

1991

Martin L. Hocking and Judith C. Hocking v. Merlyn Tingey Roberts : Brief of Appellant

Utah Supreme Court

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Keith L. Stahle; Michael T. Roberts; Campbell, Maack, & Sessions; Attorneys for Respondents.
Martin L. Hocking; Judith C. Hocking; Appellants, pro se .

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UTAH SUPREME COURT

BRIEF

910505

IN THE UTAH SUPREME COURT

MARTIN L. HOCKING, and
JUDITH C. HOCKING,

Plaintiffs and
Appellants

vs.

MERLYN TINGEY ROBERTS, n/k/a
MERLYN TINGEY de la MELENA

Defendant and
Respondent

Case No. 910505

Priority No. 11

BRIEF OF APPELLANTS

Appeal from the Judgment of the
Second District Court in and for Davis County
Honorable Douglas L. Cornaby, Judge

Martin L Hocking, and
Judith C. Hocking
349 East Center Street
P.O. Box 476
Centerville, Utah 84014
Telephone (801) 292-

1885

Appellants, pro se

Keith L. Stahle (3071)
84 South Main
Bountiful, Utah 84010
Telephone (801) 295-3351

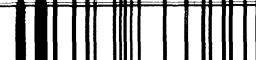
Michael T. Roberts (5538)
CAMPBELL, MAACK, & SESSIONS
One Utah Center
Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
Telephone (801) 537-5555

Attorneys for Respondent

FILED

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CLERK SUPREME COURT



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Appellants, pro se

Keith L. Stahle (3071)
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Bountiful, Utah 84010
Telephone (801) 295-3351

Michael T. Roberts (5538)
CAMPBELL, MAACK, & SESSIONS
One Utah Center
Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
Telephone (801) 537-5555

Attorneys for Respondent

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JURISDICTION OF THE COURT

The Utah Supreme Court has jurisdiction over "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction." Section 78-2-2(3)(j) Utah Code Ann. 1953, as amended.

STATEMENT OF THE ISSUES

(1) Does mutual acquiescence in a boundary require mutual belief in a line as boundary by adjoining landowners during the required period of acquiescence? Wright v. Clissold, 521 P.2d 1224 (Utah 1974); Wood v. Myrup, 681 P.2d 1255 (Utah 1984); Halladay v. Cluff, 685 P.2d 500 (Utah 1984), dissenting opinion; Low v. Bonacci, 788 P.2d 512 (Utah 1990).

(2) Since the defendant's grantor had a survey that shows he had been using property beyond and adjoining his boundary, and then conveyed only his legal, metes and bounds description, can the defendant claim the adjoining property via boundary by acquiescence based on her grantor's occupancy? Brown v. Peterson Development Co., 622 P.2d 1175 (Utah 1980).

(3) Since the District Court's findings were either disputed by competent evidence or were not supported by required evidence, was summary judgment for the defendant appropriate? Utah R. Civ. P. 56(c) and 56(e).

(4) Since opposing counsel has inflated the cost of this suit by violating Rule 3.3(a)(1) of Rules of Professional

Conduct from the Utah Code of Judicial Administration, is opposing counsel obligated to pay the plaintiffs' suit costs?

STATEMENT OF THE CASE

1. Nature of the Case.

This appeal is from a final judgment of the Second District Court in Davis County, Farmington, Utah, Judge Douglas L. Cornaby, presiding. This case involves a property boundary dispute. Judge Cornaby granted the disputed property to the defendant under the doctrine of boundary by acquiescence. The defendant's motion for summary judgment was granted. The plaintiffs' motion for summary judgment was denied.

2. Statement of the Facts.

(1) Plaintiffs ask for quiet title to a 12' x 120' strip of property included in their 1969 warranty deed and their 1969 survey. This property is currently being used by the defendant, who claims she owns this property via the doctrine of boundary by acquiescence.

(2) Exhibit A is a summary of exhibits in the pleadings. Exhibit A shows the date relationships between the fence the defendant claims is the boundary and the surveys of the deed boundaries. Also, it summarizes the warranty deed history on each piece of property. (surveys, R. 185, 194; warranty deeds on plaintiffs' property, R. 485, 77-80; warranty deeds on

defendant's property, R. 85-93) Plaintiffs have highlighted the disputed property on the surveys.

(3) The District Court found the fence the defendant claims s the boundary was installed in 1953; but competent evidence shows the fence was not installed until at least 1956, thirteen years before the plaintiffs purchased their property and received their survey. (Fact 5, R. 722-723)

(4) The District Court found the fence was installed pursuant to a 1953 survey, but the survey was never produced as evidence and plaintiffs dispute the existence of such survey. (Fact 5, R. 723-727)

(5) In 1978 the defendant purchased property adjoining the plaintiffs' lot. When the defendant purchased her property, she received a survey from her grantor that shows the fence is about 12 feet south of her south boundary. The defendant's 1978 survey agrees with the plaintiffs' 1969 survey as to the location of the common deed boundary with reference to the fence. (surveys, R. 185, 194)

(6) The disputed property has not been conveyed to the defendant or to any of her predecessors in title. Therefore, the property taxes have not been assessed to or paid by the defendant or any of her predecessors in title. (Fact 12, R. 49, 312)

(7) The disputed property has been conveyed by warranty deed to the plaintiffs and to all of their predecessors in interest. Therefore, the property taxes have been assessed to

and paid by the plaintiffs and their predecessors in interest.
(Fact 11, R. 49, 312)

(8) All of the warranty deeds on the defendant's property describe the south boundary as being 100 feet south of the front of her lot. None reference the fence as the boundary. (warranty deeds on defendant's property, R. 85-93)

(9) There is no overlap in the metes and bounds descriptions of the defendant's and the plaintiffs' properties.
(Fact 9, R. 49, 312)

(10) There are no structures on the disputed property, nor are there any structures on the defendant's property that need the disputed property to meet city zoning requirements. (Facts 28 and 29, R. 55, 313-314)

(11) Plaintiffs sent a letter dated October 10, 1989, telling the defendant the plaintiffs intended to install a fence along the common deed boundary. (letter, R. 113) On September 27, 1990, plaintiffs filed suit to quiet title to the disputed property. (Fact 24, R. 613)

SUMMARY OF THE ARGUMENT

In the current case prima facie evidence shows there was not mutual acquiescence in the fence as the common deed boundary for the required period of time. Given this fact, plaintiffs cite a case in point and other authority to show the District Court's judgment of boundary by acquiescence should be overturned.

ARGUMENT

I. THE LOWER COURT ERRED IN GRANTING THE DEFENDANT THE DISPUTED PROPERTY UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE BECAUSE THERE IS PRIMA FACIE EVIDENCE THERE WAS NOT MUTUAL ACQUIESCENCE IN THE FENCE AS THE DEED BOUNDARY FOR THE REQUIRED PERIOD OF TIME.

The plaintiffs' 1969 survey put them on notice the fence is not on the deed boundary from the time they purchased their property, 13 years after the fence was installed. At the time the defendant purchased her property in 1978, she received a survey that shows the fence is not on the deed boundary. The Court has ruled that such knowledge precludes mutual acquiescence in an artificial boundary. In Wood v. Myrup, 681 P.2d 1255 (Utah 1984), a case in point, plaintiffs Critchley believed the fence was on the boundary until plaintiffs Critchley had a survey made in 1959, eleven years after they purchased their property. Plaintiffs Critchley did not inform defendants Myrup of Critchley's survey nor did plaintiffs Wood and Critchley use their properties on the other side of the fence; there was no dispute until plaintiffs Wood and Critchley filed suit for quiet title and trespassing in September 1980, twenty-one years after the Critchleys' 1959 survey. In overturning the lower courts ruling of boundary by acquiescence, the Supreme Court ruled:

Contrary to the rule originally administered by the courts of equity, our statutory action to quiet title does not require that a plaintiff allege and prove his possession of the disputed property. *Id.* at 1257.

... while there was "acquiescence in the [fence] line as the boundary," id., for 11 years, that acquiescence cannot be inferred beyond 1959, when plaintiffs Critchley received a survey and knew that their legal line was some feet south of the fence. The requirement of acquiescence "for a long period of years," id., is not satisfied by 11 years. As we have noted, "[O]nly under unusual circumstances would a lesser period [than 20 years] be deemed sufficient." Id. at 1258

In Wright v. Clissold, 521 P.2d 1224 (Utah 1974), the Court established that mutual belief that a fence is on the deed boundary is a requirement for mutual acquiescence in a fence as the boundary. The Court discounted the need for affirmative action to negate mutual acquiescence. In its decision the Court said:

In the instant case, defendants [acquiescence claimants] urge that the failure of plaintiffs and their predecessors in interest to take affirmative action concerning the property north of the fence constitutes mutual acquiescence in the fence as the boundary, regardless of any actual knowledge by the parties that the fence was not the boundary. Id. at 1226-1227

In refuting this contention, the Court cites Fuoco v. Williams:

In order to establish a boundary by acquiescence; it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as boundary line. Wright v. Clissold 521 P.2d at 1227 (Utah 1974) and cited from Fuoco v. Williams 18 Utah 2d at 286, 421 P.2d at 947 (1966)

In the current case plaintiffs have known the fence is not on the deed boundary from the time they purchased their property in 1969 and received their survey, thirteen (13) years after the fence was installed.

In the current case the metes and bounds descriptions in both parties' warranty deeds provide adequate information to allow both owners to locate the common deed boundary on the ground. The boundary in question is described as being 100 feet from the front of the defendant's lot--a flat, open area. This description is given in all of the warranty deeds on both pieces of property; none of the warranty deeds reference the fence as the boundary. In addition to this information being in the warranty deeds, the defendant's father and previous occupant of her property, testified repeatedly that he knew he purchased only 100 feet of north-south dimension. (Tingey deposition, R. 124, 125, 135) The Utah Supreme Court has ruled that this kind of knowledge prevents mutual acquiescence in an artificial boundary. In Low v. Bonacci, 788 P.2d 512 (Utah 1990), a case that followed Staker v. Ainsworth, 785 P.2d 417 (Utah 1990) the Court denied boundary by acquiescence. In listing factors that showed mutual acquiescence was lacking the Court said:

Bonacci [the acquiescence claimant] was placed on notice of the existing boundary by the prior condemnation action, as well as by the metes and bounds property description contained in the warranty deed from his predecessor in interest which was recorded at Bonacci's request. [emphasis added] Id. at 513.

In the current case the defendant received both a warranty deed and a survey from her predecessor in interest to put her on notice of the deed boundary with reference to the fence.

II. THE DEFENDANT CANNOT USE HER PREDECESSORS' PERIODS OF OWNERSHIP AND OCCUPANCY TO SATISFY THE REQUIRED PERIOD OF MUTUAL ACQUIESCENCE BECAUSE HER PREDECESSORS DID NOT CONVEY THE DISPUTED PROPERTY TO THEIR GRANTEEES EVEN THOUGH THE DEFENDANT'S IMMEDIATE PREDECESSOR IN INTEREST HAD A SURVEY THAT SHOWED HE HAD BEEN USING THE DISPUTED PROPERTY.

When the defendant purchased her property in 1978, the defendant's predecessor in interest ordered, received, and gave to the defendant a survey that shows her predecessor had been using the disputed property. (Fact 19, R. 613) In fact the survey shows that her predecessor in interest knew he was using property in excess of his legal description before he ordered this survey because he had to specifically request the second description on the survey, "Description of Property to the Use Lines." (survey, R. 194) Having this information, the defendant's predecessor in interest did not convey the disputed property to the defendant. In other words, this is prima facie evidence he did not regard the fence line as the boundary, but instead relied on the metes and bounds description in his legal description.

In Brown v. Peterson Development Co., 622 P.2d 1175 (Utah 1980), the acquiescence claimants had notice of the true lot boundaries before buying and closing their lot purchases. If they had not obtained quitclaim deeds for the disputed property adjacent to the property in their legal descriptions, their claim

to the disputed property would not have been upheld. The Court ruled:

The fact that the plaintiff lot buyers had notice of the actual lot boundaries before buying and closing their lot purchases would have been fatal to their action if they had not received a conveyance of the legal title to the disputed strip of land by means of quitclaim deeds from the former owners of it. The later quitclaim deeds passed the legal title to them. Id. at 1178.

In the current case the defendant received a survey to put her on notice of her actual lot boundaries. She did not obtain a conveyance of the disputed property.

III. SUMMARY JUDGMENT FOR THE DEFENDANT WAS INAPPROPRIATE BECAUSE THE LOWER COURT'S FINDINGS WERE DISPUTED WITH COMPETENT EVIDENCE OR WERE NOT SUPPORTED BY REQUIRED EVIDENCE. ALSO, THE CONCLUSION OF LAW IS INCONSISTENT WITH THE UNDISPUTED FINDING.

The undisputed finding that is inconsistent with the conclusion of law is that the plaintiffs have a 1969 survey that agrees with the defendant's 1978 survey in showing the fence is about twelve feet from the common deed boundary. Knowledge the fence is not on the deed boundary prevents acquiescence in the fence as the boundary.

The remaining findings were disputed with conflicting testimony as well as with documents and with presumptive evidence. See Exhibit B, "Ruling on the Motions for Summary Judgment," which contains the lower court's findings and

conclusions. See Exhibit C, "Plaintiffs' Motion to Amend Findings 9-25-91", to which references to the record have been added to substantiate the conflicting evidence. These references to the record do not appear in the copy that was filed in the District Court and attached to the Docketing Statement. Summary judgment is not appropriate if there is a genuine issue as to a material fact. "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. Procedures 56(c).

The alleged "1953 survey" of Milton C. Green's is not admissible evidence because it has never been produced even though the plaintiffs made a formal request for its production. "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Utah R. Civ. Procedures 56(e). However, even if the defendant can produce this "survey", Green's testimony in his deposition for the defense indicates this "survey" would not support mutual acquiescence in the fence as the boundary. Milton C. Green testified that this alleged "survey" shows the fence is not on the "survey" line. (Green's deposition, R. 773-775)

IV. OPPOSING COUNSEL AND/OR THE DEFENDANT SHOULD BE MADE TO PAY THE PLAINTIFFS' COSTS OF THIS SUIT. OPPOSING COUNSEL

HAS INFLATED THE COST OF THIS SUIT BY VIOLATING RULE 3.3(a)(1) OF RULES OF PROFESSIONAL CONDUCT FROM THE UTAH CODE OF JUDICIAL ADMINISTRATION, CHAPTER 13. THE DEFENDANT HAS POSSESSED A SURVEY THAT SHOWS THE FENCE IS NOT ON THE COMMON DEED BOUNDARY SINCE 1978, BUT SHE HAS TAKEN NO ACTION TO ASSUME THE RESPONSIBILITIES OF OWNERSHIP OF THE DISPUTED PROPERTY OR TO RELINQUISH CONTROL OVER IT.

The defendant's pleadings are replete with examples of opposing counsel's violation of Professional Rule of Conduct 3.3(a)(1). These violations are noted throughout the plaintiffs' pleadings. "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Utah Code of Judicial Administration, Chapter 13, Rules of Professional Conduct, Rule 3.3(a)(1).

The defendant claims she owns the plaintiffs' property, but she has consistently refused to take action to assume the responsibilities of ownership. The defendant failed to file suit for boundary by acquiescence or to settle the boundary discrepancy in 1978 at the time she purchased her property and received her survey that reveals the fence is not on the deed boundary. Also, prior to this suit defendant failed to file suit in 1989 after her attorney telephoned such intent to an attorney the plaintiffs had consulted about this matter. (letter, R. 203) Again, prior to this suit defendant failed to file suit in 1989 after the plaintiffs and two other adjacent landowners rejected her proposed boundary agreement making the fence lines the

boundaries. (boundary agreements, R. 115-117) Also in 1989, prior to this suit the defendant threatened to sue the plaintiffs for "serious damages" if they installed a fence along the common deed boundary. (letter, R. 204B)

CONCLUSION

In the current case plaintiffs have cited prima facie evidence to show there was not mutual acquiescence in the fence as the common deed boundary. They have cited a case in point and other authority to show that boundary by acquiescence is inappropriate in light of the evidence.

THEREFORE, plaintiffs ask the Utah Supreme Court:

(1) to reverse the lower court's ruling of boundary by acquiescence;

(2) to grant plaintiffs quiet title to the disputed property;

(3) to award the plaintiffs compensation for defendant's use of their property from February 21, 1978, the date of the defendant's survey;

(4) to award plaintiffs their legal costs; and

(5) to initiate disciplinary action against attorneys for the respondent for violating rules of professional conduct.

Respectfully submitted,

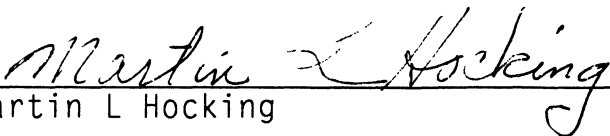
Martin L. Hocking
Martin L. Hocking, Plaintiff and Appellant, pro se

Judith C. Hocking
Judith C. Hocking, Plaintiff and Appellant, pro se

CERTIFICATE OF SERVICE

I hereby certify that I mailed four (4) true and correct copies of the foregoing BRIEF OF APPELLANTS this 15 day of January 1991, via United States Mail with postage prepaid thereon, addressed to:

Michael T. Roberts
CAMPBELL, MAACK, & SESSIONS
One Utah Center
Thirteenth Floor
201 South Main
Salt Lake City, Utah 84111



Martin L Hocking

Exhibit A

HOCKING V. DE LA MELENA

SURVEYS, FENCES, AND WARRANTY DEED HISTORIES

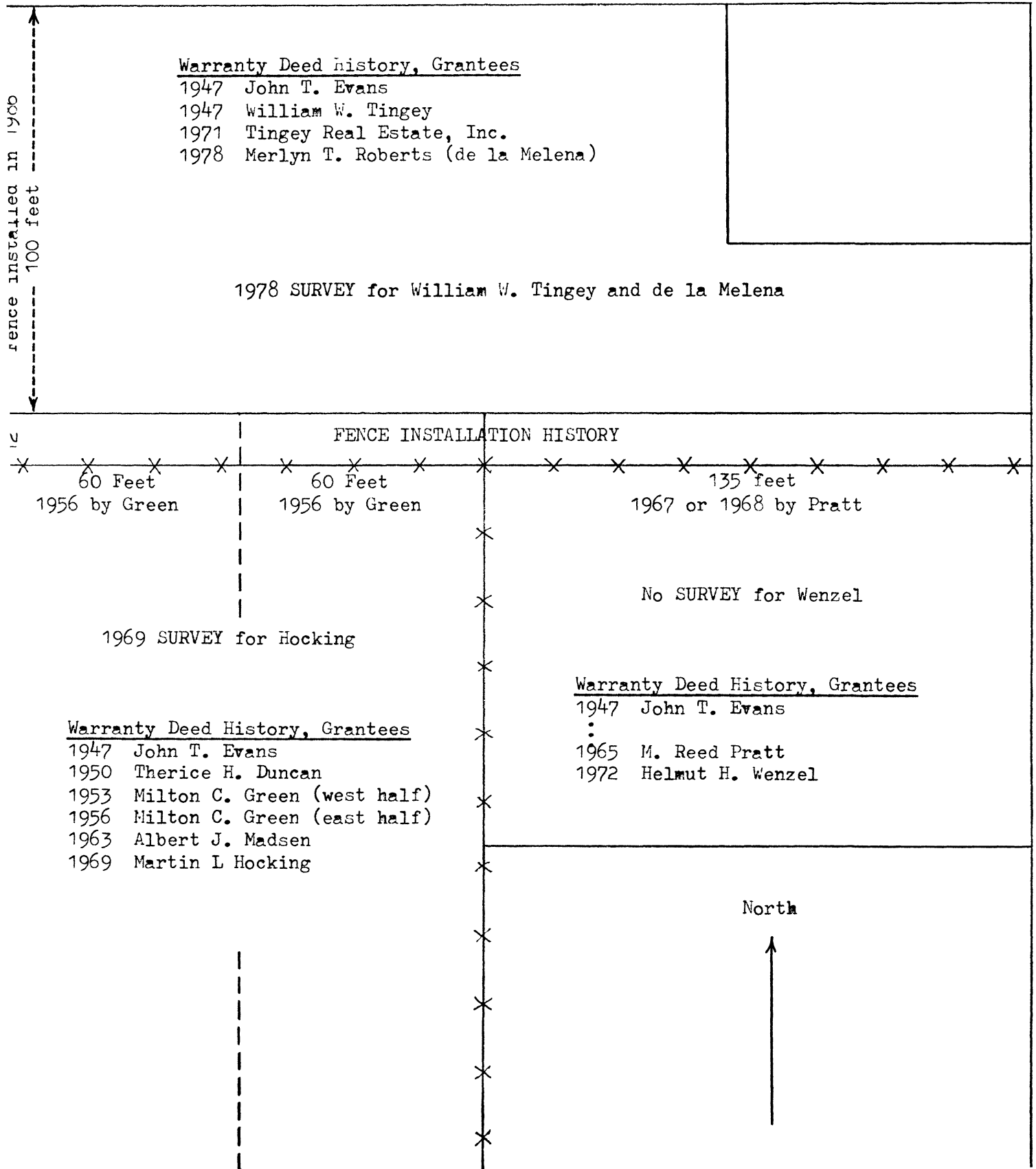


Exhibit B

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE
COUNTY OF DAVIS, STATE OF UTAH

MARTIN L. HOCKING, et al.,)
 Plaintiffs,) RULING ON MOTIONS
 vs.) FOR SUMMARY JUDGMENT
MERLYN TINGEY ROBERTS, et al.,) Civil No. 900748579
 Defendants.)

Both the plaintiff and defendant filed motions for summary judgment. The motions were heard on September 3, 1991, with the plaintiff appearing pro se and the defendant represented by Michael T. Roberts. After oral argument the Court took the motions under advisement.

The defendant's motion for summary judgment is granted. There is no genuine issue of material fact.

Milton C. Green was a previous owner of the Hockings' property, and, in 1953, pursuant to a survey, erected a chain-link fence that still serves as a boundary between what is now the Hocking and de la Melena lots. William Tingey owned de la Melena's property from 1947 to 1978. Tingey cultivated, irrigated and farmed the de la Melena lot and acquiesced in the 1953 chain-link fence as a boundary line between the two parcels. Milton C. Green and William Tingey agreed that the fence would constitute a boundary between their property. Both plaintiffs and defendants obtained surveys over the years and each learned at some point in time that the fence line and the legal title line was 12 feet off. The discrepancy was not discussed until October 10, 1989, when the plaintiffs notified the defendants they were claiming the disputed 12 feet.

The memorandum of the parties clearly set out the

controlling case law that would permit this Court to rule in the defendant's favor, especially in a recent Utah Supreme Court ruling, *Staker v. Ainsworth*, 785P.2d 417, 420 (Utah 1990). In *Staker*, the Court indicated that a fence relied upon as a boundary is superior over the boundary of record so long as the elements of boundary by acquiescence are in place. *Id.* The elements of boundary by acquiescence are: (1) occupation up to a visible line marked by monuments, fences, or building; (2) mutual acquiescence in the line as a boundary; (3) for a long period of time (20 years as the minimum, generally); and (4) by adjoining landowners. *Id.* (citing *Goodman v. Wilkinson*, 629 P.2d 447, 448 (Utah 1981)). Applying the boundary by acquiescence elements to the instant case, we find that from 1953, a fence erected by the plaintiffs' predecessors in interest was relied upon by plaintiffs' predecessors in interest, the plaintiffs, the defendants' predecessor in interest, and the defendant up until 1989. The adjoining landowners, Roberts' father and Green to begin with and eventually the Hockings and Roberts, relied on the fence to demarcate their property for more than 35 years. An affidavit by Green indicates that an earlier fence separated the property at the same spot as the one installed by Green in 1953. Thus, defendants as a matter of law are entitled to the land separated by the fenced boundary rather than the titles of record according to the common law doctrine of boundary by acquiescence.

The plaintiffs do not agree with the Court's summary of facts or law. Plaintiffs maintain that earlier surveys that they (1969) and the defendant (1978) had ordered somehow indicate that there was no mutual acquiescence. However, plaintiffs provide no proof that such surveys raised the boundary issue when drawn up. It was not until 1989 that the plaintiffs realized a fence line in effect for more than 30 years was off by 12 feet. The plaintiffs simply have no legal

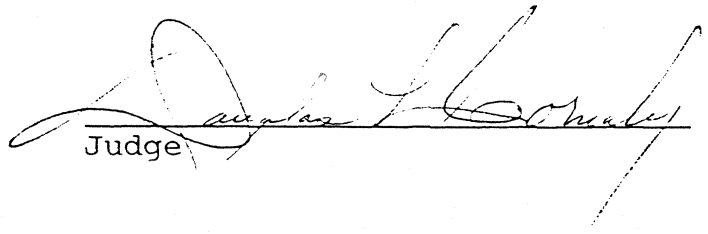
or factual ground on which to premise any motion of summary judgment. Accordingly, summary judgment in favor of the defendant seems required according to Utah law.

The plaintiffs' motion seeking reimbursement for attorney's and paralegals fees is denied. If the plaintiffs feel they have a cause of action against their former attorney the remedy is to file an action against him.

The defendants are directed to draw a formal order based upon this ruling.

Dated September 25, 1991.

BY THE COURT:


Judge

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to:

Martin L. Hocking
Judith C. Hocking
349 East Center Street
Centerville, UT 84014

Michael T. Roberts
First Interstate Plaza
170 South Main Street
SLC, UT 84101-1605

Dated this 25th day of September 1991.



Deputy Clerk

Exhibit C

MARTIN L. HOCKING, and
JUDITH C. HOCKING, pro se
349 East Center Street
P.O. Box 476
Centerville, Utah 84014
Telephone: (801) 292-1885

IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

MARTIN L. HOCKING, and
JUDITH C. HOCKING,

Plaintiffs,

vs.

MERLYN TINGEY ROBERTS, n/k/a
MERLYN TINGEY de la MELENA

Defendant.

PLAINTIFFS' MOTION TO AMEND
FINDINGS 9-25-91

Civil No. 900748579

Judge Douglas Cornaby

Pursuant to Rule 52(b) of Utah R. Civ. P., Plaintiffs move the Court to amend the findings by Judge Cornaby in his "Ruling on Motions for Summary Judgment" dated September 25, 1991, to show the findings were controverted by competent evidence and/or the findings were not supported by admissible evidence. Plaintiffs move the Court to amend the following findings to comport with the evidence presented in the pleadings:

1. Finding: Milton C. Green, in 1953, pursuant to a survey, erected a chain-link fence that still serves as a boundary between what is now the Hocking and de la Melena lots.

Amendment: In Milton C. Green's deposition dated June 11, 1991, he testified, "Sometime in 1953 or 1954", he erected the chain link fence. (R. 773, lines 8-12, Green deposition) However, his warranty deeds show he did not purchase the east half of the Plaintiffs' lot until 1956, three years after he purchased the west half. (R. 760, 761: 1953 and 1956 warranty deeds) The concrete base of the fence has no seam, proving the concrete base was poured at one time. Mr. Therice Duncan, Green's grantor, signed a notarized statement for the Plaintiffs stating he did not install the concrete fence base. (R. 764, statement 4) Therefore, the presumptive evidence is that Green installed the fence in 1956 or later.

Did Green install the fence pursuant to a survey? In Green's deposition when he was asked if he took a "survey prior to building ... this fence line", he stated, "Yes. Therice Duncan had to furnish me a survey for the title company [Security Title Company in Farmington, Utah]. ... Bill Tingey [and I] -- looked it over, and the survey line was within reasonable distance of the old fence there, you know, a foot or two or whatever. I can't remember exactly." (R. 773-775, Green deposition) Also, he testified this same survey was used by Security Title Company to issue title insurance to his grantee in 1963. (R. 779-780, Green deposition) For Green to say he installed the fence pursuant to a survey, contradicts his next statement that he and Tingey, the adjacent land owner, noted a difference between the fence line and the survey line. Also, Green

states he needed the survey for title insurance, and yet his 1953 warranty deed shows its recording was requested by Green in 1959, six years after he purchased the first half of the Plaintiffs' property. (R. 760, 1953 warranty deed) Security Title Company has no record of Green's 1953 or 1956 purchases of the Plaintiffs' property, which is confirmed by the recording information on both of his deeds. Security Title Company does have a record of Green's sale in 1963. Security Title Company's file of the 1963 transaction shows a survey was not needed, and therefore the file contains no survey. The defense has not been able or willing to produce Green's survey even though the Plaintiffs requested it in their "Request for Production of Documents" dated and served August 14, 1991. (R. 896-897, item 2) Green's predecessor in interest gave the plaintiffs a notarized statement that he did not give Green a survey because he could not get one due to unplatted east-west property. (R. 763, statements 2, 3) The defense and Green ask the Court to believe that in 1953, a surveyor erroneously located a boundary described in Green's warranty deed as being 100 feet south from the front of Tingey's flat, open lot; and that the surveyor made a twelve-foot error. There is conflicting testimony, in addition to documented and presumptive evidence this survey does not exist.

2. Finding: William Tingey owned de la Melena's property from 1947 to 1978.

Amendment: William Tingey owned de la Melena's property from 1947 to 1971. In 1971 Tingey transferred the defendant's property and twelve other properties to a family owned corporation, Tingey Real Estate, Incorporated. (R. 86-90, 1971 warranty deed) Therefore, there could not be a twenty-year period of acquiescence in the fence line by the defendant's predecessors in interest, because there was not a twenty-year period of ownership by Tingey after the fence was installed in 1956 or later. Tingey testified he used the defendant's property and the adjoining strip of the plaintiffs' property to cultivate a commercial row crop from the time he purchased this property in 1947 until Tingey Real Estate, Inc. transferred title to the defendant in 1978, but Tingey did not own this property from 1971 through 1978. (R. 91, 1978 warranty deed) A corporation is a separate legal entity. The transfer to and from the corporation is via recorded warranty deeds.

3. Finding: Milton C. Green and William Tingey agreed that the fence would constitute a boundary between their property.

Amendment: Green's statement that he and Tingey discussed the placement of the fence line and agreed that it would constitute the boundary between their lots, is controverted by Tingey's deposition. Tingey is the defendant's father. In his deposition dated December 14, 1990, when he was asked if he had any idea of where the fence was placed in relationship to his boundary, he said, "I did not. I was

never asked to participate with the fence, financially or any other way, I never was." (R. 129, lines 6-9, Tingey deposition)

4. Finding: An affidavit by Green indicates that an earlier fence separated the property at the same spot as the one installed by Green in 1953.

Amendment: The existence of an old fence was contradicted by the deposition of William W. Tingey, the defendant's father, and by a notarized statement by Therice Duncan, Green's grantor. (R. 129-130, Tingey deposition; R. 763, statement 1, Duncan statements) Also, Tingey testified that before he purchased his lot in 1947, the whole east half of the block was owned by Evans. (R. 129, lines 12-13, Tingey deposition) The warranty deeds show that William Evans purchased the east half of the block in 1932 from a common grantor. So even if there was an "old fence", it would have been considered a barrier, not a boundary, prior to Tingey's 1947 purchase. Tingey's 1947 warranty deed does not reference an old fence line as the boundary. (R. 85, 1947 warranty deed) Conclusive evidence the "old fence" could not have been considered a boundary is in Green's deposition. He states that he and Tingey looked over the fence and noted that it was not on his survey line. (R. 773-775, Green deposition) An oral agreement is not binding if it is known that the fence is not on the survey line. Also, Green noted that the "old fence" was in disrepair, another factor which shows it could not have been considered a boundary.

5. Finding: It was not until 1989 that the Plaintiffs realized a fence line in effect for more than 30 years was off by 12 feet.

Amendment: Plaintiffs stated that at the time they purchased their property in 1969, they consulted with two real estate professionals about the disputed property and were given erroneous advice that comports with Judge Cornaby's ruling. Plaintiffs also stated they obtained a plat from the Davis County Recorder's Office at that time, which they presented as an exhibit. (R. 737-738, items 1, 2; R. 836-840, supporting exhibits) Judge Cornaby rejects these statements, but accepts statements by Milton C. Green that are controverted by testimony, documents, and/or presumptive evidence.

DATED this 30th day of September, 1991.

Martin L Hocking, Plaintiff, pro se

Judith C. Hocking, Plaintiff, pro se