

2006

# Helen W. Boyer, Trustee v. Thomas Vern Boyer; Carrie Gibson Boyer; Fewkes Canyon, L.L.C., a Limited Liability Company; Jeremy Boyer; and Kimberly Boyer : Brief of Appellant

Utah Court of Appeals

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HELEN W. BOYER, Trustee,	)	
	)	
	)	
Plaintiff/Appellants,	)	Court Of Appeals No. 20061163
	)	
vs.	)	
	)	
THOMAS VERN BOYER; CARRIE;	)	
GIBSON BOYER; FEWKES CANYON,	)	
L.L.C., a Limited Liability Company;	)	
JEREMY BOYER; and KIMBERLY	)	
BOYER,	)	
	)	
Defendants/Appellees.	)	
	)	

APPEAL FROM THE FINAL JUDGMENT OF THE  
THIRD DISTRICT COURT OF SUMMIT COUNTY  
JUDGE BRUCE LUBECK, CASE NO. 040500429

FILED  
UTAH APPELLATE COURTS  
AUG 17 2007

HELEN W. BOYER, Trustee,

Plaintiff/Appellants,

vs.

THOMAS VERN BOYER; CARRIE;  
GIBSON BOYER; FEWKES CANYON,  
L.L.C., a Limited Liability Company;  
JEREMY BOYER; and KIMBERLY  
BOYER,

Defendants/Appellees.

Court Of Appeals No. 20061163

APPEAL FROM THE FINAL JUDGMENT OF THE  
THIRD DISTRICT COURT OF SUMMIT COUNTY  
JUDGE BRUCE LUBECK, CASE NO. 040500429

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## **DESIGNATION OF PARTIES**

Pursuant to Rule 24(d), Utah Rules Of Appellate Procedure, appellant Helen W. Boyer, will be referred to herein as “Helen Boyer” or “Appellant Boyer”; the Boyer appellees will be referred to herein as the “Boyer” or “Appellee Boyer” and appellee Dannie Green will be referred to herein as “Green”.

## **STATEMENT SHOWING JURISDICTION**

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(4).

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW** (Including standards of appellate review and supporting authority.)

**ISSUE ON APPEAL:** WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT SURVEYOR GREEN WAS NOT AN APPROPRIATE PARTY DEFENDANT IN THIS CASE?

*Applicable Standard of Appellate Review:* An appellate court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. See *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997). With respect to mixed questions of law and fact, the appellate court will review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a lower court's resolution of such questions of law. *Id.*

*Preservation of Issue:* The above stated issue was preserved for appeal by the following: Dannie B. Green’s Motion To Dismiss or Alternatively, for Summary Judgment (R. 205-205); Dannie B. Green’s Memorandum In Support (R. 206-214);

Memorandum In Opposition To Dannie B. Green's Motion To Dismiss Or Alternatively, Motion For Summary Judgment (R. 221-237); Defendant's Memorandum Supporting Motion To Dismiss Claims Against Dannie B. Green (R. 244-249); Dannie B. Green's Reply Memorandum In Support Of Motion To Dismiss Or, Alternatively, Summary Judgment (R. 259-265); Transcript Of Motion Hearing Dated 02-06-06 (R. 634); Ruling and Order (R. 284-299); Dannie B. Green's Motion For Clarification Of Ruling And Order Dated 02-02-06 (R. 384-385); Memorandum In Support Of Dannie B. Green's Motion For Clarification Of Ruling And Order Dated 02-07-06 (R. 386-389); Plaintiff's Motion For Reconsideration Of The Court's 02-07-06 Ruling And Order (R. 390-392); Memorandum In Support Of Plaintiff's Motion For Reconsideration Of The Court's 02-06-07 Ruling And Order (R. 393-397); Defendants' Memorandum Re: Motion For Clarification And Reconsideration (R. 405-407); Dannie B. Green's Memorandum In Response To Plaintiff's Motion For Reconsideration Of The Court's 02-07-06 Ruling And Order (R. 412-416); Memorandum In Response To Dannie B. Green's Motion For Clarification Of Ruling And Order dated 02-07-06 (R. 489-491); and Ruling And Order (R. 499-511).

**ISSUE ON APPEAL:** WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE THE PARTIES' RIGHTS AND RESPONSIBILITIES IN CONNECTION WITH REMOVAL OF THE FENCE DEFENDANTS PLACED ON PLAINTIFF'S PROPERTY AND FURTHER FAILED TO AWARD PLAINTIFF DAMAGES AND ATTORNEY FEES IN THIS MATTER?

*Applicable Standard of Appellate Review:* The adequacy of damages is a question of fact, and an appellate court will not overturn the trial court's findings unless they are



clearly erroneous. *In re Knickerbocker*, 912 P.2d 969, 981 (Utah 1996). Whether and the extent to which attorney fees are recoverable in an action is a question of law which is reviewed for correctness. *Selvae v. J.J. Johnson & Assocs.*, 910 P.2d 1252 (Utah Ct. App. 1996). The appropriate standard for reviewing equitable awards of attorney fees is abuse of discretion. *Hughes v. Cafferty*, 89 P.3d 148 (Utah 2004). An appellate court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. See *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997). With respect to mixed questions of law and fact, the appellate court will review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a lower court's resolution of such questions of law. *Id.*

*Preservation of Issue:* The above stated issue was preserved for appeal by the following: Second Amended Complaint (R. 192-199); Transcript Of Trial (Volumes I-III) (R. 635-637); Memorandum Of Law Re: Award Of Attorney Fees (R. 588-592); Memorandum Decision (R. 593-619); Plaintiff's Response To Defendant Memorandum Of Law Re: Award Of Attorney Fees (R. 620-622); Order And Judgment (R. 625-627); and Notice Of Appeal (R. 628-629).

#### **STATUTES AND RULES WHOSE INTERPRETATION ARE DETERMINATIVE OF THE APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL**

The following statutes and rules are determinative of the appeal or of central importance to the appeal.

#### **78-27-56. Attorney's fees -- Award where action or defense in bad faith-Exceptions.**

(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 Below**

The main issue in this case was the proper location of a fence which divided two sections of land (designated herein as “Section 31” and “Section 32”) situated in Summit County. The Boyer Appellees in this matter tore down a fence located on the long established section line between Section 31 and Section 32, and thereafter placed a new fence on a line consistent with a survey (“Green Survey”) completed by Green at Appellee Boyer’s request. Appellant filed suit asserting that Appellee Boyer had placed the new fence on Appellant’s property. Later, Appellant sought to add Green as a party defendant in this matter on the basis that Green’s Survey was negligently performed and clouded plaintiff’s title. After briefing and hearing, the trial court concluded Green was not a proper party defendant in this case.

Following trial, the trial court determined that the original fenced section line was the proper boundary line as opposed to the line established by Green. The trial court did not, however, award plaintiff anything for the damages plaintiff sustained (including costs and attorney fees) in relation to removal of the old fence and replacement of the new fence, nor did the trial court determine the parties’ rights and responsibilities in connection with removal of the new fence. The trial court also declined make an awarded

for damages sustained to Appellant's property. Consequently, plaintiff appealed the trial court's conclusion that Green was not a proper party in the case as well as the trial court's failure to award damages and attorney fees in this case.

### **STATEMENT OF FACTS**

Appellant agrees with the following Findings Of Fact entered by the trial court herein:

1. Joseph and Lois Boyer owned land in the Chalk Creek area of Summit County, near Coalville. What has happened to their land since their death is the subject of this dispute. Joseph died in 1967 and Lois died in 1971. They had several children: Joseph LaVern (Vern), Lyle, William, Leah Nielson, (the only daughter), Edison (Ted) and Fay Boyer. (R. 595)

2. Tom Boyer, defendant, is the grandson of Joseph and Lois through Tom's father Vern, who is the brother of Lyle Boyer, the deceased spouse of plaintiff. (R. 595)

3. Tom Boyer received section 32 and Lyle Boyer received section 31 through the chain of title to be described below. Just what those sections entailed and now entail is at issue in this case. (R. 595)

4. On October 3, 2003, Tom Boyer sold section 32 to defendant Fewkes, a limited liability company, whose managing member is Tom's son Jeremy Boyer. In November 2003 Fewkes conveyed approximately 6 acres to Jeremy Boyer. (R. 595-596)

5. Plaintiff is the trustee of the Lyle and Helen Boyer Revocable Trust, and the wife of Lyle Boyer, now deceased, and thus the aunt of Tom Boyer. (R. 596)

6. Plaintiff is the record title owner of section 31. Both sections 31 and 32 are in Township 3 North, Range 6 East, SLB&M, U.S. Survey. (R. 596)

7. Lyle Boyer acquired property through an executor's deed from the estate of his parents, Joseph and Lois Boyer. That deed was executed by one of the co-executors, William Boyer, another son of Joseph and Lois, on July 31, 1979, and that deed conveyed a good deal of other land and included "Section 31, [listing township and range as above], U.S. Survey, containing 623.6 acres, more or less," subject to the probate decree mineral rights. Lyle Boyer then quit claimed that same property with the identical description as to section 31 on June 14, 1988, to the trust named as plaintiff herein. (R. 596)

8. Tom Boyer acquired section 32 from his father Vern Boyer. Also on July 31, 1979, William Boyer as co-executor executed an executor's deed conveying property to Joseph LaVern Boyer, (Vern Boyer) and that included "Section 32 [naming the same township and range] containing 640 acres, more or less." It thus differs from the executor's deed concerning section 31 in that this section 32 executor's deed did not use the words "U.S. Survey." It was also subject to mineral rights under the probate decree. Vern Boyer by quit claim deed conveyed the same property, including the same description as to Section 32, to Tom and Vern Boyer Land and Livestock, a Utah partnership, on October 13, 1982. The Tom and Vern Boyer Land and Livestock company executed a warranty deed on May 11, 1995, to Tom Boyer and his wife. That property consisted of, among other property, Section 32 with the same description as the deed by which it was acquired. Tom Boyer and his wife, by warranty deed executed October 7, 2003, conveyed "All of Section 32 [same range and township] to Fewkes.

That deed did not contain any note as to acreage. As noted Fewkes conveyed a few acres to Jeremy Boyer and his wife the next month in 2003. (R. 596-597)

9. In the lifetime of Joseph and Lois Boyer sections 31 and 32 were fenced around their perimeter, along with other sections not at issue in this case. However, there was no fence between sections 31 and 32 during the lives of Joseph and Lois. A fence was first erected between sections 31 and 32 in 1977 or 1978 as will be described below. (R. 597)

10. Long ago, at a date not revealed by the testimony, but evidently not long after the deaths of Joseph and Lois, a dispute arose between Vern Boyer (and his son Tom Boyer) and Lyle Boyer concerning the boundary between section 31 and section 32. Tom Boyer thus commissioned a licensed surveyor, Fred Malan, who did a survey in 1976. Malan conducted that work on August 7 and 14, 1976. Tom Boyer accompanied Fred Malan on those two days, as did Malan's son Kent, who was assisting his father. Malan prepared a certified report a year later, in September 1977. That report indicated that Malan located a rock with markings on the north boundary of the line between sections 31 and 32. Section 32 lies east of section 31, and north of section 31 is section 30 owned by Judd and north of section 32 and east of section 30 is section 29. To the south of section 31 lies section 6 and to the south of section 32 and to the east of section 6 lies section 5, these sections 5 and 6 being in another township. Malan certified he made a survey of the line between sections 31 and 32. The rock was noted as having 5 notches on the east and one notch on the south. At one point the certification states the survey was done for Fay and Tom Boyer, and at another that it was done for Vernon Boyer, Tom

Boyer and Fay Boyer. Between sections 29 and 30 there was a fence that was erected before any of these events. The stone Malan indicated he found was at the intersection between sections 31 and 32 where the fence between sections 30 and 29 touched the northern edge of sections 31 and 32. The northern boundary of sections 31 and 32 was also fenced long before these events to separate the sections north of sections 31 and 32. (R. 597-598)

11. Not long after the Malan survey, sometime in 1977 or 1978 [sic], Tom Boyer erected a fence between sections 31 and 32. It was called by Tom Boyer a "stock" fence and he stated it was only to keep out livestock, and he did not intend it to be the boundary as he did not believe that was the proper boundary. That fence corresponded with the Malan survey, and on the north boundary the fence began where the fence between sections 30 and 29 ended on the south edge of those sections and the north edge of sections 31 and 32. There was thus a "four way" fence corner at the intersections of sections 29, 30, 31, and 32. The fence was approximately 400 feet east, into section 32, of where Tom Boyer believed and continues to believe the boundary between section 31 and 32 should be. The fence went south and westerly, and was erected by Tom Boyer. (R. 598-599)

12. That Malan plat was recorded by Vern Boyer, who recorded it October 9, 1980, along with an affidavit from Vern Boyer which stated that Malan located the "corner section corner common to sections 31 and 32 . . . and sections 5 and 6 . . . ." Attached was a copy of the Malan survey dated September 1977. (R. 599)

13. Disputes still continued between Tom and Lyle Boyer as to the boundary. Tom Boyer commissioned another survey in 1985 from Bing Christensen, also a licensed surveyor. Christensen did a survey June 4, 1985, and prepared a drawing showing the results, including stone monuments and fence corner posts he found and accepted as evidence of the location of corresponding section corners. Christensen provided two affidavits to that effect, one in October of an unknown year and one in October 2001. That map shows a stone was located at the "fence corner" where sections 31 and 32 meet, on the north edge. What was labeled as a "section corner stone" was found on the southwest corner of section 31 and another section corner stone was located at the southeast corner of section 32. A "fence corner" was labeled on the boundary of sections 31 and 32 at the south edge.

14. Disputes continued and a meeting was held at the request of Tom Boyer at the Summit County Courthouse in Coalville in October 1985. Present were Tom Boyer, his lawyer Wendell Bennett, Lyle Boyer, Bing Christensen, Kent Wilde, Sam Lewis, who leased section 31 from plaintiff, and Ron Baxter. Baxter and Wilde were surveyors Lyle had hired in the past. The boundary between the sections was discussed and out of that meeting further confusion arose. Some claim there was an agreement and some claim there was not. The court finds that all agreed that the fence erected by Tom Boyer was the correct boundary line that everyone would live with. Correspondence between Bennett, representing Tom Boyer, and Lyle Boyer followed. Bennett stated to Lyle the temporary fence was 400 feet too far to the east (into section 32) at the north end and 50 feet too far east at the south end of section 32. Bennett enclosed the Christensen survey. Lyle Boyer

responded that he had tried to locate the section line between the two sections. Lyle referred to receiving the Malan survey and it showed the fence built by Tom Boyer was the true line. Lyle stated he believed the Christensen and Malan surveys both showed the fence put up by Tom Boyer in about 1977-78 was in the right place. Lyle agreed to maintain the southern half and Tom would maintain the northern half of that fence, as Bennett had proposed. After the October 1985 meeting Bennett again wrote Lyle and stated concerning the fence Tom built in 1977-78 that "we have now agreed to recognize as the boundary line between sections 31 and 32 until such a time as the government authority charged with the responsibility . . . reestablishes those corner markers as between sections 31 and 32 . . . Until [a further government survey occurs] we agreed to honor the fence line as described in the enclose document, which was established by Bing Christensen . . . [and which was agreed to by Kent Wilde.]" The Bennett letter attached a description that was based somewhat on the Christensen survey, but it did not exactly trace that map, but began at the southwest corner of section 31, then north along a fence, then east 5288 feet to the four-corner fence line made between sections 29, 30, 31, and 32. Lyle Boyer wrote back in early 1986 and stated the existing fence could stay where it was located and he would maintain the southern half and Tom the northern half. Bennett in June 1986 asked Lyle to sign the agreement and that was never done. From all of this the court finds that there was an agreement but Tom Boyer was not happy or satisfied about it. No written agreement was ever executed and that agreement has no legal significance but informs the court as to credibility issues.



15. Because of the continuing disagreement, Tom Boyer commissioned yet another survey, by Green or Alta Surveying, in 2003. Green's survey, working for ALTA Survey, formed the basis of later action by Tom Boyer. Green's survey indicated the boundary between sections 31 and 32 was approximately 420 feet west, or into section 31, of where Malan and Christensen had placed the northern boundary. That is, the fence running between sections 29 and 30, where it touched the northern boundary of sections 31 and 32, was incorrect, and the true boundary was west 420 at the north end and about 50 west at the southern end. If the line was where Tom erected the fence in 1977 a spring at the southern end of the properties was partly in section 31 and partly in section 32. If the Green survey is correct, and the newly erected 2003 fence reflects the true boundary, that spring is entirely within section 32. Water rights are not at issue in this case.

Based on the Green survey, Tom Boyer removed the fence he had erected in 1977-78 and erected a new fence along the line shown as the boundary by Green, that is, about 420 feet to the west, at the north end, of where the old fence was and about 50 feet to the west on the southern boundary of the two sections at issue. When removing the 1977-78 fence its remnants were stored all on section 32, not on section 31.

16. Green obtained his surveyor's license in 2000. He explained why he disagreed with the other surveys. The court realizes its function in this case but the idea that the court can determine, on the basis of a short trial, what surveying principles were violated and what were followed is rather unrealistic. To the court all surveyors who testified seemed to be sincere and capable. It is apparent that surveying is not "rocket science" in that there is only one correct answer, but there is some disagreement even

amongst experienced surveyors. Various notes from the past may be interpreted differently, various landmarks may change, and not all surveys are completely "true" and some are better than others, just as in any endeavor. Green explained his procedures and the reasons for his results. He opined that the common corner of sections 29, 30, 31, and 32 is where it is shown on plaintiff's exhibit 9. That is, favoring defendants, or about 420 feet west at the north boundary of where plaintiff claims the boundary is. Green explained his understanding of the 1973 Manual of Surveying Instructions published by the U.S. Department of the Interior. Green explained that he considered the previous surveys, but also what are called the topographic calls, the original field notes from the 1874 U.S. Survey, the conveyance deeds, the 1967 topographic map, the acreage involved, as well as other factors. He concluded that the 1977-78 fence was not the boundary line but the boundary line is where the 2003 fence was erected by Tom Boyer after the Green survey. The original plat of 1874 shows section 31 is "short" and consists of 623.6 acres and section 32 consists of 640 acres.

Green had done another survey in the area, for a person named Henrie, in 2001. Henrie was interested in purchasing section 28 and some of section 33, and so Green obtained documents and information from neighboring land owners, including Tom Boyer, to conduct that survey. Green also obtained a title company title report which was suppose to contain the public documents. Later in 2003, after Tom Boyer heard of Green and his 2001 survey, Tom Boyer asked Green to establish the boundary between sections 31 and 32. Green later concluded, after talking to some of the surveyors of plaintiff, that they were wrong and he was right. Green opined that plaintiff's surveyors had simply

accepted the "stone" they found without "testing" it against other information, as Green did. Thus, Green opined as he did.

Green filed a survey for Henrie, and it varies in some regards from the Tom Boyer survey of 2003, which was filed in 2004 with the recorder. (There is no Summit County surveyor, so surveys are filed with the county recorder.) Green explained the 2001 Henrie survey was not "wrong" but was accurate based on the information, and with the later filing of the 2003 survey, any interested person could see what Green had done because of his narrative description on those two surveys. A great deal of testimony was elicited about the 2001 survey.

17. Various persons had been to the disputed area over the years. Many had seen, and the court finds, that indeed there was a government "stone" or monument placed there by the 1874 survey, which was intended as the common corner between sections 29, 30, 31, and 32. That was not shown on the 1967 or 1997 topographic map, but various individuals who were not interested directly in the dispute saw the stone. That stone would not show up on a government topographic map unless it was observed by a government employee tasked to find such markers. The Malan survey described the stone and his son Kent testified he saw it. The Christensen survey noted a stone at the same location. Wilde himself had seen it several times and it was notched and marked as a government-placed stone. Wilde saw it in 1977 and again in 1985, but it was not there in 2003. Wilde and Lyle Boyer had been to the corner with a view to staking a fence line south of that boundary. Lyle hired a contractor, Hortin, to "push" or clear the path for a fence. Hortin saw and described the stone, as did a neighbor who maintained the fences

of another section that adjoined the corner of 29, 20, 31, and 32. Those persons all described the stone a bit differently but as being in the same location as the four corner fence area, where the 1977-78 fence was erected going south. Tom Boyer testified he did not see such a stone ever, nor did his son Jeremy. Tom went to the site with Malan, Christensen, and at other times. The court credits the testimony of Wilde and others more than Tom Boyer concerning this government stone and its location. The description of the stone convinces the court not that they are wrong, but that they are being honest. The court does not indicate or imply Tom Boyer caused the removal of the stone, but the court credits the testimony of the many persons who saw the stone at the point where the Malan and Christensen surveys indicate it was. That is, where the fence line coming from the north between sections 29 and 30 joins the northern boundary of sections 31 and 32, or where the 1977-78 fence was erected by Tom Boyer.

18. The court finds from its own common sense as well as the expert testimony elicited, that the field notes from 1874 were not completely accurate as to what are called the topographic calls. The topographic map shows, for example, a ridge or gulch or stream, and the field notes from 1874 indicate those were in different places from what the topographic map shows. The survey's field notes from 1874 would say, for example, that from point A it was "X chains (converted into feet and inches) to a "ridge." Of course just where a ridge begins and ends is hard to determine, and that is obviously true of a gulch, a stream, or tree line. Those latter two features can and obviously may well change in 130 years from 1874 to 2003. The notes, again, show reference to a line of trees, or a gulch, or ridge, or stream, and of course natural changes occur in those over 130 years.

The notes are found by the court to be inaccurate as to distances and thus the corners which were established by following those notes as Green did were inaccurate. Often the distances were off as much as 500 feet, which would and does account for the discrepancy Green states he found. Because the field notes were incorrect as plaintiff's expert opined, Green's reliance on them caused his final conclusion to be incorrect.

19. Appellant disagrees with the factual findings set forth in Paragraph 19 of the trial court's Findings Of Fact.

ADDITIONAL FACTS SET FORTH BY APPELLANT:

20. The trial court concluded that Green's Survey was not correct and found the true boundary line between Sections 31 and 32 at the north end of those sections as shown on the Malan and Chritensen surveys and where the 1977-78 fence was erected.

The trial court, in Paragraph 8 of its Conclusions Of Law, states as follows:

Plaintiff has shown title to the land up to the boundary as found herein. Thus, plaintiff's causes of action for tortious conduct has been shown, but no damages have been proven. The court declares the boundary between sections 31 and 32 to be as herein described and quiets title accordingly. The fence should be moved as indicated below. No damages are awarded and of course no punitive damages.

(R. 616)

21. Following the entry of the trial court's judgment, plaintiff timely filed her Notice Of Appeal. (R. 628-629)

22. Tom Boyer was aware of other survey work that had been completed in relation to the government stone prior to the time he moved the 1977-78 fence and that others recollected seeing the stone. (R. 635 at 107:9-108:6)

## **SUMMARY OF ARGUMENT**

The trial court erred as a matter of law when it dismissed Green as a party defendant in this matter. There remained questions of material fact in relation to the duties and obligations Green owed to Appellant and therefore dismissal of Green was improper. The trial court also failed to award Appellant damages for the losses she sustained as a result of Appellee Boyer's actions and further failed to award Appellant costs and attorney fees associated with this action.

## **ARGUMENT**

### **Point I**

#### **The Trial Court Erred When It Dismissed Dannie B. Green As A Defendant In This Matter**

Appellant contends the trial court erred, as a matter of law, when it dismissed Green as a party defendant in this case. Notwithstanding that Green was dismissed as a party in the case (and consequently Appellant did not have a full opportunity to develop a case against Green) the trial court made several findings and conclusions in relation to Green. Appellant asserted Green breached his professional duties when he filed an inaccurate survey thereby clouding Appellant's title to her property.

In relation to this issue, the trial court stated in relevant part as follows:

As to the negligence claim of the third cause of action, the court again determines this claim under the summary judgment standard. The court believes that there are factual disputes about the nature of the survey, whether it is correct or not, and both parties agree there are disputes about the nature of the survey. As in any negligence claim, it is a rare case where summary judgment is proper. However, if there is no legal duty, factual disputes about whether there has been a breach of the duty are not important.

Green asserts the court can and should determine as a matter of law that there was no duty owed to plaintiff and thus there can be no negligence as a matter of law, whatever the merits of the dispute about the validity of the survey.

The court agrees with Green that it can and should determine if there is a duty owed as a matter of law. The court, as a matter of public policy, determines there is not a duty owed by a surveyor such that a tort of negligence will lie whenever a property owner claims the survey is incorrect under circumstances such as this case. If any adjoining owner could claim negligence against a surveyor who disagrees with other surveyors, there would be no reason whatever that defendant Boyer could not file a negligence claim against Kent Wilde or others who performed a previous survey.

The court understands the concerns of plaintiff and expresses some sympathy for the situation and believes it is a close and interesting question. If a surveyor can file whatever survey plat he desires, without regard to its correctness (plaintiff's allegation herein, and the court is not stating that is what happened here) there ought to be a duty to adjoining land owners to make sure the survey is correct. This case shows the need, plaintiff asserts, as a policy matter, for such a duty. Had plaintiff desired to sell the property, the recorded plat, with the alleged incorrect boundary line, clearly causes possible damage to plaintiff. She cannot sell the property under the disputed boundary. The filing of the plat, though not subject to a claim of wrongful lien, certainly operates as an encumbrance on the property which adjoins the property Green was hired to survey. The court understands plaintiff's position that if certain acts were done or omitted, recovery should occur as there is a duty to neighboring landowners whose interest is affected by a survey. The court acknowledges that the survey could and has affected plaintiff, and an incorrect survey could obviously affect any neighboring land owners, and any survey which purports to "give" land from one section to another clearly impacts more than the contracting parties to the survey. A loss of value of property is certainly an injury that, if caused by negligence, should be compensable.

However, on balance, as a matter of public policy, where there are allegations in this second amended complaint that will allow the court to determine the "correctness" of the various surveys that have been performed, plaintiff is not without a remedy. She is without a remedy against Green, or any other surveyor whose product disagrees with the product of other surveyors, but she is not without a remedy.

If the courts were to allow, under the circumstances of this case, such a negligence claim to stand, defendant Boyer could file a negligence claim against any and all other surveyors who disagreed with the survey he commissioned, claiming they were negligently performed and contain incorrect information which over the years has caused damage to Boyer, as “taking” his property and being an improper encumbrance on his property. Boyer could claim he could have sold property belonging to him had he know the “true” acreage. While in this case plaintiff claims Green was incorrect, Boyer could then, if the court allowed this cause of action to remain, file an action against other surveyors and claim their filings were negligently performed.

In this case, each surveyor will presumably testify, and the court will make finding as to the “correct” boundary line, and issue declaratory judgment as to whether the boundary is where Green says it is or whether it is somewhere else, where other surveyors say it is. That does not mean that each surveyor should be liable if their work is incorrect, especially in this situation where there are remedies to find the “correct” boundary. Allowing negligence suits in such situations as this would create havoc.

In other cases a negligence claim may lie against a surveyor, such as a case where a plat is filed by a surveyor and many people rely on its result to purchase land or otherwise rely on its incorrect information and can show damages as a result. Here, where there are competing surveys over a boundary line, there is no duty of a surveyor that is owed to one such as plaintiff, an adjoining landowner.

Whether there was a breach of any professional duty remains to be determined at trial in the ultimate determination of the “correct” boundary, but the result will be a declaration of the boundary line and if plaintiff prevails, damages against defendant Boyer could be assessed. There should be no claim against Green for his survey or his filing of the plat.

Thus, the court concludes there is no duty owed and so no negligence could be shown. Whether treated as a motion to dismiss or a motion for summary judgment, the result is the same. There is no legal principle which allows recovery against Green. There is no factual dispute that alters the legal conclusions of the court as to duty owed.

(R. 292-297)



Contrary to the trial court's public policy position, Utah case law has established, "It is clear that in the practice of his profession, a surveyor may be found liable in damages resulting from his mistake or misrepresentation in the survey of realty, where he does not perform his duties with a reasonable degree of care and skill." *Bushnell v. Sillitoe*, 550 P.2d 1284 (Utah 1976). In *Bushnell*, the Utah Supreme Court stated:

Where contractual relations never existed between the plaintiff and the surveyor the question has arisen as to the applicability of the general rule that no cause of action in tort can arise from the breach of a duty existing by virtue of contact unless privity of contract existed between the defendant and the person injured. While the rule has sometimes been applied so as to relieve a surveyor from liability, it has also been held that *the lack of direct contractual relationship between the parties is not a defense in a tort action.* (emphasis added)

The *Bushnell* court then referred to *Rozny v. Marnul*, 250 N.E.2d 656 (1969) which is a case where recovery was allowed in the absence of a direct contractual relationship. In *Ronzy*, the court noted:

Under these circumstances it seems to us the fortuitous circumstance that the ultimate loss resulting from the faulty survey fell upon one other than the person for whom the survey was made should not absolve defendant from responding in damages. The situation is not one fraught with such an overwhelming potential liability as to dictate a contrary result, for the class of persons who might foreseeably use this plat is rather narrowly limited, if not exclusively so, to those who deal with the surveyed property as purchasers or lenders. Injury will ordinarily occur only once and to the person owning the lot.

The *Ronzy* court also focused on the undesirability of requiring an innocent party to carry the burden of a surveyor's professional mistake, and the fact that recovery by a user whose ultimate use was foreseeable would promote cautionary techniques among surveyors. By applying the *Ronzy* reasoning to the instant case, Green performed a

survey which encumbered Appellant's property. As was true in *Ronzy*, the ultimate loss from the faulty survey fell upon Appellant (an innocent party), and as such, should not absolve Green from responding in damages. Moreover, holding a wrongdoer such as Green liable for his conduct would likely foster more professionalism and thoroughness in the completion of surveys and would likely lessen rather than increase litigation.

Other jurisdictions have taken a similar position. In *Hutchinson v. Dubeau*, 298 S.E.2d 4 (1982), the Georgia Court Of Appeals stated, "There is authority under general tort principles for holding a professional surveyor liable to third persons with whom he is not in privity for negligent misrepresentations appearing in a plat, provided that the surveyor knew or should have known that such third persons would use and rely upon the plat in subsequent transactions involving the property." Here, any prospective purchasers or lenders interested in Appellant's property would reasonably and foreseeably rely on the Green Survey. As the trial court admitted, the Green Survey not only encumbered Appellant's property, but the trial court's decision indicates Green's Survey decreased the size (and as a consequence thereof, the value) of Appellant's property. Consequently, plaintiff is entitled to be awarded the remedies she seeks herein.

In *Kent v. Bartlett*, 122 Cal. Rapt. 615; 49 Cal. App. 3d 724 (1975), the plaintiffs brought an action to recover damages against the defendant allegedly caused by defendant's negligence in making a survey of certain real property. The California court also cited *Biakanja v. Irving*, 320 P.2d 16 (1958), a leading case dealing with the right of a plaintiff to recover damages for the defendant's negligent performance of a contract

with a third party. The *Biakanja* court laid down the following guidelines to be followed in such cases:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of public policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

The *Kent* court noted that the defendant therein had made some attempts to contend that he was not negligent in making the survey and that the damages sustained by the plaintiff were not the proximate result of any negligence on the part of the defendant. In this regard, the court stated that these issues were factual in nature and should have been resolved by the jury.

The *Biakanja* factors are clearly applicable to the instant case. While Appellant did not directly contract with Green concerning the survey, the Green Survey was certainly intended to and has in fact adversely affect the portion of Appellant's property that was involved in the attempted change of the boundary line. Additionally, it was entirely foreseeable that an inaccurate survey could cause Appellant harm. The Green Survey has in fact encumbered Appellant's property and the encumbrance is a direct result of its having been improvidently filed. Finally, Green is morally responsible in any event for his errors, and his answering in damages may prevent future similar conduct by other surveyors.

As a result of the inaccurate survey, Appellant was placed in a difficult and unenviable position. Appellant's property was encumbered and she was subject to both diminished value and acreage as a result of the Green Survey having been filed. Green refused to amend or otherwise correct the inaccuracies. Yet, the trial court found that Green has no duty to Appellant. For this Court to so hold would preclude Appellant (and other similarly situated parties) from seeking any meaningful redress for the damage they have suffered as a proximate consequence of a surveyor's breach of professional obligations and misconduct.

The nature and extent of the affirmative duties that are owed by experienced and licensed professionals such as Green to members of the public such as plaintiff who have no contractual relationship with them is stated as follows in *West v. Inter-Financial, Inc.*, 139 P.3d 1059 (Utah Ct. App. 2006) where this Court held that a real estate agent as a licensed professional could be held liable for damages suffered by a third-party member of the public who relied upon the real estate agent's appraisal:

Real estate appraisers, like real estate brokers and real estate agents, have a "statutory duty to the public" and are expected to be "honest, ethical, and competent. "Hermansen, 2002 UT 52 at ¶22 (quoting *Dugan v. Jones*, 615 P.2d 1239, 1248 (Utah 1980)). Real estate appraisers are similarly "licensed person[s] or entit[ies] who hold[] [themselves] out to the public as having particular skills and knowledge in the real estate field." *Id.* At ¶20 (quoting *Secor v. Knight*, 716 P. 2d 790, 795 n.1 (Utah 1986) (additional citations omitted)).

Green's conduct of which plaintiff complained of herein consisted of two parts, i.e. first, his negligent survey, and second, his willful recordation of his survey in willful

disregard of the consequence such recordation would obviously have upon Appellant's record title to Section 31. Such conduct should have rendered Green liable for Appellant's damages and imposed a further affirmative duty upon him to amend his filed survey to remove it as an encumbrance upon Appellant's title. The trial court precluded Appellant's ability to seek redress from Green's improper actions.

## **Point II**

### **Appellant Is Entitled To Recover The Damages Sustained To Appellant's Property.**

Paragraph 19 of the trial court's Findings Of Fact states:

The evidence presented by plaintiff as to damages was not persuasive. The cost to resurvey was not shown, and based on plaintiff's position the court cannot see why another survey would have been helpful or would now be helpful. The evidence as to the cost to tear down the 2003 fence was some indication of damages, but the cost to erect a range fence was not compelling such that the court can find those costs are any measure of damages. It was not shown why any new clearing must take place, as when the 1977-78 fence was taken down in 2003, there still remains, as shown by photographs, an area somewhat clear where a new fence could be erected. That 1977-78 fence line is not overgrown such that any estimate concerning clearing it again would be accurate. The bids to again "clear" that already reasonably clear area are found not to be realistic. As to the alleged damages for remediation, as to planting new aspen trees or other vegetation, the evidence was not compelling just what was removed when the 2003 fence was erected. Certainly some trees were moved, but there was no sufficient evidence as to how many nor the value of those. Moreover, it was not shown why indeed concerning this range land there needs to be any remediation as over the many years this land has been in the Boyer family there has never been any such reforestation or replanting of grasses. The damages must be proven, though of course they need not be with specificity. They may not be the subject of conjecture, and the court believes the estimates provided are just that—conjecture. The costs for halting erosion or the spread of weeds appears to be the subject of government regulation, but it was not shown that moving the 2003 fence back to the 1977-78 fence location would cause any erosion or weed problems that must be budgeted for 10 years. Moreover, this being

rangeland it is not clear to the court that any such costs are legitimate in any fashion.

(R. 607-608)

Paragraph 5 of the Conclusions Of Law states:

Plaintiff has not proven damages as claimed. The cost of removing the fence erected in 2003 was not shown convincingly, nor was any need for remediation shown convincingly. The evidence presented was too speculative and not based on sufficient foundation such that it convinces the court that there needs to be any erosion or weed control, or that a range fence or any other fence would cost anywhere near what plaintiff's evidence showed. The court rejects all the testimony about damages and concludes that plaintiff has not proven any damages resulting from the removal of the 1977-78 fence or the erection of the 2003 fence.

(R. 615-616)

During the period this appeal has been pending, appellee Boyer has removed the 2003 fence and placed it along the original 1977-78 fence line. Consequently, the damages Appellant was seeking to remove the 2003 fence is now moot. Appellant does contend, however, that the trial court committed error when it failed to award the damages which Appellee Boyer caused to Appellant's property.

The trial court's findings clearly indicate that trees were removed from Appellant's property. In *Brereton v. Dixon*, 20 Utah.2d 64, 433 P.2d 3 (Utah 1967), the Utah Supreme Court stated, "When property has been damaged or destroyed by a wrongful act, the desired objective is to ascertain as accurately as possible the amount of money that will fairly and adequately compensate the owner for his loss." The *Brereton* court found that it is proper to consider the value of the trees and award the damaged party the amount of damages as would fairly and reasonably compensate him for being deprived of the growing trees for the purposes he intended to use them. *Id.*

In *Ault v. Dubois*, 739 P.2d 1117 (Utah Ct. App. 1987), this Court found where trees are negligently destroyed, the owner is entitled to recover either the difference in the value of the land before and after the destruction of the trees, or the value of the trees ascertainable separately from the land, whichever will best serve the objective of giving the owner reasonable and adequate compensation for his actual loss as related to his use of the property. (See also, *Henderson v. For-Shor Company*, 757 P.2d 465 (Utah Ct. App. 1998) “Generally, the measure of damages for tortious injury to real property is the difference between the value of the property immediately before and immediately after the injury. An alternative measure is the cost of restoration, provided that restoration costs do not exceed the diminution in value.”)

The trial court in this case, however, neither awarded damages for the trees that were admittedly removed from Appellant’s property nor awarded damages to restore Appellant’s property to the condition that existed prior to the 2003 fence being placed on the property. Such conduct was error.

The *Henderson* decision states, “In circumstances where no substantial damages result and none are proved, the law will infer nominal damages for the authorized entry onto the real property of another.” Given the factual finding that trees were removed and Appellant’s property was disturbed, the trial court should have determined the reasonable amount required to restore Appellant’s property and awarded that amount as damages.

### **Point III**

#### **The Court Should Have Awarded Appellant Costs And Attorney Fees**

Appellant incurred a substantial amount of costs and attorney fees in successfully bringing this action against Appellees. In general, Utah follows the traditional American rule that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award. *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 782 (Utah 1994). “However, in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest[s] of justice and equity.” *Id.* This power is “part of the original authority of the chancellor to do equity in a particular situation.” *Hall v. Cole*, 412 U.S. 1, 5 (1973) (quoting *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 166 (1939)); *Stewart* 885 P.2d at 782; see also *Sprague*, 307 U.S. at 164-67 (reviewing the history of equitable powers).

Moreover, Utah Code Ann. § 78-27-56 states in relevant part:

(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....

In paragraph 6 of the trial court’s Conclusions Of Law, the trial court states:

The claim of bad faith as to Green has been fully rejected. The claim of bad faith as to Tom Boyer is harder to resolve. Certainly Tom Boyer would argue that he acted, in taking down the 1977-79 fence and erecting the 2003 fence, that he acted on the basis of a legitimately commissioned survey. That is certainly true. However, the pause the court engages in is to ask itself why Tom Boyer felt the need to commission the 2003 survey. He had asked Malan and Christensen to do a survey and they did so, each certifying the boundary line at a place where plaintiff claims it to be. He agreed to others that was the situation in the October 1985



meeting. He still could not seem to leave it, however, for some reason, and so had still another survey conduct work. That is the difficult point the court struggles with, why, based on what, did Tom Boyer even commission Green. Tom Boyer, after having the Green survey, did not even approach his aunt, plaintiff, an elderly woman, and explain what he was doing or why. He merely acted and moved a fence. It certainly is unexplainable to the court why someone would so behave. Whatever past disputes had existed between Vern and Lyle could have and should have been forgotten long ago. Both were deceased. Tom Boyer, for whatever reason, continued to press the matter and asked for yet another survey. If such conduct is not in bad faith, it is certainly mystifying to the court. Tom Boyer seemed, however, to the court to be a sensible person in other areas of his life. Based on a consideration of all factors, many no doubt unknown to the court, the court cannot find his actions in bad faith.

(R. 616-617)

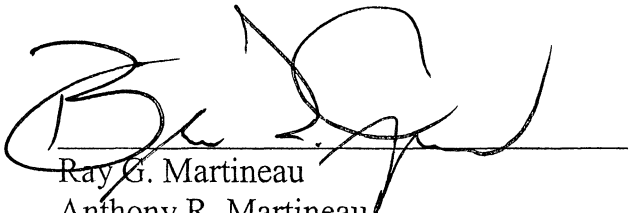
In this matter, although Tom Boyer placed the 1977-78 fence and agreed at the courthouse meeting that the fence had been properly located, he caused the 1977-78 fence to be moved to a new boundary line despite having previous surveys conducted and agreeing to the 1977-78 fence line in 1985. He was well aware that others had viewed the stone at the corner of the 1977-78 fence. Certainly such conduct in moving the fence under these circumstances is bad faith. Given that the trial court made a close call on the bad faith issue, and given that Appellant and an elderly woman in her 80's had no choice but to pursue litigation to remedy the situation, the Appellant should be awarded her costs and attorney fees in the interest of justice and equity, under *Stewart, supra* and Utah Code Ann. § 78-27-56, or both.

### CONCLUSION

Based upon the foregoing, Appellant requests that this Court reverse the judgment that Green was not a proper party defendant in this case as well as the judgment that

plaintiff is not entitled to recover the damages associated with restoring her property to its condition prior to the tortious conduct of the Boyer Appellees. The trial court should also be ordered to award plaintiff her costs and attorney fees incurred in re-establishing the boundary line in this matter.

RESPECTFULLY SUBMITTED this 17 day of August, 2007.



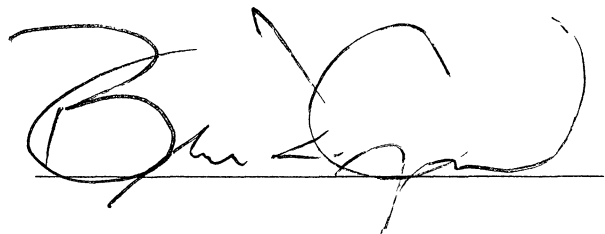
Ray G. Martineau  
Anthony R. Martineau  
Brett D. Cragun  
Attorney For Plaintiff/Appellant

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing Brief Of Appellant was served upon the following individuals by mailing a copy thereof, postage prepaid, to said individuals at the following address this 17 day of August, 2007.

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# ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HELEN W. BOYER, TRUSTEE  Plaintiff,  vs.  THOMAS VERN BOYER and FEWKES CANYON, LLC,  Defendants.	<b>MEMORANDUM DECISION</b>  Case No. 040500429  Judge BRUCE C. LUBECK  DATE: October 4, 2006
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The above matter came before the court for a bench trial on September 27, 28 and 29, 2006. Plaintiff was present with Ray G. Martineau and Brett D. Cragun and defendants were present with and through Robert H. Wilde.

BACKGROUND

Plaintiff filed a complaint June 26, 2004. A second amended complaint was filed August 4, 2005.

The second amended complaint alleged plaintiff was the trustee of the L.E. and Helen W. Boyer Revocable Trust. It alleged in summary that plaintiff and her predecessors are title holders of Section 31, Township 3 North, Range 6 East, Salt Lake Base and Meridian, according to an 1874 U.S. Survey. Defendants are legal title holders to Section 32. For more than twenty years the owners agreed that a common true boundary was marked by a fence erected in 1977 or 1978. In July 2003, defendant took out the recognized fence and erected a new fence inside the eastern

boundary of Section 31.

The second amended complaint alleges (1) tortious (sic) misconduct by defendant Boyer, (2) seeks removal of the new fence and erection of the former fence, and in cause four (claim three against Green has been dismissed) seeks a declaratory judgment that the old fence was and is the true boundary line and (5) seeks punitive damages based on the wilful nature of the conduct.

The court has made several rulings in the case. On February 7, 2006, the court dismissed the case against defendant Green, a surveyor hired by defendants. The claims against him were essentially that his 2003 survey, upon which defendants' relied in removing the old fence and erecting the new fence, was faulty and without foundation and in violation of survey standards.

On July 26, 2006, the court denied the parties' cross motions for summary judgment, ruling factual questions existed as to the boundary and the court reaffirmed the dismissal of Green.

Thus, the issue in this case is the location of a common boundary between two sections, section 31 owned by plaintiff and section 32 owned by defendant Fewkes, formerly owned by defendant Tom Boyer.

At the end of plaintiff's case defendants moved under Rule 41(b) for a dismissal. The court reserved on the motion and

addresses it herein in these findings.

The court heard evidence, received exhibits, heard argument of counsel, and is fully advised.

The court finds as follows:

#### FINDINGS OF FACT

1. Joseph and Lois Boyer owned land in the Chalk Creek area of Summit County, near Coalville. What has happened to their land since their death is the subject of this dispute. Joseph died in 1967 and Lois died in 1971. They had several children: Joseph LaVern (Vern), Lyle, William, Leah Nielson, (the only daughter), Edison (Ted) and Fay Boyer.

2. Tom Boyer, defendant, is the grandson of Joseph and Lois through Tom's father Vern, who is the brother of Lyle Boyer, the deceased spouse of plaintiff.

3. Tom Boyer received section 32 and Lyle Boyer received section 31 through the chain of title to be described below.

tions entailed and now entail is at issue in

On 1/1/81, Tom Boyer sold section 32 to  
a limited liability company, whose managing

member is Tom's son Jeremy Boyer. In November 2003 Fewkes conveyed approximately 6 acres to Jeremy Boyer.

5. Plaintiff is the trustee of the Lyle and Helen Boyer Revocable Trust, and the wife of Lyle Boyer, now deceased, and thus the aunt of Tom Boyer.

6. Plaintiff is the record title owner of section 31. Both sections 31 and 32 are in Township 3 North, Range 6 East, SLB&M, U.S. Survey.

7. Lyle Boyer acquired property through an executor's deed from the estate of his parents, Joseph and Lois Boyer. That deed was executed by one of the co-executors, William Boyer, another son of Joseph and Lois, on July 31, 1979, and that deed conveyed a good deal of other land and included "Section 31, [listing township and range as above], U.S. Survey, containing 623.6 acres, more or less," subject to the probate decree mineral rights. Lyle Boyer then quit claimed that same property with the identical description as to section 31 on June 14, 1988, to the trust named as plaintiff herein.

8. Tom Boyer acquired section 32 from his father Vern Boyer. Also on July 31, 1979, William Boyer as co-executor executed an executor's deed conveying property to Joseph LaVern Boyer, (Vern Boyer) and that included "Section 32 [naming the same township and range] containing 640 acres, more or less." It thus differs from the executor's deed concerning section 31 in that it is

section 32 executor's deed did not use the words "U.S. Survey." It was also subject to mineral rights under the probate decree. Vern Boyer by quit claim deed conveyed the same property, including the same description as to Section 32, to Tom and Vern Boyer Land and Livestock, a Utah partnership, on October 13, 1982. The Tom and Vern Boyer Land and Livestock company executed a warranty deed on May 11, 1995, to Tom Boyer and his wife. That property consisted of, among other property, Section 32 with the same description as the deed by which it was acquired. Tom Boyer and his wife, by warranty deed executed October 7, 2003, conveyed "All of Section 32 [same range and township] to Fewkes. That deed did not contain any note as to acreage. As noted Fewkes conveyed a few acres to Jeremy Boyer and his wife the next month in 2003.

9. In the lifetime of Joseph and Lois Boyer sections 31 and 32 were fenced around their perimeter, along with other sections not at issue in this case. However, there was no fence between sections 31 and 32 during the lives of Joseph and Lois. A fence was first erected between sections 31 and 32 in 1977 or 1978 as will be described below.

10. Long ago, at a date not revealed by the testimony, but evidently not long after the deaths of Joseph and Lois, a dispute arose between Vern Boyer (and his son Tom Boyer) and Lyle Boyer concerning the boundary between section 31 and section 32. Tom



Boyer thus commissioned a licensed surveyor, Fred Malan, who did a survey in 1976. Malan conducted that work on August 7 and 14, 1976. Tom Boyer accompanied Fred Malan on those two days, as did Malan's son Kent, who was assisting his father. Malan prepared a certified report a year later, in September 1977. That report indicated that Malan located a rock with markings on the north boundary of the line between sections 31 and 32. Section 32 lies east of section 31, and north of section 31 is section 30 owned by Judd and north of section 32 and east of section 30 is section 29. To the south of section 31 lies section 6 and to the south of section 32 and to the east of section 6 lies section 5, these sections 5 and 6 being in another township. Malan certified he made a survey of the line between sections 31 and 32. The rock was noted as having 5 notches on the east and one notch on the south. At one point the certification states the survey was done for Fay and Tom Boyer, and at another that it was done for Vernon Boyer, Tom Boyer and Fay Boyer. Between sections 29 and 30 there was a fence that was erected before any of these events. The stone Malan indicated he found was at the intersection between sections 31 and 32 where the fence between sections 30 and 29 touched the northern edge of sections 31 and 32. The northern boundary of sections 31 and 32 was also fenced long before these events to separate the sections north of sections 1 and 32.

11. Not long after the Malan survey, sometime in 1977 or

1987, Tom Boyer erected a fence between sections 31 and 32. It was called by Tom Boyer a "stock" fence and he stated it was only to keep out livestock, and he did not intend it to be the boundary as he did not believe that was the proper boundary. That fence corresponded with the Malan survey, and on the north boundary the fence began where the fence between sections 30 and 29 ended on the south edge of those sections and the north edge of sections 31 and 32. There was thus a "four way" fence corner at the intersections of sections 29, 30, 31, and 32. The fence was approximately 400 feet east, into section 32, of where Tom Boyer believed and continues to believe the boundary between section 31 and 32 should be. The fence went south and westerly, and was erected by Tom Boyer.

12. That Malan plat was recorded by Vern Boyer, who recorded it October 9, 1980, along with an affidavit from Vern Boyer which stated that Malan located the "corner section corner common to sections 31 and 32 . . . and sections 5 and 6 . . ." Attached was a copy of the Malan survey dated September 1977.

13. Disputes still continued between Tom and Lyle Boyer as to the boundary. Tom Boyer commissioned another survey in 1985 from Bing Christensen, also a licensed surveyor. Christensen did a survey June 4, 1985, and prepared a drawing showing the results, including stone monuments and fence corner posts he found and accepted as evidence of the location of corresponding

section corners. Christensen provided two affidavits to that effect, one in October of an unknown year and one in October 2001. That map shows a stone was located at the "fence corner" where sections 31 and 32 meet, on the north edge. What was labeled as a "section corner stone" was found on the southwest corner of section 31 and another section corner stone was located at the southeast corner of section 32. A "fence corner" was labeled on the boundary of sections 31 and 32 at the south edge.

14. Disputes continued and a meeting was held at the request of Tom Boyer at the Summit County Courthouse in Coalville in October 1985. Present were Tom Boyer, his lawyer Wendell Bennett, Lyle Boyer, Bing Christensen, Kent Wilde, Sam Lewis, who leased section 31 from plaintiff, and Ron Baxter. Baxter and Wilde were surveyors Lyle had hired in the past. The boundary between the sections was discussed and out of that meeting further confusion arose. Some claim there was an agreement and some claim there was not. The court finds that all agreed that the fence erected by Tom Boyer was the correct boundary line that everyone would live with. Correspondence between Bennett, representing Tom Boyer, and Lyle Boyer followed. Bennett stated to Lyle the temporary fence was 400 feet too far to the east (into section 32) at the north end and 50 feet too far east at the south end of section 32. Bennett enclosed the Christensen survey. Lyle Boyer responded that he had tried to locate the

section line between the two sections. Lyle referred to receiving the Malan survey and it showed the fence built by Tom Boyer was the true line. Lyle stated he believed the Christensen and Malan surveys both showed the fence put up by Tom Boyer in about 1977-78 was in the right place. Lyle agreed to maintain the southern half and Tom would maintain the northern half of that fence, as Bennett had proposed. After the October 1985 meeting Bennett again wrote Lyle and stated concerning the fence Tom built in 1977-78 that "we have now agreed to recognize as the boundary line between sections 31 and 32 until such a time as the government authority charged with the responsibility . . . re-establishes those corner markers as between sections 31 and 32 . . . Until [a further government survey occurs] we agreed to honor the fence line as described in the enclose document, which was established by Bing Christensen . . . [and which was agreed to by Kent Wilde.]" The Bennett letter attached a description that was based somewhat on the Christensen survey, but it did not exactly trace that map, but began at the southwest corner of section 31, then north along a fence, then east 5288 feet to the four-corner fence line made between sections 29, 30, 31, and 32. Lyle Boyer wrote back in early 1986 and stated the existing fence could stay where it was located and he would maintain the southern half and Tom the northern half. Bennett in June 1986 asked Lyle to sign the agreement and that was never done. From all of this the

court finds that there was an agreement but Tom Boyer was not happy or satisfied about it. No written agreement was ever executed and that agreement has no legal significance but informs the court as to credibility issues.

15. Because of the continuing disagreement, Tom Boyer commissioned yet another survey, by Green or Alta Surveying, in 2003. Green's survey, working for ALTA Survey, formed the basis of later action by Tom Boyer. Green's survey indicated the boundary between sections 31 and 32 was approximately 420 feet west, or into section 31, of where Malan and Christensen had placed the northern boundary. That is, the fence running between sections 29 and 30, where it touched the northern boundary of sections 31 and 32, was incorrect, and the true boundary was west 420 at the north end and about 50 west at the southern end. If the line was where Tom erected the fence in 1977 a spring at the southern end of the properties was partly in section 31 and partly in section 32. If the Green survey is correct, and the newly erected 2003 fence reflects the true boundary, that spring is entirely within section 32. Water rights are not at issue in this case.

Based on the Green survey, Tom Boyer removed the fence he had erected in 1977-78 and erected a new fence along the line shown as the boundary by Green, that is, about 420 feet to the west, at the north end, of where the old fence was and about 50

feet to the west on the southern boundary of the two sections at issue. When removing the 1977-78 fence its remnants were stored all on section 32, not on section 31.

16. Green obtained his surveyor's license in 2000. He explained why he disagreed with the other surveys. The court realizes its function in this case but the idea that the court can determine, on the basis of a short trial, what surveying principles were violated and what were followed is rather unrealistic. To the court all surveyors who testified seemed to be sincere and capable. It is apparent that surveying is not "rocket science" in that there is only one correct answer, but there is some disagreement even amongst experienced surveyors. Various notes from the past may be interpreted differently, various landmarks may change, and not all surveys are completely "true" and some are better than others, just as in any endeavor.

Green explained his procedures and the reasons for his results. He opined that the common corner of sections 29, 30, 31, and 32 is where it is shown on plaintiff's exhibit 9. That is, favoring defendants, or about 420 feet west at the north boundary of where plaintiff claims the boundary is. Green explained his understanding of the 1973 Manual of Surveying Instructions published by the U.S. Department of the Interior. Green

s surveys, but also what

1 field notes from

the 1874 U.S. Survey, the conveyance deeds, the 1967 topographic map, the acreage involved, as well as other factors. He concluded that the 1977-78 fence was not the boundary line but the boundary line is where the 2003 fence was erected by Tom Boyer after the Green survey. The original plat of 1874 shows section 31 is "short" and consists of 623.6 acres and section 32 consists of 640 acres.

Green had done another survey in the area, for a person named Henrie, in 2001. Henrie was interested in purchasing section 28 and some of section 33, and so Green obtained documents and information from neighboring land owners, including Tom Boyer, to conduct that survey. Green also obtained a title company title report which was suppose to contain the public documents. Later in 2003, after Tom Boyer heard of Green and his 2001 survey, Tom Boyer asked Green to establish the boundary between sections 31 and 32. Green later concluded, after talking to some of the surveyors of plaintiff, that they were wrong and he was right. Green opined that plaintiff's surveyors had simply accepted the "stone" they found without "testing" it against other information, as Green did. Thus, Green opined as he did.

Green filed a survey for Henrie, and it varies in some regards from the Tom Boyer survey of 2003, which was filed in 2004 with the recorder. (There is no Summit County surveyor, so surveys are filed with the county recorder.) Green explained the

2001 Henrie survey was not "wrong" but was accurate based on the information, and with the later filing of the 2003 survey, any interested person could see what Green had done because of his narrative description on those two surveys. A great deal of testimony was elicited about the 2001 survey.

17. Various persons had been to the disputed area over the years. Many had seen, and the court finds, that indeed there was a government "stone" or monument placed there by the 1874 survey, which was intended as the common corner between sections 29, 30, 31, and 32. That was not shown on the 1967 or 1997 topographic map, but various individuals who were not interested directly in the dispute saw the stone. That stone would not show up on a government topographic map unless it was observed by a government employee tasked to find such markers. The Malan survey described the stone and his son Kent testified he saw it. The Christensen survey noted a stone at the same location. Wilde himself had seen it several times and it was notched and marked as a government-placed stone. Wilde saw it in 1977 and again in 1985, but it was not there in 2003. Wilde and Lyle Boyer had been to the corner with a view to staking a fence line south of that boundary. Lyle hired a contractor, Hortin, to "push" or clear the path for a fence. Hortin saw and described the stone, as did a neighbor who maintained the fences of another section that adjoined the corner of 29, 30, 31, and 32. Those persons all



described the stone a bit differently but as being in the same location as the four corner fence area, where the 1977-78 fence was erected going south. Tom Boyer testified he did not see such a stone ever, nor did his son Jeremy. Tom went to the site with Malan, Christensen, and at other times. The court credits the testimony of Wilde and others more than Tom Boyer concerning this government stone and its location. The description of the stone convinces the court not that they are wrong, but that they are being honest. The court does not indicate or imply Tom Boyer caused the removal of the stone, but the court credits the testimony of the many persons who saw the stone at the point where the Malan and Christensen surveys indicate it was. That is, where the fence line coming from the north between sections 29 and 30 joins the northern boundary of sections 31 and 32, or where the 1977-78 fence was erected by Tom Boyer.

18. The court finds from its own common sense as well as the expert testimony elicited, that the field notes from 1874 were not completely accurate as to what are called the topographic calls. The topographic map shows, for example, a ridge or gulch or stream, and the field notes from 1874 indicate those were in different places from what the topographic map shows. The survey's field notes from 1874 would say, for example, that from point A it was 'X chains (converted into feet and inches to a "ridge." Of course just where a ridge begins and ends is hard to

determine, and that is obviously true of a gulch, a stream, or tree line. Those latter two features can and obviously may well change in 130 years from 1874 to 2003. The notes, again, show reference to a line of trees, or a gulch, or ridge, or stream, and of course natural changes occur in those over 130 years. The notes are found by the court to be inaccurate as to distances and thus the corners which were established by following those notes as Green did were inaccurate. Often the distances were off as much as 500 feet, which would and does account for the discrepancy Green states he found. Because the field notes were incorrect as plaintiff's expert opined, Green's reliance on them caused his final conclusion to be incorrect.

19. The evidence presented by plaintiff as to damages was not persuasive. The cost to resurvey was not shown, and based on plaintiff's position the court cannot see why another survey would have been helpful or would now be helpful. The evidence as to the cost to tear town the 2003 fence was some indication of damages, but the cost to erect a range fence was not compelling such that the court can find those costs are any measure of damages. It was not shown why any new clearing must take place, as when the 1977-78 fence was taken down in 2003, there still remains, as shown by photographs, an area somewhat clear where a

That 1977-78 fence line is not

would be accurate. The bids to again "clear" that already reasonably clear area are found not to be realistic. As to the alleged damages for remediation, as to planting new aspen trees or other vegetation, the evidence was not compelling just what was removed when the 2003 fence was erected. Certainly some trees were moved, but there was no sufficient evidence as to how many nor the value of those. Moreover, it was not shown why indeed concerning this range land there needs to be any remediation as evidently over the many years this land has been in the Boyer family there has never been any such reforestation or replanting of grasses. The damages must be proven, though of course they need not be with specificity. They may not be the subject of conjecture, and the court believes the estimates provided are just that-conjecture. The costs for halting erosion or the spread of weeds appears to be the subject of government regulation, but it was not shown that moving the 2003 fence back to the 1977-78 fence location would cause any erosion or weed problems that must be budgeted for 10 years. Moreover, this being rangeland it is not clear to the court that any such costs are legitimate in any fashion.

Based on the above findings and discussion, the court makes the following:

## CONCLUSIONS OF LAW

1. The conflicting surveys are based on a number of principles the court need not examine and discuss fully. As found above, surveying is not as exact as the court and perhaps others believed. It is subject to varying interpretations of data and evidence. A key principle involved is that a government stone, or monument, is said to be unchangeable after title passes from the United States. Right or wrong, if the monument is placed by the United States, it remains and boundaries are drawn from it. If that stone is the same stone and in the same place as originally placed, that is indeed to be interpreted as the corner of a section. Other information can be used to corroborate and test its validity but it is a key in determining section boundaries. This stone, found by the court to exist in the place Kent Wilde (and others) described, was marked appropriately to show its place within the township, with 5 chiseled notches on the east and one on the south. That shows the place of the section within the township. Section 31 is the southern and western most section in the township, which contains 36 sections. If the positioning of a stone is questionable, it may be supported by finding evidence relating to other known corners, examination of the field notes relating to natural objects, and unquestionable testimony. The testimony of interested landowners and competent surveyors and other qualified witnesses is to be

weighed. The court has done just that.

2. The court concludes that the government stone was observed before 1985 and in 1985. Its authenticity cannot reasonably be questioned. Defendant's evidence was the direct testimony of Tom Boyer that he had looked for a monument and had failed to find it, spending perhaps 30 hours in so doing. The other witnesses for defendant, William Boyer through his deposition and a letter from Lyle Boyer, are found to be less convincing than the witnesses who testified they actually saw the stone. There is certainly a conflict whether the stone was at a common boundary, but on balance the court concludes it was. The testimony of Kent Wilde is particularly telling and informative. While legally insignificant, Tom Boyer's testimony about an October 1985 meeting is some influence to the court. Several persons were there and presented testimony that after Tom Boyer erected the fence in 1977-78, he still disputed its position as being correct, so he asked for a meeting. Of all the people who attended, everyone including his attorney indicated there was an agreement that the fence would remain where Tom Boyer had erected it and the fence would be the boundary. There is certainly some language in the correspondence indicating some conflicts, but the court has found there was an agreement. Again, that is not of any legal significance as to the boundary but to the court it deals with credibility in that Tom Boyer then, many years later,

commissioned yet another survey and ultimately changed the fence. That shows the court Tom Boyer was not as credible as others who testified about the stone. When Green conducted his survey in 2003 he gave weight to that evidence of a stone being found and observed by others, but Green gave it insufficient weight in the court's view. Rather, Green relied on his interpretation of the field notes and topographic calls from the 1874 survey, and he came within a range rather than at an exact point even at that. Further, there were fences and fence posts observed and placed by others, surveys from the past, and evidence from others who saw the stone. While Green did consider those things, he considered other evidences as being more important, and to the court that is the principal reason the court rejects his survey as showing the true boundary. The Green survey was not nearly as faulty as plaintiff alleges, however. Green simply disagreed with others and gave insufficient weight to the government stone and evidence that supported the presence of that stone, and he gave increased weight to his own "retracing" efforts and relied too heavily on questionable field notes over the government stone. Green did not see the stone in 2001 or 2003, but he had evidence from other competent surveyors it had been in place and he had possession of certified surveys so showing. The court does not believe Green failed to obtain sufficient information from Tom Boyer as Green had public documents through the title report, though both the

title report and Green failed to discover the 1985 Christensen survey which was of record and had been recorded by Vern Boyer in 1980. Green had no reason to contact Kent Wilde as Wilde had not filed a survey of this area. Green did not but certainly should have contacted adjacent landowners including plaintiff, but Green did have, as noted, the field notes from the 1874 survey and his task was to retrace that survey. He had the topographic map from 1967 and there was no stone shown on that map, nor was there a stone located at the site in 2003. Green did not file an amendment to the 2001 Henrie survey, but the later 2003 survey and the narratives involved make clear that in practical effect the 2003 survey was an amendment to the 2001 survey. Green thus did not completely fail to follow standard principals to any degree approaching plaintiff's claims of wilfulness or professional incompetence. Green's survey, while the court concludes it was not sufficiently based on clear and available evidence of a section corner monument, was not done in wilful disregard of standard principles of surveying. It was merely wrong and based on other evidences Green felt more important than the government monument evidence. Indeed, survey principles do not call for a "blind" adherence to a government monument if that monument is too questionable according to all evidence. However, as the court understands it, Green used the 1874 field notes and examined terrain and topography and naturally occurring signs.

Certainly those would change to some extent in 130 years. The process Green followed is indeed not dissimilar to what the court is now undertaking in this and any other case. An examination of all evidence is made and a conclusion is reached. Green did that though in a way that others did not agree with and that this court does not agree with, in that the key evidence, the government stone, was not properly weighed by Green. This court does not agree with Green's result, or conclusion, but the process he engaged in was not so flawed as to be without some merit and it was certainly not wilfully incorrect. The Green survey was not done outside the standards of the profession, it is merely found to be incorrect based on the key finding that the government monument was not sufficiently recognized or weighed by Green.

3. Because Green's survey is not correct, the court concludes that the true boundary line between sections 31 and 32 at the north end of those sections is where it was shown on the Malan and Christensen surveys, where Wilde and many others saw the government stone, where the 1977-78 fence was erected. The boundary line then proceeds southerly and westerly to the point at the south end of sections 31 and 32 which is not disputed and shown on all surveys, including Green's. That is the true boundary and title is quieted in each section to that boundary line.



4. The conveyance deeds indeed were intended to convey certain properties to the heirs of Joseph and Lois Boyer. There were six children involved, including Vern and Lyle, five sons and one daughter. The court concludes, from all the evidence, that the conveyance deeds were not unambiguous and extrinsic evidence was thus allowed. The deeds were ambiguous because the deeds stated a specific legal description (section 31 or 32) PLUS an acreage amount. The deed to Lyle stated US Survey. The deed to Vern did not. Those create an ambiguity. The court finds and concludes that the intent of Joseph and Lois is what the court must determine, as the co-executors were then to continue to execute that intent and convey what Joseph and Lois intended. From examining the probate documents in evidence, as well as the deposition of William Boyer, the executor who executed the deeds concerning these sections, and considering all the extrinsic evidence, the court concludes that it was the intent of Joseph and Lois Boyer, to convey section 31, whatever that section was according to the U.S. Survey, to Lyle Boyer. Similarly, it was the intent of Joseph and Lois Boyer to convey all of section 32, whatever that was according to the U.S. Survey, to Vern Boyer. There was not any evidence that clearly and unequivocally shows an intent by Joseph and Lois Boyer to convey any set amount of land. These sections conveyed were only part of the land conveyed by the executor's deeds, which conveyed other property

to Vern and Lyle. It was not shown clearly by the documents or the evidence that Joseph and Lois intended to convey a certain amount of acreage, 640 acres in the case of section 32 and 623.6 acres in the case of section 31. Joseph and Lois Boyer intended each of their children to benefit equally. All property was held as tenants in common. Each offspring was to receive 1/6 of the estate. The acreage stated, "more or less," in the documents, and that acreage was taken from that 1874 U.S. Survey map. Whether section 31 was in fact comprised of 623.6 acres or not, the survey was the key factor in determining what the section consisted of and it was the overall intent that section 31 be conveyed to Lyle and section 32 to Vern. The acreage is found to be secondary to the primary intent to convey the sections involved to Lyle or Vern. The U.S. Survey, as concluded above, was based on the corner stone placed in 1874 and found to have existed where plaintiff claims it was. Thus, the true boundary line at the north boundary begins where the stone was observed to be, or at what is called by defendant as Judd's corner.

5. Plaintiff has not proven damages as claimed. The cost of removing the fence erected in 2003 was not shown convincingly, nor was any need for remediation shown convincingly. The evidence presented was too speculative and not based on sufficient foundation such that it convinces the court that there needs to be any erosion or weed control, or that a range fence or

any other fence would cost anywhere near what plaintiff's evidence showed. The court rejects all the testimony about damages and concludes that plaintiff has not proven any damages resulting from the removal of the 1977-78 fence or the erection of the 2003 fence.

6. The claim of bad faith as to Green has been fully rejected. The claim of bad faith as to Tom Boyer is harder to resolve. Certainly Tom Boyer would argue that he acted, in taking down the 1977-78 fence and erecting the 2003 fence, that he acted on the basis of a legitimately commissioned survey. That is certainly true. However, the pause the court engages in is to ask itself why Tom Boyer felt any need to commission the 2003 survey. He had asked Malan and Christensen to do a survey and they did so, each certifying the boundary line at a place where plaintiff claims it to be. He agreed to others that was the situation in the October 1985 meeting. He still could not seem to leave it, however, for some reason, and so had still another survey conduct work. That is the difficult point the court struggles with, why, based on what, did Tom Boyer even commission Green. Tom Boyer, after having the Green survey, did not even approach his aunt, plaintiff, an elderly woman, and explain what he was doing or why. He merely acted and moved a fence. It certainly is unexplainable to the court why someone would so behave. Whatever past disputes had existed between Vern

and Lyle could have and should have been forgotten long ago. Both were deceased. Tom Boyer, for whatever reason, continued to press the matter and asked for yet another survey. If such conduct is not in bad faith, it is certainly mystifying to the court. Tom Boyer seemed, however, to the court to be a sensible person in other areas of his life. Based on a consideration of all factors, many no doubt unknown to the court, the court cannot find his actions in bad faith.

7. Defendants' position as to the boundary, after the 2003 Green survey, is definitely not in bad faith and without support. No fees should be awarded to either party. There has been no wilful conduct and punitive damages are not awarded.

8. Plaintiff has shown title to the land up to the boundary as found herein. Thus, plaintiff's causes of action for tortious conduct has been shown, but no damages have been proven. The court declares the boundary between sections 31 and 32 to be as herein described and quiets title accordingly. The fence should be removed as indicated below. No damages are awarded and of course no punitive damages.

9. The court believes it probably cannot force this result or force any cooperation but believes that what makes sense in this case is for the existing 2003 fence to be relocated to the boundary as found herein. It is a quality fence, lasting and

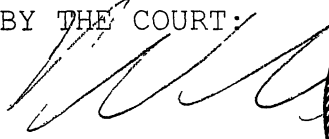
Rather than have it torn down, new

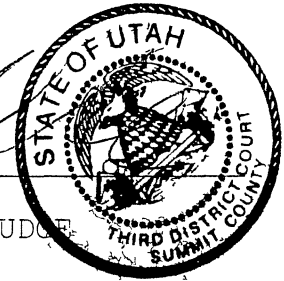
materials purchased and a new "range" fence erected (which fence would require far more maintenance and possibly engender further disputes) it seems a practical solution for defendant to move the existing 2003 fence onto the new boundary.

Plaintiff is to prepare an order in compliance with URCP, Rule 7(f) setting forth this ruling.

DATED this 4 day of Oct., 2006.

BY THE COURT:

  
\_\_\_\_\_  
BRUCE C. LUBECK  
DISTRICT COURT JUDGE




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040500429 by the method and on the date specified.

METHOD NAME

Mail	BRETT D CRAGUN ATTORNEY PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY, UT 84106
Mail	RAY G MARTINEAU ATTORNEY PLA 3098 HIGHLAND DR STE 450 SALT LAKE CITY UT 84106
Mail	ROBERT H WILDE ATTORNEY DEF 935 E S UNION AVE STE D-102 MIDVALE UT 84047

Dated this 5~~th~~ day of October, 2006.

  
Deputy Court Clerk