

2004

Khalsa v. Ward : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MAHAN KHALSA,

Plaintiff-Appellant,

vs.

JEFFERY F. WARD and JON Q. WARD,

Defendants-Appellees.

JEFFERY F. WARD and JON Q. WARD,

Counterclaim Plaintiffs-Appellees,

vs.

MAHAN KHALSA,

Counterclaim Defendant-
Appellant,

Case No. 20040164-CA

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ORAL ARGUMENT IS REQUESTED

UTAH APPELLATE COURT

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I. JURISDICTIONAL STATEMENT.

This case is an appeal from a grant of summary judgment in favor of Jeffery F. Ward and Jon Q. Ward (the “Wards”). Pursuant to Utah Code Ann. § 78-2-2(3)(j), this Court has appellate jurisdiction.

II. ISSUE PRESENTED FOR REVIEW AND STANDARD FOR APPELLATE REVIEW.

Issue Presented for Appeal:

Did the trial court correctly rule that a specific deed call to a monument controls over a course and distance call?

Standards for Appellate Review:

Mahan Khalsa (“Khalsa”) appeals from the trial court’s denial of his motion for summary judgment and its ruling in favor of the Wards’ cross-motion for summary judgment. A trial court’s legal conclusions are reviewed for correctness. *Standard Fed. Sav. & Loan v. Kirkbride*, 821 P.2d 1136, 1137 (Utah 1991).

III. DETERMINATIVE STATUTES AND RULES.

The following are the determinative statutes and rules implicated by Khalsa’s appeal:

- A. UTAH CODE ANN. § 57-3-102(1);
- B. Utah R. Civ. P. 56(c) and (e).

See Addendum Exhibit A, which is a copy of this statute and rule.

IV. STATEMENT OF THE CASE.

The Wards purchased a certain parcel of land located in Midway, Utah (the “Ward Parcel”) from Homer Ellsworth (“Ellsworth”) on July 4, 1978 by means of a Uniform Real Estate Purchase Contract (“Ellsworth Contract”). [Record on Appeal (“R.”) 222, Memorandum Decision at ¶ 3.] Immediately after purchasing the Ward Parcel from Ellsworth, the Wards took possession of the land up to the Epperson Ditch. [R. 222, Memorandum Decision at ¶ 5.] The Wards have occupied, farmed, and cultivated the Ward Parcel continuously since 1978, planting crops of hay, alfalfa, or grain annually. [R. 132, Wards’ Statement of Undisputed Facts at ¶ 7.] The Wards recorded the Ellsworth Contract on September 12, 1980. [R. 222, Memorandum Decisions at ¶ 3.] After completing installment payments under the Ellsworth Contract, the Wards recorded a warranty deed on April 15, 1987. [R. 157, Affidavit of Jon Q. Ward (Jon Ward Affidavit”) at ¶¶ 11-12; R. 144, Affidavit of Jeffery F. Ward (“Jeff Ward Affidavit”) at ¶¶ 10-11.]

The eastern boundary of the Ward Parcel is described in both the Ellsworth Contract and the Wards’ warranty deed as running “along a ditch.” [R. 222, Memorandum Decision at ¶¶ 3-4.] It is undisputed that the ditch referred to in the legal description is the Epperson Ditch. [R. 222, Memorandum Decision at ¶ 4.] The Epperson Ditch is a large irrigation canal that has not moved or changed course for at least 65 years. [R. 157, Jon Ward Affidavit at ¶ 14; R. 145, Jeff Ward Affidavit at ¶ 13.] When the Wards negotiated the purchase of the Ward Parcel with Ellsworth in 1978, they agreed that the boundary would be

the Epperson Ditch. [R. 158, Jon Ward Affidavit at ¶ 6; R. 146, Jeff Ward Affidavit at ¶ 6.] The Epperson Ditch has represented the historical and natural boundary between the Ward Parcel and Ellsworth's remaining land. [R. 157, Jon Ward Affidavit at ¶ 14; R. 145, Jeff Ward Affidavit at ¶ 13.] For example, the natural slope of the land from west to east required that only property to the east of the Epperson Ditch could be irrigated with water from it. Because the Wards own additional property to the west, they irrigated all of the land west of the Epperson Ditch using water from another irrigation canal on their property. [R. 157-56, Jon Ward Affidavit at ¶¶ 15-16; R. 145-44, Jeff Ward Affidavit at ¶¶ 14-15.]

Khalsa purchased a parcel of property in 1999 that shares the eastern border with the Ward Parcel. [R. 221, Memorandum Decision at ¶10.] The course and distance calls in both the Wards' and Khalsa's legal descriptions start and end at the Epperson Ditch. The only difference is that the eastern boundary of the Ward Parcel is described as "along a ditch", while the western boundary of Khalsa's warranty deed omits the call to "along a ditch" and describes a straight line. [R. 222-21, Memorandum at ¶¶ 3 and 10.]

In May 2002, Khalsa, without any warning or explanation, entered onto the Ward Parcel and destroyed a fence that had been constructed in 1990 that ran along the Epperson ditch. [R. 222, Memorandum Decision at ¶ 6.] Plaintiff caused a new fence to be constructed

that encroached on the Ward Parcel. Consistent with their long-term ownership and occupation of the Ward Parcel, the Wards removed Khalsa's newly constructed fence.¹

Thereafter, Khalsa initiated this Lawsuit claiming that he was entitled to a declaration that he is the owner of a small strip of property (approximately ½ acre) that lies on the western side of the Epperson ditch. The Wards counterclaimed seeking to quiet title in the Epperson Ditch as the boundary between their properties based on the plain language of the legal description contained in the Ellsworth Contract and their warranty deed and by operation of the doctrine of boundary by acquiescence.

Course of Proceeding and Disposition of the Trial Court:

Khalsa moved for summary judgment arguing that he was entitled to a declaration quieting title in the disputed property based on a recent survey showing the “course bearings and distances” described in Khalsa's warranty deed calls for a straight line just west of the Epperson Ditch. [R. 83, Affidavit of Bing Christensen (“Christensen Affidavit”) at ¶ 5]

The Wards opposed Khalsa's motion and filed a cross-motion for summary judgment based on the well-established rule of deed construction that the specific deed call to and along the Epperson Ditch controls over any conflicting call by course and distance. The

¹The parties asserted competing claims for trespass. The Wards also asserted a counterclaim to quiet title to an easement across Khalsa's property. Those claims have been settled by the parties. Therefore, the sole issue before this Court relates to the competing quiet title claims of the boundary dispute.

Wards also argued that issues of fact on their counterclaim for boundary by acquiescence precluded summary judgment in favor of Khalsa.

The trial court issued a memorandum decision granting the Wards' cross-motion and denying Khalsa's motion for summary judgment. [R. 232-224, Memorandum Decision.] The trial court found in its ruling that the call to and along the Epperson Ditch controls the boundary location. The trial court further ruled that because of the Wards' prior recording and their long term possession of land up to the Epperson Ditch, Khalsa was on notice of the Wards' ownership. On January 30, 2004, the trial court entered a Final Judgment and Quiet Title Decree, quieting title to the Wards in the center line of the Epperson Ditch. [R. 256-53, Final Judgment and Quiet Title Decree.]

V. STATEMENT OF FACTS.

The following is a summary of the Wards' Statement of Undisputed Facts and Response to Khalsa's Statement of Facts, that were set forth in its memorandum in support of its motion for summary judgment, and unrefuted by Khalsa:

1. The Wards purchased the Ward parcel from Homer Ellsworth ("Ellsworth") on July 4, 1978 by means of a Uniform Real Estate Purchase Contract ("Ellsworth Contract"). The Ellsworth Contract was signed by Ellsworth and conveyed the following described parcel:

Commencing at a point located South 13.88 feet (4.23 meters) and West 2320.67 feet (707.34 meters) from the South one-quarter corner of Section 3, Township 4 South, Range 4 East, Salt Lake Base and Meridian; thence South 98°55'45" West along a fence line 361.52 feet (110.19 meters); thence North

00°09'22" East along a fence line 674.12 feet (205.47 meters); thence North 89°55'01" East along a fence line 453.38 feet (138.19 meters); **thence South 07°54'36" West along a ditch 680.80 feet (207.51 meters) to the point of beginning.**

(emphasis added). A copy of the Ellsworth Contract was recorded at the Wasatch County Recorder's Office as Entry No. 120840, Book 135, pages 344-46, on September 12, 1980.

[R. 159, Jon Ward Affidavit at ¶¶ 2-4; R. 147, Jeff Ward Affidavit at ¶¶ 2-4.]

2. The eastern boundary of the Wards' legal description calls to the eastern boundary of the Ward Parcel as being "along a ditch", which is the Epperson Ditch. When the Wards negotiated the transaction in 1978, they agreed with Ellsworth that the eastern boundary of the property would be the Epperson Ditch. [R. 158, Jon Ward Affidavit at ¶ 7; R. 146, Jeff Ward Affidavit at ¶ 7.]

3. The Epperson Ditch is a large irrigation ditch and is a clear physical barrier between the Ward Parcel and the adjacent parcel retained by Ellsworth. [R. 157, Jon Ward Affidavit at ¶ 14; R. 145, Jeff Ward Affidavit at ¶ 13.]

4. The Epperson Ditch has existed in its current state for at least 65 years and has not moved or changed course during that time. [R. 157, Jon Ward Affidavit at ¶ 14; R. 145, Jeff Ward Affidavit at ¶ 13.]

5. Since July 4, 1978, the Wards have occupied their property up to western edge of the Epperson ditch. Every year since 1978, the Wards have tilled the soil, planted and harvested their crops, driven tractors and other farm equipment up to the Epperson Ditch.

[R. 158-57, Jon Ward Affidavit at ¶¶ 8 and 14; R. 146-45, Jeff Ward Affidavit at ¶¶ 8 and 13.]

6. The Ward Parcel and the adjacent property slope from west to east. Thus, only properties to the east of the Epperson Ditch traditionally were irrigated with water from the Epperson Ditch. [R. 157-56, Jon Ward Affidavit at ¶¶ 15-16; R. 145-44, Jeff Ward Affidavit at ¶¶ 14-15.]

7. All of the property to the west (i.e., the Ward property – owned by the Ward family for over 65 years) is irrigated by another irrigation ditch to the west, known as the West Bench Ditch. [R. 157-56, Jon Ward Affidavit at ¶ 15; R. 145, Jeff Ward Affidavit at ¶ 14.]

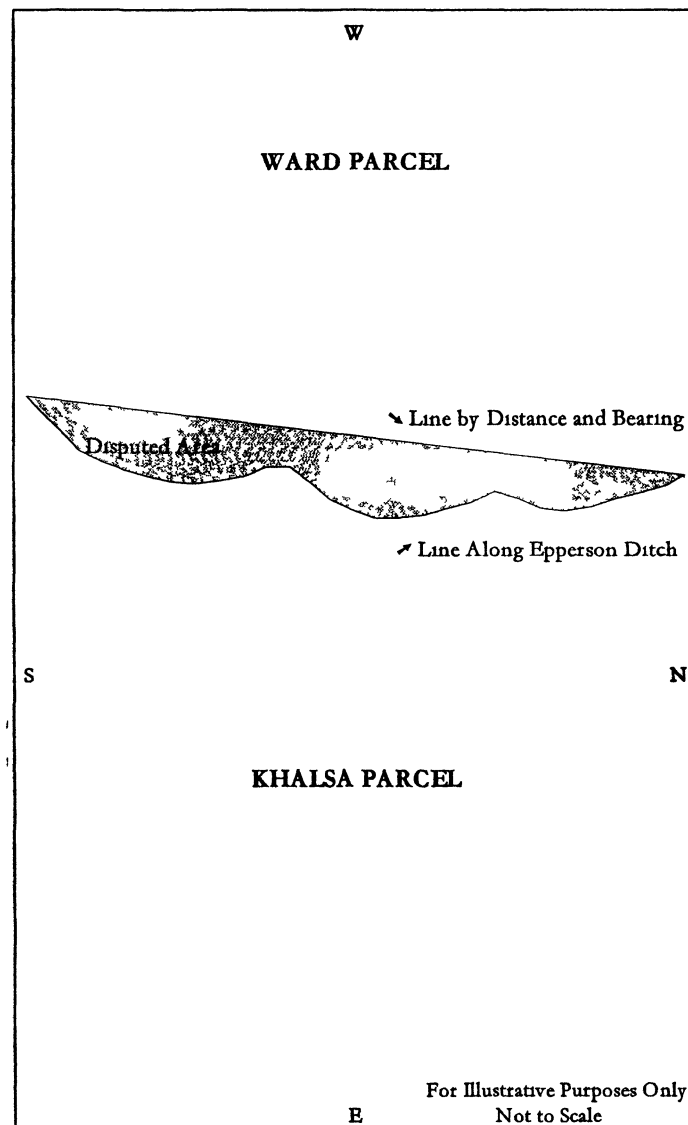
8. Essentially, property to the west of the Epperson Ditch was useless to Ellsworth because he could not irrigate property to the west because of the nature slope of the land to the east. Moreover, the Epperson Ditch was a natural impediment to Ellsworth's use and enjoyment of land west of the ditch. [R. 156, Jon Ward Affidavit at ¶ 16; R. 144, Jeff Ward Affidavit at ¶ 15.]

9. Consistent with their ownership of the property up to the Epperson Ditch, in approximately 1990, Wards constructed a fence along the western border of the Epperson Ditch. [R. 156, Jon Ward Affidavit at ¶ 17; R. 144, Jeff Ward Affidavit at ¶ 16.]

10. In 1999, Khalsa purchased his tract of land that shared a common border with the Wards and recorded a warranty deed on June 1, 1999. The legal description in Khalsa's

warranty deed omits any reference to the Epperson Ditch. [R. 221, Memorandum Decision at ¶ 10.]

11. The course and distance calls in both the Wards' and Khalsa's warranty deeds are identical on their common border in that they both start and end at the same point – the Epperson Ditch. The only difference between the two legal descriptions is that the Wards' legal description goes "along the ditch" while Khalsa's calls for a straight line. [R. 222-21, Memorandum Decision at ¶¶ 3 and 10; *see* Illustrative Drawing Below]



12. The fence constructed on the boundary of the Epperson Ditch by the Wards in 1990 was undisturbed until May of 2002, when Khalsa destroyed the fence without prior warning or explanation. [R. 222, Memorandum Decision at ¶ 6; R. 156, Jon Ward Affidavit at ¶ 17-19; R. 144, Jeff Ward Affidavit at ¶ 16-18.]

13. In November 2001, Khalsa commissioned Bing Christensen (“Christensen”) to survey the property “according to the course bearings and distances reported in their respective legal descriptions.” [R. 83, Christensen Affidavit at ¶ 5]; *see also* [R. 130-29, The Wards’ Response to Plaintiff’s Statement of Facts at ¶¶ 8-10.] Christensen never states in his affidavit filed in support of Khalsa’s motion for summary judgment that he plotted the Ward Parcel boundary according to the legal description contained in the Wards’ warranty deed, only that he plotted the boundary according to the “course bearings and distances”, thus ignoring the specific call to “along a ditch”. [R. 83, *See* Christensen Affidavit generally.]

VI. SUMMARY OF ARGUMENT.

This Court should uphold the trial court’s grant of summary judgment in favor of the Wards quieting title to the center of the Epperson Ditch. The undisputed evidence establishes that when the Wards purchased the Ward Parcel from Ellsworth on July 4, 1978, they agreed to establish the Epperson Ditch as the eastern boundary of their property. The language of legal description, topography of the property, and historical use and possession all support the trial court’s ruling. Indeed, the trial court correctly recognized that under the

undisputed facts of this case, the call to the Epperson Ditch controls over the bearing and distance calls and acreage reference. Khalsa's arguments to the contrary are unavailing.

First, Khalsa's reliance upon the language of his own legal description is misplaced. Because the Wards recorded the Ellsworth Contract nearly twenty years before Khalsa purchased his property, his interest is junior to any conflicting interest of the Wards.

Second, the Christensen Affidavit filed in support of Khalsa's motion for summary judgment does nothing to support his argument on appeal, because Christensen admittedly only plotted the "course bearings and distances" in the Wards' legal description and did not give effect to the call to the Epperson Ditch.

Third, fundamental cannons of deed construction require that where there is a conflict between a call to a monument as a boundary and a call by course and distance, the monument call prevails.

Fourth, the cases of *Mahas v. Rindlisbacher*, 808 P.2d 1025 (Utah 1990), *Williams v. Oldroyd*, 581 P.2d 561 (Utah 1978), and *Scott v. Hansen*, 422 P.2d 525 (Utah 1966), are all directly on point and cannot be distinguished in any meaningful way. The precedent created by these decisions is stated succinctly as follows – "Fixed monuments or markers of a permanent nature which can be definitely identified and located take precedence over calls of courses and distance, or plats, or amounts of acreage." *Scott v. Hansen*, 422 P.2d 525, 527-28 (Utah 1966). The trial court properly relied upon these cases.

Fifth, Khalsa's assignment of error based upon an argument that the Wards' legal description fails to close is untimely and unsupported by any evidence. Khalsa failed to raise this argument below, and presented no evidence to the trial court to support this assertion.

Sixth, Khalsa's suggestion that the Court should find issues of fact relating to the intention of the parties, if it decides to uphold the trial court's ruling, is similarly misguided. Khalsa himself moved for summary judgment based upon the plain language of the legal descriptions. Moreover, he failed to dispute any of the material issues of fact set forth in the Wards' Statement of Undisputed Facts. Therefore, the trial court appropriately found no issues of fact precluding summary judgment.

Finally, should the Court decide to reverse the trial court's decision for whatever reason, summary judgment in favor of Khalsa is inappropriate because the Wards should be allowed to present evidence of boundary by acquiescence. Indeed, the Wards have occupied the land up to the Epperson Ditch for over 25 years. Thus, even if the Court disagrees with the trial court's ruling, the Wards should have the opportunity to prove their boundary by acquiescence counterclaim.

VII. ARGUMENT.

1. THE TRIAL COURT CORRECTLY FOUND THAT THE CALL TO THE EPPERSON DITCH IN THE WARDS' LEGAL DESCRIPTION CONTROLS OVER ANY CONFLICTING CALLS BY COURSE AND DISTANCE.

In granting the Wards' cross-motion for summary judgment the trial court held that "Utah case law is clear on the issue of whether reference to a monument or marker will prevail over a conflicting metes and bounds description." [R. 229, Memorandum Decision.] Specifically, the court found that the call to the Epperson Ditch in the Wards' legal description controls over the conflicting course and distance description that references a straight line. [R. 228-27, Memorandum Decision.]

Khalsa seeks to have this Court ignore the call to "along a ditch" in the Wards' legal description and quiet title to him based upon his legal description that omits any reference to the Epperson Ditch. Khalsa's arguments, however, are contrary to Utah law and the undisputed evidence in the record, and this Court should uphold the trial court's ruling in favor of the Wards.

A. Khalsa's Legal Description is Irrelevant Because He Had Notice of the Wards' Ownership of the Property up to the Epperson Ditch Pursuant to the Prior Recorded Contract and Warranty Deed.

Khalsa correctly notes that the principal intent of the rules of deed construction is to give effect to the intention of the parties. *See, e.g.* Am. Jur. 2d Boundaries § 2 (“The primary function of a trial court resolving a boundary dispute is to ascertain the intent of the parties at the time of the original subdivision of a tract of land.”) Khalsa claims, however, that the trial court erred when “it ignored the intent of the grantor of the two warranty deeds.” [Pg. 6, Brief of Appellee.] Khalsa mistakenly refers to the legal description contained in his own warranty deed, dated May 28, 1999, as evidence of the grantor’s intent. Utah Code Ann. § 57-3-102(1) provides that a document affecting interest in real estate “from the time of recording with the appropriate county recorder, [shall] impart notice to all persons of their contents.” The Wards’ purchased their property on July 4, 1978 using a standard form of the Uniform Real Estate Purchase Contract. [R. 222, Memorandum Decision at ¶ 2.] The Ellsworth Contract describes the eastern boundary as “thence South 07°54'36" West **along a ditch** 680.80 feet (207.51 meters) to the point of beginning” (emphasis added). [R. 222, Memorandum Decision at ¶ 3.] The Wards duly recorded the Ellsworth Contract, thus imparting notice to Khalsa and his predecessors of the Wards’ interest in the property as it ran along the Epperson Ditch. [R. 222, Memorandum Decision at ¶ 2.] Indeed, the 1978 sale from Ellsworth to the Wards was the first subdivision of this property and the Wards were the first to purchase and record any sale of property from Ellsworth.

In *Wilson v. Schneider's Riverside Golf Course*, the Utah Supreme Court expressly held that an earlier recorded notice of purchase had priority over a subsequently recorded deed. 523 P.2d 1226 (Utah 1974). In *Wilson*, the plaintiff recorded a notice of a real estate purchase in April 1965. The defendant recorded his deed in November 1965. The plaintiff's and defendant's legal descriptions overlapped by more than two acres. The court ruled as follows: "Plaintiff's having recorded their notice of purchase prior to the recording of defendant's deed, the defendant becomes the subsequent purchaser and is deemed to take with notice of the plaintiff's interest." *Id.* at 1227. Thus, even though the two legal descriptions described a portion of the same property, the plaintiff prevailed because he recorded notice of his purchase first.

Similarly, the Wards' recorded the Ellsworth Contract and their warranty deed years before Khalsa purchased his property and recorded his warranty deed. Hence, Khalsa is the subsequent purchaser and his rights are junior to any conflicting rights of the Wards. The only issue before this Court is whether the proper construction of the language contained in the Wards' legal describes a boundary that runs along the Epperson Ditch, or in a straight line. Whatever Khalsa's legal description says is irrelevant, because Ellsworth could not convey to Khalsa or his predecessors what he had already conveyed to the Wards. The trial court correctly looked to the language contained in the Wards' legal description to determine the respective ownership rights of the parties.

B. Khalsa's Reliance Upon the Affidavit and Survey of Bing Christensen is Misplaced.

Khalsa refers to the Affidavit of Bing Christensen in support of his argument that the trial court erred in quieting title to the Wards. Indeed, the only basis upon which Khalsa asserted he was entitled to summary judgment was that Christensen had conducted a survey that showed “the course bearings and distances reported in their respective legal descriptions” ran in a straight line just to the west of the Epperson Ditch. [R. 83, Christensen Affidavit at ¶ 5.] By his own admission, however, Christensen only plotted the “course bearings and distances” and did not give any effect to the call to “along a ditch” in the Wards’ legal description. [R. 83, Christensen Affidavit at ¶ 5.]

No where does Christensen attest that he attempted to give effect to the call to the Epperson Ditch in the Wards’ legal description. [R. 83, Christensen Affidavit.] Thus, he reaches his conclusions, only by ignoring the call to “along a ditch” in the Wards’ legal description. Christensen’s affidavit, therefore, does nothing to support Khalsa’s claim that the grantor’s intent was not to create the Epperson Ditch as the boundary to the property sold to the Wards in 1978.

C. The Trial Court Correctly Interpreted Utah Law When it Ruled That the Call along the Epperson Ditch Controls.

The trial court correctly interpreted Utah law, finding that the call to “along a ditch” takes precedence over a conflict of courses or distances. [R. 229-28, Memorandum Decision.] Khalsa argues that the trial court misinterpreted the rules of construction and

Utah case law by not ignoring the call to the Epperson Ditch in the Wards' legal description.

Khalsa misinterprets the decisions of Utah courts and applicable rules of interpretation.

1. Fundamental Principles of Deed Construction Require That the Court Give Effect to Monument Calls.

Khalsa acknowledges the well-established rule that “[w]here the calls for locations of boundaries to land are inconsistent, other things being equal, resort is first had to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument), and thereafter to courses and distances.” 12 Am. Jur. 2d. Boundaries at § 61 (emphasis added). “Natural objects, artificial monuments, and adjacent boundaries, . . . will ordinarily, in the case of conflict in the description of boundaries to land, control all other calls.” 12 Am. Jur. 2d. Boundaries § 63; *see also* 12 Am. Jur. 2d. Boundaries § 71 (Courses and Distances) (“In the case of conflicting descriptions, courses and distances are controlled by and must yield to monuments whether natural or artificial.”)

Khalsa attempts to characterize the language in the Wards' legal description as following within some exception to this cannon of deed construction. The exceptions relied upon by Khalsa, however, are wholly inapplicable to the facts of this case. First, Khalsa cites the Utah cases of *Neeley v. Kelsch*, and *Hancock v. Planned Development Corporation* for the proposition that general references are controlled by specific descriptions. *See* 600 P.2d 979 (Utah 1979) and 791 P.2d 183 (Utah 1990). The legal descriptions in both *Neeley* and *Hancock* are markedly different from that contained in the Wards' legal description, and therefore, these cases are inapposite.

In *Neeley*, a metes and bounds legal description was followed by the general statement: “The parcel consists of all land lying north of the County Road which, in actuality, is approximately 15 acres instead of 22 acres.” *Id.* at 980. Importantly, there was no call to a monument as a boundary within the legal description. *See id.* The metes and bounds description, however, failed to include several parcels north of the county road that the grantor owned. *See id.* The court noted that the “general description” to “all land lying north of the County Road” was “meant only to affirm the land described by metes and bounds lay north of the road.” *Id.* at 982 (emphasis added). The Utah Supreme Court ruled that even though the trial court originally ruled that there was a mutual mistake between the original grantor and grantee, the deed should not be reformed to include all of the original grantor’s land north of the county road. Thus, the court affirmed ownership consistent with the metes and bounds description, because in this limited situation “the specific description in chains and degrees prevails over the general references to the location of a boundary.” *Id.* at 982 (emphasis added).

Conversely, the Ward legal description does not contain a “general” reference to an area as in *Neeley*, but rather a specific call to the eastern boundary of the Ward Parcel as “along” the Epperson Ditch. The fact that the *Neeley* Court found a metes and bounds description controlling over the general reference to the statement of “all land lying north of the country road” outside of the main body of the legal description does not create an

exception from the general rule applicable to this case that calls to specific monuments as boundaries control conflicting course and distance calls.

Similarly, *Hancock v. Planned Development Corporation* is inapposite. 791 P.2d 183. In *Hancock*, the issue was whether an exception contained in the plaintiff's metes and bounds legal description enclosed a disputed strip of land when the conveyance stated it was "subject to a fence line encroachment along east line." *Id.* at 184-85. The court ruled that the exception did not limit the metes and bounds description because the words "subject to" are commonly associated with attempts to give notice of potential encumbrances and not as means of "diminishing the quantum of the estate granted." *Id.* at 186. Clearly, the legal description in *Hancock* did not reference the "fence line encroachment" for the purpose of defining the boundary of the property, but only for the purpose of giving the grantee notice of a potential encumbrance. The Wards' legal description contains no such limitation, referring specifically to the Epperson Ditch as the eastern boundary of the Ward Parcel.

Likewise, the exceptions relied upon by Khalsa in the American Jurisprudence treatise deal with entirely different factual situations, and thus, are not persuasive. For instance, Section 61, after stating the rule that monuments control conflicting course and distance descriptions, provides that "[w]here, however, it is apparent that a mistake exists with respect to the calls, an inferior means of location may control a higher one." 12 Am. Jur. Boundaries § 61. Although this statement is not explained, the case of *Neeley v. Kelsch* is cited as providing an example of this exception. As previously noted, the clear mistake in *Neeley* was

the general reference to “all land lying north of the county road” while all of the land north of the county road was not included within the legal description. The *Neeley* decision did not consider the issue in this case – whether a specific call to a monument as a boundary controls a conflicting course and distance call. Thus, in this limited situation where a course and distance call conflicts with a general reference to a monument, “an inferior means of location may control a higher one.” The Wards’ legal description contains a specific call to the Epperson Ditch as a boundary, and therefore, controls.

Likewise, Khalsa’s reliance upon the exception noted in Section 64 of the American Jurisprudence treatise on Boundaries is misplaced. It provides in its entirety as follows:

Courses and distances and other inferior calls may control monuments and natural objects in cases of clear mistake, where the calls for monuments are inconsistent with each other, or where some other sufficient reason exists for disregarding the general rule, as where it is apparent from the instrument that boundaries are to be determined by means of location other than the monument, or where the location of the monuments is inaccurate.

Courses and distances may be used as guides by which to find natural objects or to determine, in cases of doubt, which of two or more natural objects is the one intended. In other words, they may explain latent ambiguities.

The doctrine that monuments prevail over courses and distances is never adhered to where it would lead to an absurdity or where it would defeat a grant when, by rejecting a call for one or more monuments, the deed may be upheld and the manifest intent of the parties made effectual.

12 Am. Jur. 2d. Boundaries § 64. As expressly stated within, the exceptions noted in Section 64 are intended to deal with instances where there is a conflict between more than one monuments or the location of a monument is uncertain. In those limited situations, courts

may rely upon course and distances descriptions to assist in determining the location of a monument or to correct a clear mistake. In this case, however, there is no conflict between different monument calls, and there is no dispute about the location of the Epperson Ditch. [R. 221, Memorandum Decision at ¶¶ 4-6.] Moreover, there is no other compelling evidence that requires this Court to disregard the well-established rule.

In this case, disregarding the call to the Epperson Ditch would result in an absurdity. Indeed, the undisputed evidence establishes that because of the natural topography of the land, the area above the Epperson Ditch was useless to Ellsworth because not only did the ditch provide an obvious obstacle to his use and enjoyment of the small sliver of farm land, but he had no means of irrigating the land to the west of the Epperson Ditch. [R. 157-56, Jon Ward Affidavit at ¶¶ 15-16; R. 145-44, Jeff Ward Affidavit at ¶¶ 13-15.] It is inconceivable that under these facts Ellsworth would have carved out a small sliver of property 680' long on the opposite side of the Epperson Ditch from his remaining property that he could not irrigate. Indeed, disregarding the call to “along a ditch” would create an artificial boundary where a long standing monument boundary has existed for over 65 years. [R. 157, Jon Ward Affidavit at ¶ 14; R. 145, Jeff Ward Affidavit at ¶ 13.] This is clearly not the purpose of the exception noted in Section 64 of the treatise.

Next, Khalsa cites Section 62 in support of his position.

In determining boundaries of a tract of land, it is not permissible to disregard any of the calls if they can be applied and harmonized in any reasonable manner, but if there is an actual contradiction between the calls in

the description of land, so that they are irreconcilable, the court may reject or disregard the one which is false or mistaken.

Calls which cannot be complied with because they are vague or repugnant may be rejected or controlled by other material calls which are consistent and certain. And an inconsistent call should be disregarded if thereby all the rest of the calls are reconcilable and the description perfected.

12 Am. Jur. 2d. Boundaries § 62. Khalsa argues that if the call to the Epperson Ditch is ignored, then the rest of the legal description is harmonized. This argument, however, begs the question of which call should prevail – the call to the Epperson Ditch or the course and distance call for a straight line. Again, there is nothing vague or uncertain about the call along the Epperson Ditch. A conflict arises when the physical line of the ditch is compared with the course and distance call that references a straight line just to the west of the Epperson Ditch. Because the conflict arises not from the call along the Epperson Ditch but from an inferior inconsistent course and distance call, the monument call controls.

Finally, Khalsa relies upon *Laflin Borough v. Yatesville Borough*, a 1979 Pennsylvania case. 422 A.2d 1186 (Pa. Commonw. Ct.). In *Laflin Borough*, a lower court judge described the issue as follows:

The difficulty arises from an additional element in the metes and bounds description: a call for the northeastern boundary of Laflin to adjoin the southwestern boundary of Yatesville. If this call is respected, the remaining parts of the description cannot be satisfied inasmuch as the total acreage of Laflin would increase, and three segments of the metes and bounds description would be altered by several hundred feet each. Moreover, the charter's designation of the lots to be encompassed within Laflin's boundaries would no longer be accurate; to reach the Yatesville border, Laflin would also have to include a large segment of lot twenty-five.

Id. at 1187. Moreover, after examining the evidence the commission found that the intention of Laflin’s incorporators was to establish the boundary at the dividing line between Lots Nos. 1 and 25, and the “call to adjoin the Yatesville’s southwestern boundary was based on the incorporators’ erroneous assumption that Yatesville then extended to that dividing line between lots.” *Id.* at 1189. Based upon the specific facts of that case, the *Laflin* court found that it was appropriate to deviate from the rule that a call to a boundary as an adjoinder must govern an inconsistent metes and bounds call. *Id.*² The facts of the *Laflin Borough* case are clearly not the facts of this case. The Wards’ legal description calls to an actual visible monument that represents a natural and historical boundary between the two properties rather than another town’s invisible boundary line. Also, the deviation between the Epperson Ditch and the course and distance call is a minor deviation involving a small sliver of property, while the *Laflin* legal description needed to be substantially modified on three sides by hundreds of feet to conform to the adjoining boundary call. Moreover, there is no evidence that the call to the Epperson Ditch was based upon a mistaken assumption of another boundary line as in *Laflin* case. In short, there is nothing in the Pennsylvania *Laflin* decision that requires this Court to overturn years of Utah jurisprudence and the well reasoned trial court opinion.

²“The certain and locative calls of adjoining landowners are treated as a sort of natural monument, although not so decisive as other natural monuments such as streams, etc.” 12 Am. Jur. 2d. Boundaries § 7.

2. **Numerous Utah Cases With Facts Nearly Identical to the Present Case Have Ruled that a Monument Call Controls Over a Course and Distance.**

Utah law is clear that when a course and distance call is inconsistent with a specific call to a monument, the call to the monument must prevail. *See, e.g., Mahas v. Rindlisbacher*, 808 P.2d 1025 (Utah 1990); *Williams v. Oldroyd*, 581 P.2d 561 (Utah 1978); *Scott v. Hansen*, 422 P.2d 525 (Utah 1966); *Henrie v. Hyer*, 70 P.2d 154, 157 (Utah 1937); and *Washington Rock Co. v. Young*, 80 P. 382, 386 (Utah 1905). Khalsa's attempt to distinguish these cases fails.

In *Mahas v. Rindlisbacher*, 808 P.2d 1025, 1026 (Utah 1990), the property description contained the following call: "Southeasterly *along said canal* to a point North 15 [degrees] East 10.18 chains from County Road . . ." (emphasis added). The *Mahas* Court found that the call clearly referenced a boundary that ran along an old canal. *Id.* at 1027. The only issue was whether the call referred to a currently non-existent canal or another canal some 400 feet to the north. *Id.* The court concluded that based upon the evidence, the call referred to an old canal that was no longer in existence. *Id.* Even in dissent, Justice Zimmerman concluded: "This is not enough to support a finding that such a canal ever existed, and absent such a finding, the call to a canal must be given preference over the metes and bounds and the boundary must be settled at the Warren Canal." *Id.* at 1028 (emphasis added).

First, Khalsa argues that *Mahas* is distinguishable because both of the parties' deeds referenced the call to the canal. As previously set forth, however, because the Wards'

purchase and recording preceded Khalsa's purchase and recording by years, Khalsa's rights in the property are junior to any interest of the Wards. Therefore, it is irrelevant that the legal description in Khalsa's warranty deed omits the call to the Epperson Ditch. Second, Khalsa attempts to distinguish between minor differences between two calls. Effectively there is no substantive difference between the call as stated in the Ward legal description – "thence South 07°54'36" West *along a ditch* 680.80 feet (207.51 meters) to the point of beginning" – and the *Mahas* call – "Southeasterly *along said canal* to a point North 15 [degrees] East 10.18 chains from County Road . . ." Each call contains a direction of either "South" or "Southeasterly" "along" a canal (or ditch) a certain distance to another point. Removing the reference to the canal or ditch in either situation would still allow for the surveyor to complete the survey. Indeed, this had to have been the case in *Mahas* because the location of the old canal was admittedly unknown. Thus, Khalsa's claim that removing the reference to the canal in *Mahas* makes that legal description "incomplete and incomprehensible" is unavailing.

Next, Khalsa submits that the *Williams v. Oldroyd* decision is not sufficiently specific to justify a meaningful comparison. 581 P.2d 561 (Utah 1979).³ There is nothing unspecific about the holding in *Williams*. The issue in *Williams* was whether the trial court correctly

³Khalsa makes the curious argument that the *Williams v. Oldroyd* decision is distinguishable because it involves the interpretation of only one legal description, rather than two. Khalsa again mistakenly assumes that his after recorded deed is relevant to a determination of what property Ellsworth sold to the Wards in 1978.

ruled for the plaintiff when it quieted title to property where a latent ambiguity existed between a monument call and a metes and bounds description. *Id.* at 562. The defendant submitted that the trial court erred because it refused to reform the deed on the grounds of mutual mistake to include property not described. *Id.* at 562-63. The Court described its holding as follows:

A latent ambiguity in the deed was discovered when the property was surveyed. One of the metes and bounds calls is in conflict with a call to a monument: viz., Highway 50 and 6.

Where there is such ambiguity, monument calls take precedence over calls of courses and distances, and the Court applied that rule here.

Defendants content that the Court, in relying on this rule of construction reformed the deed in a manner not intended by the parties, and that it erred in not reforming the deed in accordance with defendants' claim, noted ante, of the intended description of the parties.

Applying rules of construction, however, does not constitute reformation of a deed. The description is indeed followed. . . .

Id. at 562-63. There is nothing confusing or unspecific about this holding. The *Williams* Court simply reaffirmed the trial court's decision that quieted title to a monument call (Highway 50 and 6) that was in conflict with a metes and bounds description. The *Williams* case is directly on point, and requires that the trial court's decision be upheld quieting title to the Wards in the Epperson Ditch as the eastern boundary of their property.

Khalsa submits that the Utah Supreme Court's *Scott v. Hansen* decision is inapplicable because it involved a question of whether a county road referred to as the boundary ran in a straight line as shown on the county map, or a meandering road as actually existed. 422 P.2d

525 (Utah 1966). There is no legitimate basis to distinguish the *Scott* decision from this case. Indeed, the legal description and depiction of the disputed area in *Scott v. Hansen* is remarkably similar to the Wards' legal description – “westerly along the south side of said road 80 rods more or less” to the said quarter section line. *Id.* at 528. As in this case, it was undisputed that the metes and bounds description was consistent with a straight line and inconsistent with a meandering one. The *Scott v. Hansen* Court ruled “the conclusion seems clear” . . . “the reference was to the county road as it actually existed and was observable by the parties involved, rather than to the theoretical county road shown by the straight line on the county plat.” *Id.* The Court explained its reasoning as follows:

[F]ixed monuments or markers of a permanent nature which can be definitely identified and located take precedence over calls of courses or distances, or plats, or amounts of acreage. This is so because it is reasonable to assume that the parties are more apt to be familiar with such monuments or markers than with precise measurements, or with recorder's plats; consequently, giving precedence to the call to such a monument or marker results in less possibility of error and a greater likelihood of giving effect to the intent of the parties. (internal citations omitted).

Id. at 527-28.

The trial court in this case correctly relied upon these well founded Utah cases when it ruled in favor of the Wards, quieting title in the Epperson Ditch as the boundary of their property.

D. The Discrepancy Between the Acreage Reference and the Actual Area Conveyed is Inconsequential.

Khalsa also cites the fact that the acreage referenced after the Wards' legal description (6.31 acres) is slightly less than the property actually conveyed as evidence of an intent not to create the Epperson Ditch as the boundary. References to amounts of acreage conveyed, however, are so imprecise that they are given even less weight of intention than course and distance calls. Indeed, the Utah Supreme Court expressly held in *Scott v. Hansen* that of the rules of construction, "[o]ne of these is that fixed monuments or markers of a permanent nature which can be definitely identified and located take precedence over calls of courses or distances, or plats, or amounts of acreage." 422 P.2d at 527 (emphasis added).

Moreover, Section 73 of the American Jurisprudence treatise provides as follows:

Quantity is the least reliable of all descriptive particulars in a conveyance and the last to be resorted to. It yields to calls for monuments as well as to other courses and distances unless there is a clear intent to give a certain quantity, as would be the case in an attempted equal division of a particular tract.

12 Am. Jur. 2d. Boundaries § 73 (emphasis added). Therefore, the slight discrepancy in acreage referenced after the Wards' legal description cannot control the specific reference to the Epperson Ditch as the eastern boundary of the Ward Parcel.

E. Undisputed Factual Evidence Supports the Finding the Epperson Ditch was Intended as the Boundary by the Parties.

As previously stated, "the intent of the parties at the time of conveyance" is the purpose for which the rules of construction exist. *Scott v. Hansen*, 422 P.2d at 527. Thus, actual evidence of the parties intentions at the time of conveyance is obviously relevant. *See*,

e.g., Williams v. Oldroyd, 581 P.2d at 563 (noting that “Of those parties who were privy to that deed, only plaintiff gave evidence” . . . “that the parties intended the property as described in the deed.”) “Upon ascertaining the parties’ intention, all other rules of construction and interpretation must yield to that intention.” 12 Am. Jur. 2d. Boundaries § 2. “Furthermore, in the case of doubtful construction as to boundaries, the claim of the party in actual possession ought to be maintained.” 12 Am. Jur. 2d. Boundaries § 60 (emphasis).

It is undisputed that when the Wards negotiated the purchase of the Ward parcel with Ellsworth in 1978, they agreed with Ellsworth that the eastern boundary would be the Epperson Ditch. [R. 158, Jon Ward Affidavit at ¶ 6; R. 146, Jeff Ward Affidavit at ¶ 6.] As previously explained, this original intent is only confirmed by the language in their legal description describing the eastern boundary as “along a ditch”, the natural topography of the land, and the Wards’ continuous possession of the property since 1978.

The undisputed facts of this case provide substantial and convincing evidence that Ellsworth intended the Epperson Ditch as the boundary between the Ward Parcel and his remaining land when he sold them the property in 1978 and described the eastern boundary as “along a ditch.”

2. KHALSA’S SUGGESTION THAT THE WARDS’ LEGAL DESCRIPTION IS INEFFECTIVE BECAUSE IT DOES NOT CLOSE IS UNTIMELY AND IS NOT SUPPORTED BY ANY EVIDENCE.

Khalsa raises for the first time in his appeal an issue about whether or not the Wards’ legal descriptions would close if the call to “along a ditch” is given effect. The only evidence

given in support of Khalsa's motion for summary judgment was Christensen's affidavit, together with copies of his purported survey and the parties' warranty deeds. Nowhere in his affidavit does Christensen discuss a failure to close defect in the Wards' legal description. Rather, he stated that he plotted the Ward Parcel by only using the "course bearings and distances". [R. 83, Christensen Affidavit at ¶ 5.] Khalsa did not raise this issue below and presented no facts to the trial court to support this argument, and thus, has waived any right to argue that the trial court erred on this basis. *Govert Copier Painting v. Craig Van Leeuwen*, 801 P.2d 163, 170 (Utah Ct. App. 1990) (citations omitted) (this court "will not consider the facts on appeal when there is no record the trial judge had access to those facts when deciding the motion at issue.") Nevertheless, Khalsa's argument in this regard appears to simply reiterate his position that the call to "along a ditch" is "extraneous", and that if the Epperson Ditch is followed as the boundary, it will conflict with the course and distance call therein. These arguments have been fully addressed above.

3. THERE ARE NO ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE WARDS.

Khalsa filed a motion for summary judgment submitting that there were no issues of fact precluding summary judgment as to the ownership of the disputed property and asking the trial court to look to and construe the legal descriptions as a matter of law. [R. 72-70, Memorandum in Support of Motion for Summary Judgment]; *see Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979) ("It is the court's duty to construe a deed as it is written, and in the final analysis, each instrument must be construed in the light of its own language and

peculiar facts.”) Moreover, Khalsa failed to adequately dispute any of the Wards’ Statement of Undisputed Facts filed in support of their cross-motion for summary judgment. Rule 56(e) provides in pertinent part as follows:

When a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial.** If he does not so respond, summary judgment, if appropriate, shall be entered against him.

U. R. CIV. PRO. RULE 56(e) (emphasis added). *See also Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124-25 (Utah 1994) (stating that party opposing motion for summary judgment supported by affidavit has affirmative duty to respond with affidavit or other evidence); *D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989) (same).

On appeal, Khalsa argues for the first time that if the Court does not rule in his favor, the Court should find that there are issues of fact relating to the intention of the parties. He argues that if he loses, the language in the Wards’ legal description should be ruled ambiguous. While there is a latent conflict between the call to the Epperson Ditch as the boundary line and the course and distance call, the rules of construction set forth herein are intended to resolve these conflicts. Because both parties moved the trial court for summary judgment on the interpretation of the legal descriptions and Khalsa failed to dispute the Wards’ Statement of Undisputed Facts, the trial court properly ruled that there were no disputed issues of fact precluding summary judgment.

4. IN ANY EVENT, DISPUTED ISSUES OF FACT RELATING TO THE WARDS' COUNTERCLAIM FOR BOUNDARY BY ACQUIESCENCE PRECLUDE SUMMARY JUDGMENT IN FAVOR OF KHALSA.

Should this Court for whatever reason reverse the trial court's decision quieting title up to the Epperson Ditch in the Wards, summary judgment is inappropriate in favor of Khalsa because issues of fact remain as to the Wards' counterclaim for boundary by acquiescence.

Under Utah law there are four elements of boundary by acquiescence: (1) occupation up to a visible line marked by monuments, fences, or buildings; (ii) mutual acquiescence in the line as a boundary; (iii) for a period of 20 years; (iv) by adjoining landowners. *See, e.g., Orton v. Carter*, 970 P.2d 1254 (Utah 1998) (finding all four elements satisfied). The Wards should have the opportunity to present proof as to each of these elements.

The Wards became the owners of their real property on July 4, 1978. They immediately took possession of the Ward Parcel, up to the Epperson ditch. Every year since 1978, the Wards have farmed and cultivated their property up to the Epperson ditch. Thus, the Wards occupied the property up to the Epperson Ditch for nearly 25 years without disturbance. Clearly, should this Court reverse the trial court's decision, the Wards should have an opportunity to present evidence that the adjoining landowners acquiesced in the Epperson Ditch as the boundary between their properties. Summary judgment in favor of Khalsa, therefore, is inappropriate.

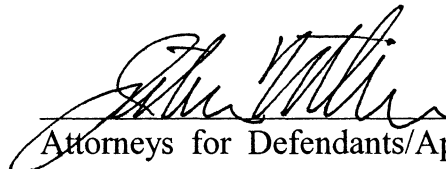
VIII. CONCLUSION.

In conclusion the trial court's ruling should be upheld. The clear and unambiguous cannons of construction and the decisions of Utah courts require that a specific call to a monument as a boundary control a conflicting course and distance call. Consequently, the call to "along" the Epperson Ditch in the Wards' legal description should be given effect over any inferior conflicting call, and this Court should affirm the trial court's ruling quieting title to the Wards in the center line of the Epperson Ditch as the eastern boundary of the Ward Parcel.

DATED this 11th day of June, 2004.

PARR WADDOUPS BROWN GEE & LOVELESS
Ronald G. Russell
Justin P. Matkin

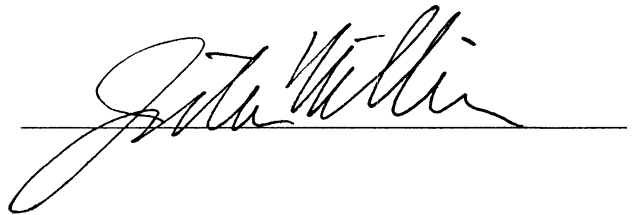
By:


Attorneys for Defendants/Appellees Jeffery F.
Ward and Jon Q. Ward

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2004, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE JEFFERY F. WARD AND JON Q. WARD**, to be mailed by first class U.S. mail, postage prepaid, to the following:

Stephen Quesenberry
J. Bryan Quesenberry
HILL, JOHNSON & SCHMUTZ
Jamestown Square
3319 North University Avenue
Provo, UT 84604

A handwritten signature in cursive script, appearing to read "John W. Miller", is written over a horizontal line.

ADDENDUM

TO

BRIEF OF JEFFERY F. WARD AND JON Q. WARD

Part 1**General Provisions**

- Section
 57-3-101. Certificate of acknowledgment, proof of execution, jurat, or other certificate required — Notarial acts affecting real property — Right to record documents unaffected by subdivision ordinances.
 57-3-102. Record imparts notice — Change in interest rate — Validity of document — Notice of unnamed interests — Conveyance by grantee.
 57-3-103. Effect of failure to record.
 57-3-104. Certified copies entitled to record in another county — Effect.
 57-3-105. Legal description of real property and names and addresses required in documents.
 57-3-106. Original documents required — Captions — Legibility.
 57-3-107. Unenforceable covenants — Definition — Inclusion in recorded document.
 57-3-108. Financing statements not subject to title.

Part 2**Master Mortgage and Trust Deeds**

- 57-3-201. Definitions.
 57-3-202. Recording master mortgage and trust deed — Requirements for master form — Indexing by county recorder.
 57-3-203. Authorization to incorporate master form by reference — Referencing a master form — Prohibiting the reference of legal descriptions.
 57-3-204. Constructive notice — Effect as between direct parties to mortgage or trust deed.

57-3-1 to 57-3-12. Renumbered as §§ 57-3-101 to 57-3-107. 1998

PART 1**GENERAL PROVISIONS**

- 57-3-101. Certificate of acknowledgment, proof of execution, jurat, or other certificate required — Notarial acts affecting real property — Right to record documents unaffected by subdivision ordinances.**

(1) A certificate of the acknowledgment of any document, or of the proof of the execution of any document, or a jurat as defined in Section 46-1-2, or other notarial certificate containing the words "subscribed and sworn" or their substantial equivalent, that is signed and certified by the officer taking the acknowledgment, proof, or jurat, as provided in this title, entitles the document and the certificate to be recorded in the office of the recorder of the county where the real property is located.

(2) Notarial acts affecting real property in this state shall also be performed in conformance with Title 46, Chapter 1, Notaries Public Reform Act.

(3) Nothing in the provisions of Title 10, Chapter 9, Part 8, Subdivisions, and Title 17, Chapter 27, Part 8, Subdivisions, shall prohibit the recording of a document which is otherwise entitled to be recorded under the provisions of this chapter.

2002

- 57-3-102. Record imparts notice — Change in interest rate — Validity of document — Notice of unnamed interests — Conveyance by grantee.**

(1) Each document executed, acknowledged, and certified,

or certified copy of a document complying with Section 57-4a-3, whether or not acknowledged, each copy of a notice of location complying with Section 40-1-4, and each financing statement complying with Section 70A-9a-502, whether or not acknowledged shall, from the time of recording with the appropriate county recorder, impart notice to all persons of their contents.

(2) If a recorded document was given as security, a change in the interest rate in accordance with the terms of an agreement pertaining to the underlying secured obligation does not affect the notice or alter the priority of the document provided under Subsection (1).

(3) This section does not affect the validity of a document with respect to the parties to the document and all other persons who have notice of the document.

(4) The fact that a recorded document recites only a nominal consideration, names the grantee as trustee, or otherwise purports to be in trust without naming beneficiaries or stating the terms of the trust does not charge any third person with notice of any interest of the grantor or of the interest of any other person not named in the document.

(5) The grantee in a recorded document may convey the interest granted to him free and clear of all claims not disclosed in the document in which he appears as grantee or in any other document recorded in accordance with this title that sets forth the names of the beneficiaries, specifies the interest claimed, and describes the real property subject to the interest. 2000

57-3-103. Effect of failure to record.

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

- (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and
- (2) the subsequent purchaser's document is first duly recorded. 1998

57-3-104. Certified copies entitled to record in another county — Effect.

(1) (a) A document of record in a county recorder's office that is certified by the county recorder may be recorded in the office of the county recorder of another county.

(b) The recording of a certified copy in the office of the county recorder of another county has the same force and effect as if the original document had been recorded in the other county.

(2) A certified copy of a document may not be submitted for recording under Subsection (1) in the office of the same county recorder that issued the certified copy. 2003

57-3-105. Legal description of real property and names and addresses required in documents.

(1) A document executed after July 1, 1983, is entitled to be recorded in the office of any county recorder only if the document contains a legal description of the real property affected.

(2) (a) A document affecting title to real property presented for recording after July 1, 1981, is entitled to be recorded in the office of any county recorder only if the document contains the names and mailing addresses of the grantees in addition to the legal description required under Subsection (1).

(b) The address of the management committee may be used as the mailing address of a grantee as required in Subsection (2)(a) if the interest conveyed is a timeshare interest as defined by Section 57-19-2.

(3) Each county recorder shall refuse to accept a document for recording if it does not conform to the requirements under

were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from the date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see *Central Bank & Trust Co. v. Jensen*, *supra*, and Rule 58A(d).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Lund v. Brown*, 2000 UT 75, 11 P.3d 277.

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 46 Am. Jur. 2d Judgments § 265 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and

hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997.)

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

Affidavit.

- Contents.
- Corporation.
- Experts.
- Extension of time to submit.
- Failure to submit.
- Inconsistency with deposition.
- Necessity of opposing affidavits.
- Resting on pleadings.
- Objection.
- Sufficiency.
- Hearsay and opinion testimony.
- Superseding pleadings.
- Unpleaded defenses.
- Verified pleading.
- Waiver of right to contest.
- When unavailable.
- Exclusive control of facts.
- Who may make.

Affirmative defense.

Answers to interrogatories.

Appeal.

- Adversely affected party.
- Standard of review.

Applicability.

Attorney's fees.

Availability of motion.

Compliance with rule.

Cross-motions.

Damages.

Discovery.

Disputed facts.

Effect of denial.

Evidence.

— Admissions of plaintiff.

— Facts considered.

— Improper evidence.

— Proof.

— Unsupported motion.

— Weight of testimony.

Implicit rulings.

Improper party plaintiff.

Issue of fact.

— Contract interpretation.

— Corporate existence.

— Deeds.

— Intent to remove trustee.

— Lease as security.

— Notice.

— Wills.

Judicial attitude.

Motion for new trial.

Motion to dismiss.

Motion to reconsider.

Notice.

— Provision not jurisdictional.

— Waiver of defect.

Procedural due process.

Purpose.

Scope.

Summary judgment improper.

— Damage to insured vehicle