

1991

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

Utah Supreme Court

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Martin L. Hocking; Judith C. Hocking; Appellants, pro se .

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CKET NO.

910505

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Priority No. 11

CLERK SUPREME COURT
UTAH

IN THE UTAH SUPREME COURT

MARTIN L. HOCKING, and JUDITH	:	
C. HOCKING,	:	
	:	
Plaintiffs and	:	
Appellants,	:	
	:	CASE NO. 91505
v.	:	
	:	Priority No. 11
MERLYN TINGEY ROBERTS, n/k/a	:	
MERLYN TINGEY de la MELENA,	:	
	:	
Defendant and	:	
Appellee.	:	

BRIEF OF RESPONDENT

On Appeal From The Judgment of the
Second Judicial District Court
in and for Davis County, State of Utah
Honorable Douglas L. Cornaby, District Judge

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	:	
Defendant and	:	
Appellee.	:	

STATEMENT OF JURISDICTION

Jurisdiction over this case is vested in this Court pursuant to Utah Rules of Appellate Procedure Rule 3 (1991).

STATEMENT OF ISSUES

1. Whether the trial court erred as a matter of law in ruling that appellee Merlyn de la Melena was entitled to summary judgment determining the long-standing fence line the legal boundary under the doctrine of boundary by acquiescence.

2. Whether the trial court erred in finding that no genuine issues of material fact exist to preclude summary judgment entered against appellants.

3. Whether appellants are entitled to costs.

STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah State Coalition of Senior

Citizens v. Utah Power & Light, 776 P.2d 632, 634 (Utah 1989); Utah R. Civ. P. 56(c). The burden of establishing the non-existence of a genuine issue of material fact is, of course, on the moving party. See e.g., Celotex Corp. v. Catrett, 477 U.S. 317 (1986). However, once the moving party has met this initial burden, the burden shifts to the non-moving party, to designate "specific facts showing there is a genuine issue for trial." Celotex, 477 U.S. at 324. It is essential to note that the non-moving party in a summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).¹

STATEMENT OF THE CASE

On or about September 27, 1990, appellants Martin L. Hocking and Judith C. Hocking (hereinafter referred to as "Hockings" or "appellants") through their counsel, Hollis S. Hunt, filed a complaint in the Second Judicial District Court against

¹The Utah Court of Appeals has expressly approved of and adopted the United States Supreme Court's approach to summary judgment set out in Celotex. See, e.g., Reeves v. Gigy Pharmaceutical, Inc., 764 P.2d 636, 642 (Utah Ct. App. 1988); Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 264 (Utah Ct. App. 1987). Moreover, when the Utah rules are modeled after the federal rules, Utah courts often look to federal decisional law to assist in application of procedural devices. See, e.g., State v. Kay, 717 P.2d 1294, 1299 (Utah 1986); Nelson v. Stoker, 669 P.2d 390, 392-93 (Utah 1983). Because Utah R. Civ. P. 56(c) is modeled after and virtually identical to Fed. R. Civ. P. 56, this Court may follow recent United States Supreme Court decisions interpreting summary judgment standards. Utah case law has long interpreted the shifting of burdens between the movant and nonmovant to be the same procedural vehicle described by the Supreme Court. See, e.g., Dupler v. Yates, 351 P.2d 624 (Utah 1960).

appellee Merlyn Tingey de la Melena (hereinafter referred to as "de la Melena" or "appellee") to quiet title on a 12' x 120' strip of property. (See R. 1-10.) On May 6, 1991, appellants filed a notice of request for withdrawal of their counsel, Hollis S. Hunt, and entered a notice of appearance as pro se plaintiffs, filed a motion to amend and supplement the complaint, and filed a motion for summary judgment against de la Melena. (See R. 34-237.) De la Melena filed a cross-motion for summary judgment and a hearing was held before the trial court on September 3, 1991. (See R. 606-706.) The trial court issued a ruling and an order granting de la Melena's motion for summary judgment. (See Exhibit "1" and R. 913.)

STATEMENT OF FACTS

The Hockings and de la Melena are adjoining landowners in Centerville, Utah. (The party's respective lots are hereinafter referred to as the "Hocking lot" and the "de la Melena lot"; see drawing of property and fence configurations in case, attached as Exhibit "2".) In 1947, William Tingey and Sylvia Tingey, who are the parents of de la Melena, purchased the de la Melena lot from William Evans. William Tingey understood that they had purchased a lot that consisted of 100 feet from north to south. Tingey cleared the rocks and dead trees off the lot and began farming over to what he thought was the boundary line, where the existing fence stands between the de la Melena and Hocking lots. He assumed that someone had "stepped off" the 100 feet to the now existing fence line, but he does not know how many feet he farmed. (See William Tingey depo. at 6-7, 11-12 and 19-21, attached as Exhibit "3".)

From 1947 to 1978, Tingey plowed, farmed and irrigated the entire de la Melena lot, up to the point where the existing fence line is situated. (See Tingey depo. at 11 and 19-20, Exhibit "3".)

On or about October 24, 1953, Milton C. Green purchased the Hocking lot from Therice H. Duncan and Oretta M. Duncan. (R. 652.) In 1953 or 1954, shortly after moving into the Hocking home, Green erected the now existing chain-link fence pursuant to a survey. (See Milton C. Green depo. at 7-9, attached as Exhibit "4".) Prior to the chain-link fence that Green built in 1953, there existed an old post and wire fence that, according to Green, had been in place for at least fifty years. (See Green depo. at 7-8, Exhibit "4".)

Green testified that he and Tingey discussed the placement of the fence line and agreed that it would constitute the boundary between the lots. (See Green depo. at 8-9, Exhibit "4" and R. 663-664.) After the fence was built in 1953, until 1978, twenty-five years later, Tingey continued to plow, plant crops, irrigate and farm right up to the fence. (See Tingey depo. at 13-14, Exhibit "3" and Green depo. at 12, Exhibit "4".) From 1953 to 1963, the period Green owned the Hocking lot, Green was never aware of any discrepancy between the fence line and the legal description of the lots. William Tingey, nor anyone else, ever discussed a discrepancy with Green during these ten years. (See Green depo at 10-13, Exhibit "4" and R. 663-664.)

On or about February 18, 1963, Green sold the Hocking lot to Albert J. Madsen and Jean F. Madsen. (R. 666.) Nearly six years later, on January 2, 1969, Martin and Judith Hocking had the Hocking lot surveyed prior to purchasing the lot from the Madsens. The survey indicated a discrepancy of about 12 feet between the

fence line and the record title boundary line. (R. 668.) Notwithstanding the discrepancy in the survey, on March 19, 1969, Martin and Judith Hocking purchased the Hocking lot from the Madsens. (R. 670.) The Hockings never notified the Tingeys regarding the 1969 survey or concerning a discrepancy in the fence line. (R. 680.) Tingey did not know of a discrepancy in the fence until the Hockings brought the matter up with de la Melena sometime in 1989. (See Tingey depo. at 12-13, Exhibit "3".)

On or about February 14, 1978, the Tingeys conveyed to de la Melena the de la Melena lot through a warranty deed. (R. 692.) De la Melena was not aware of a discrepancy in the fence line when she purchased the lot. (See de la Melena depo. at 20, attached as Exhibit "5".) The Tingeys ordered a survey on February 21, 1978 for de la Melena so that she could use the west portion of the lot as collateral for her house. The survey showed that the existing fence line encroached on the Hockings' deeded property approximately 12 feet. (See Tingey depo. at 13-14, Exhibit "3"; de la Melena depo. at 11-12, Exhibit "5"; and R. 694.)² De la Melena testified that she may have looked at the survey when she received it in 1978, but did not recognize the discrepancy in the fence line. (See de la Melena depo. at 12, Exhibit "5".)

Shortly after the de la Melena lot was conveyed to de la Melena and her now deceased husband, they built a home and landscaped the property. On the disputed strip of property, they planted raspberries, installed a small wire fence to support the

²The survey also shows that a fence running east and west on the de la Melena lot and a garage on the Clarence Sanders' property encroaches approximately nine feet into the de la Melena lot. (See Exhibit "2" and R. 356.)

berries, planted fruit-bearing bushes, fruit trees and a lawn. They also installed a sprinkling system on the disputed strip. (See de la Melena depo. at 10 and 16-18, Exhibit "5".)

Neither the Hockings nor any previous owners of the Hocking lot ever cultivated, irrigated, farmed, manicured or improved in any way the disputed strip of property. (R. 674-675.) Martin Hocking has annually repaired the chain-link fence for mule deer damage. The Hockings also use the fence as a trellis and regularly trim the growth on the fence. In 1978, Martin Hocking repaired the damage to the fence caused by the builders of de la Melena's home. In 1989, the Hockings extended the height of the fence. (R. 676-677.)

After negotiations had failed between the parties for the Hockings to purchase the vacant west portion of the de la Melena lot, the Hockings on October 10, 1989, thirty-six years after the chain-link fence was installed, notified de la Melena that they were revoking what they described as their "tacit license" allowing her to use the disputed strip of property. (R. 696.) On September 27, 1990, the Hockings filed suit against de la Melena to quiet title to the disputed strip of property. (R. 1-10.)

SUMMARY OF ARGUMENT

The Hockings' contention that the warranty deeds, the 1969 survey received by the Hockings, and the 1978 survey ordered by Tingey constitutes prima facie evidence that there was no mutual acquiescence in the long-standing chain-link fence as a boundary reflects a misunderstanding of the boundary by acquiescence doctrine. There is no authority whatsoever for the Hockings' position

that notice of a "true boundary line" in the fixing of a fence line is prima facie evidence of a lack of mutual acquiescence.

Moreover, the Utah Supreme Court in Staker v. Ainsworth, 785 P.2d 417 (Utah 1990) completely eradicated uncertainty as a factor from the boundary by acquiescence doctrine. Whether a boundary was uncertain or in doubt at the time that it was acquiesced in, or whether the boundary was known and certain, is irrelevant to the doctrine of boundary by acquiescence. Uncertainty is now only a factor in the boundary by agreement doctrine. Staker's rejection of the confusing intermingling of these doctrines accords with well reasoned authority that refute the notion that certainty of the proper line precludes mutual acquiescence in boundary by acquiescence cases. Moreover, a presumption, uncontroverted by a showing of certainty, that any dispute over the boundary line has been reconciled promotes the boundary by acquiescence doctrine's policy to preclude litigious boundary disagreements that bear ill will towards neighbors and clog the court dockets.

Even if uncertainty were still a factor in the boundary by acquiescence doctrine, the Hockings fail to designate specific genuine issues of material fact to controvert the presumption of acquiescence in this case. The undisputed material facts in this case establish as a matter of law that there was mutual acquiescence in the fence line for a sufficient period of time.

Finally, equitable principles support summary judgment for de la Melena. For at least thirty-six years, the owners of the Hocking and de la Melena lots have relied on the fence as the true and proper boundary. It would be grossly unfair at this point and time to consider the fence as anything but a fixed boundary line.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DETERMINING THAT THERE WAS MUTUAL ACQUIESCENCE IN THE LONG-STANDING FENCE LINE AS A BOUNDARY.

The Hockings erroneously argue that the warranty deeds, the 1969 survey received by the Hockings, and the 1978 survey ordered by Tingey constitute "prima facie evidence" that there was no mutual acquiescence in the long-standing fence line as a boundary. The Hockings are flatly wrong. The warranty deeds and surveys in this case do not constitute "prima facie" evidence of a lack of mutual acquiescence. Nor does such evidence controvert the trial court's finding that as a matter of law there was mutual acquiescence in the fence as a boundary.

In Staker v. Ainsworth, 785 P.2d 417 (Utah 1990), the Supreme Court affirmed a trial court's summary judgment employing the doctrine of boundary by acquiescence to establish fence lines as property boundary lines, rather than those established by record title. The court reaffirmed that the doctrine by acquiescence includes only four factors:

1. Occupation up to a visible line marked by monuments, fences, or buildings;
2. Mutual acquiescence in the line as a boundary;
3. For a long period of time; and
4. By adjoining landowners.

Id. at 420.

The trial court in this case held that based on the evidence proffered by the parties it was uncontroverted that these four factors were met by de la Melena. On appeal, the Hockings concede

that each factor was met by de la Melena, except for mutual acquiescence.

A. Because a Sufficient Period of Time had Already Run for Acquiescence, Evidence of the 1978 Survey is Academic.

In arguments I-III, the Hockings contend that mutual acquiescence ceased in 1978, upon the taking of a survey ordered by William Tingey. The Hockings are mistaken. Acquiescence continued from the erection of the chain-link fence in 1953 until 1989, when the Hockings first notified de la Melena of a boundary dispute. However, because twenty-five years from the erection of the chain-link fence in 1953 had passed before Tingey ordered the 1978 survey, it is unnecessary for this Court to determine whether mutual acquiescence ceased upon the taking of the 1978 survey. Staker held that twenty-years was a sufficient period of time to establish the third element in boundary by acquiescence, although a lesser prescriptive period would be appropriate under unusual circumstances. Id. at 420. Even if the fence were installed in 1956, as the Hockings allege in their statement of facts, twenty-two years would have passed before the 1978 survey, which is still a sufficient time to establish boundary by acquiescence. Whatever significance the Hockings attach to the 1978 survey and their allegation the fence was erected in 1956, is irrelevant to the application of the boundary by acquiescence doctrine in this case.

B. Staker v. Ainsworth Completely Eradicated Factor of Uncertainty From Boundary by Acquiescence Doctrine.

The Hockings' remaining argument that the warranty deeds and their 1969 survey constitute prima facie evidence of a lack of

mutual acquiescence misconstrues the law. There is no authority that certainty or knowledge in a boundary line constitutes prima facie evidence of a lack of mutual acquiescence. Moreover, it is implicit in Staker v. Ainsworth that uncertainty is no longer a factor in the boundary by acquiescence test.

1. Staker Recognized Clear Distinction Between Doctrines of Boundary by Acquiescence and Boundary by Agreement.

The Hockings' tortured "prima facie" theory is premised on a confusing intermingling of the doctrine of boundary by acquiescence with that of boundary by agreement.³ Holding that there is a clear distinction between these two theories, Staker overturned Halladay v. Cluff, 685 P.2d 500 (Utah 1984), rev'd 785 P.2d 417 (1990), which required that the claimant prove objective uncertainty as to the actual location of the property line.

Halladay's requirement of objective uncertainty was the result of the confusion between the separate doctrines of boundary by agreement and acquiescence. Originally, uncertainty or dispute was required only for boundary by agreement. Halladay, 685 P.2d at 503. In 1928, however, the supreme court in Tripp v. Bagley, 784 Utah 57, 276 P.2d 912 (1928), cited by Halladay as support for its imposition of the objective uncertainty requirement, began to refer to uncertainty or dispute as an essential ingredient for boundary

³Staker noted that boundary by agreement is premised on a contractual theory and requires: "(1) an agreement, (2) between adjoining landowners, (3) settling a boundary that was uncertain or in dispute, and (4) executed by actual location of a boundary line." Id. at 423 n.4 (quoting Backman, The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy, 1986 B.Y.U.L.Rev. 957, 965-82 (emphasis added)).

by acquiescence.⁴ Tripp held the doctrine of boundary by acquiescence to be not applicable because the evidence affirmatively demonstrated that when the boundary fence was erected, the parties knew that it was not on the true line, and further, they could not have believed it to be on the true line since the true line was straight north and south along a section line, and the boundary fence had sharp angle turns in it. Id. As Staker noted, however, Tripp involved a parol agreement and therefore should not have been decided as a boundary by acquiescence case. Id. at 422-23.⁵

Staker did not simply obviate the burden of proving objective uncertainty on the party relying on the boundary by acquiescence doctrine. The court repudiated the out-dated and sterile notion, initially developed in Tripp, and now latched onto by the Hockings, that the absence of uncertainty in fixing the boundary proves there was no acquiescence between the parties. Criticizing the language in Tripp that long served as the basis for recognizing uncertainty as an element of boundary by acquiescence cases, Staker stated:

Cases which followed Tripp seized upon this dicta, which we now deem to be unfortunate in its impact, and intermittently began to refer to a showing of uncertainty or dispute in a boundary by acquiescence context.

⁴In Wood v. Myrup, 681 P.2d 1255, 1258 (Utah 1984), which the Hockings cite as controlling authority in this appeal, the element of uncertainty appears to have served as a basis for the Supreme Court's decision. Wood was authored by Justice Oaks just prior to his opinion in Halladay v. Cluff, and in light of Staker, is no longer controlling authority that certainty in a deed line controverts as a matter of law the presumption of boundary by acquiescence.

⁵Tripp was cited in 12 AmJur.2d Boundaries, § 85 (1964) as an exception to the rule that "[t]he cases approving the doctrine of acquiescence generally do not differentiate between cases where the boundary was uncertain or in doubt at the time that it was acquiesced in and in cases where it was known and certain."

Id. at 422.⁶ Staker makes clear that uncertainty is a factor in boundary by agreement and not of boundary by acquiescence. Uncertainty and dispute are important in boundary by agreement cases to overcome a statute of frauds bar to an oral agreement. Id. at 423. These elements, however, have no relevance whatsoever to a boundary by acquiescence analysis.

Staker's rejection of the intermingling of the doctrine of boundary by acquiescence with the boundary by agreement doctrine accords with courts and commentators who refute the notion that certainty of the original line precludes mutual acquiescence in boundary by acquiescence cases.

Other courts, however, recognizing the doctrine of boundary by agreement as distinct from that of boundary from acquiescence declare that from acquiescence to the statutory period arises as a direct and conclusive inference, not of an agreement, but that the boundary acquiesced in is actually the true boundary, not to be controverted by evidence and unaffected by the existence or non-existence of a dispute or uncertainty concerning the original line.

7 A.L.R. 4th, Fence as Factor in Fixing a Boundary Line, ¶ 2[a] (1981) (emphasis added).

⁶The following language in Tripp was specifically criticized by Staker:

[O]ne of the requisites necessary to the establishment of a boundary line other than the true boundary line between adjoining landowners by oral agreement or acquiescence . . . is that the location of the true boundary sought to be thus established is or has been uncertain or in dispute.

It thus becomes of controlling importance to determine whether two adjacent landowners may establish a boundary line between their lands by oral agreement or by acquiescence for a long period of time, when there is no uncertainty as to the location of the true boundary line. . . .

Staker, 785 P.2d at 422 (quoting Tripp, 74 Utah at 67 & 69, 276 P. at 916 & 917) (citations omitted in first quote) (emphasis included in Staker).

Nor does the fact that the Hockings were privy to a survey in 1969 that revealed a discrepancy between the fence line and the deed line controvert the mutual acquiescence in this case. Staker also expressly discarded the notion rooted in Tripp and articulated in Halladay that a claimant is precluded from showing mutual acquiescence if the claimant knew or had reason to know the true location of the boundary during the period of acquiescence. Staker repudiated the second sentence, as well as the first sentence in the following language in Halladay:

Unless it is shown that during the period of acquiescence there was objectively measurable circumstance in record title or in the reasonably survey information (or other technique by which record title information was located on the grounds) that would have prevented a landowner, as a practical matter, from being reasonably certain about the true location of the boundary. By the same token, a claimant cannot assert boundary by acquiescence if he or his predecessors in title had reason to know the true location of the boundary during the period of acquiescence.

Staker, 785 P.2d 421 (quoting Halladay, 685 P.2d at 505) (emphasis added).⁷ Staker noted that these two sentences mean "there must

⁷Justice Howe in Halladay v. Cluff concurred with the second sentence quoted above on the limited grounds that both parties had access to a survey which indicated that they did own to the fence to which they claimed. Id. at 513. Although he suggested that perhaps a reasonable standard could be used in cases "where the discrepancy was apparent and the acquiescence was blindly indulged in," he warned that "we must not expect too much from the rule since being familiar with the legal description of one's property and locating that description on the land are two entirely different things. That is why surveys are made." Id.

Even if Justice Howe's suggested approach had been followed by Staker, the Hockings still lose on summary judgment. Both parties did not have access to a survey indicating that they did not own to the fence. The Tingeyes were not privy to a survey until 1978, well after the 20 year prescribed period for mutual acquiescence. Moreover, there is no issue of fact that the acquiescence was blindly indulged in. The Tingeyes had no reason to know that the fence was not on a true line. As Justice Howe noted:

The rule would serve well in instances like Tripp v. Bagley, supra, where an old fence line had several angle turns in it

have been a particular form of dispute," a concept that Staker disparages as inconsistent with the boundary by acquiescence doctrine. Id. The fact that the Hockings are not even claimants in this case, compounded with their failure to notify de la Melena and her predecessors in interest of a "boundary problem" the Hockings allegedly knew about in 1969, further compels a rejection of the Hockings' prima facie argument. Adoption of the Hocking position would undermine Staker's well-reasoned analysis and, as developed later in this brief, would be patently unfair.

2. Facts In Staker v. Ainsworth Are Compelling That Notice To Landowners Of A "True Boundary Line" Does Not As A Matter Of Law Controvert Acquiescence In A Fence Line As A Boundary.

Staker concluded there was mutual acquiescence in the fence line as a boundary, despite the undisputed facts before the court that the landowners had notice through surveys that the fence line was not in accordance with the deed line. A survey taken in 1953 or 1956 showed that the true boundary line between the Teeples, predecessors in interest to the Maxfield (non-claimant/appellant) property, and Ainsworth (claimant/appellee) was approximately 80 feet south of the existing fence line. In 1956, notwithstanding this discrepancy, Teeples reconstructed the fence on the same

whereas the true line was straight north and south along the section line; and Madsen v. Clegg, supra, where the boundary fence ran on a straight line, whereas the deed lines of both parties provide angle turns in them. In both cases the landowner had reason to note that the fence was not on a true line.

Id. at 513-14. In this case, not only did Tingey not have access to a survey, the fence line and the true line run parallel and are not interrupted by abrupt turns. Simply put, there is no noticeable discrepancy between the location of the fence line and Tingey's 1947 warranty deed. See Universal Inv. Corp. v. Kingsbury, 26 Utah 2d 35, 484 P.2d 173 (1971). Even if this Court were to follow Justice Howe's recommendation, the Hockings would still fail to prevail against the trial court's summary judgment.

boundary line as the previous fence shortly after the original fence was destroyed in a storm. (See Brief for Appellee Ainsworth at 3, 11, and 19 & Brief for Appellee Staker at 17, attached to record at R. 700-703, 705.) In 1972, Maxfield had a survey taken in connection with his purchase of his property. The survey again revealed the difference of approximately 75 feet between the legal description and the fence line. (See Brief for Appellant Maxfield at 18 & Brief for Appellee Staker at 4, attached to record at R. 708, 710.) In 1979, the Stakers had a survey performed which indicated a discrepancy of about 80 feet between the fence lines and the record title boundary lines on both sides of the property. Staker, 785 P.2d at 419. Finally, in 1981, Ainsworth had his property surveyed and also found a similar discrepancy. Id.

The surveys taken in 1953 or 1956, 1972, 1979 and 1981 serving notice to the landowners that the fence line was not the "true boundary line" were immaterial to the question in Staker of whether there was mutual acquiescence. Despite this abundance of previous survey information available to the landowners, Staker expressly noted that acquiescence ceased only in 1985 when the first claim regarding the dispute was filed. The court held as a matter of law that the longstanding fence line was the boundary between the adjoining landowners. Boundary by acquiescence was established under facts demonstrating that the adjoining landowners acted in a manner consistent with the belief that the fence line was the boundary, irrespective of the various landowners' surveys giving the parties notice that the fence line was not on the deed lines. Id. at 420-21.

3. Presumption Of Acquiescence Uncontroverted By Certainty Of Deed Line Promotes Policy Underlying Boundary By Acquiescence Doctrine.

Finally, a presumption, uncontroverted by a showing of certainty, that any dispute over the boundary line has been reconciled accords with the boundary by acquiescence doctrine's policy to preclude litigious boundary disagreements that bear ill will towards neighbors and clog the court dockets. Staker states:

The doctrine of boundary by acquiescence derives from realization, ancient in our law, that peace and good order of society is [sic] best served by leaving at rest possible disputes over long established boundaries. Its essence is that where there has been any type of a recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement over the boundary has been reconciled in some manner.

Id. at 423 (quoting Baum v. Defa, 525 P.2d 725, 726 (Utah 1974)).

Eliminating the factor of "uncertainty" from the boundary by acquiescence doctrine simplifies the application of the doctrine and is fair. Landowners may rely on recognizable boundary lines in existence for twenty plus years without fear that an undisclosed survey taken by an adjoining landowner will controvert the otherwise mutual acquiescence between the parties. Twenty years is long enough for a party adverse to acquiescence to note their objection to a fence line as the boundary, especially when the parties have expended reliable time and resources in developing their property in reliance on the recognized boundary line.

**II. EVEN IF UNCERTAINTY WERE STILL A FACTOR IN
BOUNDARY BY ACQUIESCENCE ANALYSIS, HOCKINGS FAIL
TO DESIGNATE SPECIFIC GENUINE ISSUES OF MATERIAL
FACT TO CONTROVERT PRESUMPTION OF ACQUIESCENCE.**

As Staker noted, a small line of cases following Tripp, including Wright v. Clissold, 521 P.2d 1224 (Utah 1974), cited to by the Hockings, unfortunately referred to uncertainty in a boundary by acquiescence context. Id. at 422. Wright stated that lack of uncertainty or dispute at the time the fence was erected could be shown as a defense by the party resisting boundary by acquiescence. See also Universal Inv. Corp. v. Kingsbury, 26 Utah 2d 35, 484 P.2d 173 (1971).⁸ These cases held that the burden of proof is upon the person asserting the defense. Once the four elements of boundary by acquiescence are established, the Court is required to presume the existence of a binding agreement unless the party who assails it proves by competent evidence that there was actually no agreement between the adjoining landowners or there could not have been a proper agreement. Wright, 521 P.2d at 1226.

⁸ The Hockings reliance in their brief on both Wright and Fuoco v. Williams, 18 Utah 2d 282, 421 P.2d 944 (1966) is misplaced. Both decisions were grounded on the affirmative defense that the boundary line was set for a purpose other than setting a boundary. Wright noted that the fence was erected not to locate a boundary which was uncertain, but simply to contain cattle and thus the parties could not acquiescence in the fence as a boundary. Id. at 1227. The language in Fuoco cited by the Hockings reaffirms that this principle. The court held that an irrigation ditch, which was located in an area overgrown with weeds, and which had to be periodically reestablished by plowing did not have the visibility and persistency of placement to constitute a boundary. Id. at 947.

Neither Wright nor Fuoco are applicable to this appeal. There is no material factual dispute that the chain-link fence in this case establishes a clear and visible boundary line. The fence was not constructed to keep out livestock, but to serve as a boundary between the Hocking and de la Melena lots. The real issue the Hockings raise is not whether the fence constitutes a clear and viable boundary between residential lots, but whether the parties acquiesced in that boundary.

One of the four mentioned defenses included "the absence of a dispute or uncertainty in fixing the boundary." Id.⁹

It is implicit in Staker that a showing of the absence of uncertainty is no longer a defense that will contradict the presumption of mutual acquiescence. The language and logic in Staker repudiate the factor of uncertainty altogether in a boundary by acquiescence context.

However, even if a showing of the absence of uncertainty were still a viable defense in a boundary by acquiescence case, the Hockings fail to meet their burden in designating specific facts showing such an absence. In this case the evidence is uncontroverted that the fence line was fixed pursuant to an agreement between the parties' predecessors in interest, notwithstanding a discrepancy the between Milt Green's 1953 survey and the warranty deeds. If the parties did not dispute the boundary line, the evidence is at least clear that the proper boundary was uncertain.

Tingey's awareness that he had purchased in 1947 100 feet from north to south is not a material fact. Dispositive on this point is Universal Inv. Corp. v. Kingsbury, 26 Utah 2d 35, 484 P.2d 173 (1971). In 1940, the parties had rebuilt a 50-year old fence dividing lots on the same line as the old fence. The new fence was located approximately five feet south of the line described in the property owner's deeds. Reversing the trial court and finding mutual acquiescence, the supreme court held that the non-claimant

⁹The other three defenses that Wright noted would rebut the presumption of a binding agreement, included: (1) no parties available to make an agreement (i.e., sole ownership of the property with the existing line which was later transferred in tracts to two or more other persons; (2) the line was set for a purpose other than setting a boundary; used in and (3) mistake or inadvertence in locating the boundary on facts that would warrant relief in equity. Id. at 1226.

defendant did not meet his burden in showing there was no uncertainty as to the true boundary line. Notably, the fact that plaintiff knew that he was aware that his deed specified 27 1/2 feet fronting from the property was insufficient to rebut the presumption of acquiescence. Plaintiff testified that he always considered the fence to be the boundary. Id. at 174.

Similarly, in this case, the Hockings advance no other facts to show that the parties had notice when the fence line was fixed except for the immaterial fact that Tingey was aware he had purchased 100 feet fronting the property. Tingey testified unequivocally that he never marked off the 100 feet and regarded the fence line to be the boundary between his property and the Hocking lot. With no other evidence to support their contention, the Hockings simply fail to raise a material fact that could rebut the presumption of acquiescence.¹⁰

There is no authority whatsoever for the notion the Hockings advance that notice of a "true boundary line" in the fixing of a fence line is prima facie evidence of a lack of mutual acquiescence. Nor is showing an absence of uncertainty in such a context a viable affirmative defense following the Staker decision. Even

¹⁰The Hockings cite Low v. Bonacci, 788 P.2d 512 (Utah 1990) for the proposition that Tingey's knowledge that he purchased 100 feet from the front of de la Melena's lot somehow prevents mutual acquiescence in this case. The facts recited in the Low opinion are sparse, but based on what little is disclosed, Low is clearly distinguishable from this case. Low found that Bonacci did not meet his burden in showing mutual acquiescence in the fence line as the boundary between his property and appellee Colletts' property. Apparently, an existing boundary was established in 1964 by a condemnation action in which the Colletts were paid by the State for the condemned portion of the property. This Court held that this action established acquiescence in the meets and bounds description, not in the fence line. Id. at 513. There has been no similar action in this case that established clear boundary lines. The evidence is conclusive that the parties have acquiesced in the fence line as the true boundary, not the deed line or a line created by a previous legal action.

if the affirmative defense still existed, the Hockings have failed to meet their burden and show a genuine issue of material fact that there was an absence of uncertainty in the fixing of the fence line.

**III. THE UNDISPUTED MATERIAL FACTS ESTABLISH
THAT THERE WAS MUTUAL ACQUIESCENCE IN THE
FENCE LINE FOR A SUFFICIENT PERIOD OF TIME.**

The only so-called "factual dispute" the Hockings raise on appeal is that the 1953 survey Milt Green testified building the fence pursuant to in sworn affidavit and deposition has not been produced. That de la Melena was unsuccessful in obtaining the survey is not surprising given the date of the survey, and the fact that Green had no need to keep the survey after 1963 when he sold the Hocking parcel to the Madsens. Even if Green had not built the fence pursuant to a survey, the fact would be immaterial since uncertainty is no longer an element or factor in boundary by acquiescence cases and, even if it were, the absence of a survey does not alone controvert the presumption of uncertainty.

The facts are uncontroverted in this case that there has been mutual acquiescence in the fence line as a boundary. The actions of the adjoining landowners demonstrate unquestionably a belief that the fence line was the true and proper boundary. The material facts relevant to this factor are substantially similar to those in Staker. Like Staker, in this case there is no indication in the record that the Hockings, de la Melena or any predecessor in interest to the two parcels behaved in a fashion inconsistent with the belief that the fence line was a boundary. The owners of both the Hockings and de la Melena lots occupied houses, constructed

buildings, farmed and irrigated only within their respective fenced areas.

Aside from simply developing the lots within the boundaries established by the fence line, the record is replete with undisputed evidence that the owners of the parcels openly regarded the fence line as the true and proper boundary. The Hockings have carefully maintained the fence, made several repairs and improvements and have even extended the height of the fence several feet.

Also, like in Staker, there has never been any indication or notification by either party of a disagreement of the fence line as the boundary until the Hockings notified de la Melena in 1989 of a dispute. The undisputed facts conclusively prove that from 1953 to 1989, a period of thirty-six years, the owners of the two parcels never discussed, notified or behaved in any way as to indicate a disagreement with the fence line as the boundary.¹¹

IV. EQUITABLE PRINCIPLES SUPPORT SUMMARY JUDGMENT FOR DE LA MELENA.

Not only is this case factually on point with Staker v. Ainsworth, but the equities in this case support a judgment in favor of de la Melena as a matter of law. The Utah Supreme Court has held that even where an affirmative defense is advanced to rebut the presumption of mutual acquiescence, the equities in the case and the public policies of eliminating litigious lawsuits may compel a finding of acquiescence, especially where a party ignored

¹¹The Utah Supreme Court also applied the objective test in determining whether adjoining owners acquiesced in a line as a boundary in Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1199 (1973).

and essentially consented to the boundary. King v. Fronk, 14 Utah 2d 135, 378 P.2d 893, 895 n.5 (1963).

It is suggested that even where mistake is shown, there might be a case where the doctrine, based on principle of repose and elimination of litigious lawsuits may hurdle a mistake in the interest of settling boundaries. Each case must be viewed in the light of its own facts, equity and public policy. One might be mistaken, but shown to have ignored and consented to the boundary.

Id.

The facts in this case compel a finding of mutual acquiescence. For at least thirty-six years, the owners of the Hockings and de la Melena lots have relied on the fence erected by the Hockings' predecessor in interest as the true and proper boundary. It would be grossly unfair at this point in time, some thirty-six years later, to consider the fence as anything but a fixed boundary line, especially in light of the reliance of the property owners in developing their property consonant with the fence as a boundary line. Moving the fence would disrupt an established sprinkling system, causing lines to be moved and result in expenses for the reconstruction of a lengthy fence. Moreover, all the Hockings stand to lose by maintaining the fence line is a strip of land they have never used, or indicated a desire to use.

IV. HOCKINGS ARE NOT ENTITLED TO COSTS.

De la Melena's counsel is reluctant to dignify with a response the Hockings' allegation that de la Melena's counsel have violated professional rules of conduct. Their allegation, not taken lightly by de la Melena's counsel, is offensive, scandalous and bizarre.

A party is obviously never obligated to another party to sue that party.

Appellee recognizes the frustration the Hockings have had with a system they have not fully understood as pro se advocates, but accusing counsel of unethical conduct with reckless abandon is hardly justified.

CONCLUSION

The Hockings have failed to state any grounds that the trial court erred in its summary judgment for de la Melena. Accordingly, the trial court's order should be affirmed in all respects.

DATED this 3rd day of March, 1992.

CAMPBELL MAACK & SESSIONS

Michael T. Roberts
MICHAEL T. ROBERTS

Attorneys for Respondent

CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employed in the law firm of Campbell, Maack & Sessions, One Utah Center, Thirteenth Floor, 201 South Main Street, Salt Lake City, Utah and in said capacity and pursuant to Rule 26, Utah Rules of Appellate Procedure, four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT were mailed, postage prepaid, on this 3rd day of March, 1992, to the following:

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

CAMPBELL MAACK & SESSIONS

Michael T. Roberts
MICHAEL T. ROBERTS

Tab 1

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

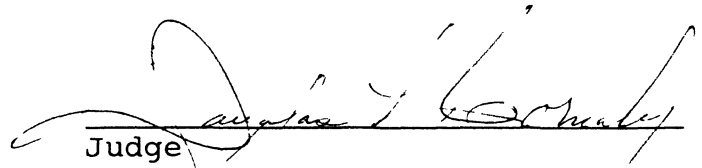
or factual ground on which to premise any motion of summary judgment. Accordingly, summary judgment in favor of the defendant seems required according to Utah law.

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

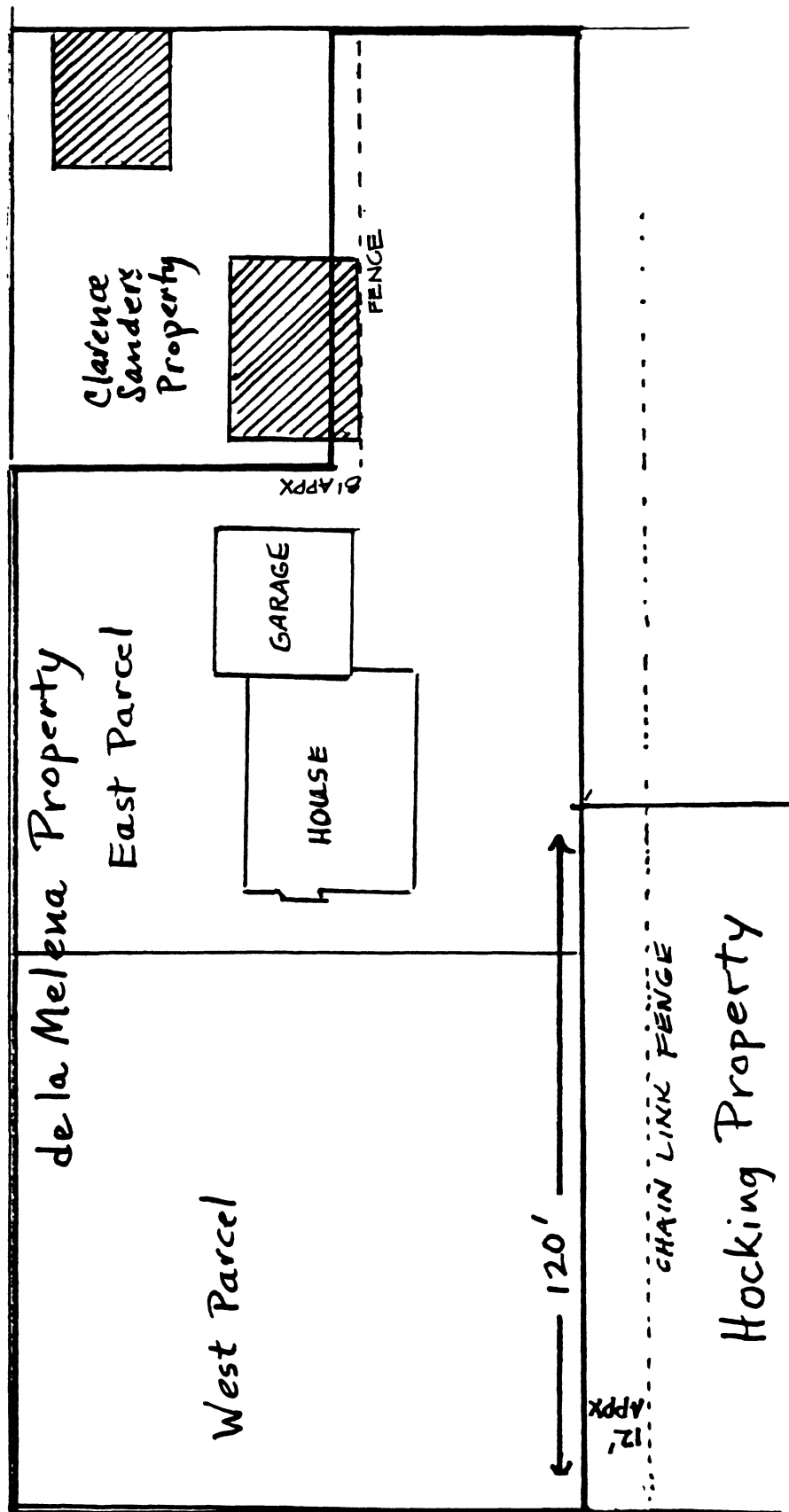
Michael T. Roberts
First Interstate Plaza
170 South Main Street
SLC, UT 84101-1605

Dated this 25th day of September 1991.


Deputy Clerk

Tab 2

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E

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Tab 3

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

MARTIN L. HOCKINGS, and
JUDITH C. HOCKINGS,

Plaintiff,

vs.

MERLYN TINGY ROBERTS, n/d/k
MERLYN TINGY DE LA MELENA,

Defendant.

Case No. 900748579

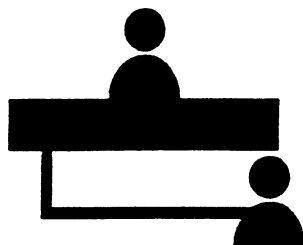
DEPOSITION UPON ORAL EXAMINATION OF:

WILLIAM TINGY

TAKEN AT: 243 East 400 South, #200, Salt Lake City, Utah

DATE: December 14, 1990

REPORTED BY: Jody Edwards, CSR



**CAPITOL
REPORTERS**

175 South Main, #510
Salt Lake City, Utah 84111

(801) 363-7939

1 A Eighty-one.

2 Q And are you familiar with the property that is the
3 subject of this lawsuit?

4 A Yes.

5 Q And just for the record, this is the property which
6 is currently owned by your daughter, Merlyn Roberts de la
7 Melena?

8 A Yes.

9 Q Is that correct?

10 A Yes.

11 Q At one time that property was owned by yourself, do
12 you recall that?

13 A Yes.

14 Q Can you tell me when you first purchased the lot in
15 question?

16 A November the 19th, 1947.

17 Q And from whom did you purchase that property?

18 A William Evans.

19 Q Do you recall the dimensions of that lot when you
20 bought it?

21 A Yes, to this extent, he said, I will sell you 100
22 feet from north to south.

23 Q Okay. What did you do with the lot when you bought
24 it from Mr. Evans?

25 A Cleaned some dead trees and rocks off and started --

1 and farmed it.

2 Q And what type of agriculture did you farm on that?

3 A Well, produce; squash, beans.

4 MRS. TINGY: Peas.

5 THE WITNESS: Peas, that type of produce.

6 Q (BY MR. HUNT) Okay. And so it was your
7 understanding when you bought the lot that you only had 100
8 feet from north to south?

9 A Correct.

10 Q Okay. Now, after you bought the lot from Mr. Evans,
11 you changed the title or the ownership of the lot to Tingy
12 Real Estate, do you recall that?

13 A It was in our name. You mean when we -- other
14 ground that we --

15 Q No. Well, I know you've owned other parcels.

16 A Okay. August the 8th, 1963, for -- as tenant in
17 common for estate planning.

18 Q Okay. Who did you change the title to at that time,
19 Mr. Tingy, just to yourselves?

20 A Yes, we were --

21 Q Okay. And at some point subsequent, after 1963, did
22 you change it to a corporation?

23 A In December -- yes, December the 20th, 1971 we
24 turned it to Tingy Real Estate, Incorporated.

25 Q Okay. And then after that you sold it or conveyed

1 A Yes.

2 Q Several years ago?

3 A Yes, after we had the property.

4 Q That's correct.

5 A Yes.

6 Q All right. And did you have any idea of where the
7 fence was placed in relationship to the boundary on your lot?

8 A I did not. I was never asked to participate with
9 the fence, financially or any other way, I never was.

10 Q Was there a fence between that property before this
11 chain link fence was built?

12 A No, there was not. Wil Evans owned the whole half a
13 block there.

14 Q Okay.

15 A He owned their lot and also the rock house out on
16 the corner.

17 Q How did you farm that ground, then? How did you
18 know where to farm when you were farming it? And you started
19 that in 1947. How far did you plow and irrigate?

20 A Well, we didn't have a survey then, I imagine we
21 just decided on a -- I just plowed the same area every year.

22 Q And so you went back 100 feet and stopped?

23 A Yes, that's right.

24 Q Okay. Other than just your plowing and your
25 irrigating, there was no differentiation between the north

1 side of that block and the south side, then?

2 A No.

3 Q I see. And so the first fence to come up was the
4 chain link fence?

5 A Correct, yes.

6 Q Did you notice that it did not correspond with the
7 place that you were plowing and irrigating?

8 A You're referring to this (indicating)?

9 Q I am.

10 A No, I did not. In fact, I did not know that there
11 was a discrepancy until this came up. I have to admit that
12 I -- maybe I should have done, but I did not know that there
13 was a discrepancy on the line, property line, until this came
14 up a few years ago.

15 Q When's the first time you recall hearing about the
16 fact that the fence wasn't on the property line?

17 A I can't tell you the date? When did you make the
18 first request?

19 Q The record needs to understand, you're looking at
20 the Hockings and asking the Hockings?

21 A Yes. Maybe they could give me a --

22 Q Maybe I can rephrase the question so we can keep it
23 just you testifying instead of the Hockings?

24 A Oh, all right.

25 Q What you're saying to me is that you didn't know

1 about the discrepancy in the fence line until --

2 A I did not. I did not and I paid no attention. I
3 had no idea that it was not on the correct line.

4 Q I see. Now, when you sold your property or conveyed
5 it to your daughter, Merlyn Roberts at that time, didn't you
6 order a survey?

7 A Yes.

8 Q Okay. What you have in front of you is Exhibit 1,
9 which is the survey.

10 A Yes.

11 Q And did you see that survey at that time when
12 you --

13 A I assume that I did, but I paid no attention to it
14 whatsoever. As I remember, the survey was made so that she
15 could use the lot for collateral to build her home.

16 Q I see.

17 A And she used both lots. We understood that there
18 were two lots there. We always figured there was two lots and
19 she used both lots as collateral to build the home.

20 Q All right. But you didn't notice --

21 A I didn't even keep the survey, we gave it to her.

22 Q I see. In the course of your using the lot before
23 you gave it to your daughter, did you plow right up to the
24 fence?

25 A Yes, yes, as close as I could get to it to keep the

1 weeds down.

2 Q But before the fence was up, you only went back 100
3 feet?

4 A That's all.

5 Q Didn't it strike you as odd that you went back
6 another 12 feet further?

7 A No, it didn't. I don't remember. I'd have to say
8 no to that.

9 Q I realize it's a year or two ago and that there's
10 been a lot of water under the bridge, or a lot of water down
11 the ditch I guess in Utah that's how you say it. A lot of
12 water down the ditch, all right. Did you order this survey
13 for your daughter?

14 A Yes.

15 Q You did?

16 A Yes.

17 Q All right. But you don't recall if you looked at it
18 or even saw that the fence line was in the wrong place?

19 A I don't recall, no. I did not know that the fence
20 line was in the -- not on the property line.

21 Q And so --

22 A I had no reason to know until an objection came up.

23 Q Okay. But you did have the survey, it was there?

24 A We had the survey -- Jack Balling made the survey.

25 Q And you never talked about it with him?

1 Q All right. Did anybody talk to you before the
2 Hockings did about the fence being in the wrong place?

3 A No, no one.

4 Q No one ever raised that issue?

5 A No one.

6 Q Not even the people that owned the property before
7 the Hockings?

8 A No, no one.

9 Q So you have no recollection at all about the fence?

10 A I do not. And there's been two residents in the
11 east side since the fence was put up. Do you know what I
12 mean?

13 Q Okay.

14 A There's been two, Reed Pratt lived there and his
15 wife, and Helmit Wenzel lives there now. That's referring to
16 the home east of the Hockings. And there was never a
17 discussion about the property line with those two.

18 Q Because this strip goes over into the Wenzel
19 property, too, does it not?

20 A It does.

21 Q And the Wenzels have never said anything to you
22 about it?

23 A No, they have never mentioned one word to me, not
24 since our daughter has --

25 Q They did mention it to her?

1 A No, she mentioned to it them.

2 Q She mentioned it to them, okay. Did anybody mention
3 it to your family that you're aware of?

4 A No.

5 Q Even if they didn't mention it to you?

6 A Other than Merlyn, no. Absolutely no, no one has
7 been interested in it.

8 Q Okay. But you think that somebody may have
9 mentioned it to Merlyn, but not to you?

10 A I'm sure the Hockings did.

11 Q Okay.

12 (Off the record discussion.)

13 Q (BY MR. HUNT) Mr. Tingy, when you were farming the
14 ground initially back in 1948, 1949 and so on until the fence
15 went up in 1953, did you notice that when you started farming
16 to the fence that you were getting more production per acre
17 off of that ground?

18 A No, I did not.

19 Q Okay. You see because there's about 30 percent more
20 on that lot with that additional 12 foot strip, and I wondered
21 if you noticed that there was any increase in production off
22 of that property?

23 A No, I did not. I would assume that I was plowing
24 right over and that was where the fence is now was the
25 property line. Do you know what I mean? I assumed that that

1 was the line. I don't remember going out ten more feet with
2 the plow at all.

3 Q But you must have. It seems to me that you must
4 have.

5 A Well, if --

6 Q If you were going 100 feet and all of the sudden the
7 fence was 112 feet --

8 A Unless I was over there before.

9 Q Oh, now I haven't thought of that?

10 A It could be.

11 Q You might have over plowed the original lot, is what
12 you're saying, because there was no prior fence?

13 A Well, Evans never established the point. I don't
14 remember who did, but he never did. He and I, as I remember,
15 we never did establish the point. And I assume that we
16 stepped it off, somebody did, and established the 100 feet
17 back.

18 Q Okay. And you don't recall one year going 100 feet
19 and the next year going 112 feet?

20 A No.

21 Q And you didn't remember getting a substantial
22 increase of your crop off that?

23 A No, when you pick zucchini you don't know whether
24 you've got 100 or --

25 Q I'm with you if that's what you had on there. I'm

1 sorry, it's been a long week and that's humerus. Okay.
2 Zucchini is zucchini, isn't it?

3 A Right.

4 MR. HUNT: Off the record again.

5 (Off the record discussion.)

6 MR. HUNT: I don't any other questions.

7 MR. ROBERTS: I don't have any questions.

8 (Deposition concluded at 3:40 p.m.)

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C E R T I F I C A T E

STATE OF _____)
 : ss.
 COUNTY OF _____)

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 18 pages, numbered from 4 to 21, inclusive, and the same is a true and correct transcription of said testimony with the exception of the corrections I have listed below in ink, giving my reasons therefor.

1.	Page	<u>11</u>	Line	<u>23</u>	Correction	<u>from 6 to 10 to 11 to 12 to 13 to 14 to 15 to 16 to 17 to 18 to 19 to 20 to 21 to 22 to 23 to 24 to 25 to 26 to 27 to 28 to 29 to 30 to 31 to 32 to 33 to 34 to 35 to 36 to 37 to 38 to 39 to 40 to 41 to 42 to 43 to 44 to 45 to 46 to 47 to 48 to 49 to 50 to 51 to 52 to 53 to 54 to 55 to 56 to 57 to 58 to 59 to 60 to 61 to 62 to 63 to 64 to 65 to 66 to 67 to 68 to 69 to 70 to 71 to 72 to 73 to 74 to 75 to 76 to 77 to 78 to 79 to 80 to 81 to 82 to 83 to 84 to 85 to 86 to 87 to 88 to 89 to 90 to 91 to 92 to 93 to 94 to 95 to 96 to 97 to 98 to 99 to 100 to 101 to 102 to 103 to 104 to 105 to 106 to 107 to 108 to 109 to 110 to 111 to 112 to 113 to 114 to 115 to 116 to 117 to 118 to 119 to 120 to 121 to 122 to 123 to 124 to 125 to 126 to 127 to 128 to 129 to 130 to 131 to 132 to 133 to 134 to 135 to 136 to 137 to 138 to 139 to 140 to 141 to 142 to 143 to 144 to 145 to 146 to 147 to 148 to 149 to 150 to 151 to 152 to 153 to 154 to 155 to 156 to 157 to 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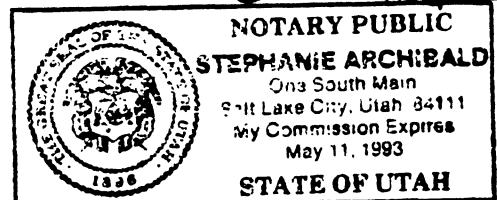
Wm W. Tinger
 WILLIAM TINGEY
 William W. Tinger

SUBSCRIBED AND SWORN to at Zions Bank - Centerville
 this 14th day of January, 1991.

My commission expires:

May 11, 1993

Stephanie Archibald
 NOTARY PUBLIC
 Residing at Centerville



Tab 4



Tempest
Reporting, Inc.

COPY

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

-O-

MARTIN L. HOCKINGS, and :
JUDITH C. HOCKINGS, :

Plaintiffs, :

Case No. 900748579

vs. :

MERLYN TINGY ROBERTS, :
n/d/k MERLYN TINGY :
DE LA MELENA, :

Deposition of:
MILTON C. GREEN

Defendant. :

-O-

Place: Law office of
Keith L. Stahle

Date: June 11, 1991
11:00 a.m.

Reporter: Carole King, CSR/RPR

-O-

1 A Mm-hm.

2 Q Do you follow what I'm talking about there?

3 A Yes, I follow that.

4 Q Do you know who built that fence line?

5 A That fence line that's in there, I built.

6 Q You built?

7 A Yep.

8 Q When did you build that fence line?

9 A Well, I can't put it right to the day, but

10 it was within a year or two after I --

11 Q Sometime in 1953 or 1954?

12 A Yep.

13 Q Was there an existing fence line or base

14 where the fence line is that you built that existed

15 previously?

16 A Right. The property behind me was owned by

17 Bill Tingy when I moved there.

18 Q Now, the property you're talking about that

19 was owned by Bill Tingy, is that now owned by

20 Mrs. Merlyn De La Melena, known as Mrs. Roberts to you?

21 A Right, to me. And there was an old pioneer

22 fence line, you know. Wasn't in great repair, but there

23 were sufficient posts at that line that well indicated

24 what the line was at that time. And there was some wire

25 on it. Wouldn't turn livestock or anything, but you

1 could tell at one time it was a good fence, you know.

2 Q Now, this prior fence line, do you know how
3 long that fence line had been in existence?

4 A Oh, good Lord. The way it looked it had to
5 be 50 years or so old. I'd imagine it was a fence built
6 by very early settlers in the valley. I've lived around
7 here all my life, and I know a fence that was built by
8 pioneers, you know, by looking at it. And so I -- I
9 wouldn't hazard to guess how long, but it was a long,
10 long time.

11 Q Did you happen to take a survey prior to
12 building or repairing this fence line?

13 A Yes. Therice Duncan had to furnish me a
14 survey for the title company when -- because of the fact
15 that there's a lot of defugilty with the east-west lines
16 in Centerville. And so the title company required a
17 survey of the property when I bought it from Therice.

18 Now, I can't remember exactly how close that
19 back line survey was to that fence, but I know that Bill
20 and I, which was customary --

21 Q Bill Tingy?

22 A Bill Tingy. -- looked it over, and the
23 survey line was within reasonable distance of the old
24 fence there, you know, a foot or two or whatever. I
25 can't remember exactly. But there was no question

1 either in my mind nor his that that fence line was close
2 enough.

3 Q For the survey?

4 A For the survey. So have at it, he says.

5 Q So this survey was ordered by Therice
6 Duncan?

7 A Right.

8 Q Was this prior to your moving into the home,
9 prior to purchasing this home?

10 A No, not really. It was a week or two after,
11 because, you know, I knew Therice, he knew me. We knew
12 if there was any problems we'd work them out.

13 Q Do you remember who took the survey?

14 A I think it was Great Basin.

15 Q But you're not sure.

16 A Great Basin Engineering, but I'm not right
17 positive. But it seems to me that's who it was.

18 Q Do you still have a copy of that survey?

19 A No. I've been gone from that property for
20 years. And I'd imagine Great Basin would if -- or
21 Security Title would be more likely to have it because
22 they are were the ones that actually ordered the survey,
23 because they wouldn't write the title insurance on it
24 without a survey. They wouldn't take -- because of the
25 problems over there on the east-west lines, they would

1 never write a title policy on a piece of property in
2 Centerville without a survey.

3 Q But as far as you can recollect, then,
4 Mr. Tingy and you both reviewed the survey and agreed
5 that the fence line would be where it's at?

6 A Yep.

7 Q Were you aware -- I guess I'm asking a
8 question you've already answered, but let me ask it
9 anyway. Were you aware then that the fence line was not
10 on the deed line, the property deed line?

11 A What are you asking me, Mike, that I wasn't
12 aware that it was --

13 Q Were you aware at all of a discrepancy
14 between the fence line and the deed description on your
15 warranty deed?

16 A None whatsoever. We didn't -- in those
17 days, you know -- and if I remember correctly, that
18 measurement comes from center of roads up there. And
19 so, you know -- in the old days we followed the old
20 fence lines.

21 Q Did anyone ever say to you at anytime or
22 make any indication to you or infer in any way of a
23 discrepancy between the fence line and the deed
24 description?

25 A Never.

1 Q Did Mr. Tingy ever say anything to you with
2 regard to a discrepancy between the fence line?

3 A Never.

4 Q When did you first learn of this
5 discrepancy, or have you heard of it prior to today?

6 A Well, yeah, but it hasn't been very long
7 ago. Merlyn Roberts, who has been a friend of mine --
8 she was Bill Tingy's daughter, and I've known her ever
9 since she was about the size of Hector's pup. And
10 she -- 'cause she called me and said that there had been
11 a question arise on that line and asked me a few
12 questions similar to what we're discussing here today.

13 And that's the first time that I ever heard
14 of any discrepancy on that property line.

15 Q The Madsen's, who purchased the property
16 from you, did they ever ask or make any sort of inquiry
17 or any kind of a statement with regard to the fence
18 line?

19 A Never.

20 Q So as far as you knew and understood, you
21 and Mr. Tingy were in agreement that the fence line was
22 the appropriate boundary?

23 A Yes.

24 Q Did you ever use this disputed strip
25 indicated in the survey, this 12 feet between the fence

1 line and the deed line?

2 A No. Bill farmed his side of the fence, and
3 I farmed mine.

4 Q Did he farm right up to the fence; do you
5 recall?

6 A Yeah, pretty close. There was some old wild
7 roses there, and, you know, most farmers would harrow as
8 close as they could get to the fence without tucking
9 onto the roses and jerking the fence out.

10 And so it seems to me like he left a little
11 strip, maybe three or four feet, that he didn't keep the
12 weeds down, but he got up as close -- if my memory
13 serves me, there's a difference in elevation a little
14 bit, was when I moved there, and the fence was on the
15 high side. I'm a little higher than that property.
16 Haven't looked at it for years, but it seems to me
17 that's the way it was when I lived there. But he got up
18 pretty close to that fence.

19 MR. ROBERTS: Off the record for just a
20 minute.

21 (A discussion was held off the record.)

22 Q (By Mr. Roberts) During the ten years that
23 you owned this property, was there any dispute between
24 you and Mr. Tingy as to the fence line?

25 A Never.

1 Q Never any dispute at all?

2 A (The witness shakes his head.)

3 Q Or was there any dispute that was brought
4 to your attention from that time that you sold the
5 property to the Madsen's up until the time that you
6 spoke of earlier when Ms. De La Melena brought it to
7 your attention?

8 A Never.

9 MR. ROBERTS: That's all the questions I
10 have.

11 MR. HOCKINGS: Can we ask a couple?

12 MR. ROBERTS: You may do so.

13

14 EXAMINATION

15 BY MR. HOCKINGS:

16 Q I'd like to know if Mr. Green gave
17 Mr. Madsen a survey when you sold to him.

18 A I don't think so. I know I furnished
19 Mr. Madsen with the title policy. And as a general
20 rule, when you're selling real estate, that suffices for
21 the buyer if he gets a title policy.

22 Now, if the title company thinks that they
23 ought to have a survey -- just like the case when I
24 bought it from Therice -- they'll request one.

25 But in my case we had already had it

Tab 5

(By Mr. Hunt)

1 Q. How would you describe the property at the
2 time you purchased it?

3 A. Just some land.

4 Q. Would you call it a vacant lot? A field?

5 A. It was a field.

6 Q. Did it have any kind of grass or vegetation
7 on it?

8 A. It probably had some vegetation on it from a
9 field, farm produce.

10 Q. Let me ask the obvious question, then. Had
11 it been used by your father in his truck farming
12 business?

13 A. Yes.

14 Q. And was it a field in which he grew
15 vegetables or produce?

16 A. Vegetables, yes.

17 Q. And was it currently in that type of use
18 when you purchased it?

19 A. Yes.

20 Q. How long was it from the time of your
21 purchase on February 14th, 1978, until you built or
22 erected a home?

23 A. We began building right -- I think -- let's
24 see, this was in April -- or February? About a
25 month. We started planning the home and it was

(By Mr. Hunt)

1 completed in September of that same year. We moved in
2 in September.

3 Q. Of 1978?

4 A. Yes.

5 Q. And you occupied the home at that point in
6 time?

7 A. Yes.

8 Q. Do you have any idea how long your father
9 had owned this property prior to his transfer to his
10 corporation and then to you?

11 A. I don't know in years. I don't know. It's
12 been a long time.

13 Q. Let me take you back to the time when you
14 purchased the property on February 14th of 1978. Did
15 you obtain a survey of that property?

16 A. Yes.

17 Q. And in that packet of documents right by
18 your right hand there is a survey that has a date in
19 the lower left hand corner of February 21, 1978, and
20 that would be marked as Exhibit 2?

21 A. Right.

22 Q. Did you order that survey to be surveyed on
23 your property?

24 A. I personally didn't.

25 Q. Can you tell me who did?

(By Mr. Hunt)

1 A. Bill and Sylvia Tingey did.

2 Q. Your folks?

3 A. Yes.

4 Q. On your behalf?

5 A. Yes.

6 Q. Did you ever have an occasion to look at
7 that survey?

8 A. I probably looked at it when I got it, and
9 then I probably looked at it when I was going to sell
10 my house.

11 Q. Did you sell your house?

12 A. When I was going to sell my house.

13 Q. When were you going to sell your house?

14 A. In 1989.

15 Q. But at the time that you received it in
16 1978, you looked at it as well, did you not?

17 A. I probably did, because I had it in my
18 possession.

19 Q. And were you aware at that time that the
20 fence that was on the property was not at your
21 property line?

22 A. I personally did not have that knowledge.

23 Q. You did not?

24 A. No.

25 Q. Did your father?

(By Mr. Hunt)

1 A. I don't remember specifically. If they
2 asked for it, we would have given it to them, but I
3 don't remember specifically.

4 Q. Did your husband take part in these
5 transactions as well?

6 A. Yes.

7 Q. Is he still alive?

8 A. No.

9 Q. Do you retain all the files of whatever was
10 accumulated at that time?

11 A. Yes.

12 Q. Would you please tell me what took place,
13 after you built your house in 1978, with the property
14 to the west of your home, and particularly the 12-foot
15 strip that borders the Hocking's property, which is
16 approximately 12 feet by 120 feet.

17 A. On that strip there, we put raspberries.
18 And there is a little fence, just for all the
19 berries. I put some other bushes there, fruit-bearing
20 bushes. I have the fruit trees, lawn. There is a
21 sprinkling system.

22 Q. And can you tell me the date that these were
23 installed?

24 A. Oh, probably the first -- within the first
25 five years that we lived there. I don't know exact

(By Mr. Hunt)

1 dates.

2 Q. But it was after you received the survey of
3 February of 1978?

4 A. Yes.

5 Q. And did you put them in that portion on the
6 survey? You are welcome to look at that document. I
7 have highlighted that in yellow so you can see. Are
8 those plants that you have described, and sprinkling
9 system, within that portion?

10 A. Some of them.

11 Q. And do they come right up to the --

12 MR. STAHL: Just a second, Hollis. Off the
13 record.

14 (Discussion off the record.)

15 Q. Let me redirect my question, and I
16 appreciate that correction, I'm talking about the
17 south border of your property, the north border of the
18 Hocking's property. I think you understood what I was
19 talking about, but I misspoke, and I appreciate that
20 correction.

21 Would your answer be the same if we make
22 that correction from west to south?

23 A. Yes.

24 Q. And so those plants and sprinkling system,
25 does it come right up to the existing fence, the

(By Mr. Hunt)

1 sprinkling system?

2 A. I think it's pretty close. Part of it is.
3 Some of it is.

4 Q. Tell me what kind of sprinkling system it
5 is.

6 A. Rain Bird.

7 Q. Isn't it correct that all of those
8 improvements were put in after your survey of February
9 21st, 1978?

10 A. Right.

11 Q. Can you tell me what is immediately -- and
12 again looking at Exhibit No. 2 -- what is immediately
13 north of that 12-foot strip that's highlighted?

14 A. Garden.

15 Q. Is it a garden?

16 A. Yes.

17 Q. You have not installed, erected or built any
18 other buildings immediately adjacent to that strip?

19 A. No.

20 Q. Can you tell me how far away from the strip
21 that the nearest building or house is? That would be
22 going from the yellow strip to your home, or garage,
23 or what other improvements you would have on that
24 property.

25 A. My house.

(By Mr. Hunt)

1 paid taxes on the strip referred to as the 12-foot by
2 120-foot strip of land?

3 A. We paid taxes on the description in our
4 deed.

5 Q. And are you aware that your deeded
6 description does not include that 12-foot strip?

7 A. I am now.

8 Q. And weren't you aware of that in 1978?

9 A. No, I was not.

10 Q. Was your husband?

11 A. He may have, but it would be kind of hard to
12 find out.

13 Q. I understand that. And I don't pretend to
14 have those kinds of powers.

15 At any time since 1978, when you purchased
16 your property -- when the property was deeded to you
17 as a gift from your parents, have you ever attempted
18 to pay taxes on this 12-foot strip?

19 A. No.

20 Q. Your counsel has filed an answer and a
21 counterclaim to the Hocking's complaint against you,
22 and they assert on your behalf that in fact you claim
23 that property as your own, the 12-foot by 120-foot
24 strip; is that correct? I realize you did not draft
25 this document, and I'm not trying to put you in --