

2006

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

Utah Court of Appeals

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Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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Ray G. Martineau; Anthony R. Martineau; Brett D. Cragun; Attorneys for Appellants.

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HELEN BOYER, A TRUSTEE,  
  
Plaintiff/Appellant,  
  
vs.  
  
THOMAS VERN BOYER; CARRIE GIBSON  
BOYER; FEWKES CANYON, LLC, 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

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HELEN BOYER, A TRUSTEE,  
  
Plaintiff/Appellant,  
  
vs.  
  
THOMAS VERN BOYER; CARRIE GIBSON  
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Utah Code Anno. 78-27-56

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## LIST OF PARTIES

The parties are all listed in the case caption.

## STATEMENT SHOWING JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this case pursuant to Utah Code Anno. 78-2a-3(2)(j).

## STATEMENT OF THE ISSUES

1 - May the appellant maintain an appeal from a bench trial where it has not marshaled the evidence? Standard on appeal: Because this issue did not appear until the appellant submitted his brief in the appellate court there is no standard of review of any action by the trial court.

2 - Is Dannie Green liable to the appellant for survey malpractice? Standard on appeal: The standard on appeal on the trial court's factual findings is an abuse of discretion by the trial court. *Van Dyke v. Van Dyke*, 86 P.2d 767, 769 (Utah App. 2004).

3 - Did the trial court err in ruling the appellant failed to sustain its burden of proof on damages? Standard on appeal: The standard on appeal on the trial court's factual findings is an abuse of discretion by the trial court. *Van Dyke v. Van Dyke*, 86 P.2d 767, 769 (Utah App. 2004).

4 - Did the trial court err in not awarding the appellant attorney fees? Standard on appeal: The standard on appeal on the trial court's factual findings is an abuse of discretion by the trial court. *Van Dyke v. Van Dyke*, 86 P.2d 767, 769 (Utah App. 2004).

5 - Did the trial court fail to award costs and if so did it err in so doing? Standard on appeal: The standard on appeal on the trial court's factual findings is an abuse of discretion by the trial court. *Van Dyke v. Van Dyke*, 86 P.2d 767, 769 (Utah App. 2004).

#### DETERMINATIVE LAW

Copies of Utah Code Anno. 78-27-56 and Rule 54 Utah R. Civ. P. are included in the addendum.

#### STATEMENT OF THE CASE

At heart, this is a quiet title action seeking to resolve the boundary between sections 31 and 32 Township 3 North, Range 6 East, Salt Lake Base and Meridian. The plaintiff/appellant is the Helen W. Boyer Revocable Trust (the Trust). The defendants/appellee who respond in this brief are Tom Boyer and Fewkes Canyon, LLC (the Boyer Defendants).

The complaint was filed June 26, 2004 and amended August 4, 2005. After discovery these parties filed cross motions for summary judgment which the trial court denied. The trial court did dismiss Dannie Green as a defendant on summary judgment. The matter was then tried to the court on September 27-29, 2006. The trial court quieted title in the disputed property in the Trust and ordered the fence moved to match the property line. The fence has since been moved. The trial court did not award the Trust damages or attorney fees. As to the Boyer defendants, these are the issues the Trust has appealed:



## RELEVANT FACTS WITH CITATION TO THE RECORD

Joseph and Lois Boyer owned land in the Chalk Creek area of Summit County, near Coalville. 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. Tom Boyer, defendant, is the grandson of Joseph and Lois through Tom's father Vern, who was the brother of Lyle Boyer, the deceased spouse of plaintiff. Tom Boyer received section 32 and Lyle Boyer received section 31 through the chain of title to be described below. (R 595).

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. 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. 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. 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 595-6).

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). Section 32 passed to Fewkes Canyon LLC through ensuing transactions. (R 596).

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. (R 597).

In 1977 Tom Boyer engaged a surveyor, Fred Malan to establish a fence line between sections 31 and 32. (R 635 pages 22-23). Tom Boyer felt this was necessary because Lyle Boyer had attempted to install a fence on a line with which Tom Boyer disagreed. (R 635 page 24). Later, because on the continuing disagreement on the location of the boundary Tom Boyer hired another surveyor, Bing Christensen, and asked him to establish the line back to the original 1874 survey. (R 635 page 53).

In 1976 or 1978, Tom Boyer erected a stock fence between sections 31 and 32. 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 line, 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 599).

Disputes still continued between Tom and Lyle Boyer as to the boundary. Tom Boyer commissioned another surveyor in 1985, Bing Christensen, also a licensed surveyor, to locate the line. 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. (R 599)

In October, 1985 Tom Boyer met with Lyle Boyer and others at the courthouse in Coalville to discuss the boundary. (R 635 pages 64-66). The meeting did not result in an agreement on where the line was or should be. (R 635 page 67, 86). No written agreement came from the meeting. (R 602)

In 2003 Tom Boyer commissioned a survey, by Dannie Green of Alta Surveying. 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 feet at the north end and about 50 feet west at the southern end. (R 602)

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. (R 603).

The survey performed by Dannie Green did not take at face value the location of the claimed government stone which Malan and Christensen claimed to have seen. Rather, he relied upon the topographic calls from the original 1874 U.S. government survey. Using this method Green came to the conclusion that the line between sections 31 and 32 was further west where Tom Boyer placed the fence in 2003. This line would have given section 31 623.6 acres and section 32 640 acres as shown on the original 1874 survey plat. (R 603-04). The trial court found that notwithstanding the Green survey and Mr. Green's explanation the boundary line was where the stock fence had been. (R 607).

In installing the 2003 fence Tom Boyer pushed a fence line to allow access to the presumed boundary line. The Trust claimed that because this pushed line was on its property it had been damaged. The Boyer Defendants introduced recent photographs of the area which showed that in the months between the installation of the fence in 2003 and the time of trial the natural vegetation had largely already grown back over the area where the access road had been. ( R 637 Pgs 628-629) They also introduced photographs of other portions of the Trust's property showing junk on the property indicating that the Trust did not maintain its land for any purpose other than grazing. ( R 637 Pgs 633-635) The Trust claimed that it would be necessary to resurvey the property to re-establish the

location of the prior fence and to clear the area before installing a new fence at the location the Trust urged. The court found the evidence on this point was not compelling since the photographs of the old fence line clearly showed where it had been and that neither re-surveying nor clearing were needed. (R 607)

At trial the Trust attempted unsuccessfully to establish damages. The Trust offered Exhibit 23 through Jeff Vernon of Geary Construction. That exhibit suggested that the cost to move the 2003 fence would be \$67,649.25. (R 637 pages 544-46). However, on cross examination Mr Vernon acknowledged that his firm's services are never used by ranchers to install range fence in Summit County and they just do it themselves. (R 637 pages 548-49). The Trust also claimed damages for removed trees and damage to the property but the evidence showed that few, if any, trees were removed. (R 637).

The Trust then examined Mrs. Boyer's son-in-law, Mike Rees, who testified that though he was not a forester or a landscaper he had gone on line and consulted Google to find the costs to rehabilitate the allegedly disturbed property. (R 637 pages 550-58) Mr. Rees also admitted he had not seen the property in over a year and did not know if it needed rehabilitation or not. (R 637 pages 563-66).

#### SUMMARY OF ARGUMENT

The Trust's arguments, aside from whether there is theoretical liability against Dannie Green, are all factually based issues. Where the Trust seeks to have an appellate

court overturn the factual findings of the trial court it must marshal the evidence supporting the court's findings and show that evidence to be so insubstantial that it cannot be believed. The Trust has not done so.

The trial court correctly ruled that as a surveyor working for Boyer Defendants Green had no liability to the Trust. Even if there were a theoretical basis for liability against Green the trial court's findings concerning the Green survey show that it was within the standard of care for surveyors in Utah and Green has no liability to the Trust.

The Trust mistakenly appealed the trial court's failure to award costs. Under Rule 54 Utah R. Civ. P. the Trust was entitled to costs but failed to submit its bill of costs timely and may not now claim those costs.

The Trust is not entitled to attorney fees. It was not a "private attorney general" in this matter. The trial court's findings show that the Boyer Defendants' actions did not rise to the level which would require an award of attorney fees under Utah Code Anno. 78-27-56.

## DETAIL OF ARGUMENT

### I. THE TRUST FAILED TO MARSHAL THE EVIDENCE

Though it attempts to frame its appeal as being comprised of legal arguments, the primary thrust of the Trust's appeal, as it relates to the Boyer defendants, challenges the sufficiency of the evidence supporting the trial court's findings and ruling. To prevail on the insufficiency of evidence assertions, The Trust "must first marshal all the evidence

that supports the court's findings” and then demonstrate that the evidence, when viewed in the light most favorable to the court's ruling, is insufficient. *State v. Widdison*, 2001 UT 60, ¶ 60, 28 P.3d 1278. The Trust’s brief is devoid of any reference to, or example of, marshaling evidence. Without that marshaled evidence the Trust’s attack on the trial court’s factual findings fails as a matter of law.

## II. DANNIE GREEN HAS NO LIABILITY TO THE TRUST

### II A. THERE IS NO SURVEYOR LIABILITY

The Boyer defendants rely on and incorporate by reference the appeal brief of Dannie Green. The Boyer defendants believe the trial court properly ruled on this issue when it was presented on Mr. Green’s motion for summary judgment.

### II B. THE TRIAL COURT ABSOLVED GREEN OF LIABILITY

In the trial court’s findings, at paragraph 16, the court discussed Green’s approach to the survey and his methodology. In Conclusion of Law two the court discussed Green’s performance and found that though the outcome was found to be erroneous the approach and methodology were not. The court specifically concluded the Green survey was not performed outside the standards of the profession.

A major thrust of the Trust’s case was that the Dannie Green survey was malpractice in that it fell below the standard of care in the surveying profession. To prove that point they hired a surveyor expert witness, John Stahl, and called Mr. Green as their own witness.

The trial court's detailed analysis of Dannie Green's work shows that it was not below the standard of care in the surveying industry. That being the case, even if there were some theoretical right for the Trust to sue Green, Green would not be liable to the Trust on both law of the case and res judicata theories.

### III. PLAINTIFF WAS AWARDED COSTS BUT DID NOT SUBMIT A BILL OF COSTS

The Trust complains that Judge Lubeck did not award it costs. Costs are governed by Rule 54(d) Utah R. Civ. P. which provides that costs are automatically awarded "... to the prevailing party unless the court otherwise directs." Rule 54(d)(1) Utah R. Civ. P. Nowhere in either the court's memorandum decision or its judgment did the court "otherwise direct." I.e., the Trust was awarded costs.

Rule 54(d)(2) Utah R. Civ. P. governs collecting costs. It requires the party to whom costs have been awarded to claim those costs within five days. The Trust did not submit a bill of costs timely and has waived its right to the awarded costs. This position has been upheld by the Utah Supreme Court on numerous occasions. *Valcarce v. Fitzgerald*, 961 P.2d 306 (Utah 1998); *Walker Bank and Trust Co. v. New York Term. Whse. Co.*, 10 Utah 2d 210 350 P.2d 626 (1960).

The Trust was actually awarded costs but failed to comply with Rule 54 and waived them. This portion of the Trust's appeal must, accordingly, be dismissed.

### IV. PLAINTIFF DID NOT CARRY ITS BURDEN ON ATTORNEY FEES AND



## DAMAGES

### IV A. PLAINTIFF WAS NOT ENTITLED TO ATTORNEY FEES

#### IV A(1). UTAH CODE ANNO. 78-27-56 DOES NOT ENTITLE THE TRUST TO ATTORNEY FEES

The Trust's appeal of the trial court's failure to award attorney fees under Utah Code Anno. 78-27-56 is ill taken. As the Trust notes there are two elements of this section of the code, lack of "good faith" and "without merit." The parameters of this section have been clearly established in prior appellate cases. A frivolous action having no basis in law or fact is "without merit," but is nevertheless in "good faith" as long as there is an honest belief that it is appropriate, and as long as there is no intent to hinder, delay, defraud or take advantage of another. *Cady v. Johnson*, 671 P.2d 149 (Utah 1983). Here the court discussed the Trust's position in some detail at Conclusion of Law six. The court specifically did not find that Tom Boyer's actions were in bad faith.

The evidence supports that conclusion. It was shown that before moving the fence Mr. Boyer spent the time and the money to have a survey performed by Dannie Green. That survey showed that the section line was where Mr. Boyer put the fence. Mr. Boyer is not a surveyor and testified that he understood that the section line was where the Green survey set it rather than where a stone he had not seen would have put it. (R 635 page 113/9). When Mr. Boyer engaged Mr. Green he gave him everything Mr. Green asked for. (R 635 page 69). Mr. Green had already done surveys in the area for a

neighboring property owner and was familiar with the area. (R 635 pages 70-71). Mr. Boyer testified that despite more than 30 hours of looking he had never seen a government stone where the Trust claimed it was. (R 635 page 58, 119).

*Cady v. Johnson* requires bad faith and lack of merit. The lack of merit issue was never argued to the trial court and there was no finding that Boyer Defendants's position lacked merit. To the contrary, the trial court found that though the Dannie Green survey was erroneous it did not rise to the level of malpractice. The Boyer Defendants' reliance on that survey is more than sufficient to immunize them from liability for attorney fees under Utah Code Anno. 78-27-56.

#### IV A(2). THE TRUST WAS NOT A PRIVATE ATTORNEY GENERAL

The Trust's reliance upon *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 783 (Utah 1994) is misplaced. They do not consider the actual holding of that case. There the court discussed at some length the private attorney general theory which allows a plaintiff whose actions benefit a greater group of people, in that case the rate payers of U.S. West Communications, Inc. The court then found "[t]here is no doubt that the plaintiffs in this case have conferred substantial benefits on all USWC ratepayers," *id*, and awarded attorney fees based on benefits bestowed on that larger group.

Here the Trust sued solely on its own account for damages it alleged had occurred to its own property. There was no allegation that the suit was to benefit the greater good and no corresponding finding or conclusion by the trial court. The rule of *Stewart* is

designed to help a very narrow group of plaintiffs. The Trust is not in that group.

This issue was not raised with the trial court. In the Trust's closing argument counsel briefly addressed the issue of fees at (R 637 659-60). The only basis for an award of attorney fees addressed there was the claimed "bad faith." (R 637 page 660).

This argument was not raised below. The Trust does not qualify for attorney fees under *Stewart*. This portion of the appeal must be dismissed.

#### IV B. THE TRUST DID NOT PROVE DAMAGES

The court described the Trust's evidence as to damage as not persuasive. (R 607). Their expert witness testified that the damage was \$67,649.25 if his construction company did the work but acknowledged on cross examination that ranchers in Summit County did not hire his company to do that sort of work because it was too expensive. Their rehabilitation expert, Mrs. Boyer's son-in-law, testified that he calculated the damages after looking at various web sites on Google and that he had no background or training which would allow him to offer an opinion on damages. The Trust had the burden of proof to establish its damages. *Crane Co. v. Dahle*, 576 P.2d 870, 872 (Utah 1978) The conflicting evidence did not establish the damages but only that the damages, if any, could not be quantified by the Trust. The Boyer Defendants put on evidence that the cost to move the fence would more closely approximate \$4500.00 but the fence has now been moved back to its original position so the Trust has no damages related to the move.

In response to the Trust's alleged damages the Boyer Defendants put on evidence which showed that; a) nature had restored the Trust's ground, and b) the manner in which the Trust cared for its ground elsewhere on the same section cast serious doubt on the Trust's claim for damages to the property generally. It is clear from the trial court's findings that court did not find the Trust's damage testimony credible.

#### IV C. THE PLAINTIFF DID NOT MARSHAL THE EVIDENCE ON DAMAGES

As argued above, *State v. Widdison*, 2001 UT 60, ¶ 60, 28 P.3d 1278 requires a party appealing from a bench trial to marshal the evidence on those points on which it believes the trial court erred. The Trust does not even use the term "marshal" in its brief. The Trust's argument is that their evidence preponderated. The court specifically discussed their evidence at paragraph 19 of the findings of fact and found it did not. The trial court went through each of the Trust's damage claims and found that they were either speculative or not proven. In conclusion of law five the court specifically rejected all damage evidence.

The trial court's findings show that it was left wondering if there was in fact any damage at all. If there was damage the trial court was further left wondering what the amount of that damage was. The Trust's suggestion that it was entitled to nominal damages is undercut by the trial court's finding that the Trust failed to prove there was actual damage notwithstanding the removal of some trees or that any particular number of trees were actually removed.

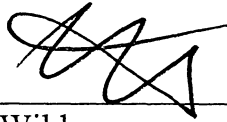
The Trust's case law is inapposite. In *Brereton v. Dixon*, 20 Utah 2d 64, 433 P.2d 3 (1967) the trees which were destroyed were part of an orchard. Similarly *Ault v. Dubois*, 739 P.2d 1117, 1121 (Utah Ct. App. 1987) is unavailing. There the court addressed the measure of damages for "ornamental trees or shrubbery." The trees on the property in this case were aspen. The court noted that the property was used for grazing. The exhibits show the removal of the trees allowed grazable plants to grow more freely. It can easily be argued removing the aspen enhanced the value of the property for grazing.

The Findings of Fact and Conclusions of Law show that the trial court did not believe the Trust had met its burden of proof. The Trust failed to marshal the evidence to show that the trial court abused its discretion in making those findings and reaching those conclusions. The appeal must be dismissed on this point.

#### CONCLUSION AND RELIEF SOUGHT

This court should dismiss the Trust's appeal and award the Boyer defendants costs and attorney fees pursuant to Rule 33 Utah R. App. P.

DATED THIS 5<sup>th</sup> DAY OF SEPTEMBER, 2007.

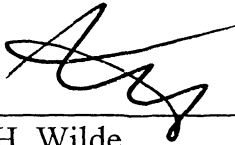
  
\_\_\_\_\_  
Robert H. Wilde  
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellees was served upon the following individuals by mailing a copy thereof, postage prepaid, at the following address this 5<sup>th</sup> day of September, 2007.

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\_\_\_\_\_  
Robert H. Wilde

# Addendum

# **Exhibit 1**



2006 DEC 11 AM 11:02

FILED BY



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

	-----oo0oo-----	
HELEN BOYER, A TRUSTEE,	)	ORDER AND JUDGMENT
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Civil No. 040500429 MI
THOMAS VERN BOYER & FEWKES	)	
CANYON, L.L.C.;	)	
	)	
Defendants.	)	Judge Bruce Lubeck
	)	
	-----oo0oo-----	

This matter came on regularly for trial to the court on September 27, 28, and 29, 2006. Plaintiff was represented by Ray G. Martineau and Brett D. Cragun and Defendants were represented by Robert H. Wilde. The court having previously made findings of fact and reached conclusions of law;

Now therefore it is hereby ordered, adjudged, and decreed;

1. Title is quieted between Sections 31 and 32, Township 3 North, Range 6 East, Salt Lake Base and Meridian, in that the section line between these two sections is determined to run in a

straight line in an approximately northern direction from the acknowledged common southern corner of the two sections to former location of the government monument at the existing south fence corner between sections 29 and 30 Township 3 North, Range 6 East, Salt Lake Base and Meridian, where the 1977-78 fence previously existed.

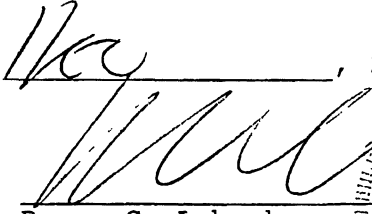
2. The Plaintiff's claim for damages is denied. Damages were not proven by a preponderance of the evidence.

3. There is no statute or contract which allows attorney fees in this matter. The request for attorney fees is denied.

4. No bad faith was proven. The request for punitive damages is denied.

5. The court urges the parties to cooperate in moving the fence from its current location to the section line found in paragraph one of this order.

DATED this 8 day of Nov, 2006.

  
Bruce C. Lubeck  
District Judge



Delivery Certificate

I hereby certify that a true and correct copy of the foregoing Order and Judgment was mailed to the following via first class mail, postage prepaid thereon, this 16<sup>th</sup> day of November, 2006.

Ray G. Martineau  
Anthony R. Martineau  
Brett D. Cragun  
3098 Highland Drive, Suite 450  
Salt Lake City, Utah 84106

Angie Wright

## **Exhibit 2**

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. Just what those sections entailed and now entail is at issue in this case.

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.

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 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 is 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 31 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 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. 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 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 effective for its purposes. Rather than have it torn down, new

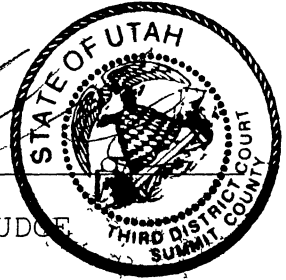
materials purchased and a new "range" fence erected (which fence would require far more maintenance and possibly engender further disputes) it seems a practical solution for defendant to move the existing 2003 fence onto the new boundary.

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 5th day of October, 2006.

  
Deputy Court Clerk

## **Exhibit 3**



#### **Rule 54. Judgments; costs.**

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(c)(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(d)(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

## **Exhibit 4**

**78-27-56**

**Statutes and Session Law**

**Title 78 - Judicial Code**

**Chapter 27 - Miscellaneous Provisions**

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

**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).

Amended by Chapter 92, 1988 General Session

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