

1995

Walter Scott Hansen and Kristi D. Hansen v. Craig Oberg and Diane Oberg : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Hansen v. Oberg*, No. 950231 (Utah Court of Appeals, 1995).
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UTAH SUPREME COURT
BRIEF

IN THE UTAH COURT OF APPEALS

WALTER SCOTT HANSEN and
KRISTI D. HANSEN,

Plaintiffs and Appellees,

vs.

CRAIG OBERG and DIANE OBERG,

Defendants and Appellants.

Case No. 950231-CA

Argument Priority No. 15

APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL
DISTRICT COURT IN AND FOR SANPETE COUNTY, STATE
OF UTAH, HONORABLE DAVID L. MOWER PRESIDING

BRIEF OF APPELLEES

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FILED
Utah Court of Appeals
OCT 16 1995
Marilyn M. Branch
Clerk of the Court

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LIST OF PARTIES TO PROCEEDINGS BELOW

Plaintiffs: Walter Scott Hansen and Kristi D. Hansen

Defendants: Craig Oberg and Diane Oberg

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BRIEF OF APPELLEES

JURISDICTION

This appeal is from a final judgment of the Sixth Judicial District Court in and for Sanpete County, State of Utah, the Honorable David L. Mower presiding, entered November 22, 1994. This Court has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(k) and pursuant to the order of the Utah Supreme Court dated March 31, 1995, transferring this matter from the Supreme Court to the Court of Appeals for disposition.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

STATEMENT OF ISSUES

Hansens do not dispute Obergs' statement of issues insofar as they relate to Obergs' challenge to Judge Mower's Findings of Fact. As discussed more fully below, however, Hansens

disagree with Oberg's claim that their appeal raises issues of law for disposition by this Court.

In addition, the content of Oberg's brief has given rise to another issue: Whether Oberg has marshalled the evidence in support of Judge Mower's Findings of Fact, as required by Rule 52(a), Utah Rules of Civil Procedure, and the case law decided thereunder.

STANDARD OF REVIEW

Issue No. 1

The standard of review is governed by Rule 52(a) of the Utah Rules of Civil Procedure, which states in part, "Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The "clearly erroneous" standard applies whether the case is one in equity or one at law. Barker v. Francis, 741 P.2d 548 (Ut. App. 1987).

The trial court's conclusions of law are reviewed for correctness, granting no particular deference. Carter v. Hanrath, 885 P.2d 801 (Ut. App. 1994).

Issue No. 2

The reviewing court will affirm the trial court's ruling "absent an abuse of discretion". Baldwin v. Burton, 850 P.2d 1188, and if proper "will affirm the trial court's ruling absent an abuse of discretion". Baldwin v. Burton, supra, at 1198.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, RULES AND REGULATION**

Regarding issue of boundary by acquiescence and Defendants' challenges to the Trial Court's Findings of Fact:

Rule 52(a), Utah Rules of Civil Procedure, provides, in relevant part:

Findings of Fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses.

Regarding the award of attorney's fees:

Utah Code Annotated § 78-27-56 provides:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

STATEMENT OF THE CASE

**Nature of the Case, Course of Proceedings and
Disposition in the Court Below**

This case presents a simple contest between Plaintiffs, Walter Scott Hansen and Kristi D. Hansen (hereinafter referred to as "Hansens"), who claim title to real property by their deed, title of record and possession, and Defendants, Craig Oberg and

Diane Oberg (hereinafter referred to as "Obergs"), who claim title under a theory of boundary by acquiescence.

A two-day trial was held before the Honorable Judge David L. Mower, who entered oral findings from the bench and then took the matter under advisement (Tr. 453, 463).

The Court issued its Findings of Fact and Decision on or about September 21, 1994, and directed Hansens' attorney to prepare a Judgment and Order that would conform to its decision (R. 181).

The Court ruled in Hansens' favor and found that Obergs had promised to move the fence in the future when the Hansens developed their property (R. 179, 196), that there never was a boundary between the parties' property that met the requirements under a theory of boundary by acquiescence (R. 197), that the Obergs had trespassed upon the Hansens' property (R. 197), and that the Hansens were entitled to an award of attorney's fees (R. 180, 181 and 198).

STATEMENT OF FACTS

A. Introduction

Hansens take issue with Obergs' statement of facts. It is misleading because it is very selective and omits much of the evidence at trial that is pertinent to the findings of fact they challenge. Obergs have completely failed to marshal the evidence in support of Judge Mower's Findings of Fact, as required under Rule 52(a), Utah Rules of Civil Procedure. The requirement to marshal the evidence is discussed more fully in the "Argument"

section below. Oberg's statement of facts is thus nothing more than a recital of the evidence that Oberg believe would support their claim against Hansens.

While Oberg's failure to marshal the evidence is sufficient by itself to warrant dismissal of this appeal, Hansens will nonetheless set forth below a summary of the ample evidence that supports Judge Mower's Decision and the Findings of Fact. Hansens have summarized the facts and have also summarized the pertinent testimony of each witness who testified at trial. To assist the Court, the witnesses and their roles are identified briefly below.

<u>Witness or Party</u>	<u>Role</u>
Walter Scott Hansen	Plaintiff, current owner of Parcel 107
Oscar Deloy Peterson	Prior owner of parcel 107
Jack L. Peterson	Prior owner of parcel 107
Steve L. Ludlow	Surveyor
Thomas LaVeal Hansen	Plaintiff's father
Merrill Ogden	Abstractor
Craig Oberg	Defendant, current owner of parcel 105
Robert Sevy	Prior owner of parcel 107
Earl Livinston	Employee of Defendant who built fence
Ted Peterson	Neighbor of Defendant who has lived near parcels 105 and 107 since 1948
Don Christensen	Defendant's father-in-law

Wayne Sevy

Prior owner of Lot 107

B. Summary of Testimony

The testimony of the trial witnesses is summarized below. This summary is not intended to be an exhaustive statement of all the testimony, but rather a summary of the evidence that supports Judge Mower's Findings of Fact. As such, it constitutes the "marshalling of the evidence" that Obergs should have incorporated in their brief. The evidence overwhelmingly supports the Findings of Fact and the judgment in Hansens' favor.

Walter Scott Hansen

Walter Hansen, a Plaintiff in this action, purchased parcel 107 from Jack Lou Peterson, etux, in August of 1990.

After he purchased the property, he improved the property and placed a mobile home where he, his wife and four children live. (Tr. 15-16).¹

At the time Hansen purchased the property, Peterson showed him the southernmost boundary as beginning in the middle of Cottonwood Creek and running directly west. The old fence was on the north side of the creek, was in disrepair and was overgrown with a lot of foliage. (Tr. 16-17).

Oberg called Hansen two days after he moved into his mobile home in August of 1990 and asked him if he was interested in

¹References to the record other than the trial transcript will be referred to herein as R. __, indicating the page number of the record. References to the trial transcript will be referred to as Tr. __, indicating the page number of the transcript.

selling the now disputed property, to which Hansen replied in the negative. During this conversation with Oberg, there was no discussion concerning the old fence nor did Oberg make any claim of entitlement to or ownership of the disputed property, although Hansen told Oberg of how Peterson had identified the boundary. (Tr. 18-19).

Hansen had another conversation, in May of 1991, after Oberg's horse had trampled Hansens' newly planted grass. They discussed putting up a fence together, and again Oberg made no claim to the disputed property. (Tr. 20-21).

In March or April of 1992, Oberg built an irrigation pond 50-70 yards to the northwest of Hansens' parcel 107. Hansen complained to Oberg about the pond concerning safety issues with his children and other neighborhood children. Oberg responded by building a fence around his pond but stopped at the northwest corner of Hansens' parcel 107. (Tr. 29-32).

Hansen stated that his children played on both sides of the old fence and built huts and little play areas from the time he moved in, in August of 1990 to August of 1992. Oberg never stopped them or complained they were on his property. (Tr. 34 and 35).

In August of 1992, while Hansen was away to the Utah National Guard Summer Camp, Oberg had his employees build the fence that ran more or less where the old fence had been. (Tr. 35).

Hansen did not recall ever seeing Oberg do any repairs to the old fence prior to the construction of the new fence. (Tr. 34).

Oberg and Hansen had a conversation in August of 1993, after this lawsuit was filed, and Oberg said he would move the fence when Hansen was ready to develop his property. (Tr. 36-38).

Oscar Deloy Peterson

Oscar Peterson testified that he purchased parcel 107 in April of 1980 from Robert Sevy. Mr. Sevy took him to the property with his brother Jack Peterson. Mr. Sevy showed him the southernmost boundary line to be on the south side of Cottonwood Creek and identified the fence line which Oberg's claim to be the boundary by acquiescence as "the pig fence that we put up." (Tr. 46-52).

Mr. Peterson stated that there was not much of a fence and that during the three years that he owned the property he never saw Oberg do any repairs to the fence, nor did Oberg ever make a claim to the property. (Tr. 49, 52 and 61). Peterson always considered the boundary of the property to be where Robert Sevy had showed him, not the old fence. (Tr. 57). During his ownership, Mr. Peterson chased children off the disputed parcel, cut a rope out of a tree on the parcel, and pruned the trees thereon. (Tr. 55). He used the disputed property "no more than the rest of the property that I'd bought." (Tr. 58).

Just before Mr. Peterson sold parcel 107 to his brother, he recalled Oberg putting up a fence on the south side of

Cottonwood Creek, made of green posts and wire on the approximate boundary line that Mr. Sevy had shown to him when he purchased the property. (Tr. 52-56, and see Exhibit #25).

Mr. Peterson recalls Oberg putting horses on parcel 105 but that the horses were tethered to a stake by a rope. (Tr. 58).

Jack Lou Peterson

Jack Peterson is the brother of Oscar Deloy Peterson, and he purchased parcel 107 from Oscar in 1983.

Mr. Peterson remembers going to the property with Mr. Robert Sevy when his brother purchased the property and recalled the boundaries described as Oscar Peterson testified. He understood the boundary with parcel 105 was south of the creek. (Tr. 80-81).

Peterson testified that Oberg had a fence built on the south side of Cottonwood Creek that was constraining livestock Oberg had on parcel 105. The fence Oberg had on parcel 105 was on the approximate boundary line as had been described by Mr. Sevy. (Tr. 81 and 82).

Peterson recalls Oberg placing "No Trespassing" signs on fences around parcel 105 but not on the old fence. (Tr. 85 and 88).

Steve Ludlow

Steve Ludlow is a registered engineer and land surveyor who surveyed parcels 105 and 107, marked as Exhibit #26, in June, 1992. (Tr. 101, 104).

Ludlow testified that he found no gaps or overlaps for parcels 105 and 107 and that the deeded descriptions matched up with what he found on the ground pursuant to his survey. (Tr. 99-101 and 117).

Ludlow described the disputed property as having a considerable amount of over-growth and saw no older fence. (Tr. 118 and 121).

Ludlow measured 99.74 feet inside Oberg's fences whereas his deeded description called for 66 feet. (Tr. 120).

Thomas LaVeal Hansen

Tom Hansen is the father of the Plaintiff, has lived in Ephraim for 57 years (Tr. 137), and owns a business across the street south from the subject parcels.

Mr. Tom Hansen recalled the conversation between Oberg and his son in August of 1990 at which time Oberg pointed out the boundary line and made no claim to the disputed property. (Tr. 143 and 144).

Mr. Hansen testified that the Plaintiff, Kristi Hansen, called him to help her get Oberg's men off their property, i.e., make them stop building the new fence and quit cutting down the trees. (Tr. 146, 159).

Mr. Hansen and his other son, Kenny, took pictures of the damage done to the property and of the new fence. (Tr. 147-159).

Merrill Ogden

Merrill Ogden is a registered abstractor and licensed title insurance agent in the State of Utah.

Ogden testified that he ran a title search on the property back fifty years and found no overlapping descriptions or gaps on the property. (Tr. 177).

Ogden found that parcels 105 and 107 were commonly owned from the 1950's until March of 1970, when Hespert Sevy deeded parcel 107 to his son, Kenneth Sevy. (Tr. 178, 187).

Ogden found a Decree Quieting Title marked as Exhibit 27 for parcel 105. (Tr. 178-183).

Parcels 105 and 107 have had distinct and separate legal descriptions since 1877.

Craig Oberg

Craig Oberg is a Defendant and purchased the property in 1977 from Kenneth Sevy and moved to Ephraim in 1978. (Tr. 194 and 195).

Oberg testified there was an old fence on the disputed area that "wasn't all that great" and that there was a lot of growth and vegetation on the old fence. (Tr. 216, 221).

Oberg testified that when his employees built the new fence on Hansens' property they removed a lot of trees and bushes. (Tr. 241).

Oberg testified that he thought Beck had built the fence. (Tr. 245).

Oberg testified that he, like everybody else, does not know why the old fence was placed in its location. (Tr. 271 and 272).

Oberg testified that he has never told anybody that the disputed property was his. (Tr. 272 and 273).

Oberg testified that he will lose no ground if the Court decides the boundary is the survey line and that the ground has no monetary value to him. (Tr. 276 and 277).

Oberg agreed that he had discussed the option to move the fence he had constructed on Hansens' property at a later date. (Tr. 278 and 279).

It should be noted that Oberg's cite Tr. 282 as Craig Oberg's testimony that he believed he was constructing the new fence on the property line. There is no such testimony on that page or any nearby page.

Robert Sevy

Robert Sevy is a prior owner of parcel 107. He received the property from his father, Hespert Sevy, who also owned parcel 105 at the time. (Tr. 292 and 293).

Robert Sevy testified that he did not care where the fence was because his family owned the other parcel 105. (Tr. 297 and 298). Oberg's cite Tr. 291 as support for the claim that Robert Sevy understood the old fence was the boundary. The actual testimony is far less certain, as follows:

Q What did you understand the south and west boundaries to be when you were given the property?

A Well, I never really thought about it until this come up, and I just always figured the fence line was -- I never had any worry about it. . . .

Q So was it your opinion during the time that you owned that piece of ground, parcel 107, that the fence constituted the boundary line?

A I never even thought about it. I just knew there was a fence there. (Tr. 291-292).

Sevy testified that he sold the property by the deed to Oscar Deloy Peterson. (Tr. 298). Mr. Sevy made no mention of the fence during the sales transaction.

Sevy testified that he built pig pens on parcel 107 and watered the pigs out of Cottonwood Creek on the other side of the old fence. (Tr. 300 and 301).

Sevy testified that when his father owned both parcels 105 and 107 that the farm animals could roam over both parcels at will because the fence had not been repaired. (Tr. 301-302).

Sevy testified that the predecessors in interest (Beck and Sevy) who owned both parcels repaired the fence to keep livestock away from Mrs. Beck's house. (Tr. 303 and 304). Further, that after Mrs. Beck died, the fence was not repaired and his father, Hespert Sevy, a predecessor in title to both parcel 105 and 107, let his livestock roam at will over both parcels. (Tr. 316, 319).

Earl Livinston

Oberg's employee who built the new fence on the Hansen property. Livinston testified that Plaintiff's father, Tom Hansen, told them they were trespassing and to quit building the fence. (Trial Transcript and 322-323).

Livinston testified that when they began to build the new fence, that the old fence was in disrepair and in pretty bad shape. (Tr. 324).

Livinston testified that they had to cut down two trees on Hansens' property in order to build the new fence. (Tr. 329).

Ted Peterson

Neighbor of Oberg who has lived on the same street as subject property since 1948.

Has cleaned Cottonwood Creek and utilized water shares out of the creek. (Tr. 341).

Peterson testified that he observed livestock wandering over parcels 105 and 107 while it was owned by Hespert Sevy that the livestock could roam and use the whole piece. (Tr. 348).

Peterson testified that when he cleaned Cottonwood Creek in the 1940's and 50's the fence between parcels 105 and 107 was a worn out, torn down fence and poorly maintained. (Tr. 351 and 352).

Don Christensen

Father-in-law to Oberg. Lived in Ephraim 73 years and personally knew the Becks and the Sevys.

Testified that Becks and Sevys pastured animals on both parcels 105 and 107 and that they had fences and gates that they moved around. (Tr. 386-387).

Wayne Sevy

Son of Hespert Sevy and brother to Robert Sevy, predecessors in title to disputed ground. Testified he built hog pens on parcel 107 and watered the pigs out of Cottonwood Creek. (Tr. 396).

Testified does not even recall a fence when he raised pigs there in 1977, the same year the Oberg's purchased the property. (Tr. 399).

Testified that when his father owned both parcels 105 and 107, the livestock were free to roam over the entire parcels. (Tr. 400).

Testified he never saw anyone do any repairs to the fence. (Tr. 401).

Further, was not even sure there was a fence. (Tr. 402).

Kristi Hansen

A plaintiff in this action. Testified that fence was in total disrepair and children would play there and that the Oberg's never complained about the children being there. (Tr. 413).

C. Facts

1. Plaintiffs reside in Ephraim, Utah, and are adjoining neighbors to Defendants. (R. 191-192).

2. Defendants acquired their property in March 1976 from Kenneth M. Sevy and Sylvia L. Sevy by Warranty Deed dated April 29, 1976, and recorded February 23, 1977, in the official records of the Sanpete County Recorder. The real property conveyed by said deed is described as follows:

Beginning at a point 1.00 chain West from the Southwest corner of Block 30, Plat "A" Ephraim City Survey, and running thence North 1.00 chain; thence West 1.58 chains; thence North 17 degrees 15 minutes West 7.40 chains; thence North 64 degrees 30 minutes West 2.10 chains; thence South 69 degrees West 1.15 chains; thence South 30 degrees East 1.90 chains; thence North 78 degrees 30 minutes East 0.92 of a chain; thence South 14 degrees East 2.58 chains; thence South 60 degrees East 0.90 of a chain; thence South 3.80 chains; thence East 3.50 chains to the point of beginning.

Said property is also identified in the records of the Sanpete County Recorder as parcel 105, Plat "A", Ephraim City Survey (R. 191, Exhibit 2).

3. Plaintiffs acquired their property by Warranty Deed from Jack Lou Peterson and Kris W. Peterson, dated August 8, 1990, recorded August 8, 1990, in the official records of the Sanpete County Recorder. The real property described in the deed received by Plaintiffs is set forth below:

Beginning at a point 1.00 chain West and 1.00 chain North from the Southwest corner of Block 30, Plat "A" Ephraim City Survey, and running thence West 1.58 chains; thence North 17 degrees 15 minutes West 3.30 chains; thence East 2.62 chains, more or less; thence South 3.29 chains to the point of beginning.

The foregoing parcel is also identified in the official records of the Sanpete County Recorder as a part of Parcel 107, Plat "A" Ephraim City Survey. (Hereinafter referred to as parcel 107). (R. 191, Exhibit 14).

4. The above described parcels are contiguous to each other and share a common boundary. The first call of Hansens' legal description (West 1.58 chains) is common to the second call of Oberg's legal description. The second call of Hansens' legal description is, in part, common to the third call of the Oberg's legal description. (R. 174, 175).

5. There is a natural water course running through Ephraim City known as Cottonwood Creek that crosses the two common boundary lines between the parties' property so that a portion of it runs through the area enclosed within Hansens' legal description and a portion runs through the area enclosed within Oberg's legal description (R. 174 and 192).

6. Hansens' predecessors in interest to parcel 107 after 1954 were as follows:

<u>Owner</u>	<u>Dates of Ownership</u>
Madonna P. Beck	1954-1963
F. Hespert Sevy	1963-1970
Robert P. Sevy	1970-1980
Oscar D. Peterson	1980-1983
Jack L. Peterson	1983-1990

7. Oberg's predecessors in interest to parcel 105 after 1954 were as follows:

<u>Owner</u>	<u>Dates of Ownership</u>
Madonna Beck	1958-1963
F. Hespert Sevy	1963-1971
Rosella P. Sevy	1971-1973
Kenneth M. Sevy	1976-1976

8. Parcels 105 and 107 were under common ownership from November 1958 when Madonna Beck owned both parcels until March 1970, when F. Hespert Sevy conveyed parcel 107 to his son Robert P. Sevy (R. 193, Tr. 185, 187).

9. Parcel 107 was not used for residential purposes by any of Plaintiffs' predecessors in interest listed in paragraph 7 above. Plaintiffs were the first to use parcel 107 for residential purposes (R. 194).

10. Jack Peterson sold parcel 107 to Plaintiffs in August 1990. (R. 193, Tr. 15, Exhibit 14).

11. The parties' respective properties were never part of a large parcel of ground but have existed as separate descriptions/parcels for at least fifty (50) years. (Tr. 184).

12. The parties' respective properties were under common ownership from at least the 1950's until F. Hespert Sevy conveyed the Hansen property to his son Robert P. Sevy in March of 1970. (R. 193, Tr. 185, 187).

13. The parties' predecessors in interest, Madonna Beck and F. Hespert Sevy, during their separate periods of ownership, used parcels 105 and 107 together to graze and raise livestock. (R. 176, 194, Tr. 301).

14. At some time in the past, on a date that is unknown, a fence was constructed that ran basically parallel to Cottonwood Creek and which was located on parcel 107 and on the North side of Cottonwood Creek (where it runs East and West) and also on the east side of Cottonwood Creek (where it runs North and South). (R. 176 and 194).

15. The parties' predecessors in interest to both parcels 105 and 107 did not treat the fence as a boundary fence (Tr. 297, 298, 400, 304, 315, 316 and 431).

16. The only repairs to the fence by the parties' predecessors in interest was for the purpose of livestock control (Tr. 304, 82, 83, 92, 95, 56, 58).

17. No one did any repairs to the fence from at least 1977 to 1990 (Tr. 92, 52, 56, 316, 401).

18. In 1977 when the Oberg's purchased their parcel 105, the fence was in disrepair. (R. 176 and Tr. 399, 402 and 403). In fact, Robert Sevy's brother, Wayne, raised pigs on the Hansen property and watered them out of Cottonwood Creek and does not recall a fence at all. (R. 177, 194 and Tr. 399, 402 and 403).

19. The fence was still in disrepair in 1990 when the Hansens purchased their property. (R. 177).

20. Oscar Deloy Peterson sold the property to his brother, Jack Lou Peterson, by the deed, and showed him the property line on the South side of Cottonwood Creek and not the old fence line. (Tr. 46 through 52).

21. Jack Lou Peterson sold parcel 107 to the Hansens by the deed and showed Mr. Hansen where the boundary line was south of Cottonwood Creek and not the old fence line (Tr. 16 and 17).

22. The Oberg's built a fence entirely on their north deeded property line and located south across the Creek from the old fence about 1983. They later took the fence down (Tr. 54, 55, 56, 81, 82).

23. Madonna P. Beck and the Oberg's used parcel 105 for residential purpose. (R. 177 and 194).

24. The Hansens were the first owners listed herein to use parcel 107 for residential purposes. (R. 177 and 197).

25. From the time the Hansens purchased the property in 1990 and moved a trailer on the property and up to 1992, the Hansen children occupied those portions of parcel 107 and 105 in the area of Cottonwood Creek and used that area for operation of ATV's and for play activities. (R. 177 and 195).

26. Oberg put "No Trespassing" signs on his fences during the time Jack Lou Peterson owned parcel 107 but he never put any signs on the old fence on parcel 105. (Tr. 85, 88-91).

27. Oberg offered to purchase the disputed portion of parcel 107 from the Hansens, at which time the parties' discussed a survey and Oberg made no claim that the old fence was the boundary. (Tr. 19-20).

28. While Mr. Hansen was out of town in June of 1992 for two (2) weeks to the Utah National Guard Summer Camp, Oberg had his

employees build a new fence in approximately the same location as the old fence, on the Hansen parcel 107. (Record 178 and 179, 195 and 196).

29. In June of 1992, Mr. Hansen's father, Thomas Hansen, appeared at the property when Oberg's employees were starting the construction of the new fence and asked them to stop. (R. 179, 196).

30. In August of 1992, Mr. Oberg claimed the boundary between parcels 105 and 107 is Cottonwood Creek and that he, Mr. Oberg, would move the fence in the future as Hansens developed their property. (R. 179, 197).

31. In March of 1992, Oberg built an irrigation pond that is Northwest of the Hansen property and not close to the property in dispute. (Tr. 22, 29-33).

32. In November of 1992, Hansens' counsel sent Oberg a letter asking Mr. Oberg to vacate the Hansens' property, dismantle the fence and desist from any further interference. (R. 180, 197).

33. The new fence still stood on August 3, 1994. (R. 180, 197).

34. There has never been a boundary between parcels 105 and 107 that qualified as a boundary by acquiescence. (R. 180 and 197).

35. To the extent that there may have been a fence or any other boundary between parcels 105 and 107, neither party has acquiesced in the monument as a boundary and Mr. Oberg built a

fence between 1977 and 1983 that would interrupt any period of acquiescence. (Tr. 423, 432 and 454).

36. The Obergers have trespassed on the Hansens' property, and the Hansens have employed the only means available to them to prevent the continued trespass. That means is this lawsuit. (R. 180, 197).

SUMMARY OF ARGUMENT

The primary reason that Obergers' appeal should be rejected is that they have failed to marshal the evidence as required by Rule 52(a), Utah Rules of Civil Procedure, and the case law decided thereunder. Obergers' brief consists of nothing more than a recitation of the evidence that Obergers believe supports their arguments. Obergers have made no effort whatsoever to set forth the evidence that supports Judge Mower's Findings of Fact. This deficiency alone is sufficient to warrant denial of Obergers' appeal.

Hansen has marshalled the evidence in support of Judge Mower's Findings of Fact. The facts overwhelmingly support Judge Mower's findings.

With respect to Obergers' claim that there was acquiescence in the old fence by the parties and their respective predecessors in title, the witnesses uniformly testified that the fence was in total disrepair by 1977, when the Defendants purchased parcel 105. The witnesses that owned the property prior to the parties testified that they did not care about the location of the fence or the boundaries and the predecessors in title permitted their

livestock to roam freely upon both the Plaintiffs' and Defendants' ground. There simply was no testimony or evidence to support Oberg's claim that there was acceptance of the fence as a boundary.

The disputed property was commonly owned from at least 1958 to 1970 when Hespert Sevy deeded the parcel 107 to his son Robert Sevy. Even then, Mr. Sevy did not care where the boundary was nor was the old fence accepted as the boundary because the livestock were free to roam the entire area, and his family owned the adjoining property.

Oberg purchased parcel 105 in 1977 from another son of Hespert Sevy, Kenneth Sevy. Mr. Oberg claimed he used the part of parcel 107 up to the old fence line during his ownership by allowing his horses to chew down the grass there. However, two of the predecessors in title recall Oberg placing a fence upon what they believed to be the true boundary and deeded line sometime in 1983. Mr. Oberg showed he knew and accepted the true boundary by his conversations with Mr. Hansen. Mr. Oberg never regarded the old fence as the property line, so he wants to rely solely on his predecessors in title to show the long time of acquiescence to a boundary it was his burden to establish. There was simply no testimony from any of the witnesses as to the purpose, use or intent of the fence prior to 1954. From 1954 to 1977 the fence was not recognized as a fence, let alone a boundary.

Finally, Judge Mower, as a trial court judge, had inherent equitable power to award reasonable attorney's fees when he deemed it appropriate in the interest of justice and equity.

Utah Code Annotated § 78-27-56 does not require written findings on the bad faith issue. In fact, if the Court finds bad faith and no merit to the actions of the losing party, the Court then has no discretion and must award reasonable attorney's fees to the prevailing party. Judge Mower substantively found that Oberg's action was without merit and their defense was in bad faith. There is sufficient evidence in the record to indicate the basis of Judge Mower's award of attorney's fee. Mr. Oberg had built his first fence on his deeded boundary line, took it down and then had his employees trespass upon Hansens' property while Mr. Hansen was away and build a fence upon Hansens' ground. Oberg dug holes, tore down trees and removed bushes and other vegetation as he trespassed upon Hansens' property. Mr. Hansen asked Oberg to quit trespassing and doing damage to his property, but Oberg refused to even discuss the matter and directed his employees to continue the construction of the fence.

Mr. Hansen had his counsel write a letter to Oberg asking him to remove the fence he had wrongfully built upon the Plaintiffs' property. Mr. Oberg refused.

Judge Mower presided over this lawsuit from beginning to end and had an opportunity to view and judge the credibility of the witnesses and the evidence. Based thereon, Judge Mower awarded

attorney's fees. Such an award of attorney's fees is appropriate for public policy reasons in that the law and the courts need some means to make the Plaintiff whole when they suffer damages inflicted by actions such as Oberg's. The Oberg's should not be allowed to trespass upon anyone's property at will, destroy trees or build fences, thinking that they will be shielded from having to pay the total cost of making the victim of their actions whole. Attorney's fees are part of the damages suffered by the prevailing party, they cannot be made whole without recovery of those fees. Actions by others similarly situated to the Oberg's need to be discouraged and an award of attorney's fees should be affirmed as a signal to others that bad faith litigation is a burden on both courts and prevailing parties and the costs of such action will be borne by the bad faith litigant.

Argument

I. Oberg's Challenge to Judge Mower's Findings of Fact Should be Rejected Because Oberg's have Failed to Marshal the Evidence in Support of the Findings of Fact.

Under Rule 52(a), Utah Rules of Civil Procedure, Oberg's challenge to Judge Mower's Findings of Fact will fail unless they can establish that the findings are "clearly erroneous". In order to meet this burden, Oberg's are required to marshal the evidence in support of Judge Mower's Findings of Fact and demonstrate that despite the supporting evidence, the findings are clearly erroneous. Utah Department of Social Services v. Adams, 806 P.2d

1193, 1197 (Ut. App. 1991); Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Ut. App. 1989).

Obergs have failed to marshal the evidence in support of the findings as required. Obergs' brief simply reargues the evidence that Obergs believe supports their view of the case.

This Court recently stated how carefully appellants must marshal evidence and why appellate courts will not give a moment of consideration to those who do not.

Utah appellate courts do not take courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling duty]... the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists."

Oneida v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Ut. App. 1994) (emphasis added; emphasis of "supports" in original; extensive citations omitted).

The Oneida court also articulated the appellant's post-marshalling duty under the "rigorous", clearly erroneous standard:

Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence', thus making them

'clearly erroneous'." Id., at 1053 (emphasis added; citations omitted).

In the instant case, Oberg's did precisely the opposite from marshalling—they recite and discuss only the evidence on which they relied at trial. They altogether ignored Hansens' compelling evidence supporting the denial of Oberg's frivolous defense of boundary by acquiescence and the award of attorney's fees. Indeed, Oneida might have been describing Oberg's failure of their duties:

Oneida has failed to marshal the evidence in support of the trial court's factual findings. Rather than bearing its marshaling burden, Oneida has merely presented carefully selected facts and excerpts of trial testimony in support of its position. Such selective citation to the record does not begin to marshal the evidence; it is nothing more than attempting to reargue her case before this court--a tactic that we reject. Id., at 1053 (emphasis added; citations omitted).

Oberg's, as did the Oneida appellant, failed their two-fold duty to demonstrate how the trial court found the facts from the evidence and why those findings contradict the weight of the evidence supporting the award. Id., at 1054.

The Oneida court had no trouble affirming the district court without analysis of the arguments raised on appeal.

Because Oneida has failed to marshal the evidence supporting the trial court's findings, we hold that those findings are accurate and affirm the trial court's dismissal based on those findings.

As we decline to consider the merits of Oneida's appeal, we take the occasion to

further articulate our rationale behind the marshaling requirement. . . .

Id., at 1053 (emphasis added; citations omitted); see also, e.g., Allred v. Allred, 835 P.2d 974 (Ut. App. 1992) (appellate court affirmed without comment because appellant failed to marshal evidence).

Because of Oberg's failure to marshal the evidence, their challenge to Judge Mower's Findings of Fact should be dismissed without further consideration. "When the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid." Mountain States Broadcasting, supra, 783 P.2d 553.

II. The Testimony and Evidence Produced at Trial Support Judge Mower's Findings of Fact.

Oberg's argue that their title to the disputed property became perfected under the doctrine of boundary by acquiescence prior to the time Hansens acquired a deed to their property which included the disputed property. To advance this argument. Mr. Oberg quotes himself and then refers to only two one-line statements made by Mr. Robert Sevy in support of his argument. Oberg's totally ignore the other testimony and evidence Judge Mower considered in arriving at his decision as set forth above in the summary of the testimony presented at trial.

The elements of a boundary by acquiescence are:

(1) Occupation up to a visible line marked by monuments, fences, or buildings, (2) mutual acquiescence in the line as a boundary,

(3) for a long period of time, (4) by adjoining land owners.

Englert v. Zane, 848 P.2d 165, 168 (Ut. App. 1993).

Utah courts have always restrictively applied this doctrine. A party claiming title by acquiescence must establish all of the required elements to give rise to a presumption of ownership in his or her favor.

Id., at 168-169 (citations omitted). Obergs failed to carry their burden of establishing at least elements (1), (2), and (4). Obergs failed to show occupation of the disputed parcel or even that the fence was sufficiently visible to demark any line or barrier. There is no showing of mutual acquiescence in the old fence line as a boundary line. There is no showing of why the fence was originally constructed or any of the use of the fence except for the purpose of holding livestock. The earliest evidence regarding the use of the fence occurred while both the Obergs' and Hansens' property were owned by the same owner. There is no evidence that any party treated the fence as a boundary line at any time in the past. Hansens presented evidence showing that the old fence line was not regarded as the property line by him or his predecessors in interest. Finally, because Obergs presented no evidence of any use of the property or the fence line prior to the 1950's, and since both Obergs' and Hansens' property were under common ownership until 1970, Obergs have failed to show an agreement as to a boundary between adjoining land owners over any sufficient period of time to constitute boundary by acquiescence.

In Leon v. Dansie, 639 P.2d 730 (Utah 1981), the Utah Supreme Court upheld a finding of no boundary by acquiescence in a case involving a fence used to contain livestock. The Court stated:

The defendants have set forth in their brief, only isolated parts of testimony favoring their contentions, emphasizing existence of a fence for a long time. There was no showing of the important continuity of use factor, and no proof positive of any mutual acquiescence that the fence was or was intended to be a boundary. The trial court reasonably could have recognized and apparently did recognize such insufficiency in the evidence.

Id., at 731. The Obergss failed to establish that the old fence line was used as a boundary or was placed to settle any uncertainty about the location of the boundary. The mere fact that a fence happens to be put up and neither party does anything about it for a long period of time will not establish it as the true boundary. Ringwood v. Bradford, 2 Ut. 2d 119, 121, 269 P.2d 1053 (1954).

It is not to be questioned that if an owner of property puts up a fence simply as a barrier to separate one part of his property from the other, for some purpose of his own convenience, such as to confine animals in a pasture, or to keep them out of certain areas, such a fence is properly referred to as a barrier, and not as a boundary. The period of time that a fence exists under such circumstances as a barrier will not constitute part of the "long period of time" requisite to establish a boundary by acquiescence. On the other hand, if the property on either side of such a fence is conveyed to separate parties, so that there comes into being separate ownership of the tracts on either side, and the circumstances are such that the party should reasonably be assumed to accept the fence as

the boundary between their properties, thence from that time on, the time during which the fence continues to exist, should be regarded as going toward fulfilling the time requirement for establishment of a boundary by acquiescence.

Baum v. Defa, 525 P.2d 725 (Ut. 1974). During all the time the properties were in joint ownership, no boundary by acquiescence could accrue. Oberg's failed to show circumstances in which the parties would reasonably be assumed to accept the fence as a boundary. Some owners did not even know there was a fence there. The Hansens' predecessors, Oscar Peterson, Jack Peterson, and Robert Sevy all believed that the true boundary was in or near the creek. They did not acquiesce in the fence as a boundary.

There was evidence presented that the property of Hansens and Oberg's was previously commonly owned or owned by closely related family members, and while commonly owned both parcels were used as one big pasture and that livestock freely roamed over the entire property. (Robert Sevy, Tr. 301-319); (Ted Peterson, Tr. 348); (Wayne Sevy, Tr. 396, 399, 400).

Oberg's own witness, Mr. Ted Peterson, testified that when he cleaned Cottonwood Creek in the 1940's the fence was in disrepair, worn out and torn down. (Tr. 351 and 352).

In fact, there was no evidence presented by either party as to the purpose, intent or use of the property or the fence prior to 1954 when the Becks owned both parcels.

In fact, the Court brought to a head the very question of acquiescence by predecessors in interest to the property at the

close of the trial in a discussion with Obergs' counsel (see Tr. 440-442). Judge Mower made a finding that there has never been a boundary between parcels 105 and 107 that qualified as a boundary by acquiescence (R. 197). Further, to the extent that there may have been a fence or any other boundary between parcels 105 and 107, there was no acquiescence in it by the parties to this action. (R. 197).

Obergs failed at trial to show any evidence as to the acquiescence in the fence as a boundary by anyone. They simply claimed there was an old fence and it ought to be the boundary. They make the same claim again on appeal. Because the trial court's decision is amply supported by the evidence, the judgment of the trial court should be affirmed.

III. Judge Mower Substantively Found that Obergs' Action was Without Merit and Their Defense was in Bad Faith.

In most cases, attorney's fees are awarded only if authorized by a statutory or contractual provision. In this case, although not specifically stated in the findings, the trial court substantively found Obergs' actions to be without merit and that their defense was in bad faith. There is sufficient evidence in the record and transcript in support of the award of attorney's fees pursuant to Utah Code Annotated § 78-27-56, under which Judge Mower was required to award attorney's fees if Obergs' claim has no merit and is in bad faith.

Oberg cites Baldwin v. Barton, 850 P.2d 1188 (Utah 1993) for the general proposition that an award of attorney's fees is

appropriate only if authorized by statute or contract. Yet the Baldwin court, per Chief Justice Hall, upheld the trial court's award of attorney's fees pursuant to § 76-27-56, Utah Code Annotated, even though the trial court had not indicated a legal basis for its conclusion. Id., at 1198. Justice Hall went into the record and transcript to find the facts on which the trial court based its decision.

Appellate review of a "without merit" determination is a question of law that will be reviewed for correctness.

On the other hand, a "bad faith" determination is a question of fact and is reviewed under the clearly erroneous standard. Jeschke v. Willis, 811 P.2d 202 (Ut. App. 1991).

The Utah Supreme Court has stated that "[I]n the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney's fees when it deems appropriate in the interest of justice and equity." Steward v. Utah Public Service Comm'n, 885 P.2d 759, 782, (Utah 1994). See also Jensen v. Bowcut, 261 Utah Adv. Rep. 16, 19 (Ut. App. 1995) wherein the Court of Appeals per Justice Greenwood upheld an award of attorney's fees based on the principles of equity and justice as they related to the specific circumstances of that case.

In the instant case, Oberg's trespass upon the Hansens' property and their destruction of trees and vegetation compelled Hansens to bring this action. (R. 195).

Obergs continued their trespass in spite of Hansens' protests while Mr. Hansen was out of town serving in the Utah National Guard. (Tr. 35, 146 and 159).

Obergs agreed to move their fence in the future as Hansens developed their property. (R. 197).

In November of 1992, Hansens' counsel sent Obergs a letter asking them to vacate Hansens' property, dismantle the fence and desist from any further interference. (R. 197).

The fence still stood at the time of trial in this matter. (R. 197).

Obergs' counsel said this whole matter was over a grudge between the parties and that the parties should not even be here. (Tr. 450).

There is ample evidence in the record and the transcript to support the trial court's award of attorney's fees, and due deference is owed to Judge Mower who actually presided over the proceeding and has firsthand familiarity with the litigation. Utah Dep't of Social Services v. Adams, 860 P.2d 1193 (Ut. App. 1991).

The record also supports Judge Mower's findings that there is no factual or legal justification for Obergs' actions.

Judge Mower found that "there has never been a boundary between parcels 105 and 107 that qualified as a boundary by acquiescence." (R. 197) (emphasis added). Judge Mower also found that "to the extent that there may have been a fence, or any other

boundary between parcels 105 and 107, there was no acquiescence in it by the parties to this action. (R. 197) (emphasis added).

Obergs simply failed to provide evidence remotely sufficient to support their defense of this action on the theory of boundary by acquiescence. Obergs offered no proof at trial and cannot point to any proof on appeal. This whole appeal is Obergs' continuation of their grudge with Hansens over a piece of ground that Mr. Oberg claims has no value. (Tr. 276 and 277).

Judge Mower awarded attorney's fees when he made his oral findings. (Tr. 456 and 457). Judge Mower awarded attorney's fees when he drafted his own Findings of Fact and Decision. (R. 172 and 181). Judge Mower awarded attorney's fees in the Findings of Fact and Conclusions of Law. (R. 190 and 197). Judge Mower awarded attorney's fees in the Judgment and Order that he signed. (R. 199 and 200).

Obergs filed a Motion to Amend Judgement and a Memorandum in Support making the same arguments he has on appeal. (R. 182 through 187). Judge Mower denied their motion. (R. 216). Judge Mower has stayed firm in his award of attorney's fees.

Judge Mower had a firsthand look at Obergs' case, the facts and the evidence presented, and found that their defense of Hansens' actions had no basis in law or fact and therefore was without merit.

The award of attorney's fees should be upheld by this Court, and Obergs should be assessed attorney's fees and costs on

this frivolous appeal, particularly in light of their total failure to marshal the evidence in support of the trial court's ruling. There is no evidence in the record that Oberg's had an honest belief in their claim. Oberg's intended to and did take unconscionable advantage of Hansens and knew this suit would cause Hansens monetary damage they could ill afford. (Tr. 394).

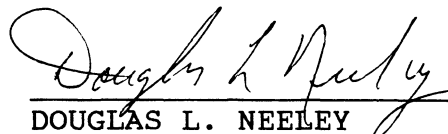
CONCLUSION

The evidence supports the Findings of Fact that Oberg's challenge. Judge Mower correctly determined that there was never any acquiescence in the fence as a boundary by predecessors or by the parties. Judge Mower had an opportunity to see and evaluate the witnesses and evidence. The evidence supports Judge Mower's award of attorney's fees because of the meritless and bad faith defense by Oberg's, and because of the Court's inherent equitable powers.

Last but perhaps more importantly, Oberg's totally failed to marshal the evidence in support of the trial court's judgment, thereby requiring Hansens to do so, and on that basis alone their appeal in its entirety should be dismissed.

For the foregoing reasons, Hansens respectfully request that this Court affirm the judgment of the trial court, and award them their costs and attorney's fees on this appeal.

DATED this 13 day of October, 1995.

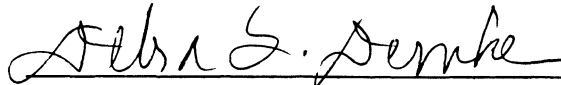


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Certificate of Mailing

I do hereby certify that on this 13th day of October, 1995,
I mailed two complete true and correct copies of the foregoing
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