

2004

## Khalsa v. Ward : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MAHAN KHALSA,

Appellant/Plaintiff,

vs.

JEFFERY F. WARD and JON Q. WARD,

Appellees/Defendants.

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JEFFERY F. WARD and JON Q. WARD,

Counterclaim Plaintiffs/Appellees,

vs.

MAHAN KHALSA,

Counterclaim Defendant/Appellant.

---

**REPLY BRIEF OF APPELLANT**

Appellate Case No. 20040164-CA

Trial Court Case No. 020500294

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Appeal From the Fourth Judicial District Court, Wasatch County, State of Utah  
The Honorable Donald J. Eyre

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APPELLANT REQUESTS ORAL ARGUMENT AND A PUBLISHED DECISION

FILED  
UTAH APPELLATE COURT

JUL 22 2004

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APPELLANT REQUESTS ORAL ARGUMENT AND A PUBLISHED DECISION

## TABLE OF CONTENTS

ARGUMENT .....	1
I. THE TRIAL COURT INCORRECTLY HELD THAT THE REFERENCE TO THE DITCH IN THE LEGAL DESCRIPTION OF THE WARDS' WARRANTY DEED GOVERNS THE LEGAL DESCRIPTION IN MR. KHALSA'S WARRANTY DEED .....	1
A. The Wards' <i>Notice</i> Argument Is Circular, and Only Begg the Underlying Question – Whose Legal Description of the Common Border Governs? .....	1
B. The Trial Court's Ruling Incorrectly Interprets Utah Law and Applicable Canons of Deed Construction .....	3
1. The Wards' Deed Construction Preference Ignores the Overall Rule of Giving Effect to the Grantor's Intent .....	3
2. The Wards' Supporting Caselaw is Distinguishable .....	7
C. The Wards' Testimony Regarding Mr. Ellsworth's Intent is Hearsay ...	10
D. Mr. Khalsa Has Previously Raised the Claim That the Wards' Legal Description Is Ineffective Because it Does Not Close, and Said Claim Is Properly Supported by Evidence .....	11
E. Alternatively, Issues of Fact Exist as to Mr. Ellsworth's Intent Which Preclude Summary Judgment .....	13
II. THE WARDS' BOUNDARY BY ACQUIESCENCE CLAIM IS INAPPLICABLE .....	14
CONCLUSION .....	15
CERTIFICATE OF SERVICE .....	16

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Ault v. Holden</u> , 2002 UT 33, ¶ 16 .....	14
<u>Gillmor v. Cummings</u> , 904 P.2d 703, 706 (Utah App. 1995) .....	6
<u>Laflin Borough v. Yatesville Borough</u> , 422 A.2d 1186 (Pa. Commonw. Ct. 1979) .....	7
<u>Mahas v. Rindlisbacher</u> , 808 P.2d 1025 (Utah 1990) .....	7, 8, 9
<u>Neeley v. Kelsch</u> , 600 P.2d 979 (Utah 1979) .....	4, 5
<u>Scott v. Hansen</u> , 422 P.2d 525 (Utah 1966) .....	10
<u>Williams v. Oldroyd</u> , 581 P.2d 561 (Utah 1978) .....	9
<u>Wilson v. Schneider’s Riverside Golf Course</u> , 523 P.2d 1226 (Utah 1974) .....	3

### **Statutes**

U.C.A. § 57-3-102(1) .....	1, 2
----------------------------	------

### **Secondary Authorities**

12 Am. Jur. 2d Boundaries § 64 .....	5
--------------------------------------	---

## ARGUMENT

### **I. THE TRIAL COURT INCORRECTLY HELD THAT THE REFERENCE TO THE DITCH IN THE LEGAL DESCRIPTION OF THE WARDS' WARRANTY DEED GOVERNS THE LEGAL DESCRIPTION IN MR. KHALSA'S WARRANTY DEED**

#### **A. The Wards' *Notice* Argument Is Circular, and Only Begg the Underlying Question – Whose Legal Description of the Common Border Governs?**

Mr. Khalsa's opening appeal brief points to the identical metes and bounds of the common border between the parties legally described in the parties' respective warranty deeds as indicating their common grantor's intent in selling the two parcels. In response, the Wards claim that the legal description in Mr. Khalsa's Warranty Deed (Exhibit A attached to the Brief of Appellant) is irrelevant because he supposedly had notice of the Wards' ownership of the land in question pursuant to the Wards' Uniform Real Estate Purchase Contract ("Purchase Contract), which was recorded prior to Mr. Khalsa's Warranty Deed.

This argument, however, is circular. Mr. Khalsa may have had notice of the Wards' Purchase Contract pursuant to U.C.A. § 57-3-102(1), but of what exactly does the Wards' Purchase Contract give him notice? The Wards' *notice* argument follows that the Purchase Contract gives Mr. Khalsa actual notice of the legal description contained therein (which is the same legal description of the Wards' Warranty Deed)<sup>1</sup>. However,

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<sup>1</sup> Compare the legal description in the Purchase Contract [R. at 159, ¶¶ 2-4; R. at 147, ¶¶ 2-4] to the legal description in the Wards' Warranty Deed (attached to the Brief of Appellant as Exhibit B).

comparing the legal description of Mr. Khalsa's Warranty Deed to the legal description of the Wards' property in their Purchase Contract yields the same metes and bounds (or distances and bearings) of their common border. Thus, looking at the legal description of the Wards' Warranty Deed or Purchase Contract at the time Mr. Khalsa bought his neighboring parcel, Mr. Khalsa would have assumed that because his Warranty Deed contains the same metes and bounds of the common border with the Wards, there was no conflict, and any reference to the ditch was extraneous. The Wards would of course claim that Mr. Khalsa had notice of the legal description reference to "along a ditch" in the Purchase Contract which the Wards would claim governs. However, such is the present dispute between the parties – i.e. does the identical metes and bounds in both legal descriptions govern or does the phrase "along a ditch" in the Wards' legal description govern? Thus, the Wards' notice argument is circular, leading the Court right to where it otherwise is in this appeal – i.e. how to construe the parties' warranty deed legal descriptions.

Furthermore, the Wards appear to use U.C.A. § 57-3-102(1) to require Mr. Khalsa to not only do a title search on his property and the chain-of-title leading up to the purchase of his property, but the Wards would also have Mr. Khalsa do a title search of all the parcels of property adjacent to his property (including the Wards' parcel). In effect, the Wards would required Mr. Khalsa to investigate and inspect the chain-of-title and legal descriptions of all the land adjacent to his. Rather than cite any supporting caselaw for this expansive view of recorded notice, the Wards simply rely on one case –

Wilson v. Schneider's Riverside Golf Course, 523 P.2d 1226 (Utah 1974). The Wilson court, however, fails to resolve the present dispute at bar because in its brief, one-page decision, it fails to provide the legal descriptions of the two overlapping properties. Apparently, the legal description in Wilson must have contained a standard metes and bounds legal description with no conflicting, extra language such as is contained in the Wards' Warranty Deed. Further, the legal descriptions of the parties in Wilson must not have described a common border so that the later-recording party, doing a title search, would have noticed the lack of a commonly-described border. Indeed, the Wilson court omits all of these facts which would have been determinative to the present dispute. Thus, Wilson fails to resolve the dispute at bar.

At the very least, the legal description in the Wards' Purchase Contract and Warranty Deed is ambiguous, begging the question: does the Eastern boundary of the Wards' property track along metes and bounds or the ditch? Accordingly, the Wards' *notice* argument is of no avail as it is circular and fails to aid the Court in deciding this appeal.

**B. The Trial Court's Ruling Incorrectly Interprets Utah Law and Applicable Canons of Deed Construction**

**1. The Wards' Deed Construction Preference Ignores the Overall Rule of Giving Effect to the Grantor's Intent**

The Wards rely on the canon of deed construction which holds that monument calls govern conflicting courses and distances. The Wards' reliance on this canon of construction, however, ignores the critical inquiry – what did the grantor, Mr. Ellsworth,



intend to grant? To divine Mr. Ellsworth's intent requires the Court to review the legal descriptions in the parties' warranty deeds (because his testimony by affidavit or deposition is unavailable). Because the legal description in the Wards' Warranty Deed fails to solve the ambiguity of what Mr. Ellsworth intended the Eastern boundary of the Wards' property to be, the Court must compare the Wards' Warranty Deed to Mr. Khalsa's Warranty Deed. Because both warranty deeds contain the same course and descriptions for the common boundary, but only the Wards' Warranty Deed refers to the ditch, it is reasonable to conclude the Mr. Ellsworth intended the common boundary between the parcels to be the boundary described by the metes and bounds of both warranty deeds. This conclusion is further buttressed by the fact that deleting the reference in the Wards' Warranty Deed to the ditch does not effect the description to the common border. In other words, the legal description in both Warranty Deeds stands independent of the ditch reference in the Wards' Warranty Deed.

The intent of the grantor was the focus of the court in Neeley v. Kelsch, 600 P.2d 979 (Utah 1979), when it stated the principle:

[w]hen *the face of a deed shows the **intention** was to convey a specific quantity of **land*** and the metes and bound would give that quantity, but a reference to a monument would embrace more or less than that quantity, the metes and bounds description should be followed.

Id. at 982 (emphasis added). Further indicative of the intent of the grantor, according to Neeley, is the "quantity of land" conveyed. In Neeley, the common grantor testified that it was her intent to have conveyed the disputed land to Kelsch. However, the Neeley court looked at the acreage such a conveyance would have created for Kelsch – i.e. 23

acres – versus the acreage provided for in the warranty deed at issue – i.e. 15 acres – and concluded that insufficient evidence exists to establish that the grantor intended to convey the disputed land to Kelsch. *Id.* at 982. Similarly, as set forth in the *Brief of Appellant*, the Wards’ Warranty Deed gives them only 6.31 acres, but because the Trial Court awarded the disputed half acre to the Wards, the Trial Court’s award of summary judgment increases the Wards’ acreage to 6.89 acres. In response, the Wards claim that references to amounts of acreage conveyed is imprecise and thus unreliable. Although acreage by itself is not the preferred cannon to construe a deed, it nevertheless sheds light on the grantor’s intent.

Further, the common law exception set forth in the Brief of Appellant supports the cannon that the intent of the grantor is paramount. 12 Am. Jur. 2d Boundaries § 61 (holding that an inferior means of location may control a higher one when it is apparent that a mistake exists with respect to the calls; in such case the controlling call is that most consistent “with the apparent intent of the grantor.”). The Wards attempt to distinguish this exception by distinguishing *Neeley* again. However, this common law exception is a principle of law, not a rule, and as such, it applies to different factual situations. Thus, just because the present case is not factually identical to *Neeley* does not impugn the applicability of the *Neeley* common law exception to the present case.<sup>2</sup>

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<sup>2</sup> The other common law exception found in 12 Am. Jur. 2d Boundaries § 64 similarly applies in cases of clear mistake, “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.” Section 64 does not

Next, the Wards borrow from the aforementioned common law exceptions by claiming that disregarding the “along a ditch” language in their warranty deed would result in an absurdity. The Wards claim that Mr. Ellsworth could not have intended to exclude the disputed piece of land from his sale of property to the Wards (and later convey it to Mr. Khalsa’s predecessors-in-interest) because such would supposedly result in the absurdity that if the disputed strip is given to Mr. Khalsa, it is uphill from the ditch in question, and thus un-irrigatable. Although it may have been the Wards’ intent to use their property to grow crops, not all land owners of large tracts of land so desire to use their land as the Wards. In fact, Mr. Khalsa (a businessman, not a farmer) intends to commercially develop his land. Setting that aside, there is no evidence of record indicating the use of Mr. Khalsa’s predecessors-in-interest. Thus, just because Mr. Khalsa or his predecessors-in-interest might use the disputed strip of land differently than the Wards does not equate to an absurd use.

One Utah case overlooked to date is Gillmor v. Cummings, 904 P.2d 703, 706 (Utah App. 1995), which divined the intent of the grantor by focusing on the specific language in the vesting deed:

The [legal] description in question says ‘to a point.’ ***‘The words ‘to a point’ indicate that the limit is not set by a physical feature, but by a theoretical location.’*** Stephen V. Estopinal, A Guide to Understanding Land Surveys 171 (1989). ***If the deed description had intended to use the road to define the boundary, as asserted by Cummings, the description would have followed the***

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solely apply to conflicts between more than one monument as indicated in the Brief of Appellees.

*east side of the road to the point of beginning rather than calling to a point 3 rods east of the quarter corner.* Here, the deed refers to the section quarter corner and follows from that, not from the road.

(Emphasis added). Similarly, the Wards' legal description in their Warranty Deed because at a point ("Commencing at a point located South . . .) and ends at the same point, indicating that "If the [Ward's Warranty Deed] description had intended to use the [ditch] to define the boundary, as asserted by Cummings, the [Wards' legal] description would have followed the [ditch] to the point of beginning."

Finally, although different in facts, Laflin Borough v. Yatesville Borough, 422 A.2d 1186 (Pa. Commonw. Ct. 1979) supports the overarching principle that "the call adopted as the controlling one should be the [m]ost *consistent with the apparent intent of the parties*." Id. at 1187.

Accordingly, the Wards' preferred deed construction ignores the paramount cannon of construction requiring courts to give effect to the intent of the grantor.

## **2. The Wards' Supporting Caselaw is Distinguishable**

The Wards rely on a number of cases in support of their claim that the cannon of deed construction holding that a monument controls over a course and distance governs the present case. These cases, however, are inapplicable to the present action.

The Wards claim that Mahas v. Rindlisbacher, 808 P.2d 1025 (Utah 1990) is applicable because the legal descriptions in Mahas refers to a canal. As previously set

forth in the Brief of Appellant, only the Wards' Warranty Deed refers to a ditch, whereas both vesting deeds in Mahas refers to a canal. Further, the calls to the canal in both the legal descriptions at issue in Mahas stand alone, without also calling to a course and direction. For example, the Mahas plaintiff's legal description reads in pertinent part:

. . .running thence West 1.06 chains; thence South 27 [degrees] West to Canal; thence Southeasterly along said canal to a point North 15 [degrees] East . . .

Id. at 1026. The Mahas defendant's legal description similarly reads in pertinent part:

. . . thence North 27 [degrees] East 12.00 chains, more or less, to a canal; thence Southeasterly along canal to a point North 15 [degrees] east 10.18 chains from the County Road . . .

Id. Both of these legal descriptions expressly call to a canal, without which, both legal descriptions would be incomprehensible. The Wards claim that "[r]emoving the reference to the canal or ditch in [the Mahas legal descriptions] would still allow for the surveyor to complete the survey." (See, Brief of Appellees at 24). Such is impossible. Removing the reference to the canal in the Mahas plaintiff's legal description would yield:

. . .running thence West 1.06 chains; thence South 27 [degrees] West to []; thence Southeasterly [] to a point North 15 [degrees] East . . .

Without the necessary call to the canal, the Mahas plaintiff's legal description is missing

an entire boundary.<sup>3</sup> Contrast the canal call in the Mahas legal descriptions to the ditch reference in the Wards' legal description:

. . . 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.

The Wards' legal description not only refers to a ditch, but also gives a course and distance along the same boundary of the property. Omitting the reference to ditch does not render the legal description incomprehensible.

The Wards claim this distinction is irrelevant because Mr. Khalsa supposedly had notice based on the Wards' previously recorded Purchase Contract (or Warranty Deed). However, as stated above, the Wards' *notice* argument is circular and unavailing.

Next, the Wards rely on Williams v. Oldroyd, 581 P.2d 561 (Utah 1978). As noted earlier in the Brief of Appellant, Williams is inapplicable to the present case because it involved only one vesting deed – from a grantor to a grantee – not two vesting deeds of neighboring grantees (as is the situation in the present case). Based on this, the Williams court did not have the benefit of two vesting deeds describing a common boundary with

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<sup>3</sup> The Wards concluded that even without the call in the Mahas legal descriptions to a canal, a surveyor could complete the survey because the old canal was unknown. (See, Brief of Appellee at 24). However, there was a fence line that ran along the old canal. Id. at 1026. And, if the fence line was used as the boundary, both legal descriptions “close and harmonize with each other.” Id. Thus, just because the location of the old canal was unknown does not mean that any surveyor could have plotted the Mahas properties from legal descriptions omitting the canal reference.

metes and bounds to help it divine the grantor's intent. The Wards' only response to this critical difference is a footnote reference to their circular *notice* argument.

Finally, the Wards also rely on Scott v. Hansen, 422 P.2d 525 (Utah 1966), but ignore the distinguishing fact in Scott that the boundary dispute there involved only one vesting deed, not two like is the situation in the present case. Further, the call to a road in Scott is necessary to have a complete legal description in that case. Omitting the call in Scott to the road leaves that vesting deed incomprehensible, which would not be the situation in the present case.

Accordingly, the caselaw relied on by the Trial Court and the Wards is distinguishable and inapplicable to the case at bar.

**C. The Wards' Testimony Regarding Mr. Ellsworth's Intent is Hearsay**

Focusing on the critical issue of intent, the Wards assert that Mr. Ellsworth supposedly intended the ditch to be the Eastern boundary of the Wards' parcel. The Wards support this claim by arguing that "they agreed with Ellsworth that the eastern boundary would be the Epperson Ditch." (See, Brief of Appellees at 28). However, this argument is based solely on one paragraph in the Wards' affidavits in which they testify that:

Prior to our purchase of the Ward Parcel on July 4, 1978, [the Wards] had discussions with Mr. Ellsworth about the property that we would be purchasing. During these discussions, we agreed that the boundary between the Ward Parcel and Mr. Ellsworth's remaining land would be the Epperson ditch.

[R. at 158, ¶ 6; R. at 146, ¶ 6.] To the extent these paragraphs from the Wards' affidavits refer to what Mr. Ellsworth agreed upon, or imply that he consented or said anything in support of their understanding, such is hearsay. At best, the Wards can only testify as to their intent and understanding, not the intent and understanding of Mr. Ellsworth. Because we have no affidavits or deposition testimony of Mr. Ellsworth, at present his intent can only be derived from the parties' warranty deeds.

Accordingly, the representations as to Mr. Ellsworth's intent contained in the Wards' affidavits, is inadmissible hearsay and should not be considered by this Court.

**D. Mr. Khalsa Has Previously Raised the Claim That the Wards' Legal Description Is Ineffective Because it Does Not Close, and Said Claim Is Properly Supported by Evidence**

On page three of his *Reply to Memorandum in Opposition to Plaintiff's Motion for Summary Judgment*, Mr. Khalsa argued:

Furthermore, note that the length of the common border between the two parcels in question is exactly 680.8 feet – in both legals. Now, if the language “along a ditch” is erased, nothing changes. The bearings and distance are still in agreement. Thus, “along a ditch” is extraneous and does not affect the bearing and distance of the common border.

On the other hand, concluding that the common border tracks “along the ditch” as Defendants claim, would not only contradict the straight line and specific distance in Defendants' legal description, but would vitiate the identical bearing and distance in Plaintiff's legal description. In other words, the two legal descriptions would not “close.” In order for the two legals to “close,” the only possible reading of “along a ditch” (so as to harmonize it with the otherwise identical bearings and distances of the common boundary) is to interpret “along a ditch” to mean that the common boundary described by the identical bearings and distances in the two legals *generally follows along the line of the ditch*. To hold



otherwise would require the Court to reform Plaintiff's warranty deed by adding "along a ditch" into Plaintiff's legal, or to vitiate the identical bearings and distances in Defendants' and Plaintiff's legal (as set forth above).

[R. at 161.] Thus, Mr. Khalsa clearly raised his *closure* argument below. Further, the inability of the Wards' legal description (if the "along a ditch" language is used) to close is evidenced by the surveyor's plot of the parties' properties *and the ditch* in Exhibit C attached to the Brief of Appellant.<sup>4</sup> In fact, the illustrative drawing on page eight of the Brief of Appellees shows the same thing – i.e. the land circumscribed between the contours of the ditch and the common boundary between the properties does not touch the northern or southern boundaries of either of the parties' properties. Put another way, said circumscribed land is floating between the northern and southern boundaries – it does not close.<sup>5</sup>

Thus, relying on "along a ditch" as the proper construction of the Wards' Warranty Deed (and the common boundary between the parties' properties) results in an inability to

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<sup>4</sup> The Wards claim that surveyor Bing Christensen's affidavit, to which the plot is attached, is somehow irrelevant to (or is an improper basis for) Mr. Khalsa's claim because Mr. Christensen gave effect to the "course bearings and distances" in the legal descriptions of the parties' warranty deeds and supposedly did not give effect to the ditch. This claim, however, makes no sense in that the surveyor plotted the ditch on his plot of the parties' properties. (See, Exhibit C attached to Brief of Appellant). That is all Mr. Khalsa relies on the surveyor for – the plot of the properties and the ditch and the acreage of the disputed strip of land.

<sup>5</sup> Thus, the Wards' claim that the course and distance calls in both the Wards' and Mr. Khalsa's legal descriptions start and end at the Epperson Ditch (see, Brief of Appellees at 3) is incorrect.

close the boundaries of the parties' properties. Surely, this was not the intent of Mr. Ellsworth.

**E. Alternatively, Issues of Fact Exist as to Mr. Ellsworth's Intent Which Preclude Summary Judgment**

The Wards take umbrage at Mr. Khalsa's claim that issues of fact exist as to Mr. Ellsworth's intent that preclude summary judgment in favor of the Wards. Although Mr. Khalsa has argued that based on the two Warranty Deeds, the Trial Court should have awarded Mr. Khalsa summary judgment (and this Court should too). *Alternatively*, if this Court is not so inclined to rule, it should nonetheless reverse the Trial Court's award of summary judgment in favor of the Wards because issues of fact exist as to Mr. Ellsworth's intent *vis-a-vis* the correct legal description of the common border. There is nothing inconsistent with such alternative arguments which attorneys routinely make.

As stated above, the Wards' hearsay claim as to Mr. Ellsworth's intent is inadmissible. Mr. Khalsa does not dispute what the Wards may have understood their Eastern boundary to be at the time they purchased their land. Naturally, the Wards claim that their understanding was and is that the ditch is the correct boundary between the parties' properties. But, their intent does not govern. Mr. Ellsworth's intent governs. This Court can certainly take notice that the Wards' claim as to what Mr. Ellsworth intended (at the time they bought their property from Mr. Ellsworth) is hearsay, which should not be relied upon by the Court.

Accordingly and in the alternative, issues of fact exist regarding Mr. Ellsworth's intent. The Trial Court's award of summary judgment to the Wards should thus be reversed and this case should be remanded back to the Trial Court for further disposition.

## **II. THE WARDS' BOUNDARY BY ACQUIESCENCE CLAIM IS INAPPLICABLE**

The Wards argue that their boundary by acquiescence claim creates issues of fact precluding the Court from reversing the Trial Court and awarding Mr. Khalsa summary judgment. This claim is without merit.

For a court to quiet title in a parcel of property based on boundary by acquiescence, the party claiming title to property under said doctrine must establish: "(i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a long period of time, [and] (iv) by adjoining landowners." Ault v. Holden, 2002 UT 33, ¶ 16. "If the party attempting to establish boundary by acquiescence fails to satisfy any *one* of the elements of the doctrine, the boundary is defeated." Id. at ¶ 16. (emphasis in the original).

The Wards' boundary by acquiescence claim fails because there are no issues of fact as to their inability to establish the fourth element which requires that the Wards owned the land for 20 consecutive years. The Wards attempt to establish this 20 year period with their Purchase Contract which they recorded on September 12, 1980. However, the Wards' 20-year period would not begin until they became *legal* owners

pursuant to their Warranty Deed recorded in 1987.

The Wards' 1987 Warranty Deed governs this issue because it establishes that they became *legal* owners at that time. Although the Wards had a recorded contract prior to 1987, such did not give them legal ownership. They could have, at any time under the contract, stopped paying and just walked away. The Wards have not provided the Trial Court or this Court any caselaw providing them legal ownership of the disputed land based solely on an executory contract. Also, according to the Purchase Contract, Defendants' monthly payments consisted of principal and interest, but no taxes. [R at 147.] Thus, Mr. Ellsworth was paying the taxes on the Wards' land until he legally conveyed it to them in 1987. Had Mr. Ellsworth defaulted on paying taxes, the government would have pursued him, not the Wards.

In sum, Defendants' boundary by acquiescence claim fails the 20-year ownership requirement and therefore is inapplicable.

### **CONCLUSION**

Based on the forgoing, the Court should reverse the Trial Court's award of summary judgment in favor of the Wards, and instead award Mr. Khalsa summary judgment by holding that the correct boundary between the parties' properties is the metes and bounds description contained in both parties' warranty deeds, not the ditch referred to in the Wards' Warranty Deed.

RESPECTFULLY SUBMITTED this 22 day of July, 2004.

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**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 22 day of July, 2004, they caused a true and correct copy of the foregoing *Reply Brief of Appellant* to be delivered to the following:

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