

2006

Shirley Ottman, an individual v. Kenneth Baldwin,  
an individual, and Collette Baldwin, an individual :  
Petition for Rehearing

Utah Court of Appeals

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Unknown.

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**IN THE UTAH COURT OF APPEALS**

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SHIRLEY OTTMAN, an individual,

Plaintiff-Appellant,

Petitioner and Appellee,

vs.

KENNETH BALDWIN, an individual,  
and COLLETTE BALDWIN,  
an individual

Defendants-Appellees.

**PETITION FOR REHEARING**

Case No. 20060209

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**COMES NOW** Plaintiff/Appellant, Shirley Ottman, by and through her attorneys of record, Zoll & Tycksen, LC, and pursuant to Rule 35 of the Utah Rules of Appellate Procedure, does hereby petition the Court to for rehearing of this matter. As support for this motion, Plaintiff offers the following:

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**IN THE UTAH COURT OF APPEALS**

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## SUMMARY OF ERROR

In its ruling, the lower court, and the Court of Appeals overlooked unmistakable, and undisputed evidence that the boundary line between the parties' properties ran from the corner of the Pardoe property on the north, to the corner of the Farmbrook Estates property to the south, and that the boundary ran along the existing and undisputed boundary lines already leading up to those two points. Instead, the Court has affirmed the lower court's finding that the boundary line now runs from the corner of the Pardoe property on the north of the disputed boundary, to a point several feet east of the corner of the adjoining Farmbrook Estates property to the south, ignoring entirely the undisputed evidence from both sides that there is no such jog in the boundary line between properties in that area that use that very line to mark their boundary.

### RELEVANT FACTS PRESENTED TO THE COURT OF APPEALS

1. Counsel for the Plaintiff hereby certifies that this motion is presented in good faith and not for delay.
2. The Plaintiff cited the following in the Brief of the Appellant:
  29. Dave Peterson also admitted at trial that he testified in his deposition that Farmbrook Estates' (a development adjoining Redbirch Estates immediately to the south) eastern boundary followed the "old fence line" (**Record at 820 pp. 305:12-307:7**), and that he had no evidence to refute testimony claiming that the old fence at issue connected the corner northeast corner of Farmbrook Estates with the southwest corner of the Pardoe property (**Record at 820 p. 310:10-22**).
  30. Testimony from Shirley Ottman (**Record at 819 pp. 9:16-10:25, 19:18-22**) and Ken Howcroft (**Record at 819 pp. 50:22-53:11**) both verified that the old fence line was the boundary line running from the Pardoe property to the corner of Farmbrook Estates.

...  
32. David Peterson previously testified in the evidentiary hearing on June 11, 2004, that there was only one old fence line, and that that old fence line was also the boundary for Farmbrook Estates to the south (**Record at 820 pp. 305:12-307:7**).

...  
38. ... Mr. Peterson also acknowledged that the fence line followed by Farmbrook Estates and the old fence line Mr. Peterson saw when he surveyed the land follow the same line (**Record at 821:72**).

...  
45. During trial on September 16, 2005, Mr. Peterson acknowledged that he had previously testified that the eastern fence of Farmbrook Estates followed the old fence line at least on the north side (the side abutting the disputed boundary – and from which corner the chain link fence extended) (**Record at 820 pp. 305:12 – 307:7**). However, on September 20, 2005, the court mistakenly ruled that such a line of questioning did not come in at trial on September 15-16, 2005 (**Record at 820 p. 354:6-15**).

33. The text of the cited trial transcript (attached hereto as Exhibit 1) includes responses by Dave Peterson like:

a. Q. Okay, the southeast corner for the Baldwin property, okay, how does that relate to the property south, the Farmbrooks, Farmbrook Estates' property?

A. Oh they met. In fact they line up with adjoining subdivisions.

Q. **So is the eastern boundary of the Redbirch Estates Subdivision the same as the eastern boundary, consistent with the eastern boundary of the Farmbrook Estates Property?**

A. Yes.

Q. That's a straight line, is it not?

A. They should be, yeah, I think so.

(Record at 82 pp. 290:21-291:6) (emphasis added).

b. Q. [reading from Mr. Peterson's deposition] "Finally, when you were out there observing this property at this fence line, were you able to see that the sub, subdivision to the south – and I think they call it Farmbrook?" Answer: "Yes, I don't remember what it's name is." "Were you able to see that there were fences that the Farmbrook property was following a fence line that followed more or less the

same fence line of the old line of the old fence that you saw?

Answer: "I agree that Farmbrook does follow the fence line."

"Okay? Of the old fence that you, that you saw and surveyed?" "A portion of, yes, relatively close, it follows it."

**So is that to say that the wooden fence built on the boundary of Farmbrook Estates follows the old fence line that you observed and surveyed as you did the subdivision plat?**

A. **Well, it does to the north.** But no, it doesn't, to the south I guess.

(Record at 820 pp. 305:25-306:19) (emphasis added)

c. Q. Now on your Exhibit L have you notated or made any reference to that wooden fence there at Farmbrook?

A. I didn't actually show it on that survey .

Q. Okay, but if you were to tell us where it is, where would it be on this line? **Would it follow the blue old wire fence line?**

Approximately? Surveyed by Bob Jones?

A. **Possibly would, I believe they backed off their line, yeah.**

(Record at 820 pp. 307:22-308:4) (emphasis added).

d. Q. And if the testimony of all the witnesses, or **most of the witnesses in this case indicate there was a fence line that did connect between those two** [corners of Pardoe property and Farmbrook Estates property], **have you any reason to differ with that?**

A. ... **I have no reason to say the're wrong ....**

(Record at 820 p. 310:17-22) (emphasis added).

34. In her Reply Brief, Plaintiff also cited the admission by Defendants' expert, that indeed the eastern boundary of Farmbrook Estates did follow the fence line.

Q. Well isn't that basically what you said in your deposition?

A. Uh-huh (affirmative).

Q. **That you agree that the Farmbrook Estates does follow the old line?**

A. **Relatively close.**

Record at 820 p. 308:10-15) (emphasis added).

35. In her Reply brief, the Plaintiff also pointed out:

If the boundary of **Farmbrook Estates was in line with the old fence line** (as **affirmatively testified by both sides – by Ken Howcroft: Record at 819 p. 46:11-47:3, and by Dave Peterson: Record at 820 p. 290:16-291:6, 305:25-306:14**), it would preclude any possibility of the existence of a duplicate fence to the east of that boundary as being the old fence described in the deeds to the parties' properties, and it would solidify Plaintiff's case that **the old fence line extended north from the northeast corner of Farmbrook Estates to the corner of the Pardoe property.**

See Reply Brief p.21 (emphasis added).

### ARGUMENT

Attached hereto as Exhibit 2, is a photocopy of a portion of the plat map of the area that was used at trial. The map was also used in oral argument before the Court of Appeals, shows the eastern boundary of Red Birch Estates running along the same eastern boundary that connects the southwest corner of the Pardoe property to the north (point A) with the northeast corner of the Farmbrook Estates property to the south (point B). It is undisputed that both parties agreed that the boundary ran through point A and point B. Based on the undisputed factual evidence cited above, which was again reiterated in oral argument before the Court, the boundary should run through point A and Point B on Exhibit 2. It is not only clearly erroneous to conclude that the boundary line did not pass through the corners of the adjoining property to the north and the adjoining property to the south, but **it is impossible for the boundary not to pass through these two points** because both parties have insisted that the line is in fact consistent with the western

Pardoe boundary to the north, and the Farmbrook Estates eastern boundary to the south. Despite this clear and unambiguous truth, the Court has failed to recognize the clear error by the lower court in finding that the south end of the boundary line sits several feet to the east of the northeast corner of Farmbrook Estates.

Now the Court has affirmed a decision that will allow the Defendants to continue to construct their wall, which will extend at its southernmost end, far to the east of the northeast corner of the Farmbrook Estates property, as clearly shown in the picture exhibit D used at trial. A blown up copy of picture exhibit D was used during oral argument before the Court of Appeals to show this glaring discrepancy. Looking at picture exhibit D, attached hereto as Exhibit 3, it is clear to see that the wall the Defendants are constructing will overshoot the eastern boundary of Farmbrook Estates by several feet to the east, creating a jog in the property line. Neither property is defined as containing any jog in the boundary. This will be right in the middle of Plaintiff's parcel, creating not one, but now three boundary vectors on Plaintiff's western boundary: (1) the first shared with the Defendants from the North to the jog, (2) the second is a shorter jog straight west to bring the line back to the boundary observed by all adjacent parcels, and (3) the third would be the true boundary as between the Plaintiff and Farmbrook Estates. Even Defendants' expert, Mr. Peterson testified that the eastern boundary of Farmbrook Estates matches up with the eastern boundary of the Defendants' subdivision, as well as the adjoining subdivisions. (Record at 820 pp. 290:21-291:4). The Court should not simply

ignore this glaring truth. The wall creates a jog in the line that otherwise serves as a boundary between several adjoining properties.

As part of their case the Defendants used Exhibit L to attempt to persuade the lower court that the boundary line should follow where the wall was being constructed. However, when asked where the eastern boundary of Farmbrook Estates would be placed on trial Exhibit L, Mr. Peterson affirmed that it would be on or near the line indicated by the inscription, “Old Wire Fence (surveyed by Bob Jones).” This is an entirely different line than that which Mr. Peterson labeled for the boundary, yet Mr. Peterson testified that the boundary is in line with the Farmbrook Estates line. It is impossible for the Farmbrook Estates wooden fence, which, according to Mr. Peterson is supposed to be in line with the Defendant’s property as well as other adjoining properties, to also be located off of the boundary line as shown in Exhibit L. Defendant’s theory is inconsistent at best, and the truth of the matter is that the Defendant’s proposed placement of the boundary is incorrect.

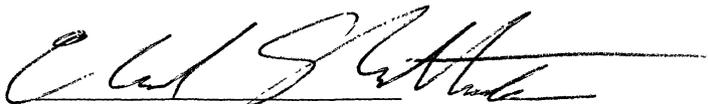
### **CONCLUSION**

Upon consideration of the preceding undisputed facts, Plaintiff respectfully believes that the Court has overlooked or misapprehended evidence that should have clearly established the boundary line between the parties’ property, and shows with no uncertainty (using Picture Exhibit D) that the wall creates a jog in the line separating the properties in the area. Plaintiff hereby requests a rehearing on this matter so that the

Court may more fully understand the evidence that was presented in this regard, so that this error can be corrected and so that the Court does not mistakenly use its judicial powers to create a 7-9 foot jog on the boundary line when one has never before existed between the parcels belonging to the parties to this action.

DATED and SIGNED this 14<sup>th</sup> day of June, 2007.

ZOLL & TYCKSEN, L.C.



Chad C Shattuck  
Attorney for Plaintiff/Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the foregoing, **PETITION FOR REHEARING**, postage pre-paid to the following:

Russell A. Cline  
CRIPPEN & CLINE  
10 West 100 South, Suite 425  
Salt Lake City, UT 84101

on this 18 day of June 2007.

