

1991

Waterside Associates, a limited partnership,
Machan-Hampshire Properties, Inc., a Utah
Corporation, and W.E.S. MHP Venture v. D.
Stoddard Judd and Valene A. Judd, husband and
wife : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark O Van Wagoner; Christopher J. Condie; Van Wagoner and Stevens; Attorneys for Appellees.
C. Reed Brown; Attorney for Appellants.

Recommended Citation

Brief of Appellant, *Waterside Associates v. Judd*, No. 910607.00 (Utah Supreme Court, 1991).
https://digitalcommons.law.byu.edu/byu_sc1/3813

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF UTAH

WATERSIDE ASSOCIATES, a limited
partnership; MACHAN-HAMPSHIRE
PROPERTIES, INC., a Utah corpora-
tion; and W.E.S./MHP VENTURE,

Third-Party Plaintiffs and
Appellees,

vs.

D. STODDARD JUDD and VALENE
A. JUDD, husband and wife.

Third-Party Defendants and
Appellants.

Case No. 910061

Argument Priority No. 16

APPELLANTS' BRIEF

Appeal from a Final Judgment
of the Third District Court
in Favor of Plaintiff

Honorable Timothy R. Hanson

C. Reed Brown
6925 Union Park Center
Suite 480
Midvale, Utah 84047
Attorney for Appellants

Mark O. Van Wagoner
Christopher J. Condie
VAN WAGONER & STEVENS
215 South State Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Appellees

ED

JUN 18 1991

LIST OF PARTIES

The following is a list of all parties to the proceeding in the Third District Court as required by Rule 24(a)(1), Utah Rules of Appellate Procedure:

Plaintiff:

CAHOON & MAXFIELD IRRIGATION COMPANY, a Utah corporation

Defendants and Third-Party Plaintiffs:

WATERSIDE ASSOCIATES, a limited partnership; MACHAN-HAMPSHIRE PROPERTIES, INC., a Utah corporation; and W.E.S./MHP VENTURE

Third-Party Defendants:

D. STODDARD JUDD and VALENE A. JUDD, husband and wife.

The case had been consolidated with another Third District Court case, Civil No. C87-6497 in which the following were parties:

D. STODDARD JUDD and VALENE A. JUDD, plaintiffs

vs.

BRUCE McMULLIN; WESTERN ENVIRO-SYSTEMS, INC., a Utah corporation; WATERSIDE ASSOCIATES, a limited partnership; MACHAN-HAMPSHIRE PROPERTIES, INC., General Partner; MACHAN-HAMPSHIRE PROPERTIES, INC., a Utah corporation; and W.E.S./MHP JOINT VENTURE, as a partnership or unincorporated joint venture, defendants.

IN THE SUPREME COURT OF UTAH

| | | |
|-----------------------------------|---|--------------------------|
| WATERSIDE ASSOCIATES, a limited |) | |
| partnership; MACHAN-HAMPSHIRE |) | |
| PROPERTIES, INC., a Utah corpora- |) | |
| tion; and W.E.S./MHP VENTURE, |) | |
| |) | |
| Third-Party Plaintiffs and |) | |
| Appellees, |) | Case No. 910061 |
| |) | |
| vs. |) | |
| |) | |
| D. STODDARD JUDD and VALENE |) | |
| A. JUDD, husband and wife, |) | Argument Priority No. 16 |
| |) | |
| Third-Party Defendants and |) | |
| Appellants. |) | |

APPELLANTS' BRIEF

Appeal from a Final Judgment
of the Third District Court
in Favor of Plaintiff

Honorable Timothy R. Hanson

C. Reed Brown
6925 Union Park Center
Suite 480
Midvale, Utah 84047
Attorney for Appellants

Mark O. Van Wagoner
Christopher J. Condie
VAN WAGONER & STEVENS
215 South State Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Appellees

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | iv |
| Case Law | iv |
| Statutes and Rules | iv |
| Treatises | iv |
| JURISDICTION | 1 |
| ISSUES AND STANDARD OF REVIEW | 1 |
| DETERMINATIVE PROVISIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| Nature of the Proceedings | 2 |
| Statement of Facts | 3 |
| SUMMARY OF ARGUMENTS | 6 |
| ARGUMENT | 7 |
| POINT I | |
| THE TRIAL COURT’S FINDINGS THAT THE JUDDS HAD REFUSED TO DEFEND TITLE AND REFUSED TO PARTICIPATE IN SETTLE- MENT NEGOTIATIONS IS UNSUPPORTED BY THE RECORD. LAC- KING THE NECESSARY EVIDENTIARY BASIS THOSE FINDINGS ARE REVERSIBLE ERROR | 7 |
| POINT II | |
| JUDDS DID NOT, AS A MATTER OF LAW, BREACH THEIR WAR- RANTY OF TITLE OR DUTY TO DEFEND. THE TRIAL COURT’S CONCLUSION SHOULD, THEREFORE, BE SET ASIDE | 8 |
| A. THE TRIAL COURT’S ERRONEOUS INTERPRETATION OF THE FACTS GAVE RISE TO AN INCORRECT CONCLUSION OF LAW | 8 |
| B. THE TRIAL COURT’S CONCLUSION THAT JUDDS HAD BREACHED THEIR WARRANTY OF TITLE IS INCORRECT AS A MATTER OF LAW | 9 |

| | | |
|------------------------------|---|----|
| C. | JUDDS ARE ENTITLED TO THEIR DAY IN COURT TO DEFEND THE TITLE WHICH THEY WARRANTED. WATER-SIDE'S SETTLEMENT WITHOUT JUDDS' CONSENT, AFTER THEY HAD PREPARED THEIR DEFENSE, WAIVED JUDDS DUTY TO DEFEND THE TITLE | 10 |
| D. | IF, AT SOME POINT, THERE WAS A BREACH OF THE DUTY TO DEFEND, THAT BREACH WAS CURED BY THE ACTIVE PARTICIPATION OF JUDDS' PRESENT COUNSEL IN DEFENSE OF THE TITLE | 11 |
| E. | JUDDS TOOK ALL ACTION NECESSARY TO DEFEND THE TITLE WHICH THEY CONVEYED, THEREBY DISCHARGING THEIR DUTY TO DEFEND | 11 |
| CONCLUSION | | 13 |
| CERTIFICATE OF SERVICE | | 13 |
| ADDENDUM | | 14 |

TABLE OF AUTHORITIES

Case Law

| | |
|--|------|
| <u>Brewer v. Peatross</u> , 595 P.2d 866 (Utah 1979) | 11 |
| <u>Burton v. United States</u> , 507 P.2d 710 (Utah 1973) | 11 |
| <u>College Irrigation Co. v. Logan River & Blacksmith Fork Irr. Co.</u> , 780 P.2d 1241 (Utah 1989) | 1 |
| <u>Creason v. Peterson</u> , 470 P.2d 403 (Utah 1970) | 9 |
| <u>Crimmins v. Simonds</u> , 636 P.2d 478 (Utah 1981) | 1, 7 |
| <u>Doelle v. Bradley</u> , 784 P.2d 1176 (Utah 1989) | 2 |
| <u>Estate of Wolfinger v. Wolfinger</u> , 793 P.2d 393 (Utah App. 1990) | 1, 7 |
| <u>Hancock v. Planned Development Corp.</u> , 791 P.2d 183 (Utah 1990) | 1 |
| <u>Mellor v. Chamberlain</u> , 672 P.2d 610 (Wash. 1983) | 10 |
| <u>State By and Through Div. of Consumer Protection v. Rio Vista Oil, Ltd.</u> , 786 P.2d 1343 (Utah 1990) | 2 |

Statutes and Rules

| | |
|---|--------|
| Utah Code § 57-1-12 (1953) | 10, 11 |
| Utah Code § 78-2-2(3)(j) (1953, as amended) | 1 |
| Rule 52(a), Utah Rules of Civil Procedure | 1 |

Treatises

| | |
|--|----|
| 61 A.L.R. 10 | 10 |
| 6 Powell, Real Property, § 905 | 9 |
| 7 Thompson, Real Property § 3196, p. 353 | 9 |

JURISDICTION

Jurisdiction to hear this appeal is conferred by Utah Code § 78-2-2(3)(j) (1953, as amended).

ISSUES PRESENTED AND STANDARD OF REVIEW

This is an appeal from the final judgment of the Third District Court finding that appellants had breached their duty to defend title conveyed by them and awarding damages to appellees. The issues presented for review are:

1. Did the trial court err in finding that D. Stoddard Judd and Valene A. Judd (the "Judds") had breached their duty to defend title where there was insufficient factual basis for that finding? The findings of fact of a trial judge sitting without a jury may be set aside by the Supreme Court where the findings are clearly erroneous. Hancock v. Planned Development Corp., 791 P.2d 183, 185 (Utah 1990), citing Rule 52(a), Utah Rules of Civil Procedure. The Supreme Court may weigh the facts in an equity case. Crimmins v. Simonds, 636 P.2d 478, 479 (Utah 1981). The finding must be reviewed in a light most favorable to the finding. College Irrigation Co. v. Logan River & Blacksmith Fork Irr. Co., 780 P.2d 1241, 1244 (Utah 1989). The trial court's findings were based upon proffered evidence rather than direct testimony and should receive no more deference than when a decision is rendered upon stipulated facts. Estate of Wolfinger v. Wolfinger, 793 P.2d 393 (Utah App. 1990).

2. Did the trial court err, as a matter of law, in finding that Judds had breached their duty to defend title where they had engaged in discovery, researched the law and facts, and appeared at trial prepared to defend title which they conveyed? The Supreme

Court reviews the trial court's conclusions of law for correctness without according them deference. Doelle v. Bradley, 784 P.2d 1176, 1179 (Utah 1989). This is true even if the conclusions of law are denominated findings of fact. State By and Through Div. of Consumer Protection v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990).

DETERMINATIVE PROVISIONS

Judds believe that this is a matter of first impression for this court and that, therefore, there are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this case.

STATEMENT OF THE CASE

Nature of the Proceedings

The Judds conveyed by warranty deed a parcel of property in conjunction with a Real Estate Exchange Agreement to Western Enviro-Systems, Inc. The property was subsequently conveyed to W.E.S./MHP Joint Venture, who subsequently conveyed to Waterside Associates who constructed an apartment complex on the property. (Appellees are referred to herein collectively as "Waterside".) In 1985, the Cahoon & Maxfield Irrigation Company filed an action against Waterside claiming a fee interest in the property. Waterside joined Judds as third-party defendants to defend title to the property.

In 1987, Judds commenced an action against Western Enviro-Systems, Inc. and other parties, including Waterside, for non-payment of amounts due under the Real Estate Exchange Agreement and foreclosure on the property. This action was subsequently consolidated with the 1985 lawsuit.

During the course of the lawsuit, Judds were represented by three different sets of counsel. Upon entry of appearance by Judds' present counsel, Judds engaged in discovery and research in preparation for defense of the title which they conveyed. As trial neared, they were approached with vague offers to discuss settlement. Having researched the facts and the law, Judds were convinced that the title they conveyed was defensible and expressed a preference for defending their title at trial. Prior to trial, Waterside participated in several settlement negotiations which did not include Judds. As trial neared, Waterside entered into a settlement agreement with Cahoon & Maxfield without resolving the legal issues.

On the day of trial, Judds appeared, ready to defend their title. Because of the settlement with Cahoon & Maxfield, the trial court determined that the only issues to be resolved were whether Judds were liable to Waterside for breach of warranty or breach of their duty to defend title. The parties agreed that the trial court could make the determination based upon proffered evidence. The trial court subsequently, without entering specific findings of fact in support of its legal conclusion, found that the Judds had breached their duty to defend and awarded costs and attorney fees to Waterside.

Statement of Facts

1. On August 17, 1983, the Judds conveyed by warranty deed the subject parcel of property to Western Enviro Systems, Inc. (Record, 00122; Defendant's Exhibit 1)
2. The property was subsequently conveyed by Western Enviro-Systems, Inc. to W.E.S. / MHP Joint Venture by warranty deed. (Defendant's Exhibit 2)
3. On August 7, 1985, Cahoon & Maxfield Irrigation Company commenced this

action against Waterside alleging, among other things, a fee simple interest in a 33 foot wide strip of land aligned with its canal across the property. (Record, 00001)

4. On November 10, 1986, Appellees, as Third-Party Plaintiffs, filed a complaint against Judds, as Third-Party Defendants, to require them to defend title to the property. (Record, 00106; Record, 00870 (Trial Transcript), page 9, lines 23-24)

5. Judds were represented by two law firms prior to entry of appearance by Judds' present counsel on August 18, 1988 (Record, 00426).

6. The Judds instructed their present counsel to examine the records of the ditch company to evaluate the fee claim (Record, 00870, page 20, line 17). Appellant's counsel immediately initiated discovery (E.g., Notice of Deposition at Record, 00437).

7. Judds' counsel researched the facts, making available to counsel, including counsel for Waterside, a letter from counsel for Cahoon & Maxfield disavowing fee simple claim to the property (Record, 00870, page 18, lines 9-11; Plaintiff's exhibit 4).

8. Judds' counsel also researched the law surrounding the fee simple claim, including evaluation of an attorney's opinion letter secured by the Judds in November of 1986 (Record 00870, page 17, lines 17-18).

9. Waterside negotiated on several occasions with Cahoon & Maxfield, the latest beginning ten days before trial (Record, 00870, page 5, lines 15-19). The Judds were not present at or invited to these negotiations.

10. The Saturday before trial, Waterside again negotiated with Cahoon & Maxfield, entering into a settlement agreement (Record, 00870, page 7, lines 11 et seq.; page 8, lines 1-2). The Judds were not represented at the settlement negotiations.

11. The settlement was entered into even though Waterside acknowledged valid

defenses to the fee claim (Record, 00870, page 7, lines 2-3).

12. On the day of trial, the Judds appeared, ready to defend their title. They were advised that Waterside had settled with Cahoon & Maxfield. The trial court determined the only remaining issue to be that related to breach of duty to defend. The Judds and Waterside stipulated that the trial court could take evidence by proffer for purposes of resolving the remaining issue.

13. Waterside proffered testimony that Judds had failed and refused to accept the defense of the title (Record, 00870, page 8, lines 17-19).

14. Judds proffered testimony showing they were actively involved in defense of the title (Record, 00870, page 20, line 17; Record, 00870, page 18, lines 9-11; Record 00870, page 17, lines 17-18).

15. The trial court entered, among others, the following findings of fact and conclusions of law:

a. Finding of Fact No. 4: When sued by Cahoon, Waterside made demand upon the Judds to defend title. The Judds' defense consisted merely of appearing at trial announcing that they were ready to defeat Cahoon's claims to fee simple ownership. The record shows that the Judds effectively refused to defend the title throughout the lengthy period of time that this litigation pended. (Record, 00809, emphasis in original.)

b. Finding of Fact No. 9: Prior to trial, Waterside and Cahoon reached a stipulated resolution of their claims, wherein Waterside would take certain actions to insure action [sic] to the ditch for Cahoon, but would not lose fee simple title to the area in question. The cost to third-party plaintiffs to settle Cahoon's claims was \$51,000 (\$36,000 to widen the canal; \$15,000 cash settlement). The Judds refused offers to participate in the negotiations that lead [sic] to the settlement between Waterside and Cahoon. (Record, 00910, emphasis in original.)

c. Conclusion of Law No. 5: The duty to defend and warrant the title in the Warranty Deed that the Judds gave requires that the Judds do more than appear at the time of trial, with knowledge that Waterside had settled, and boldly announce that they were ready to defeat Cahoon's claims to fee simple ownership. (Record,

00811.)

d. Conclusion of Law No. 6: The Judds have breached their duty to defend and warrant the title. Third-party plaintiffs are entitled to be indemnified for the cost they incurred in defending title in the amount of \$78,500 (\$36,000 to widen canal; \$15,000 cash settlement; \$27,500 in attorneys fees), both the costs related to effecting the settlement and to attorneys fees. (Record, 0811 to 00812.)

SUMMARY OF ARGUMENTS

The trial court's findings of fact related to Judds' duty to defend title are not supported by the record. Because this is an equity case and the testimony was proffered pursuant to stipulation of the parties, this court may weigh the evidence and need give no deference to those findings. Based upon the record, the trial court's findings are clearly erroneous and should be set aside.

The trial court erroneously interpreted the facts, concluding that Judds had done nothing but show up at trial ready to defend the title. It also incorrectly concluded that Judds had breached their warranty of title. Both of these conclusions are erroneous as a matter of law.

Judds did everything reasonably required of them to defend the title which they conveyed and warranted. If there was a breach due to earlier, incorrect legal advice, that breach was cured by the subsequent active participation of Judds' present counsel in defense of the title. Further, as a matter of law, Judds have a right to defend the title they warranted, even if the case goes to trial, and were deprived of that right. That deprivation amounts to a waiver of Waterside's claims of breach of duty to defend. Under any evaluation of the law and the facts, the trial court's conclusion that Judds breached their duty to defend is erroneous and should be set aside.

ARGUMENT

POINT I

THE TRIAL COURT'S FINDINGS THAT THE JUDDS HAD REFUSED TO DEFEND TITLE AND REFUSED TO PARTICIPATE IN SETTLEMENT NEGOTIATIONS IS UNSUPPORTED BY THE RECORD. LACKING THE NECESSARY EVIDENTIARY BASIS THOSE FINDINGS ARE REVERSIBLE ERROR.

The only indications that the Judds may have failed to defend title are contained in the allegations of the Third-Party Complaint (Record, 00106) and the testimony proffered pursuant to stipulation of the parties (Record, 00870, page 8, lines 17-19). By contrast, the evidence shows that Judds, through their present counsel, were actively involved in defense of the title. Judds examined the records of the irrigation company to evaluate the fee claim (Record, 00870, page 20, line 17), engaged in discovery (E.g., Notice of Deposition, Record, 00437 and Record, 00586), researched facts and made evidence available to other counsel (Record 00870, page 18, lines 9-11; Plaintiff's Exhibit 4), researched the law (E.g., Record 00870, page 17, lines 17-18), and appeared at trial ready to defend title.

There is no evidence in the record that Judds were ever offered a change to participate in settlement negotiations. Nor is there evidence that they refused to participate in those negotiations.

Because the proffered testimony was made upon stipulation by the parties, this court need not accord the factual findings of the trial court the normal deference and need only sustain those findings if convinced of their correctness. Estate of Wolfinger v. Wolfinger, 793 P.2d 393, 395 (Utah App. 1990). Since this is a case in equity, this court is permitted to weigh the facts. Crimmins v. Simonds, 636 P.2d 478, 479 (Utah 1981). Comparing the

evidence of record, it is apparent that there is more evidence in support of the proposition that Judds were defending title than in support of the claim that they breached their duty to defend.

Even viewed in a light most favorable to the findings, those findings are clearly erroneous. There is no evidentiary support for the portion of Finding No. 9 that the Judds refused to participate in the settlement negotiations. The record clearly does not support Finding No. 4 that Judds refused to defend the title throughout the litigation. Because the trial court's findings are clearly erroneous, they should be set aside by this court.

POINT II

JUDDS DID NOT, AS A MATTER OF LAW, BREACH THEIR WARRANTY OF TITLE OR DUTY TO DEFEND. THE TRIAL COURT'S CONCLUSION SHOULD, THEREFORE, BE SET ASIDE.

A. THE TRIAL COURT'S ERRONEOUS INTERPRETATION OF THE FACTS GAVE RISE TO AN INCORRECT CONCLUSION OF LAW.

The trial court's statement in Conclusion No.5 is probably a correct statement of the law:

The duty to defend and warrant the title in the Warranty Deed that the Judds gave requires that the Judds do more than appear at the time of trial, with knowledge that Waterside had settled, and boldly announce that they were ready to defeat Cahoon's claims to fee simple ownership. (Record, 00811.)

However, there is no evidence in the record which would provide a factual basis for this conclusion as applied to the Judds. As discussed in Point I, Judds did much more than appear at trial and "boldly announce that they were ready to defeat Cahoon's claims to fee simple ownership." They investigated the facts, researched the law, participated in discov-

ery, prepared their defense and appeared at trial ready to defend the fee claim.

Further, there is nothing in the record showing that Judds had knowledge of the settlement. Even if they did know of the settlement, it would not have any bearing on the fact that they had prepared and were ready to defend the title.

While the trial court's statement of the law would appear to be correct, the factual basis for applying this conclusion to Judds does not exist. The application of this conclusion to Judds is, therefore, incorrect as a matter of law.

B. THE TRIAL COURT'S CONCLUSION THAT JUDDS HAD BREACHED THEIR WARRANTY OF TITLE IS INCORRECT AS A MATTER OF LAW.

The trial court's Conclusion No. 6 holds that Judds breached their duty to warrant title. "As a general rule, there is no breach of a covenant of warranty or for quiet enjoyment until there is an eviction under paramount title." 7 Thompson, Real Property § 3196, p. 353 (emphasis added). This breach occurs only when it is conclusively shown that the grantor did not own the property he conveyed by the warranty deed description. Creason v. Peterson, 470 P.2d 403, 404 (Utah 1970).¹

Because the original claim by Cahoon & Maxfield was settled, no determination was ever made regarding the claim to fee title. There was no eviction under paramount title, actual or constructive, nor was it conclusively shown that Judds did not own the property conveyed by their warranty deed. They did not, therefore, breach their warranty of title and the trial court's conclusion that they did is clearly erroneous.

¹Citing 6 Powell, Real Property, § 905 (1969).

C. JUDDS ARE ENTITLED TO THEIR DAY IN COURT TO DEFEND THE TITLE WHICH THEY WARRANTED. WATERSIDE'S SETTLEMENT WITHOUT JUDDS' CONSENT, AFTER THEY HAD PREPARED THEIR DEFENSE, WAIVED JUDDS DUTY TO DEFEND THE TITLE.

The object of notifying a grantor of a claim to title is "to give the covenantor a fair opportunity to defend the title he has warranted, to the end that he may defeat an unjust claim of superior title. . ." 61 A.L.R. 10, 173. In addition to the duty to defend title, a grantor has a right to defend that belongs to him and not to the grantee or subsequent grantees. Mellor v. Chamberlain, 672 P.2d 610, 613 (Wash. 1983). Included in the covenants statutorily imposed upon one who executes a warranty deed is the warranty to defend the title "against all lawful claims whatsoever." Utah Code § 57-1-12 (1953) (emphasis added). Nowhere is there a duty imposed upon a grantor to settle a claim of fee title.

Judds are entitled to defend the title which they conveyed and, if they choose to do so, defend it at trial. They had researched the facts and the law and were prepared to defend title. They, and they alone, were at risk for an adverse ruling on the fee simple claim.

Waterside, though nominally at risk for an adverse ruling, would, as a matter of law, have been indemnified by Judds through their warranty of title. Waterside was not, in actuality, at risk. Even so, Waterside engaged in negotiations for and entered into a settlement of the fee simple claim without the consent of Judds. The effect of this settlement is that it deprived Judds of their right to defend the title which they warranted. Having so deprived Judds of their right to defend, the settlement by Waterside acts as a waiver of their claim against Judds for breach of the duty to defend. In other words, if Waterside wished to claim a breach of the duty to defend, they should not have deprived Judds of

their right to defeat, at trial, Cahoon & Maxfield's claim to superior title.

D. IF, AT SOME POINT, THERE WAS A BREACH OF THE DUTY TO DEFEND, THAT BREACH WAS CURED BY THE ACTIVE PARTICIPATION OF JUDDS' PRESENT COUNSEL IN DEFENSE OF THE TITLE.

The trial court's Findings of Fact fail to specify the acts or omissions of Judds which may have amounted to breach of their duty to defend. It is possible, as evidenced by the argument in Point I, that the court looked at the early actions in this case and failed to recognize the active participation of Judds' present counsel in defense of the title. If, in fact, the finding of breach was based upon actions or inactions under the guidance of former counsel, the direct involvement of Judds' present counsel in defense of the title should act as a cure for the earlier breach.

The facts indicating the active participation of Judds' present counsel should, as a matter of law, lead to the conclusion that there was no breach of the duty to defend or, at least, that any prior breach was cured.

E. JUDDS TOOK ALL ACTION NECESSARY TO DEFEND THE TITLE WHICH THEY CONVEYED, THEREBY DISCHARGING THEIR DUTY TO DEFEND.

The duty to defend is statutory and applies only to the interest actually conveyed by the warranty deed. Utah Code § 57-1-2 (1953); Brewer v. Peatross, 595 P.2d 866, 868 (Utah 1979); Burton v. United States, 507 P.2d 710, 712 (Utah 1973).

In this action, Judds had no duty to defend claims related to easements or other non-fee issues. The covenant to defend against these items was expressly excluded by the language of the warranty deed. The only issue Judds had a duty to defend against was Cahoon & Maxfield's claim to a fee interest. The duty to defend does not extend to pro-

protecting any other of Waterside's interest nor to indemnification for attorney fees expended in protecting those interests.

Judds were able and ready to defend against the fee claim. They had made reasonable investigation into the facts and law related to the claim. They appeared with counsel at the time designated for trial and stated their readiness to proceed.

Judds were convinced from the facts and the law that Cahoon & Maxfield's fee claim was without merit. Waterside characterizes this position as a denial of Judd's duty to defend. On the contrary, it is a manifestation of their belief in a carefully reached legal conclusion and of their readiness to show at trial that the claim was without merit.

That Waterside was not comfortable with Judds' posture does not minimize the fact that they were ready, willing and able to defend the title, all that they were required by statute to do. Waterside was not entitled to undertake that defense so long as Judds were defending title. Merely because Waterside retained and paid counsel to defend the title and protect any other interests it had does not prove that Judds failed or refused to defend the title.

Waterside reached a settlement with Cahoon & Maxfield, precluding a hearing of the fee claim on its merits. This eliminated the claim without determining its validity. By doing this, Waterside prevented Judds from consummating their defense of the title. Having blocked the opportunity to defeat the fee claim, Waterside should not be permitted to claim that Judds failed to defend the title.

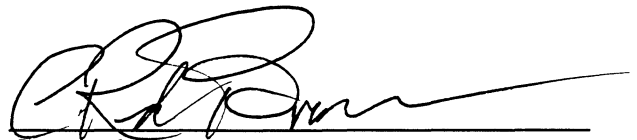
Judds did all that was reasonably necessary to evaluate the facts and the law and were prepared to defeat Cahoon & Maxfield's fee claims at trial. This clearly discharges their duty to defend the title which they conveyed. The trial court's Conclusion No. 6 is

clearly erroneous and should be set aside.

CONCLUSION

Neither the facts nor the law support the trial court's holding that Judds breached their duty to defend. Since the Findings of Fact and Conclusions of Law are clearly erroneous, the judgment of the trial court should be set aside and judgment entered in favor of Judds.

Respectfully submitted this 18th day of June, 1991.




C. Reed Brown
Attorney for Appellants and Third-
Party Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on the 18th day of June, 1991, I caused four copies of this Appellant's Brief to be mailed, postage prepaid, to:

Mark O. Van Wagoner
Christopher J. Condie
VAN WAGONER & STEVENS
215 South State Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Appellees



ADDENDUM

1. Revised Findings of Fact and Conclusions of Law, dated January 9, 1991.
2. Judgment, dated January 9, 1991.

FILED DISTRICT COURT
Third Judicial District

JAN 9 1991

By Evelyn Thompson Deputy Clerk

VAN WAGONER & STEVENS
Mark O. Van Wagoner (3323)
Christopher J. Condie (5267)
215 South State Street
Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 532-1036

Attorneys for Defendants and
Third-Party Plaintiffs

IN THE THIRD JUDICIAL DISTRICT FOR SALT LAKE COUNTY

STATE OF UTAH

CAHOON & MAXFIELD IRRIGATION)
COMPANY, a Utah corporation,)
Plaintiff,)

v.)

WATERSIDE ASSOCIATES, a)
limited partnership;)
MACHAN-HAMPSHIRE PROPERTIES,)
INC., a Utah corporation;)
and W.E.S./MHP VENTURE,)

Defendants and Third-)
Party Plaintiffs,)

v.)

D. STODDARD JUDD and VALENE)
A Judd, husband and wife,)

Third-Party Defendants.)

REVISED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. C 85-5168

Honorable Timothy R. Hanson

This case was heard in a non-jury trial before the
Honorable Timothy R. Hansen, District Court Judge, on November
14, 1989. Cahoon & Maxfield Irrigation Company was not present,
its claims having been settled prior to trial. Waterside

00806

Associates, Machan-Hampshire Properties, Inc. and W.E.S./MHP Venture (hereinafter collectively referred to as "third-party plaintiffs") were present and represented by their counsel of record, Mark O. Van Wagoner, Esq. and Christopher J. Condie, Esq. D. Stoddard Judd and Valene A. Judd were present and represented by their counsel of record, C. Reed Brown, Esq. Western Enviro-Systems, Inc. was present and represented by its counsel of record, James L. Warlaumont, Esq.

The matter proceeded by way of proffer of testimony by all parties through their attorneys, and exhibits were marked and received into evidence. Prior to trial, counsel submitted legal memoranda to the Court. Following the proffer of testimony, further legal argument dealing directly with the evidence was received by the Court. Additional post-trial memoranda were submitted to the Court at its request.

After having received the pleadings on file herein, having received the evidence and exhibits of the parties, having considered the arguments of counsel, being fully advised in the premises and good cause appearing therefore, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Western Enviro-Systems, Inc. ("Western Enviro") purchased a piece of property (the "Property") from D. Stoddard Judd and Valene A. Judd (the "Judds") by Warranty Deed on August 17, 1983. The Warranty Deed given to Western Enviro by the Judds contained the customary requirement to "defend and warrant" title to the buyer. The Warranty Deed contained the exceptions as stated below:

SUBJECT TO Easements, Restrictions and Rights of Way, currently of record and/or enforceable in law and equity, and general property taxes for the year 1983 and thereafter, in any and all water rights of record.

2. By way of Quit Claim Deeds, Western Enviro and R. Bruce McMullin conveyed their interest in the Property to W.E.S./MHP Joint Venture. On June 28, 1985, W.E.S./MHP Joint Venture transferred the property to Waterside Associates ("Waterside") by Warranty Deed.

3. On September 27, 1985, Cahoon & Maxfield Irrigation Company ("Cahoon") filed suit against third-party plaintiffs claiming, among other things, a fee simple interest to a ditch area that cut through Waterside's development.

4. When sued by Cahoon, Waterside made demand upon the Judds to defend the title. The Judds' defense consisted merely of appearing at trial announcing that they were ready to defeat Cahoon's claims to fee simple ownership. The record shows that the Judds effectively refused to defend the title throughout the lengthy period of time that this litigation pended.

5. In September of 1986 the Judds began a non judicial foreclosure proceeding against third party plaintiffs. Following a hearing on August 6, 1987, the Court entered a preliminary injunction against the Judds enjoining them from proceeding with their foreclosure action.

6. Third-party defendants have deposited \$125,000 as bond for the preliminary injunction, which are currently being held in West One Bank account number 0100230194.

7. On September 30, 1987, the Judds filed a Complaint against the third party plaintiffs, McMullin and W.E.S., civil no. C87-6497. That case was consolidated with C85-5168.

8. After consideration of Cahoon's claims and the potential effects of an adverse ruling on the entire project, Waterside determined that the risk of an adverse finding

warranted some attempt at settlement and compromise with Cahoon.

9. Prior to trial, Waterside and Cahoon reached a stipulated resolution of their claims, wherein Waterside would take certain actions to insure action to the ditch for Cahoon, but would not lose fee simple title to the area in question. The cost to third-party plaintiffs to settle Cahoon's claims was \$51,000 (\$36,000 to widen the canal; \$15,000 cash settlement). The Judds refused offers to participate in the negotiations that lead to the settlement between Waterside and Cahoon.

10. Third-party plaintiffs incurred [~~were required to pay~~] \$27,500 in attorneys fees to defend title to the property. No evidence was presented at trial adverse to the scope, cost or reasonableness of the attorneys fees incurred by third-party plaintiffs.

CONCLUSIONS OF LAW

1. The Judds' duty to defend title to the property which they conveyed by Warranty Deed arises from a covenant that runs with the land. Waterside has standing to assert its claim against the Judds under the Warranty Deed given to Waterside's predecessor in 1983.

2. Cahoon's claims of fee simple against the title are not excluded under the Warranty Deed. Excluded only are easements, restrictions and rights of way, no of which constitutes a claim of fee simple ownership.

3. The amount of land claimed by Cahoon would have adversely impacted the complex built by Waterside. Third-party plaintiffs were justified in settling Cahoon's claims against them.

4. The scope and cost of Waterside's work to effect a settlement which precludes a potential adverse verdict was both reasonable and appropriate under the circumstances of this case.

5. The duty to defend and warrant the title in the Warranty Deed that the Judds gave requires that the Judds do more than appear at the time of trial, with knowledge that Waterside had settled, and boldly announce that they were ready to defeat Cahoon's claims to fee simple ownership.

6. The Judds have breached their duty to defend and warrant the title. Third-party plaintiffs are entitled to be indemnified for the cost they incurred in defending title in the amount of \$78,500 (\$36,000 to widen canal; \$15,000 cash

settlement; \$27,500 in attorneys fees), both the costs relating to effecting the settlement and to attorneys fees.

7. All claims asserted in C87-6497 are dismissed with prejudice.

8. Third-party plaintiffs are entitled to the release of the bond for the preliminary injunction from West One Bank account number 0100230194 to their counsel of record.

DATED this 9 day of *January 1991* ~~December~~, 1990.

BY THE COURT:



TIMOTHY R. HANSON
Third Judicial District Court Judge

ATTEST

Evelyn Thompson

By

Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing REVISED FINDINGS OF FACT AND CONCLUSIONS OF LAW to be mailed this 28 day of December, 1990, by depositing the same in the United States mail, postage prepaid, to:

E. J. Skeen, Esq.
50 South Main Street, Suite 1500
P. O. Box 45340
Salt Lake City, UT 84145

C. Reed Brown, P.C.
3450 South Highland Drive
Suite 301
Salt Lake City, UT 84106

James L. Warlaumont, Esq.
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101

Carole Coppola

4000.cahoon

JUN 1991

VAN WAGONER & STEVENS
Mark O. Van Wagoner (3323)
Christopher J. Condie (5267)
215 South State Street
Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 532-1036

FILED DISTRICT COURT
Third Judicial District

JAN 9 1991

By Evelyn Thompson
SALT LAKE COUNTY
Deputy Clerk

Attorneys for Defendants and
Third-Party Plaintiffs

IN THE THIRD JUDICIAL DISTRICT FOR SALT LAKE COUNTY

STATE OF UTAH

CAHOON & MAXFIELD IRRIGATION)
COMPANY, a Utah corporation,)

Plaintiff,)

v.)

WATERSIDE ASSOCIATES, a)
limited partnership;)
MACHAN-HAMPSHIRE PROPERTIES,)
INC., a Utah corporation;)
and W.E.S./MHP VENTURE,)

Defendants and Third-)
Party Plaintiffs,)

v.)

D. STODDARD JUDD and VALENE)
A Judd, husband and wife,)

Third-Party Defendants.)

JUDGMENT

2162408
1-11-91-8.21am.

Civil Nos. C 85-5168
VC 87-6497

Honorable Timothy R. Hanson

The Court, having reviewed the proffered evidence,
all legal memoranda and trial exhibits and entered its
Findings of Fact and Conclusions of Law, hereby enters the
following Judgment:

00815

1. That plaintiff Cahoon & Maxfield Irrigation Company's claims against defendants, Waterside Associates, Machan-Hampshire Properties, Inc., and W.E.S./MHP Venture be dismissed with prejudice pursuant to the stipulation between the parties thereto;

2. That third-party plaintiffs Waterside Associates, Machan-Hampshire Properties, Inc., and W.E.S./MHP Venture are awarded judgment against third-party defendants, D. Stoddard Judd and Valene A. Judd the sum of seventy eight thousand five hundred dollars (\$78,500) (\$36,000 to widen the canal; \$15,000 cash settlement; \$27,500 in attorneys fees), with interest thereon at the rate of 12% per annum as provided by law and their costs of action.

3. That all claims raised by D. Stoddard and Valene A. Judd in case no. C87-6497 are dismissed with prejudice.

4. That the money currently held in West One Bank account number 0100230194, be released to third-party plaintiffs and their counsel.

DATED this 9 day of January 1991
~~June, 1990.~~


CLERK OF COURT

DISTRICT COURT JUDGE

2

ATTEST


Evelyn Thompson

00816

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing JUDGMENT to be mailed this 27 day of June, 1990, by depositing the same in the United States mail, postage prepaid, to:

E. J. Skeen, Esq.
50 South Main Street, Suite 1500
P. O. Box 45340
Salt Lake City, UT 84145

C. Reed Brown, P.C.
3450 South Highland Drive
Suite 301
Salt Lake City, UT 84106

James L. Warlaumont, Esq.
200 American Savings Plaza
77 West 200 South
Salt Lake City, Utah 84101

Carrie Coppola

1000.cahoon