

2004

Mahan Khalsa v. Jeffery F. Ward and Jon Q. Ward : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MAHAN KHALSA,

Appellant/Plaintiff,

vs.

JEFFERY F. WARD and JON Q. WARD,)

Appellees/Defendants.

JEFFERY F. WARD and JON Q. WARD,)

Counterclaim Plaintiffs/Appellees,)

vs.

MAHAN KHALSA,

Counterclaim Defendant/Appellant.)

BRIEF OF APPELLANT

Appellate Case No. 20040164-CA

Trial Court Case No. 020500294

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 COURTS

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APPELLANT REQUESTS ORAL ARGUMENT AND A PUBLISHED DECISION

LIST OF PARTIES

Appellant/Plaintiff

Mahan Khalsa

Appellees/Defendants

Jeffery F. Ward and Jon Q. Ward

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I. STATEMENT OF JURISDICTION

Pursuant to U.C.A. § 78-2a-3(2)(j), and the Utah Constitution, Art. VIII, § 3, this Court has jurisdiction over the present appeal.

II. STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Issue 1: Did the trial court correctly construe the property descriptions of the parties' relevant deeds?

Standard of appellate review: De Novo. Because this is a question of law, the trial court's legal conclusions are given no deference and its decision is reviewed for correctness. White v. Gary L. Deeselhorst, NP Ski Corp., 879 P.2d 1371, 1374 (Utah

1994).

Issue 2: Did the trial court correctly quiet title and declare judgment as a matter of law in the Wards?

Standard of appellate review: De Novo. Because this is a question of law, the trial court's legal conclusions are given no deference and its decision is reviewed for correctness. White, 879 P.2d at 1374.

III. STATEMENT OF THE CASE

A. Nature of the Case

The parties are neighbors, Mr. Khalsa to the East and the Wards to the West. The parties' common predecessor-in-interest is a man named Ellsworth, who conveyed directly to the Wards the parcel of land they now own by Warranty Deed which was recorded by the Wards on April 15, 1987. Mr. Khalsa's parcel of land also came from Mr. Ellsworth, but was conveyed through a number of intermediate owners before Mr. Khalsa bought it and recorded a Warranty Deed on June 1, 1999.

Mr. Khalsa asserts that the property line dividing his parcel from the Wards' parcel runs just West of a ditch that generally parallels the dividing line between the properties, and thus Mr. Khalsa's parcel of property includes the ditch. The Wards maintain that the ditch (or some part of it) is the Western property line based on the phrase "along a ditch" contained in the legal description of their parcel.

After the boundary dispute arose, Mr. Khalsa hired a surveyor to survey the property line dividing the two properties according to the metes and bounds of the legal descriptions of the parties' Warranty Deeds. The survey confirmed that the ditch is not the dividing line between the two parcels of property, but is actually contained within Mr. Khalsa's property.

B. Proceedings Below

Mr. Khalsa initiated this action by filing a Complaint to which the Wards answered and filed a Counterclaim. Mr. Khalsa subsequently filed a Motion for Summary Judgment and the Wards responded with a Cross-Motion for Summary Judgment. Mr. Khalsa files the instant appeal from the Trial Court's decision on these summary judgment motions.

C. Material Facts

1. The parties own neighboring parcels of property in Wasatch County, Utah. (R at 70, ¶ 1.)
2. The parties' parcels of property come from the same predecessor-in-interest, a man named Ellsworth. (R at 70, ¶ 2.)
3. Mr. Khalsa's parcel of property at issue herein was conveyed from Mr. Ellsworth through a number of intermediate owners before Mr. Khalsa bought it and recorded a Warranty Deed on it in June of 1999. (R at 70, ¶ 3; 73-74.) A copy of Mr.

Khalsa's Warranty Deed is attached hereto as Exhibit A.

4. The Wards' parcel of property at issue herein was conveyed by Mr. Ellsworth directly to them by Warranty Deed recorded April 15, 1987. (R at 76.) A copy of the Wards' Warranty Deed is attached hereto as Exhibit B.

5. Mr. Khalsa's parcel of property is legally described as follows:

COMMENCING at a point having State Plane Rectangular Coordinates of X:2003075.02 and Y:786473.28 (based on the Lambert Conformal Projection, Utah Central Zone), said point also being North 6.9 feet and East 359.94 feet from the Southwest corner of Section 3, Township 4 South, Range 4 East, Salt Lake Base and Meridian; thence North 07°54'36" East 680.8 feet; thence North 89°24'37" East 589.39 feet; thence South 676.05 feet' thence South 89°41'08" West 692.05 feet to the point of beginning.

(R at 73-74.)

6. The Wards' parcel of property is described as follows:

Commencing at a point located South 13.88 feet (4.23 meters) and West 2320.67 (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 89°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.

(R at 76.)

7. A licensed surveyor, Bing Christensen, surveyed the disputed piece of land in a survey dated November 11, 2001. (R at 83, ¶ 3.) This survey is not in dispute.

8. In plotting the boundary between the parties' properties, Mr. Christensen used the legal description from the parties warranty deeds. (R at 83, ¶ 4.)

9. More recently, Mr. Christensen plotted the Khalsa and Ward properties (according to the legal descriptions in their respective warranty deeds), as well as the ditch in question. (R at 83, ¶¶ 5-7; 78.) This plot is not in dispute. A copy of said plot is attached hereto as Exhibit C.

10. According to Mr. Christensen's survey and plot, the boundary between the Ward and Khalsa properties, based on the metes and bounds in the legal descriptions of their warranty deeds, is approximately 10-20 feet west of the ditch in question. (R at 83, ¶ 8.)

11. The Wards' Warranty Deed expressly states that the area they received was 6.31 acres. (R at 76.)

12. The surveyor calculated the acreage of the Wards' property from the legal description in their warranty deeds as 6.306 acres (excluding the disputed parcel) which is identical (when rounded up) to the 6.31 acres stated in the Wards' warranty deed. (R at 207.)

14. The acreage of the disputed parcel is .58 acres. (R at 78.)

IV. SUMMARY OF ARGUMENT

The Trial Court erred below when it granted the Wards' Cross-Motion for

Summary Judgment, thereby quieting title in the disputed land to the Wards. The Trial Court erred in that it ignored the intent of the predecessor-in-interest as contained in the parties' warranty deeds, and it used incorrect cannons of construction in construing said warranty deeds. In the alternative, disputed issues of fact exist regarding the intent of the predecessor-in-interest in conveying his land to the parties, thereby making the Trial Court's award of summary judgment improper.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN QUIETING TITLE AND DECLARING JUDGMENT IN FAVOR OF THE WARDS, AND IN NOT QUIETING TITLE AND DECLARING JUDGMENT IN FAVOR OF MR. KHALSA

The Trial Court ruled in its Memorandum Decision (R at 225-232; a copy of which is attached hereto as Exhibit D) that title be quieted in the Wards to the disputed piece of land based on the language "along a ditch" which, the Trial Court held, governs this dispute. The Trial Court concluded that the ditch was the correct boundary in both the legal descriptions in the parties' two warranty deeds. However, the Trial Court erred in that (1) it ignored the intent of the grantor of the two warranty deeds, and (2) applied the incorrect cannon of construction.

1. **When the Face of a Deed Shows the Intention Was to Convey a Specific Quantity of Land and the Metes and Bounds 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**

The polar star rule in construing deeds is that the Court should effectuate the grantor's intent. Thompson on Real Property § 82.13(a)(3); see also, Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979) (holding that the object of construction is to ascertain intention of the parties, "especially that of grantor"). Determining the grantor's intent precedes application of the various cannons of construction used to construe deeds. Id.; see also, 1-8 Disputes—Adjoining Landowners § 8.02; 12 Am. Jur. 2d Boundaries § 61 (quoted below); Stanolind Oil and Gas Co., 252 S.W.2d 149, 152 (Tex. 1952). In fact, if the Court can determine the intent of the grantor, an analysis of the cannons of construction is unnecessary. Thompson on Real Property § 82.13(b).

The best indicator of the parties' common grantor-in-interest, Mr. Ellsworth is the parties' Warranty Deeds. The legal description to the Wards' Warranty Deed states:

Commencing at a point located South 13.88 feet (4.23 meters) and West 2320.67 (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 89°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.

The legal description in Mr. Khalsa's Warranty Deed states:

COMMENCING at a point having State Plane Rectangular Coordinates of X:2003075.02 and Y:786473.28 (based on the Lambert Conformal Projection, Utah Central Zone), said point also being North 6.9 feet and East 359.94 feet from the Southwest corner of Section 3, Township 4 South, Range 4 East, Salt Lake Base and Meridian; ***thence North 07°54'36" East 680.8 feet***; thence North 89°24'37" East 589.39 feet; thence South 676.05 feet' thence South 89°41'08" West 692.05 feet to the point of beginning.

Mr. Khalsa hired a surveyor to survey both properties' according to the above legal descriptions so as to accurately plot the boundary between the parties' properties, as well as the ditch in question. In performing the survey, the surveyor relied solely on the metes and bounds of the legal descriptions contained in the parties' warranty deeds. According to said survey, the boundary dividing the Khalsa and Ward properties **runs just West of the ditch** by about 10 - 20 feet. In fact, ignoring the words "along a ditch" (found only in the Wards' legal description), the legal descriptions of the parties' common border – as conveyed to them by their common predecessor – is identical. The ditch, then, is not the intended boundary between the parties' properties according to the legal descriptions in the parties' warranty deeds. The survey thus validates Mr. Khalsa's contention that the metes and bounds in the legal description *of both parties' warranty deeds* correctly describes their predecessor's intent and the boundary between their properties.

Further evidence of the Mr. Ellsworth's intent is found in the Wards' Warranty Deed which expressly states that the area conveyed by their Warranty Deed was 6.31 acres. However, when the surveyor plotted the legal description from the Wards'

Warranty Deed, he calculated their acreage at 6.306 which is identical (when rounded off) to the 6.31 acres stated in the Wards' warranty deed. This amount does not include the disputed parcel because the surveyor used the metes and bounds from the Wards' Warranty Deed to plot their piece of property. According to the surveyor, the acreage of the disputed parcel is .58 acres – more than half an acre. Adding this disputed acreage to the acreage conveyed by the Wards' Warranty Deed yields 6.886 acres that the Trial Court has awarded to the Wards. However, on the face of the Wards' Warranty Deed, Mr. Ellsworth only conveyed 6.31 acres to them. As the Utah Supreme Court held in Neeley v. Kelsch, 600 P.2d 979, 982 (Utah 1979), “[w]hen the face of a deed shows the intention was to convey a specific quantity of land and the metes and bounds 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.” The Trial Court, however, did not do this.

In sum, focusing first and solely on the intent of the prior grantor and the Wards' Warranty Deed, the Wards only received land circumscribed by the metes and bounds description in their Warranty Deed, which necessarily excluded the disputed piece of land related to the ditch.

2. The Trial Court Erred in its Application of Cannons of Construction

Although the Trial Court below held that the phrase “along a ditch” was a call to a

monument which governs over the metes and bounds of a legal description, this construction of the Wards' Warranty Deed ignores Mr. Khalsa's Warranty Deed and more applicable cannons of construction.

One such cannon of construction holds that a specific description will control over a general description:

Plaintiff maintains that the specific metes and bounds description controls over the general language of the exception clause, relying on *Neeley v. Kelsch* for that proposition. *Neeley* does in fact follow the well-recognized rule that ***a specific description will control or limit a general description.***

Hancock v. Planned Dev. Corp., 791 P.2d 183, 185 (Utah 1990) (emphasis added). The Utah Supreme Court similarly held in Neeley, 600 P.2d at 982:

While Kelsch may have first recorded their deed and their deed contained a general description of 'all land lying north of the County Road,' their metes and bounds description did not include the disputed land, nor was all land north of the County Road conveyed infra. ***The specific description in chains and degrees prevails over the general references to the location of a boundary. Also, when the face of a deed shows the intention was to convey a specific quantity of land and the metes and bounds 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.***

(Emphasis added). Furthermore, common law provides exceptions to the monument-governs-over-metes-and-bounds cannon. The Trial Court's Memorandum Decision ignored the following such exceptions:

Where the calls for the location of boundaries to land are inconsistent, ***other things being equal***, resort is to be had first 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. *Where, however, it is apparent that a mistake exists with respect to the calls, an inferior means of location may control a higher one. In the last analysis the call adopted as the controlling one should be that most inconsistent with the apparent intent of the grantor.*¹

12 Am. Jur. 2d Boundaries § 61 (emphasis added). Further, 12 Am. Jur. 2d Boundaries § 64 contains other exceptions pertinent to the case at bar:

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 uncertain.

* * *

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.*

(Emphasis added). In the case at bar (and as discussed above), the face of both parties' warranty deeds shows the intention of their common grantor to convey the parties' respective adjoining parcels with a common border running in a straight, somewhat diagonal line as specifically described by the metes and bounds of their warranty deeds. Such intent makes the phrase "along a ditch" extraneous and irrelevant. 12 Am. Jur. 2d

¹ The highlighted portion of this section of Am. Jur. specifically cites to the Utah Supreme Court case, Neeley (as well as cases from other jurisdictions).

Boundaries § 62 provides that courts can reject or disregard extraneous calls:

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

* * *

And an inconsistent call should be discarded if thereby all the rest of the calls are reconciled and the description perfected.²

(Emphasis added). In fact, another cannon of construction applicable in this case states, “Useless or contradictory words may be disregarded as mere surpluses.” J. Cribbet, Principles of the Law of Property, at 170 (Foundation Press 2d ed. 1975); see also, 14-81A Powell on Real Property at 81A.05[3][f]. Thus, if one were to delete the phrase “along a ditch” from the legal description in the Wards’ Warranty Deed, the boundary between the parties’ properties lines up perfectly along a common boundary that runs 15-20 feet West of (and generally parallel to) the ditch according to the metes and bounds in the legal descriptions of the parties’ properties as depicted in their respective warranty deeds and the most recent survey and plot. Just as the Neeley court ignored the extraneous phrase “all land lying north of the County Road” contained in the legal description to the defendant’s property, the Trial Court below failed to ignore the words

² This proposition from 12 Am. Jur. 2d Boundaries § 62 also relies on Neeley and other jurisdictions.

“along a ditch” contained in the Wards’ Warranty Deed.

The Court in Borough v. Borough, 422 A.2d 1186 (Pa. Commonw. Ct. 1979) applied the above exception to facts closely related to the case at bar. In Borough, the charter of a borough named Laflin contained a legal description of a number of lots, concerning which “there would be no dispute because this description can be plotted fairly accurately.” Id. at 1187 (citation omitted). However, the Laflin charter also contains:

‘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.’

Id. (Citation omitted). The Borough court held:

‘An inferior call will prevail where absurd consequences might ensue by giving controlling influence to a superior call, or where a consideration of all the facts and circumstances shows the inferior call to be more reliable or certain, or where the superior call was inserted by mistake or inadvertence. [Citation omitted] In any event, the call adopted as the controlling one should be the [m]ost consistent with the apparent intent of the parties. [Citation omitted]’

Id. Thus, in the present case, “along a ditch” is extraneous language unintended by the common grantor, and is governed by the canons of construction that discard extraneous language and that hold specific metes and bounds of the parties’ warranty deeds govern of general calls to land. The Trial Court thus erred in quieting title based on the words

“along a ditch” contained in the Wards’ Warranty Deed.

a. If the Words “along a ditch” Govern this Dispute, Neither of the Warranty Deeds’ Legal Descriptions Would Be Able to “close”

In reviewing the metes and bounds of the parties’ legal descriptions quoted above, the bearing for the common boundary is 07°54'36" which is the same for both parcels of property. The only difference with this bearing is that in the legal description in the Wards’ Warranty Deed, the bearing is South; in Mr. Khalsa’s legal description, the bearing is North.

Furthermore, according to the metes and bounds of the parties’ legal descriptions, the length of the common border between the two parcels in question is exactly 680.8 feet. If the words “along a ditch” is deleted, 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 literally tracks “along the ditch” as the Wards claim, would not only contradict the straight line and specific distance in the Wards’ legal description, but would vitiate the identical bearing and distance in Mr. Khalsa’s legal description, resulting in the two legal descriptions being unable to “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 Khalsa’s warranty deed by adding “along a ditch” into his legal description, or to vitiate the identical bearings and distances in the legal descriptions to the parties’ warranty deeds.

b. Alternatively, Issues of Fact Exist Regarding the Intent of the Parties and the Common Grantor-in-interest So as to Preclude the Trial Court’s Award of Summary Judgment

In the alternative, if the Court does not hold as a matter of law that the Trial Court incorrectly awarded summary judgment to the Wards and should have awarded summary judgment on the quiet title claim to Mr. Khalsa, then issues of fact exist as to the intent of the parties, as well as their common grantor-in-interest, Mr. Ellsworth. “Deeds are to be construed like other written instruments, and where a deed is plain and unambiguous, parol evidence is admissible to determine the parties’ intent. Hartman, 596 P.2d at 656. In Plateau Mining Company v. Utah State Division of Lands & Forestry, 802 P.2d 720, 725 (Utah 1990), the court noted that where ambiguity exists in a contract, the intent of the parties is a question of fact to be determined by the trier of fact. Finally, “Where, as here, the court has determined that the contract is ambiguous and there are issues of fact regarding the intention of the parties, summary judgment may not be granted based on contract interpretation.” Peterson v. Sunrider Corp., 48 P.3d 918, 928 (Utah 2002).

Accordingly, if the Court is unable to interpret the intent of the common grantor-in-interest based on the Warranty Deeds, and thereby reverse the Trial Court's ruling and quiet title in the disputed land in favor of Mr. Khalsa, then material issues of fact exist such that preclude the Trial Court's award of summary judgment to the Wards.

B. THE TRIAL COURT'S CASELAW SUPPORT IS INAPPLICABLE TO THE LEGAL DESCRIPTIONS AT ISSUE IN THE PRESENT DISPUTE

The Trial Court relied on Mahas v. Rindlisbacher, 808 P.2d 1025 (Utah 1990) in support of its *reform and vitiate* Memorandum Decision. A critical difference between Mahas and the present case is that in Mahas, "The two properties are physically separated by an old fence, which expert witnesses determined ran along the line of a canal which is called to in the legal descriptions contained **in the vesting deeds of both plaintiffs and defendant, . . .**" Id. at 1025. Thus, both parties in Mahas possessed deeds that contained a reference to a canal. Compare this with the legal descriptions in the two warranty deeds in the present case – the legal description in Mr. Khalsa's warranty deed contains no reference to a ditch.

The second difference between Mahas and the present case is the legals. Compare the reference in the Wards' Warranty Deed to the ditch (" . . . thence South 07°54'36" West along a ditch 680.80 feet . . .") to the references in the two deeds in Mahas:

- " . . . thence South 27 [degrees] West to Canal; ***thence Southeasterly along said canal to a point*** North 15 [degrees] East 10.18 chains from County

Road . . .” (Mahas plaintiff’s deed) (emphasis added);

- “ . . . 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 . . .” (Mahas defendant’s deed) (emphasis added).

If all references in these two Mahas deeds to the canal were deleted, the descriptions would be incomplete and incomprehensible. In other words, the Mahas legal descriptions clearly rely on the references to the canal; the Wards’ legal description, however, can stand independent of the reference to a ditch contained therein.

The Trial Court also relies on Williams v. Oldroyd, 581 P.2d 561 (Utah 1978) in support of its Memorandum Decision. Williams, however, is also different from the present case in that it was a dispute between a plaintiff-grantor who deeded a parcel to the defendant-grantee. Thus, Williams involved one deed, not two, and so did not have the benefit of a second legal description of the disputed common border such as is present in the instant case. Moreover, the Williams court summarily concluded, without setting forth the actual legal description at issue before it, that “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.” As can be observed in Mahas, a comparison between the legal in Williams and the legals in the present case is critical to determine how similar or different the monument references are. Accordingly, Williams is not only distinguishable, but fails to provide sufficient information upon which an accurate

comparison can be made to the present case.

The Trial Court further relies on Scott v. Hansen, 422 P.2d 525 (Utah 1966) in its Memorandum Decision. However, just as with Mahas, Scott deals with references to a county road in the legal descriptions of both the plaintiff and defendant's deeds, which is not the case in the present action. Moreover, the Scott controversy centered around a county road that "as it actually exists has always been a meandering road . . . , whereas, it is shown on the county recorder's plat as a straight east-west line." Id. at 527. Such a controversy is not found in the present case.

Although Scott is distinguishable on its facts, it is actually helpful in its references to a Texas Supreme Court case for the proposition that, "There are rules of construction which have been adopted for the purpose of assisting in ascertaining and giving effect to such intent." Id. at 527. The reference in Scott supporting this proposition is to Stanolind Oil and Gas Co., 252 S.W.2d 149, 152 (Tex. 1952), which holds:

The rules for the construction of grants and for ascertaining their boundaries, which have from time to time been announced by the court and have been acted on in establishing their lines, ***are all designed for the purpose of carrying out the intention of the grantor. When this intention is once made manifest, all else must yield to and be governed by it.***

(Emphasis added). Thus, the parties' intent (just as with any contractual interpretation analysis) is the governing query for a court to make (as discussed above). The parties' intent in the case at bar, when viewing the parties' legal descriptions clearly indicates that

the common border follows along the identical bearing and distance found in both deeds.

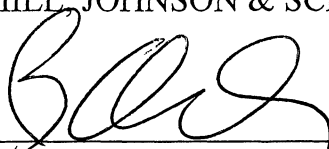
In sum, none of Defendants' supporting caselaw advances their claims and are all distinguishable on their facts.

VI. CONCLUSION

Based on the foregoing, the Court should reverse the Trial Court's decision by quieting title and declaring judgment in favor of Mr. Khalsa. In the alternative, if the Court is unable to make this determination, it should reverse the Trial Court's decision and remand for further proceedings.

RESPECTFULLY SUBMITTED this 12 day of May, 2004.

HILL, JOHNSON & SCHMUTZ, L.C.



Stephen Quesenberry
J. Bryan Quesenberry
Attorneys for Appellant

VII. APPENDIX

Exhibit A Mr. Khalsa's Warranty Deed

Exhibit B The Wards' Warranty Deed

Exhibit C The surveyor's plot

Exhibit D Memorandum Decision

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 12 day of May, 2004, they caused a true and correct copy of the foregoing Brief of Appellant to be delivered to the following:

Justin P. Matkin
Parr, Waddoups, Brown, Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1537

Sent Via:

☒ Hand -Delivery
☐ Facsimile
☐ Mailed (postage prepaid)

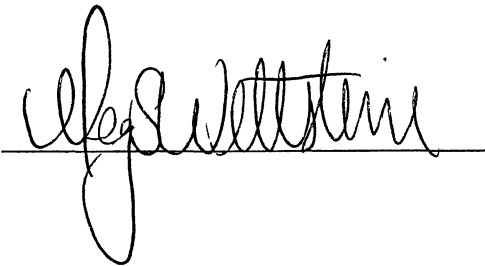
A handwritten signature in cursive script, appearing to read "Justin P. Matkin", is written over a horizontal line.

EXHIBIT "A"

Mahan Singh Khalsa
730 West 1180 South
Midway UT 84049
Order No.: W-40281

WASATCH CO RECORDER-ELIZABETH K PARCELL
1999 JUN 01 11:50 AM FEE \$13.00 BY KWC
REQUEST: FIRST AMERICAN TITLE COMPANY

Space Above This Line for Recorder's Use

WARRANTY DEED

B.
Martin Graybill Jr., Trustee of the MARTIN B. GRAYBILL, Jr. REVOCABLE TRUSTE

of Midway

State of Utah

grantor
hereby

CONVEY S and WARRANT S to Mahan Singh Khalsa and Mahan Kaur Khalsa, as joint tenants

grantee

of Midway

County Wasatch

, State of | Utah

for the sum of TEN DOLLARS and other good and valuable consideration, the following described tract of land in

Wasatch

County, State of Utah

, to-wit:

SEE ATTACHED EXHIBIT "A"

PAGE (●) INDEX () ABSTRACT () PLAT (X) CHECK ()

WITNESS the hand of said grantor , this 28th day of May A.D. 19 99 .

Signed in the presence of

Martin Graybill Jr.
Martin Graybill Jr., Trustee

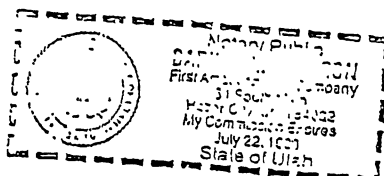
STATE OF UTAH |

{ SS.

COUNTY OF Wasatch

On the 28th day of May A.D. 1999 personally appeared before me Martin Graybill Jr., Trustee of the Martin B. Graybill, Jr. Revocable Trust

the signer of the within instrument who duly acknowledged to me that he executed the same.



Notary Public

My Commission Expires: 7-22-99

DESCRIPTION

COMMENCING at a point having State Plane Rectangular Coordinates of X:2003075.02 and Y:786473.28 (based on the Lambert Conformal Projection, Utah Central Zone), said point also being North 6.9 feet and East 359.94 feet from the Southwest corner of Section 3, Township 4 South, Range 4 East, Salt Lake Base and Meridian; thence North 07°54'36" East 680.8 feet; thence North 89°24'37" East 598.39 feet; thence South 676.05 feet; thence South 89°41'08" West 692.05 feet to the point of beginning.

TOGETHER WITH and subject to the following described right-of-way: Commencing at a point having State Plane Rectangular Coordinates of X:2005365.02 and Y:786487.17 (based on the Lambert Conformal Projection, Utah Central Zone), said point also being West 30.0 feet from the South one quarter corner of Section 3, Township 4 South, Range 4 East, Salt Lake Base and Meridian, thence West 396.0 feet; thence South 89°19'53" West 653.03 feet, thence South 89°41'08" West 1331.7 feet, thence North 07°54'36" East 32.33 feet; thence North 89°41'08" East 1327.25 feet; thence North 89°19'53" East 563.03 feet, thence East 396.0 feet; thence South 32.0 feet to the point of beginning.

Together with well application No. 58855

Together with 8 shares of Midway Irrigation Company Water Stock.

EXHIBIT “B”

Recorded at Request of _____

at _____ M. Fee Paid \$ _____

by _____ Dep. Book _____ Page _____ Ref. _____

Mail tax notice to Jeff Ward Address 4020 So. 7th E.
Murray, Utah 84

WARRANTY DEED

Homer S. Ellsworth, a Married Man grantor
of Midway, County of Wasatch, State of Utah, hereby
CONVEY and WARRANT to Jeffrey Ward and Jon Q. Ward

of Salt Lake County grantee
TEN DOLLARS (\$10.00) for the sum of
DOLLARS,

the following described tract of land in Wasatch County,
State of Utah:

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 89°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.

Area = 6.31 acres (25,518.93 meters)

NO 141949 DATE 4-15-87 TIME 11:45 FEE 5.00
REQ FOR JON Q WARD BOOK 189 PAGE 571
WARRANTY DEED INDEXED BY BRUCE BAILLY
Wasatch County, State of Utah

PAGE (X) INDEX (X) ABSTRACT (O) PLAT () CHECK ()

WITNESS, the hand of said grantor, this _____ day of _____

Signed in the Presence of

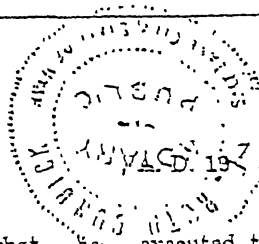
Marie Rose

STATE OF UTAH,

County of Salt Lake ss.

On the 2 day of June
personally appeared before me

the signer of the within instrument, who duly acknowledged to me that he executed the same.



Bruce Bailly

Notary Public.

My commission expires 2/1/88

EXHIBIT "C"

NOU J9 22 E 674 17

SECTION 3 T4S R4E S18W
(TOWN OF KASATCHI COUNTY
SURVEY MONUMENT)

S89°54'57"W 361.82'

S89°41'08"W 692.05'

S89°41'08"W 692.05'

N89°50'E 453.38'

N89°24'37"E 598.39'

N89°24'37"E 253.80'

S07°54'36"W 680.80'
N07°54'36"E 680.80'

58 ACRES

SOUTH 676.05'
NORTH 676.68'

S31°22'17"E
466.42'

S26°23'56"E
109.43'

S26°34'32"E
200.30'

EXHIBIT "D"

IN THE FOURTH JUDICIAL DISTRICT COURT
WASATCH COUNTY, STATE OF UTAH

MAHAN KHALSA,

Plaintiff,

v.

JEFF WARD and JON Q. WARD,

Defendants.

JEFFERY F. WARD and JON Q.
WARD,

Counterclaim Plaintiffs,

v.

MAHAN KHALSA,

Counterclaim Defendant.

MEMORANDUM DECISION

Case No. 020500294

Judge Donald J. Eyre

This matter comes before the Court on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Partial Summary Judgment. The Court has reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, issues the following ruling.

FACTUAL SUMMARY

1 Plaintiff and Defendants are the owners of adjacent parcels of real property located in Midway, Utah.

2. At an earlier point in time, both parcels of real property were owned by Homer Ellsworth ("Ellsworth").

3. Defendants purchased their parcel from Ellsworth on July 4, 1978 by means of a Uniform Real Estate Purchase Contract ("Ellsworth Contract"). A copy of the Ellsworth Contract was recorded at the Wasatch County Recorder's Office on September 12, 1980. The Ellsworth Contract described the parcel as follows:

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.

4. All parties acknowledge that the legal description referring to "along a ditch" has reference to a large irrigation ditch known as the Epperson ditch. The ownership of the Epperson ditch is disputed by the parties.

5. Since July 4, 1978, Defendants have occupied their property up to the western edge of the Epperson ditch.

6. During the year 1990, Defendants constructed a fence along the western border of the Epperson ditch. The fence remained undisturbed until May 2002, when Plaintiff removed the fence without any prior warning or notice to Defendants.

7. The Ellsworth Contract also provided for 20 foot easement for ingress and egress over Ellsworth's remaining tract of land ("the easement").

8. Defendant Jon Q. Ward has submitted an affidavit indicating that he has utilized the easement on numerous occasions despite the efforts of previous owners to bar access to the easement. In 1999, Plaintiff erected a barrier at the entrance of Stringtown Road that has

prevented Defendants' access to the easement from the road.

9. Defendants recorded a warranty deed on their real property on April 15, 1987.

10. In June 1999, Plaintiff purchased his parcel of property and recorded a warranty deed on it. The legal description of Plaintiff's parcel is as follows:

Commencing at a point having State Plane rectangular Coordinates of X:2003075.02 and Y:786473.28 (based on the Lambert Conformal Projection, Utah Central Zone), said point also being North 6.9 feet and East 359.94 feet from the Southwest corner of Section 3, Township 4 South, Range 4 East, Salt Lake Base and Meridian, thence North 07°54'36" East 680.8 feet; thence North 89°24'37" East 598.39 feet; thence South 676.05 feet; thence South 89°41'08" West 692.05 feet to the point of the beginning.

11. In November 2001, Plaintiff hired Brent Christensen to perform a land survey of Plaintiff's property and Defendants' property. According to Christensen's survey, the boundary between the two properties, based on their legal descriptions, is approximately 10-20 feet west of the Epperson ditch.

12. Plaintiff brought an action seeking to quiet title on the disputed property and declaratory judgment on its causes of action and seeks a permanent injunction against Defendants as well as damages for trespass to land and trespass to chattels.

13. Defendants filed a Counterclaim seeking judgment and an order quieting title on the boundary of the disputed property as well as a judgment and order quieting title in the easement over Plaintiff's property. In addition, Defendants bring an action for trespass and seek an order enjoining Plaintiff from continued and threatened actions in violation of Defendants' alleged property rights. Alternatively, Defendants argue that they are entitled to the property by virtue of the doctrine of boundary by acquiescence

ANALYSIS & RULING

Summary judgment is appropriate “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 judgment as a matter of law.” Rule 56(c), Utah Rules of Civil Procedure. In applying this rule, the Utah Supreme Court has indicated that, when considering a motion for summary judgment, all facts and inferences arising therefrom must be considered in a light most favorable to the nonmoving party *Winegar v. Froer Corp.*, 813 P.2d 104, 107 (Utah 1991). Furthermore, “[t]he presence of a dispute as to material facts disallows the granting of summary judgment.” *Bill Brown Realty, Inc. v. Abbott*, 562 P.2d 238, 239 (Utah 1977).

Quieting Title in the Disputed Boundary Line of the Property

Both Plaintiff and Defendants seek an order from the Court quieting title in the disputed boundary line separating their respective tracts of real property. When Courts are asked to interpret legal descriptions of real property, 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. In the case of *Mahas v. Rindlisbacher*, the Utah Supreme Court noted “the well established rule that in interpreting legal descriptions, a call to a monument or marker takes precedence over courses and distances.” 808 P.2d 1025, 1026 (Utah 1990) (citing *Henrie v. Hyer*, 92 Utah 530, 538, 70 P.2d 154, 157 (1937); *Washington Rock Co. v. Young*, 29 Utah 108, 119, 80 P. 382, 386 (1905)). In an earlier decision, the Utah Supreme Court decided a case where “[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 Where there is such ambiguity, monument calls take precedence over calls of courses or distances.” *Williams v. Oldroyd*, 581

P.2d 561 (Utah 1978) (citing *Scott v. Hansen*, 18 Utah 2d 303, 422 P.2d 525 (1966)). The Utah Supreme Court explained the rationale for this rule as follows:

In a situation such as this where a dispute arises as to the boundary between tracts conveyed to the parties by a common grantor, it becomes important to determine if possible the intent of the parties at the time of the conveyance. There are rules of construction which have been adopted for the purpose of assisting in ascertaining and giving effect to such intent. One 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. 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.

Scott v. Hansen, 422 P.2d 525, 527-528 (Utah 1966).

Notwithstanding Plaintiff's arguments to the contrary, Utah case law establishes the general rule that a reference to a monument will prevail over metes and bounds descriptions in a deed. As the *Scott* case makes clear, this rule of construction has been established because the parties are likely to be more familiar with identifiable markers or monuments than with precise measurements. *Id.* While Plaintiff does not dispute the language of Defendants' deed referencing the boundary of the property as being "along a ditch[.]" Plaintiff argues that reference to the Epperson ditch should not be given effect because such language does not appear in Plaintiff's subsequent deed. However, in making this argument, Plaintiff fails to consider the notice attributed to him as a result of Defendants' prior recorded deed. *See* Utah Code Ann. § 57-3-102(1). The undisputed evidence before the Court establishes that the Epperson ditch served as the boundary separating the two tracts of property in excess of twenty years and Defendants made use of the property throughout that period of time. Moreover, Defendants recorded a warranty

deed on their real property in April 1987. When Plaintiff purchased his real property in 1999, he was on notice of the contents of Defendants' deed. The Court cannot relieve Plaintiff of his burden to make inquiry into Defendants' claims to the disputed boundary separating the tracts of property when he was obligated to do so. Given the undisputed language of Defendants' warranty deed which makes reference to a specific monument, the court finds that Defendants are entitled to summary judgment on the issue of the legal interpretation of the property description. Furthermore, Defendants are entitled to declaratory judgment and an order quieting title in Defendants.

The Easement

Defendants seek summary judgment and an order from the Court quieting title in the easement over Plaintiff's property referenced in the Uniform Real Estate Purchase Contract between Defendants and Ellsworth. The contract of sale between Defendants and Ellsworth was recorded in September 1980. Accordingly, Defendants argue that Plaintiff was, at a minimum, put on constructive notice of the recorded contract of sale that included an express grant of an easement to Defendants over Plaintiff's property. As Defendants have aptly pointed out, Utah law has held that "[w]hether or not recorded, a conveyance is valid as between the parties to it and as against those with notice of it." *Johnson v. Higley*, 989 P.2d 61, 69 (Utah Ct. App. 1999) (internal citations omitted).

Plaintiff does not dispute that Defendants were granted an express easement by Ellsworth. However, Plaintiff argues that Defendants have lost their rights in the easement through non-use, relinquishment, acquiescence, or abandonment, and through Plaintiff's adverse possession and/or prescriptive use. On the issue of a party losing his rights in an easement, the Utah Supreme Court has held the following:

It is well recognized that an easement or right of way may be abandoned. However, to determine the issue of abandonment several factors need be considered among which are whether or not the right was acquired by prescription or grant, the extent of its use, and the actual intent of the owner. This court has previously recognized that a right gained by conveyance may not be lost by non-use alone and that an actual intent to abandon be evident.

Western Gateway Storage Co. v. Treseder, 567 P.2d 181, 182 (Utah 1977) (internal citations omitted).

The Utah Supreme Court further held that an intent to abandon an easement must be established by clear and convincing evidence. *Id.* In requesting summary judgment on this issue, Defendants allege that Plaintiff has failed to raise any genuine issue of material fact. Defendant Jon Q. Ward has submitted two affidavits, wherein he states that he has made use of the easement numerous times. In addition, he documents the efforts of his neighboring landowners, including Plaintiff, to block his access to and use of the easement. One such specific incident referred to by Jon Q. Ward is the alleged removal of a bridge connecting the two parcels of land in 1980 by Richard Benton, a previous owner of Plaintiff's property. Jon Q. Ward also refers to a barrier, allegedly erected by Plaintiff in 1999, which has prevented Defendants' access to the easement from Stringtown Road.

Regarding the issue of the easement, the Court finds that there are issues of genuine fact that must proceed to trial. In making this determination, the Court recognizes that mere non-use of an easement will not operate to deprive a party of the rights granted by the conveyance. However, Plaintiff has raised the possibility of abandonment of the easement. In 1980, Mr. Benton removed the bridge across the Epperson ditch, thereby effectively precluding vehicular access to the easement, with the possible exception of access via motorcycle, for over twenty years. Although access to the easement via the bridge has not existed for an extended, continuous period of time, Defendants assert that they have never abandoned their interest in the easement.

The conduct of Defendants and the predecessor neighboring landowners relative to the easement presents issues of fact that preclude the granting of summary judgment. This issue will be heard at trial.

Remaining Causes of Action

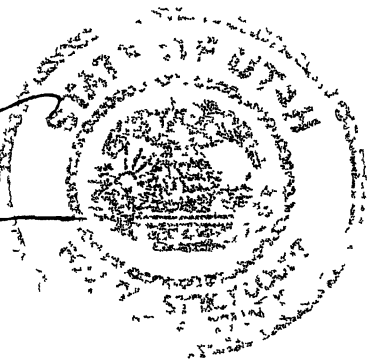
Defendants' causes of action seeking damages for trespass to land and chattels and permanent injunctive relief will proceed to trial, as will the issues of pre and post-judgment interest and attorney's fees.

CONCLUSION

For the above reasons, the Court hereby rules that Defendants' Motion for Partial Summary Judgment is granted on the issue of quieting title to the disputed strip of property west of the Epperson ditch in Defendants. The remaining issues will be heard at trial. Counsel for Defendants is directed to prepare an order consistent with this ruling, submitting it to counsel for Plaintiff for approval as to form and to the Court for execution.

DATED this 11th day of April, 2003


DONALD J. EYRE, JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020500294 by the method and on the date specified.

METHOD	NAME
Mail	JUSTIN P MATKIN ATTORNEY DEF 185 SOUTH STATE SUITE 1300 SALT LAKE CITY, UT 84111
Mail	J BRYAN QUESENBERY ATTORNEY PLA 3319 NORTH UNIVERSITY AVENUE Jamestown Square PROVO UT 84604
Mail	STEPHEN QUESENBERY ATTORNEY PLA 3319 NORTH UNIVERSITY AVE JAMESTOWN SQUARE, SUITE 200 PROVO UT 84604
Mail	RONALD G RUSSELL ATTORNEY DEF 185 SOUTH STATE STREET SUITE 1300 PO BOX 11019 SALT LAKE CITY UT 84147

Dated this 1st day of April, 2003.


Deputy Court Clerk