

1995

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

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Hansen v. Oberg*, No. 950231 (Utah Court of Appeals, 1995).
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FILED
Utah Court of Appeals
NOV 16 1995
Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

WALTER SCOTT HANSEN and)	
KRISTI D. HANSEN)	
)	
Plaintiffs and Appellees,)	
)	
vs.)	Case No. 950231-CA
)	
CRAIG OBERG and DIANE OBERG,)	Argument Priority No. 15
)	
Defendants and Appellants.)	

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

REPLY BRIEF OF APPELLANTS

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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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REPLY BRIEF OF APPELLANTS

STATEMENT OF THE CASE

Defendants set forth in their principal brief a statement of facts with citations to the record. Plaintiffs also set forth in their brief a statement of facts as well as a summary of the testimony of the witnesses in this case. Without conceding the factual statements contained in other paragraphs of plaintiffs' summary of testimony and statement of facts, the following assertions by plaintiffs need clarification.

At the bottom of page six and the top of page seven of plaintiffs brief it is asserted that defendant Oberg asked plaintiff if he was interested in selling the now disputed property. The actual testimony was as follows:

Q. All right. And that phone call was from Mr. Oberg?

A. Yes, it was.

Q. And did he identify himself?

A. Yes, he did.

Q. And what did Mr. Oberg say to you?

A. Mr. Oberg asked me if we would exchange that parcel of property or piece of property for another property across the adjacent street.

Q. Okay. And did you -- what was your reply to Mr. Oberg's request?

A. Mr. Oberg's request, I told him that we had just established ourself and that we were not willing to trade or sell or do anything with the property at that time.

Q. Okay. Did you or Mr. Oberg discuss -- well, did you and Mr. Oberg discuss the boundaries?

A. Ah, yes, we did. I told him that I wanted the boundary surveyed at that time.

(Trial Transcript at 18, 19). From the testimony, it is not clear which parcel of ground plaintiff is referring to. It could be all or a portion of the property which plaintiffs purchased. In fact, Jack L. Peterson had previously talked to Mrs. Oberg about purchasing parcel 107. (Trial Transcript at 84).

On page 9 of their brief plaintiffs assert that Jack L. Peterson testified that defendant Oberg erected a fence on parcel 105 which was approximately on the boundary line purportedly described by Mr. Sevy. However, Mr. Peterson described that fence as a cat/horse fence with steel posts but he did not testify that it was located on the property line purportedly described by Mr. Sevy. (Trial Transcript at 82).

At page 10 of plaintiffs' brief it is asserted that Steven Ludlow, when he surveyed the property, described a considerable amount of over-growth and saw no older fence. However, Mr. Ludlow did not survey the property until after the new fence was constructed along the same line as the subject fence. (Record at 121).

Plaintiffs' statement of fact 15 states: "The party's predecessors in interest to both parcels 105 and 107 did not treat the subject fence as a boundary fence." Plaintiffs' references to the trial transcript in support of that statement, however, deal primarily with the period that parcels 105 and 107 were in common ownership by the Becks and Sevys. It also omits the testimony of Robert Sevy to the effect that he believed that the subject fence was the boundary. (Trial Transcript at 291, 305, 306).

Plaintiffs' statement of fact 20 states that "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. (T.R. 46-52)." Plaintiffs' reference to the transcript does not mention any discussion between Oscar D. Peterson and Jack L. Peterson regarding the sale of the property to Jack L. Peterson or what was shown to him by Oscar D. Peterson relevant thereto. There does not appear to be any evidence of a discussion between the Petersons that the property was sold to Jack L. Peterson by the deed or that the property line was south of Cottonwood Creek.

Paragraph 27 of plaintiffs' statement of facts again refers to a purported offer by defendant Oberg to purchase the disputed property. As noted above, it is unclear whether that discussion referred to the disputed property, some other portion of the property or the entirety

of parcel 107. (Trial Transcript at 18-19).

Plaintiffs' statement of fact 35 asserts that a purported fence built by defendant Oberg south of Cottonwood Creek interrupted the period of acquiescence. However, there is no evidence that if in fact such a fence was constructed that it was intended by defendant Oberg as a boundary. He consistently testified that he always believed that the subject fence was the boundary of his property. (Trial Transcript at 206, 217-218, 221-222, 244-246, 283).

ARGUMENT

POINT I

THE TRIAL COURT'S FAILURE TO MAKE A FINDING OF FACT REGARDING THE PARTIES PREDECESSORS' ACQUIESCENCE IN THE SUBJECT FENCE LINE AS A BOUNDARY OBVIATES THE NECESSITY OF DEFENDANTS MARSHALING THE EVIDENCE WITH REGARD TO SUCH ACQUIESCENCE

The basis of defendants' appeal on the boundary issue relates primarily to the trial court's inadequate findings of fact and the application of law to the facts of the case. Specifically, the court's finding of fact number 30 states: "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." (Record at 197). The court did not make any findings regarding the acquiescence of the parties' predecessors in and to the subject fence as a boundary. Presumably, because of the required mutuality of acquiescence, the court's finding of no acquiescence by the parties to this action is for the period of time subsequent to plaintiffs' acquiring parcel 107, August of 1990. The focus of defendants' appeal is that defendants' title by adverse possession ripened as a matter of law based upon the actions of defendants and defendants' predecessors as well as

plaintiffs' predecessors in interest. The critical time period is from March, 1970, when Hespert Sevy conveyed parcel 107 to his son Robert Sevy, until August 1990, when plaintiffs acquired parcel 107. Because the court did not make findings of fact as to the acquiescence of the owners during that period of time, defendants were not required to marshal evidence on that issue.

In Woodward v. Fazzio, 823 P.2d 474 (Utah App. 1991) the court stated:

"The process of marshaling the evidence serves the important function of reminding litigants in appellate courts of the broad deference owed to the fact finder at trial." However, we will only grant this deference when the findings of fact are sufficiently detailed to disclose the evidentiary basis for the court's decision. There is, in effect, no need for an appellant to marshal the evidence when the findings are so inadequate they cannot be meaningfully challenged as factual determinations. In other words, the way to attack findings which appear to be complete and which are sufficiently detailed is to marshal the supporting evidence and then demonstrate the evidence is inadequate to sustain such findings. Where the findings are not of that caliber, the appellant may not need to go through a futile marshaling exercise. Rather, the appellant can simply argue the legal insufficiency of the court's findings as framed. (Omitting citations).

823 P.2d at 477-478. In the present case, because of the court's failure to make findings regarding the acquiescence of plaintiffs' predecessors in interest, defendants' principal brief illustrated testimony from plaintiffs' predecessors, as well as defendants' predecessors, regarding that issue. Plaintiffs did not marshal evidence regarding that finding because defendants do not assert acquiescence on the part of plaintiffs.

If, on the other hand, the court intended by finding of fact 30 that defendants Oberg did not acquiesce in the subject fence as a boundary, such a finding would be clearly erroneous and would be subject to the marshaling requirement. The evidence marshaled by plaintiffs in their brief on that issue is as follows:

Oscar Deloy Peterson

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).

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).

Plaintiffs'/Appellees' brief, p. 8-9.

Jack Lou Peterson

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 it 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).

Plaintiffs'/Appellees' Brief, p. 9.

Craig Oberg

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

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

Plaintiffs'/Appellees brief, p. 11-12.

Wayne Sevy

Wayne Sevy testified he never saw anyone do any repairs to the fence.
(Tr. 401).

Plaintiffs'/Appellees brief, p. 15. The only other testimony which defendants have been able to locate which may relate to the issue of defendants' acquiescence in the subject fence as a boundary is testimony from Oscar D. Peterson and Craig Oberg. Mr. Peterson testified that defendant Oberg did not use the property on the north side of Cottonwood Creek while Oscar Peterson owned parcel 107 (1980-83). (Trial Transcript at 59). When asked on cross examination whether or not it was true that he knew the boundary line was on the south side of the creek, defendant Oberg testified that he had no idea where the boundary line was. He further testified that he didn't consider it to be an issue at all where the exact line was located. (Record at 273).

When considered in light of the other relevant facts of this case, the foregoing testimony hardly supports a finding that defendant Oberg did not acquiesce in the subject fence as a boundary from the time he acquired parcel 105 in 1976 at least until the time plaintiffs acquired parcel 107 in August, 1990. Oscar D. Peterson owned parcel 107 only for a period of three years between 1980 and 1983 and he did not reside on the property. (Trial Transcript at 50, 59). Likewise, Jack L. Peterson did not reside on parcel 107. During the time Jack L. Peterson owned parcel 107 he rarely visited the property. In fact, he testified, "I was only down a few times." (Trial Transcript at 82). He also testified that "I mostly wasn't around." He responded affirmatively to the following question: "So you didn't see what happened on the property, his

property or your property, really, for the most part?" (Trial Transcript at 87 and 88). When asked by plaintiffs' counsel how often he came to Ephraim to visit the property Mr. Peterson testified that it was four times. (Record at 91).

In contrast to the foregoing paucity of evidence regarding non-acquiescence by defendants Oberg, the following testimony demonstrates conclusively that defendant Oberg believed that the subject fence constituted a boundary and that he has occupied the property up to the subject fence from the time he acquired parcel 105. The testimony in that regard is summarized below.

When defendant Oberg was negotiating for the purchase of parcel 105 he assumed the boundary was the subject fence. (Trial Transcript at 206). Defendant Oberg was never told that the subject fence did not constitute the boundary of his property. (Trial Transcript at 217-218). Every year defendant Oberg has owned parcel 105, he grazed off the land up to the old fence, usually with horses. He testified that the section between the creek and the fence contained a lot of growth and vegetation and that that was "the first section I worked on and cleaned up over the years." (Trial Transcript at 221). Mr. Oberg further testified that during the time Robert Sevy owned the property on the other side of the subject fence "it was always my understanding that we both agreed that the fence is the property line during that period." (Trial Transcript at 222). Mr. Oberg also testified that the subject fence, consisting of posts and wire, existed continuously from the time he purchased his property (parcel 105). (Record at 244-245). He further testified that he considered the subject fence to be the boundary line all the time that he has owned his property. (Trial Transcript at 246). At one time Mr. Oberg kept four roping steers on his property in a corral. Those steers were contained by the subject fence which he

considered the boundary line. He also testified that the subject fence was used for the purpose of maintaining livestock since he has been there. (Trial Transcript at 253). Finally, Mr. Oberg testified that until June of 1992, he did not have any reason to believe that the subject fence was not the true boundary between his and plaintiffs' property. (Trial Transcript at 283).

Robert Sevy, who owned parcel 107 when defendants Oberg acquired parcel 105, recognized that defendant Oberg treated the subject fence as the boundary between their respective properties. He asked permission from defendant Oberg to put a V in the subject fence so that his horse could drink. (Trial Transcript at 305, 307).

As demonstrated above, the interpretation of finding of fact 30 which is most consistent with the court's other findings and decision is that the lack of acquiescence by the parties in the subject fence as a boundary was during the period of time since plaintiffs' acquisition of parcel 107. If finding of fact 30 is construed to include the period of time since defendants' acquisition of parcel 105, then, as the foregoing evidence shows, that finding is clearly erroneous. In either case, the issue then becomes whether or not defendants established the elements of boundary by acquiescence for the period from March, 1970, to August, 1990.

POINT II

PLAINTIFFS' PREDECESSORS IN INTEREST, BY THEIR INDOLENCE,
ACQUIESCED IN THE SUBJECT FENCE AS A BOUNDARY AND DEFENDANTS
TITLE TO THE DISPUTED PROPERTY BECAME PERFECTED PRIOR TO
PLAINTIFFS' ACQUIRING AN INTEREST IN THE PROPERTY
NORTH OF THE SUBJECT FENCE LINE

As noted in defendants' principal brief, the Utah Supreme Court in Staker v. Ainsworth, 785 P.2d 417 (Utah 1990) overruled Halladay v. Cluff, 685 P.2d 500 (Utah 1984) and

established the following elements of boundary by acquiescence:

- "(1) occupation up to a visible line marked by monuments, fences, or boundaries;
- (2) mutual acquiescence in the line as a boundary; (3) for a long period of time;
- (4) by adjoining landowners." (Omitting citations).

785 P.2d at 417. With regard to the first element, finding of fact 17 indicates that at some time in the past a fence was constructed which, when new, consisted of cedar posts with net wire and a strand or two of barbed wire on top. The court does not indicate the date of the construction of the fence, but the testimony of Leon Olsen was that the fence has been in existence prior to 1923 and other witnesses have testified to the ancient date of the subject fence. (Record at 194, Trial Transcript at 363). The court did not make a finding as to the visibility of the fence, but noted only that at various times it was in disrepair. (Record at 194). The only witness to testify to the lack of visibility was Wayne Sevy, the brother of Robert Sevy, who used parcel 107 for a short time to take care of hogs. He noted that in obtaining water from the creek for the hogs he did not have to cross over a fence. (Trial Transcript at 399, 402). On the other hand, his brother, Robert Sevy, the owner of the property, definitely recalls the fence being there and in fact asked permission of defendant Oberg to put a V in the fence so that his horse could drink. (Trial Transcript at 305,307). He also recalled having to go through a fence to get to the creek to get water for his pigs. (Trial Transcript at 301, 314-315). Defendant Oberg also testified as to the visibility of the fence and indicated that it was in better condition in some places than in others. (Trial Transcript at 216). Leon Olsen testified that the fence was always there. (Trial Transcript at 370). Ted Peterson testified as to the visibility of the fence, that it was in disrepair, and that it was fixed up from time to time. (Trial Transcript at 351-352). He also

testified that the new fence, built in 1992, was on the same line as the old fence. (Trial Transcript at 344). Earl Livingston testified that it was clear that there was a fence, that he could tell that it had been repaired over the years and that it would have held a horse. (Trial Transcript at 222, 224, 225). Plaintiffs admit the existence of the subject fence. (Record at 18).

The evidence clearly establishes that there was a visible line marked by a fence. The next issue is whether or not defendants and their predecessors occupied up to the visible line. Again, the court did not make a finding as to defendants' or their predecessors' occupation of the property. However, defendant Oberg testified that he grazed off the property up to the subject fence every single year and that he cleaned out the area between the fence and the ditch on a regular basis. (Trial Transcript at 221). Robert Sevy, the owner of parcel 107 from March, 1970 to 1980, testified that his father, Hespert Sevy, pastured parcel 105 and that the livestock could get through the subject fence to parcel 107. (Record at 301). His surviving spouse, Rozella Sevy, and her son, Kenneth Sevy, who acquired the property in 1973, continued to occupy the property up to the subject fence for purposes of grazing livestock. (Trial Transcript at 216).

The third and fourth elements of boundary by acquiescence are easily satisfied in this case. Plaintiffs do not dispute that parcels 105 and 107 have been owned by separate adjoining landowners for the period from March 1970 to the present time. (Plaintiffs/Appellees brief, page 18). The principal issue in this case is whether or not the second element of boundary by acquiescence has been satisfied, that of mutual acquiescence in the line as a boundary. That issue is a mixed question of law and fact. A portion of the factual issue is discussed in Point

I above. Defendants do not contend that a mutual acquiescence existed after plaintiffs acquired parcel 107 in August of 1990. The court specifically found that there was no acquiescence by the parties, which, as demonstrated in Point I above, is for the period after plaintiffs acquired parcel 107 in August of 1990. Defendants do not contend that mutual acquiescence existed after that point in time and consequently a marshaling of evidence is not necessary because, except as outlined in Point I above, defendants do not intend to show that that finding is clearly erroneous. Rather defendants contend that during the period beginning with the conveyance of parcel 107 to Robert Sevy (March 1970) until the time plaintiffs acquired their property (August 1990), defendants title to the disputed property became perfected by operation of law.

Defendants' argument on the issue of acquiescence is set forth in Point I of their principal brief. Without repeating that argument here, defendants will respond to plaintiffs' opposing argument which is found at Point II of plaintiffs' brief. Initially, it should be noted that once the elements of boundary by acquiescence have been satisfied, title is then vested in the person claiming boundary by acquiescence even though a court decree to that effect is not obtained until some time thereafter and even though the circumstances may have changed at the time the decree is entered. Brown v. Peterson Development Co., 622 P.2d 1175 (Utah 1980). In the cited case, a predecessor of the plaintiffs purchased land in 1943 and from that time until 1971 occupied and farmed the land up to an existing old fence. The court found that the defendants and their predecessors had not occupied, possessed, used or claimed any of the disputed land for more than forty years prior to the filing of the complaint in that case. The court held that the plaintiffs

had acquired title to the disputed strip of land by operation of law under the doctrine of boundary by acquiescence. The defendants' predecessors in title and interest held good title to their lands west to the old fence and only the bare record title to any land west of the old fence that was embraced within the descriptions in their title documents. Their legal title to any part of the disputed strip of land had been extinguished when Johnson's [plaintiffs' predecessor's] occupancy and possession had ripened into a legal title.

The title lost by defendants' predecessors by virtue of the operation of the doctrine of boundary by acquiescence did not revert to the defendants nor to the former owners of the record title when the surveyors established the record title line of the Meadow Cove Number 2 Subdivision at the white fence line. The legal title to the disputed strip remained in Reynold Johnson or his grantee or his successor in interest from who the plaintiffs received their title.

622 P.2d at 1177-1178. Accordingly, even if plaintiffs themselves did not acquiesce in the subject fence as a boundary, if defendants' title under the doctrine of boundary by acquiescence had been established during the more than twenty year period prior to plaintiffs acquisition of parcel 107, legal title to the property became vested in defendants and was not conveyed to plaintiffs.

The testimony of the witnesses in this case demonstrates a do-nothing attitude on the part of plaintiffs' predecessors regarding the subject fence. The facts fall squarely within the doctrine enunciated by the court in Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1190 (1973). In that case, the court set forth the legal definition of "acquiescence" for purposes of boundary by acquiescence.

Plaintiff asserts that there is no evidence to indulge a fiction that there was a fence mutually "intended" to be a boundary. To this we say that the test to establish the boundary by "acquiescence" necessarily need not be based on mutual "intent." "Intent" is not synonymous with "acquiescence" in these cases. "Acquiescence" is more nearly synonymous with "indolence," or "consent by

silence" -- or a knowledge that a fence or other monuments appears to be a boundary, -- but that no one did anything about it for forty-eight years. No one in this case did much except by invective, across the very fence that made irritants out of erstwhile neighbors, for forty-eight years, -- until suddenly the appreciation of property values transmuted yesteryear's minimal values into objects d'art of an inestimable value in the real estate market.

505 P.2d at 1200. Plaintiffs' principal argument to defeat acquiescence by plaintiffs' predecessors in title is that there was not evidence presented as to the original purpose of the subject fence and that the fence was used primarily for holding livestock. While it is true that to constitute a boundary by acquiescence a fence or other visible barrier must be intended as a boundary, the fact that it was once used as a barrier or to control animals does not prevent its becoming a boundary at a later date. The court in Baum v. Defa, 525 P.2d 725 (Utah 1974) stated that rule as follows:

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 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 boundary on either side of the 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 parties should reasonably be assumed to accept the fence as the boundary between their properties, then from that time on, the time during which the fence continues to exist should be regarded as going toward fulfilling the time requirement for the establishment of the boundary by acquiescence. (Emphasis added).

525 P.2d 727.

In this case, when Hespert Sevy conveyed parcel 107 to his son Robert Sevy in March 1970, the properties became separated and, as acknowledged by Robert Sevy, the subject fence was looked upon by him as a boundary between his property and his father's property. (Trial

Transcript at 291, 306). Although he was not too concerned about the boundary because his father owned the property on the other side of the fence, nevertheless he recognized the fence as a boundary and asked permission of defendant Oberg, after defendant Oberg acquired parcel 105, to put a V in the fence for the purpose of letting his horse drink. When Robert Sevy conveyed parcel 107 to Oscar D. Peterson in 1980, Oscar Peterson testified that Robert Sevy told him the boundary between his property and the defendants' property was just south of Cottonwood Creek. (Trial Transcript at 48-49). Robert Sevy's testimony is not that definite:

"I sold him a deed. I took him there and I said, 'Here's this piece of property. It has this much in it.' And that was all that there was said."

(Trial Transcript at 298). While Oscar Peterson does not state that he recognized the fence as a boundary, his actions fall within the parameters of Lane v. Walker, supra, in that he did not do much with the property nor prevent defendants use of the subject property. His testimony was that he did not have any discussions with defendants concerning the boundary and that he did not use the property south and west of the subject fence other than for chasing kids off of the property, cutting a rope out of a tree and cutting limbs off of the tree. (Trial Transcript at 57 and 58). Oscar Peterson transferred parcel 107 to his brother, Jack L. Peterson, in 1983. (Trial Transcript at 80). Not only did Jack L. Peterson not use the property for any purpose, but he also did not have any discussions with defendants regarding the boundary between his property and defendants' property. (Trial Transcript at 83, 87). Jack L. Peterson sold parcel 107 to plaintiffs in August of 1990. (Trial Transcript at 15, Exhibit "14").

This court's decision in Carter v. Hanrath, 885 P.2d 801 (Utah App. 1994) is instructive

in establishing the application of acquiescence to the facts of this case. In that case, the plaintiff used the disputed property for growing hay, pasturing animals and calving, and his predecessors used the disputed property for farming and grazing. The "visible line" in that case consisted of cliffs. In addressing the plaintiff's argument that acquiescence requires actual knowledge of the disputed boundary the court stated:

The Utah Supreme Court has stated that "[a]cquiescence' is more nearly synonymous with 'indolence,' or 'consent by silence,' --- or a knowledge that a fence or other monuments appears to be a boundary, --- but that no one did anything about it." *Lane v. Walker*, 29 Utah 2d 119, 505 P.2d 1199, 1200 (1973). This accords with the dictionary definition of acquiescence as "[p]assive compliance or satisfaction ... [c]onduct from which assent may be reasonably inferred.... Equivalent to assent inferred from silence with knowledge or from encouragement, and presupposes knowledge and assent." Black's Law Dictionary 24 (6th ed. 1990).

Therefore, landowners may acquiesce to a boundary through idleness or laziness. In other words, a landowner whose property has been encroached upon acquiesces to the boundary when he or she "either had or *should have had* knowledge that his [or her] property was being claimed by another." (Omitting citations).

Moreover, our holding that acquiescence may be imputed from long-term indolence is consistent with the policy upon which boundary by acquiescence is based, namely

"that the peace and good order of society require that there be stability ... in the ownership and occupation of lands.... [B]oundary lines which have been long established and accepted by those who should be concerned should be left undisturbed in order to leave at rest matters which may have resulted in controversy and litigation."

James H. Backman, *The Law of Practical Location of Boundaries and the Need*

for an Adverse Possession Remedy, 1986 B.Y.U.L.Rev. 957, 965 (1986) (quoting *Olsen v. Park Daughters Inv. Co.*, 29 Utah 2d 421, 425, 511 P.2d 145, 147 (1973)).

885 P.2d at 806. Similarly, in the present case, the actions of Oscar D. Peterson and Jack L. Peterson show long term indolence from which legal acquiescence may be imputed as found by the court in Carter v. Hanrath, *supra*. Their predecessor, Robert Sevy, acquiesced in the subject fence as a boundary and his successors did not take any action inconsistent with that continued belief. Robert Sevy recognized and expressed his belief to defendant Oberg that the subject fence was the boundary by asking his permission to put the V in the fence. Based on that recognition by Robert Sevy, defendant Oberg was justified in assuming that the successors of Robert Sevy recognized the fence as a boundary inasmuch as they did not take any action inconsistent with that belief.

In Motzkus v. Carroll, 7 Utah 2d 237, 322 P.2d 391 (1958), the Utah Supreme Court reversed the trial court's finding that boundary by acquiescence had not been established on facts which are not dissimilar to those in the present case. In that case, the fence had existed for more than forty-five years and there was a total lack of evidence as to who built the fence or when it was built except that it had been there for at least forty-five years prior to trial. The owners on each side of the fence did not claim any land beyond the fence and each farmed and used his tract to the fence and never claimed or used the land beyond it. In light of those facts, the court found that the owners recognized, acquiesced in and treated the fence as the boundary. The court then held as follows:

We conclude that under this evidence an affirmative finding that the boundary line

by acquiescence in the old fence as marking the boundary was established and that the court should have so held.

322 P.2d at 391.

Plaintiffs cite Leon v. Dansie, 639 P.2d 730 (Utah 1981) and Ringwood v. Bradford, 2 Utah 2d 119, 269 P.2d 1053 (1954) in support of their argument that plaintiffs' predecessors did not acquiesce in the subject fence as a boundary. Ringwood v. Bradford was decided in 1954, well before the Utah Supreme Court decision in Lane v. Walker, *supra*, broadening the legal definition of acquiescence in boundary by acquiescence cases. Furthermore, it was decided prior to Staker v. Ainsworth, *supra*, which redefined the elements of boundary by acquiescence. As noted by the court in Carter v. Hanrath, *supra*;

"...it is clear that boundary by acquiescence and boundary by agreement are separate doctrines, each springing from distinctive conceptual roots. Boundary by agreement is based on the law of contract and thus requires actual agreement supported by consideration. By contrast, boundary by acquiescence is akin to prescription and requires no actual agreement. Thus, Hanrath's reliance on Wright [Wright v. Clissold, 521 P.2d 1224 (Utah 1974)] is misplaced."

885 P.2d 805-806, n.5. Thus, the doctrine of boundary by acquiescence has been distinguished from the doctrine of boundary by agreement and those cases, such as Ringwood v. Bradford and Wright v. Clissold, which discuss rebutting a presumption of boundary by acquiescence by showing that no agreement was made, are inapplicable.

In Leon v. Dansie, *supra*, not only did the court rely upon Ringwood v. Bradford, *supra*, but the court also found that the purpose of the existing fence was "keeping livestock away from the fields below. Such purpose eliminates any question of boundary by acquiescence, since the primary purpose of it is to lock title about which there may be some kind of disagreement into

a fixed asset.” 639 P.2d at 731. In the present case, after the severance of the common ownership of parcel 107 from parcel 105 by Hespert Sevy’s conveyance of parcel 107 to Robert Sevy in March 1970, the new owner of parcel 107 regarded the subject fence as the boundary of his property.

The present case fits squarely within the doctrine established by Lane v. Walker, *supra*, Staker v. Ainsworth, *supra*, and Carter v. Hanrath, *supra*. Those cases look to the establishment of boundaries of ancient vintage where the parties have slept on their rights or through their indolence have acquiesced in an existing fence line as a boundary. The evidence in this case falls well within the doctrine enunciated in those cases. The trial court should have found acquiescence by plaintiffs’ predecessors in the subject fence as a boundary. Consequently, title to the subject property should be quieted in defendants under the doctrine of boundary by acquiescence.

POINT III

**THE TRIAL COURT’S AWARD OF ATTORNEY’S FEES TO PLAINTIFFS
SHOULD BE REVERSED INASMUCH AS SUCH AN AWARD IS NOT AUTHORIZED
BY STATUTE, CONTRACT, OR AN EXCEPTION TO THE GENERAL RULE
PROHIBITING THE AWARD OF ATTORNEY’S FEES IN THE ABSENCE OF
A STATUTE OR CONTRACT PROVIDING THEREFOR**

It is clear that in this case, the court awarded attorney’s fees to plaintiffs not pursuant to a statute or contract, but as damages in plaintiffs’ action for trespass. At the conclusion of defendants’ case, plaintiffs made a motion to reopen for the purpose of testifying as to attorney’s fees. Defendants counsel objected to that motion. The following exchange between the court and counsel demonstrates the underlying basis for the award of attorney’s fees made in this case.

The Court: Oh, you want to reopen.

Mr. Neeley: Reopen for the purpose of testifying as to attorney's fees.

Mr. Christiansen: I'd object to that, Your Honor.

The Court: Attorney's fees, because that's an element of your damages.

Mr. Neeley: That's correct. That's what we pled.

The Court: You didn't offer them before.

Mr. Neeley: I just forgot.

The Court: You're saying they had their chance.

Mr. Christiansen: Well, we are saying that they had their chance and also that there's no provision for attorney's fees.

Mr. Neeley: I believe that's the discretion of the Court, Your Honor. What we're claiming involves a trespass.

The Court: I think I've got to have -- if I'm gonna award attorney's fees, I've got to have some kind of a basis. I've got to have a statute. I've got to have a contract.

I do remember a case, ah, that I tried once and I came up on the short end of the stick before Judge Tibbs. And it was a boundary dispute case and he awarded as damages the plaintiff's money that she paid to her lawyer. I don't recall if he called it attorney's fees, but he called it damages. We never appealed it, so I don't know if we have any direction from on high about that. But I do remember that happening to me.

The Court: And Mr. Neeley, you're saying, "They paid me. It is an item of their damages. I forgot to bring it up so please relieve me of my mistake."

Mr. Neeley: That's right. And I think it is customarily done in this Court, Your Honor.

Also, we pled in our complaint, Your Honor, for damages for trespassing

in the amount of \$10,000 and we also asked for attorney's fees. I believe in a trespass action that the Court can award damages, equitable damages, and exemplary damages and I think that part of those exemplary damages could be attorney's fees.

The Court: Mr. Christiansen?

Mr. Christiansen: Your Honor, the plaintiffs have not put on any evidence as to damages during their direct examination. I would certainly object to allowing them to do it at this juncture in time.

The Court: Your motion is limited to evidence of how much they have either paid you or are obligated to pay you. Right, Mr. Neeley?

Mr. Neeley: Correct.

The Court: Okay. That motion is granted [sic]. You need to reopen for that limited purpose.

(Trial Transcript at 389-390, 392). Plaintiffs counsel did not assert in his motion to reopen, in his proffer of attorney's fees, or in closing argument that attorney's fees should be awarded pursuant to Utah Code Annotated Section 78-27-56, which provides in part that "in civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines the action or defense of the action was without merit and not brought or asserted in good faith."

Plaintiffs have cited no cases authorizing an award of attorneys fees as an element of damage for trespass. Such an award would fall under the general rule that attorney's fees are not awardable unless authorized by statute or contract. On appeal, plaintiffs assert that the trial court's award of attorney's fees is justified, not as an element of damage for trespass, but rather pursuant to Section 78-27-56 or under the court's inherent equitable powers to award attorneys fees in certain exceptional circumstances. As shown above, plaintiffs did not argue the

applicability of Section 78-27-56 nor did the lower court make any findings pursuant thereto in awarding attorney's fees to plaintiff. Not only do defendants have a meritorious claim to boundary by acquiescence, but as demonstrated above, defendants should prevail on that issue.

In Hatanaka v. Struhs, 738 P.2d 1052 (Utah App. 1987), the lower court found that the defendants trespassed upon the plaintiff's property and ordered the defendants to remove a fence, dirt, and debris which they had placed on what the court determined to be the plaintiff's property and further enjoined the defendants from placing any additional fences, debris or fill on that property. The plaintiff also sought attorney's fees which were denied by the lower court. The basis for the plaintiff's claim to an award of attorney's fees was Utah Code Annotated Section 78-27-56. Because the appellate court found that the defense was meritorious, the issue of good faith was not reached.

In the present case the trial court made absolutely no findings as to any lack of merit or good faith by defendants in making their defense or asserting their counterclaim to quiet title under the doctrine of boundary by acquiescence. The court simply found that the parties did not acquiesce in the subject fence as a boundary and that consequently the doctrine of boundary by acquiescence was not applicable. The court further found that defendants trespassed by constructing a new fence along the old fence line and awarded attorney's fees to plaintiffs as an element of damage. Plaintiffs did not offer any evidence of damages for trespass. (Trial Transcript at 392). Defendant Oberg testified that the new fence which was constructed in June of 1992, was constructed because he was contacted by Ralph Mickelson, the ASCS officer from Manti, informing defendant Oberg that he had received a complaint from Tom Hansen, plaintiff

Scott Hansen's father. He also testified that the ASCS told him that he would be required to put a fence around the perimeter of the pond, but that they did not limit the fence to the perimeter of the pond. (Trial Transcript at 247, 275). Defendant Oberg also testified that there are potential problems with relocating the fence constructed along the old fence line, including the problem of a new fence crossing Cottonwood Creek for long stretches and creating accumulations of debris, not restraining livestock and children from going under the fence where it crosses the Cottonwood Creek, and potential problems with access to the ditch for maintenance. (Trial Transcript at 285-286).

Plaintiffs cite Jensen v. Bowcut, 892 P.2d 1053 (Utah App. 1995) and Stewart v. Utah Public Service Commission, 885 P.2d 759 (Utah 1994) for the proposition that in the absence of statute or contract, the court has inherent equitable power to award attorney's fees. However, in both of those cases, the court noted that exceptions to the general rule that attorney's fees are only awarded pursuant to contract or statute, are strictly limited. Those limited circumstances where the exception is applied generally fall into two categories: (1) "where a party acts in bad faith, vexatiously, wantonly or for oppressive reasons", or (2) where the successful litigant has represented a class or third persons and has obtained a fund through the litigation for the benefit of the class or third persons. Stewart v. Utah Public Service Commission, at 782.

In Stewart v. Utah Public Service Commission, the plaintiff conferred a substantial benefit upon all USWC rate payers. In Jensen v. Bowcut, *supra*, the court found that the attorney's fees incurred by the successful litigant were for the benefit of a minor child. In the

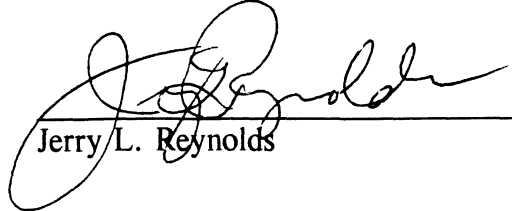
present case, the award of attorney's fees was to plaintiffs in their individual capacities and not for their efforts in recovering an award or fund for third persons. Furthermore, the court did not make any finding that defendants acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." There is no basis for the court's award of attorney's fees in this case. As demonstrated above, defendants are entitled to a decree quieting title to the subject property in them under the doctrine of boundary by acquiescence. Therefore, the trial court's award of attorney's fees to plaintiffs should be reversed.

CONCLUSION

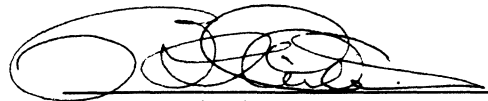
Defendants' title to the disputed property in this case became perfected under the doctrine of boundary by acquiescence prior to plaintiffs acquisition of parcel 107 in August, 1990. That title was not defeated by any actions or statements of plaintiffs or defendants thereafter. Consequently, defendants' construction of a fence along the old fence line in June of 1992, did not constitute a trespass. The lower court's judgment should be reversed so as to quiet title to the disputed property up to the old fence line in defendants. If the court reverses the lower court's decision on the issue of boundary by acquiescence, obviously, plaintiffs are not entitled to an award of attorney's fees. Even if that decision is not reversed, however, because plaintiffs are not entitled to an award of attorney's fees pursuant to statute or contract, and because plaintiffs have not established their entitlement to an award based on an exception to that general rule, the trial court's judgment awarding attorney's fees to plaintiff should be reversed and the order modified so that the parties bear their own attorney's fees in this action.

Dated this ____ day of November, 1995.

Respectfully submitted,



Jerry L. Reynolds

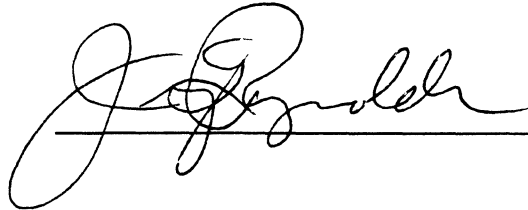


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Attorneys for Defendants/Appellants

MAILING CERTIFICATE

I hereby certify that I mailed two complete, true and correct copies of the foregoing Reply Brief of Appellants by first class mail with postage prepaid thereon, this 15th day of November, 1995, to the following:

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