outcome. It is fixed at the moment of recording. *Wilson v. Schneider’s Riverside Golf Course*, 523 P.2d 1226, 1227 (Utah 1974), *quoting* §57-3-2 (notice imparted “from the time of filing the same with the recorder”). If by the term “conveyance” the Haik Parties mean that only a deed imparts record notice, then they could not be more wrong. All “documents” within the meaning of §57-1-1(2), including a “conveyance,” impart record notice.

The purpose of a lis pendens illustrates. Persons dealing with real property that is the subject of litigation are on record notice upon the recording of a lis pendens.⁴ A lis pendens “serves as a warning to all persons that any rights or interests they may acquire in the interim are subject to the judgment or decree” in pending litigation. *Bagnall v. Suburbia Land Co.*, 579 P.2d 914, 916 (Utah 1978). The result of that litigation, likely not yet determined when the lis pendens is recorded, nevertheless binds anyone dealing with the subject property. *See also Timm v. Dewsnap*, 921 P.2d 1381, 1392 (Utah 1996). The law does not await the outcome of the litigation before a determination of record notice is made. Neither is record notice suspended until a person gains actual knowledge

⁴ A lis pendens must be recorded in a partition action, UTAH CODE ANN. §78B-6-1204(1), and may be recorded in any action concerning real property. *Id.* at §78B-6-1303.

of a recorded instrument (a deed, a mortgage, a mechanics' lien) and determines that the instrument was performed according to its terms.

Legal knowledge of the interest, in the case of an agreement, or the *potential* interest(s), in the case of a lis pendens, whatever those interests are *or turn out to be*, is imparted upon recording. *State v. Tooele County*, 2002 UT 8, ¶19, 44 P.3d 680, *quoting* UTAH CODE ANN. §57-3-101. That is both the result of recording, a conclusive presumption the Haik Parties cannot avoid, and it is also *why we record*. *Capital Assets Fin. Servs. v. Maxwell*, 994 P.2d 201, 206 (Utah 2000)(policies underlying recording act are “intended to impede fraud, to foster the alienability of real property, and to provide for predictability and integrity in real estate transactions.”). While it is not clear under Utah law whether the Agreement of Sale’s reference to the Sandy Deed constitutes record notice of the deed’s contents, there was plainly record notice of the deed’s existence and delivery because the Agreement plainly describes both. (R. 278-79, ¶¶1,5)(payment, execution and delivery of deed occurred simultaneously on January 13, 1977). *Cf. Johannessen v. Canyon Road Towers Owners Ass’n.*, 2002 UT App 332, ¶24, 57 P.3d 1119(recorded CC&R’s imparted record notice of statute “by incorporation”).⁵

⁵ In some states, recorded documents impart notice of other documents they reference. *See, e.g., Deljoo v. SunTrust Mortgage*, 668 S.E.2d 245 (Ga. 2008); *Powers v. Olson*, 742 A.2d 799 (Conn. 2000); *Urquhart v. Teller*, 958 P.2d 714 (Mont. 1998). South Carolina appears to have gone even further. There, the duty to exercise due diligence in a real property transaction is sufficient to trigger inquiry notice. *Spence v. Spence.*, 628 S.E.2d 869, 876 (S.C. 2006)(“[a] party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him”).

D. Sandy argued and thereby preserved equitable conversion.

The Haik Parties contend that Sandy did not preserve its “equitable conversion” argument. (Resp. Brf. at 20). Appellate preservation requires that an issue be first raised in the trial court, “giving that court an opportunity to rule” *Searle v. Searle*, 2001 UT App 367, ¶17, 38 P.3d 307(internal quotation marks omitted). An issue is sufficiently raised when it is brought “to a level of consciousness such that the trial judge can consider it.” *LeBaron & Assocs. v. Rebel Enters.*, 823 P.2d 479, 483 (Utah App. 1991)(internal quotation marks omitted).

Under the heading “*Constructive notice of Sandy’s claim was imparted due to the nature of the recorded Agreement[,]*” Sandy argued the elements of equitable conversion in reply to the Haik Parties’ claim that the Agreement was merely “executory”:

Recording an agreement for the sale of real property imparts the same notice imparted by a deed. What plaintiffs miss is the legal effect of agreements for the sale of real property. “The interest of a purchaser under a real estate contract is an interest in real property” *Lockhart Co. v. Anderson*, 646 P.2d 678, 679 (Utah 1982).

“An earnest money agreement is a legally binding executory contract for the sale of real property.” *Lach v. Deseret Bank*, 746 P.2d 802, 805 (Utah App. 1987), *citing et al. Eliason v. Watts*, 615 P.2d 427, 429 (Utah 1980). The seller’s interest converts to “personalty.” *Lach*, 746 P.2d at 805, *quoting Willson v. State Tax Commission*, 499 P.2d 1298, 1300 (Utah 1972). The buyer in turn “acquires the equitable interest in the property at the moment the contract is created and is thereafter treated as the owner of the land.” *Lach*, 746 P.2d at 805. *See Jelco, Inc. v. Third Judicial District Court*, 511 P.2d 739, 741 (Utah 1973).

(R. 448-49).

Sandy did not use the term “equitable conversion” in its memorandum, but the argument is there, and the cited authorities use the term. “Equitable conversion” is merely a name for circumstances that result in a legal conclusion—the conversion of a seller’s interest from realty to “personalty” and the buyer’s acquisition of equitable title. *Cf.* R. 448-49 and *Lach*, 746 P.2d at 805.

Furthermore, citing (but misspelling) *Lach v. Deseret Bank*, counsel repeated the argument at the hearing, using the talismanic phrase the Haik Parties require:

And the language [of the Agreement of Sale] plainly describes a contemporaneous transfer of consideration, payments, whatever that was, in exchange for a deed effective upon execution, paid upon execution and recorded the next day at the request of the grantor, by the way, which I think you can draw a pretty important inference from that. If you’re the person giving up the property described in the contract, I don’t think you’re going to rush off to the Recorder’s Office the next day unless you’ve got a done deal and record that agreement. Saunders and Sweeney recorded this thing, it was recorded at their request.

. . . That’s why the argument is wrong. It’s irrelevant because when we are talking about the conveyance or the transfer of real property, a – *it’s the doctrine of equitable conversion, and I address this in my response brief.* It’s when parties come together to – with a written agreement for the transfer of real property, upon execution, when the deal is done, the grantor retains only a personal property interest in that property right, equitable title for the grantee – the grantee is treated as the owner from that point forward. I think that is the Lech, L-e-c-h, Case described – or cited in my memorandum.

. . .

So it doesn't help them to say, "Well, maybe the contract is merely executory,[""] the equitable title passed the moment that agreement was signed.[]

(R. 571 at 23-24)(emphasis added).

Sandy argued equitable conversion, and it is sufficient to carry the day, both to reverse summary judgment and to quiet Sandy's title. Under the Agreement of Sale, Sandy acquired "the equitable interest in the property at the moment the contract [was] created and is thereafter treated as the owner" *Lach*, 746 P.2d at 805 (citations omitted). The Haik Parties knew of Sandy's interest as a matter of law the moment they began dealing with the Water Right. *Bekins Bar V Ranch v. Beryl Baptist Church*, 642 P.2d 371, 373 (Utah 1982)("The basic purpose of the recording laws is to give notice to third-party purchasers of real property.")

In the same vein, the Haik Parties distinguish *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989), on the grounds that the "recorded contract in question *itself* created a covenant . . . that ran with the land and did not involve constructive notice of an unrecorded deed or other instrument of conveyance." (Resp. Brf. at 19, *citing* 776 P.2d at 629). They are only half right, but not in the way they intend. The agreement in *Flying Diamond* created the covenant, the terms of which were binding on later parties due to record notice. *Flying Diamond's* rationale explains why the Agreement of Sale imparted record notice of Sandy's interest. Like the agreement in

Flying Diamond, the Agreement of Sale creates Sandy's interest in the Water Right by conveying equitable title. *See, e.g., Butler v. Wilkinson*, 740 P.2d 1244, 1253-54 (Utah 1987)(under equitable conversion, vendee's equitable interest in an installment land sale contract is real property for purposes of § 78-22-1).

E. The Haik Parties incorrectly interpret the Agreement of Sale.

The Haik Parties are perplexed by the plain terms of the Agreement of Sale and transfixed by the term "payments." They contend that no consideration beyond "payments" is explicitly cited. Yet they are certain that "payments" must mean money. They also dispute delivery of the Sandy Deed.

A contract is "a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998)(*revised opinion*), *quoting* RESTATEMENT (SECOND) OF CONTRACTS, §17(1) (1981). Sufficient consideration "requires that 'a performance or a return promise must be bargained for.'" *Aquagen*, 972 P.2d at 413, *quoting* RESTATEMENT at §71 and *citing* *Resource Management Co. v. Weston Ranch and Livestock Co. Inc.*, 706 P.2d 1028, 1036 (Utah 1985)("Consideration is an act or promise, bargained for and given in exchange for a promise. . . . For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties."). This Court "consider[s] each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none." *Cafe Rio, Inc. v. Larkin-Gifford-Overton*,

LLC, 2009 UT 27, ¶25, 207 P.3d 1235 (second omission in original)(internal quotation marks omitted).

In *Aquagen*, reading unambiguous contract terms, this Court noted that one party “promised to pay \$250,000 in exchange for [an] assignment . . . and [a] promise not to compete. In this bargained-for exchange, an enforceable contract was obviously created.” *Aquagen*, 972 P.2d at 413-14. *Aquagen*’s straightforward analysis was based on the plain terms of the writing, contrary to the Haik Parties’ unusual theory of contract interpretation, which apparently cannot be done with any degree of accuracy until the exchange is confirmed . . . “definitively.” (Resp. Brf. at 3, n.1). As the Haik Parties would have it, no exchange of promises is on its face enforceable as such, or can even be interpreted as such. Rather, contract interpretation or enforceability is suspended until confirmation that consideration actually changed hands.⁶

Without a hint of irony, the Haik Parties concede that they “had constructive notice of an exchange of promises, or an executory contract” (Resp. Brf. at 14). That undisputed fact at the very least seals record notice of Sandy’s equitable title. *Lach*, 746 P.2d at 805. The Agreement of Sale recites the exchange of consideration and states that “payments” for the Water Right will be made upon execution, which happened on

⁶ Consideration is likely the easiest of a contract’s elements. “[A]s a general rule it is settled that any detriment no matter how economically inadequate will support a promise.” *DeMentas v. Estate of Tallas*, 764 P.2d 628, 632 (Utah App. 1988), *quoting* J. CALAMARI & J. PERILLO, *CONTRACTS* § 55 at 107 (1970), *and citing* *Gasser v. Horne*, 557 P.2d 154, 155 (Utah 1976)(“It has further been held that there is consideration whenever a promisor receives a benefit or where promisee suffers a detriment, however slight.”).

January 13, 1977, when “the deed” was delivered to Sandy. (R. 278-79, ¶¶1, 5).⁷ Under the Haik Parties’ theory, not even a properly executed and recorded deed imparts record notice because, even though presumptively delivered,⁸ it is impossible to tell (“definitively”) by looking at it whether it was *actually* delivered, or whether the consideration it recites (often mere boilerplate: “ten dollars and other good and valuable consideration,” *see Wood v. Roberts*, 586 P.2d 405, 407 (Utah 1978)) was actually paid.

F. The trial court properly dismissed the Haik Parties’ second claim.

Dismissal under Rule 12(b)(6) assumes the truth of the alleged facts but denies any right to relief based on them. *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995). Dismissal is appropriate if what is pled does not support a proper claim and cannot do so “under any state of facts” that could be proved to support the claim. *Educators Mutual Ins. Ass’n. v. Allied Prop. & Cas.*, 890 P.2d 1029, 1030 (Utah 1995).

⁷ The Agreement of Sale is integrated. In *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶12, 182 P.3d 326, this Court defined an integrated agreement as “a writing or writings constituting a final expression of one or more terms of an agreement.” *Id.* quoting *Hall v. Process Instruments & Control, Inc.*, 890 P.2d 1024, 1027 (Utah 1995)(citations omitted). An agreement is integrated if the parties adopt the writing “as the final and complete expression of their bargain.” *Id.* quoting *Bullfrog Marina, Inc. v. Lentz*, 501 P.2d 266, 270 (Utah 1972). *Tangren* explains “that when parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties.” 2008 UT 20 at ¶12. The plain terms of the Agreement of Sale leave nothing out. They describe a complete, and completed, transaction as of January 13, 1977.

⁸ Recording a deed creates a presumption of delivery. *Kresser v. Peterson*, 675 P.2d 1193, 1194 (Utah 1984).

The Haik Parties alleged the following facts to support theories of waiver, estoppel and laches:

During the 28 years prior to recording of the Sandy Deed, Sandy has never asserted ownership of the Water Right but has instead taken various actions, including the filing of written documents, acknowledging no ownership of the Water Right and confirming instead ownership in the Plaintiffs' predecessor in title.

(R. 4 ¶19). According to the Haik Parties, Sandy is “estopped” by these facts “from claiming *or owning*” the Water Right, and has “waived any ownership of or interest in the Water Right” or is “barred by . . . laches from asserting any ownership.” (R. at 4, ¶¶ 20-22)(emphasis added).

Waiver “is the intentional relinquishment of a known right.” *CCD, L.C. v. Millsap*, 2005 UT 42, ¶34, 116 P.3d 366. Nutshelled, the elements of estoppel are a statement or conduct, “inconsistent with” a later claim, that induces a response and resulting reliance-based injury. *Ceco Corp. v. Concrete Specialists, Inc.*, 772 P.2d 967, 969-70 (Utah 1989)(citations omitted). A “negative equitable remedy,” laches is “closely related . . . with estoppel” *Pettersen v. Ogden City*, 176 P.2d 599, 604 (Utah 1947), *quoting* 2 LAWRENCE ON EQUITY JURISPRUDENCE 1121. Laches “deprives” one of a “right or remedy” “because his delay in seeking it has operated to the prejudice of another.” *Id.*

1. The Haik Parties' second claim was never more than an affirmative defense to an anticipated counterclaim.

The Haik Parties conceded the central point that their theories of waiver, estoppel and laches were not claims for affirmative relief at all, as claims in a complaint must be, UTAH R. CIV. P. 8(a). The theories were “a bar against [Sandy’s] competing claim to title.” (R. 69). Thus explained, the theories were never intended as cognizable claims for relief. They were and are affirmative defenses. UTAH R. CIV. P. 8(c). Moreover, having been “mistakenly designated” as claims, the best the trial court could do was “treat the pleadings as if there had been a proper designation,” UTAH R. CIV. P. 8(c). The claim would have been treated as an affirmative defense to Sandy’s counterclaim, which treatment was ultimately unnecessary because they were re-pled in response to the counterclaim. (R. 62-“Fifth Defense”).

2. Waiver, estoppel and laches are not defenses to Sandy’s quiet title claim.

“When a person has become the legal owner of real estate he cannot transfer it or part with title, except in some of the forms prescribed by law.” *Julian v. Petersen*, 966 P.2d 878, 880 (Utah App. 1998)(quoted cite omitted), *citing* UTAH CODE ANN. § 25-5-1. *Cf. Chipman v. Miller*, 934 P.2d 1158, 1161 (Utah App. 1997)(“Merely meeting the judicially created requirements of boundary by acquiescence *does not create legal ownership*. Absent a voluntary agreement between the disputing parties, a quiet title action is the only legally binding way to settle a boundary dispute.”)(emphasis added).

See also Tripp v. Bagley, 276 P. 912, 918 (Utah 1928)(“acquiescence alone will not operate as a conveyance. Land cannot be conveyed from one person to another by merely a change in possession . . .”).

Title must reside somewhere. The mere passage of time neither destroys title nor bars an owner from asserting it. *See Salt Lake County v. Metro West Ready Mix, Inc.*, 2004 UT 23, ¶¶13, 17, 89 P.3d 155. *Metro West* stands at least for that. Title to the Water Right is not the Water Right itself, nor even the use of it. Title is ownership, the legally protected right to control the property, regardless of whether that control is exercised. *See, e.g., Pacific Am. Constr. v. Security Union Title*, 987 P.2d 45 (Utah 1999)(title policy indemnifies against loss due to a defect in the title, not against loss due to diminution or change in value of the underlying property); *Haw River Land & Timber v. Lawyer’s Title*, 152 F.3d 275 (4th Cir. 1998)(“[t]itle refers to the legal ownership of a property interest so that one having title to a property interest can withstand the assertion of others claiming a right to that ownership.”)

Accordingly, a property owner might publicly disclaim title, and others might occupy and improve the property in reliance. But until title is transferred or divested in some lawful fashion, only possession is surrendered. The actions of others, even if induced by the owner, do not affect title. Someone who forgets they own property does not by virtue of age or bad memory lose title or the right to assert it. *See, e.g., UTAH CODE ANN. § 25-5-1*(“[n]o estate or interest in real property . . .nor any trust or power

over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, *surrendered* or declared otherwise than by act or operation of law, or by deed or conveyance in writing”(emphasis added).⁹

Sandy possessed a signed, presumptively delivered deed, which on its face is a conveyance. UTAH CODE ANN. § 57-1-13 (properly executed quitclaim is a “conveyance”); *Chamberlain v. Larsen*, 29 P.2d 355, 362 (Utah 1934)(possession of deed creates a presumption of delivery). The Haik Parties speculate about why the Sandy Deed was not recorded. The failure to record neither aids their claim nor affects the validity of the conveyance that deed reflects. Even if Sandy’s conduct caused the Haik Parties to believe they owned the Water Right, that in no way bars Sandy from asserting and establishing its title. Sandy must do so on the strength of its own claim, of course. *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶20, 5 P.3d 1206. The Haik Parties’ defense theories were never more than substitutes for that same burden.

⁹ Under UTAH CODE ANN. §78B-2-209, for example, a person without legal title is deemed “to have been under and in subordination to” the legal title owner unless that person has adversely possessed the property. See *Metro West*, 2004 UT 23, ¶¶22-23, 89 P.3d 155. In other words, even if *possession* has changed hands in an adverse possession claim, *title* remains in the first owner until ruled on by the court. *Id.*

VIII. CONCLUSION

A. The Haik Parties purchased the Water Right with unambiguous record notice of Sandy's interest, defeating their claim to good faith protection under §73-1-12.

This first conclusion is a matter of law. The Agreement of Sale is a “document” that by definition imparts notice of its contents—Sandy’s equitable title. The Haik parties were deemed to know that fact just as if they had actually read the Agreement. They are not, therefore, protected by §73-1-12.

B. Based on the undisputed facts, Sandy's title should be quieted.

The Haik Parties can, and do, only speculate about why the Sandy Deed was not recorded at the same time as the Agreement of Sale by relying mostly on the memory of someone (Saunders) who cannot recall. The presumptions of a conveyance and delivery, along with the undisputed surrounding circumstances of Sandy’s possession of the original deed, including where it was kept and how it was found, establish Sandy’s title. The Haik Parties’ appurtenance argument is mere cover, but never reached due to (1) the presumptive conveyance to Sandy and (2) record notice of Sandy’s undisputed interest.

Accordingly, the Court should reverse the summary judgment and remand for entry of judgment quieting Sandy’s title.¹⁰

¹⁰ Below, Sandy established certain facts surrounding the recording of the Agreement of Sale. Specifically, Sandy explained the circumstances of its conveyance to Saunders and Sweeney of 4.1 acres adjacent to the land that later became the Little Cottonwood Subdivision. (R. 257 ¶1, 258 ¶¶3-5). That 4.1 acres was declared surplus and was designated for sale to Saunders. (R. 363). A preliminary title report for that ground, a copy of the deed for the 4.1 acres to Saunders and Sweeney and other documents were

February ____, 2010.

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kept in the same file as the *original* Sandy Deed and the Agreement of Sale. (R. 258-59, ¶¶ 8-15). Our belief was and is that the 4.1 acres was the consideration paid for the Water Right. Saunders and Sweeney, which conveyed the Water Right to Sandy upon signing the Sandy Deed, unquestionably received the 4.1 acres and recorded their deed at the same time as they recorded the Agreement of Sale. (R. 259 ¶¶9-10). Saunders and Sweeney later sold a portion of the 4.1 acres. (R. 259, ¶15). We did not, as the Haik Parties suggest, abandon that theory. The facts were provided below because the inference is reasonable, but it is not necessary to establish Sandy's title.

CERTIFICATE OF SERVICE

I certify that on February ____ 2010, two copies of the foregoing Reply Brief of Appellant were delivered to the following by:

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ADDENDUM

Letter of December 18, 1998 (R. 378-80)