

2006

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

Utah Court of Appeals

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Robert H. Wilde; Attorney for Appellees Boyers and Fewkes Canyon. John Braithwaite; Plant, Christensen and Kanell; Attorney for Appellee Dannie Green.

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

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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 “Boyer Appellees” and appellee Dannie Green will be referred to herein as “Green”.

## ARGUMENT

### Point I

#### **The Trial Court Erred When It Determined Dannie B. Green Was Not An Appropriate Party Defendant In This Case**

The primary issue in this case was a disputed boundary line. The reason a boundary line dispute existed is because Green incompetently completed and filed an inaccurate survey without having followed most of the required professional surveying standards in connection with its preparation. It was Green’s preparation and filing of this inaccurate survey which slandered the title to Helen Boyer’s property and provided the Boyer appellees with additional incentive to claim to a substantial portion of Helen Boyer’s property. Further, it was this inaccurate survey that caused Helen Boyer to incur considerable costs and attorney fees which were necessary to clear the title and remove trespassers from her property. Significantly, Green failed and refused to file a corrected survey notwithstanding the obvious inaccuracy of his originally filed survey until long after the trial.

When determining whether Green had a “duty” to Appellant Boyer (an adjoining landowner) to file an accurate survey, the trial court considered the issue to be a “close

and interesting” question. The trial court, however, determined that based upon public policy issues Helen Boyer had no claim against Green.

Under the facts and circumstances of this case, Green should have been allowed to be a party defendant in the case. The trial court questioned why Tom Boyer “felt the need to commission the 2003 survey.” While the necessity of Green’s 2003 survey is left to argument, the fact is it was completed at Tom Boyer’s request, and it was shown at trial to be faulty.

The question from a public policy standpoint is who should bear the responsibility and loss caused by Green’s defective survey? Helen Boyer is innocent and is not liable in any respect. Tom Boyer should bear responsibility for the loss. In speaking of Tom Boyer, the trial court indicated:

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 surveyor 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.

(R. 616-617)

Green should likewise be held liable for the loss as well. Green is a state licensed surveyor. He is a professional. Notwithstanding Tom Boyer's "mystifying" conduct in requesting that Green complete another survey after having commissioned two previous surveys and after having agreed to the boundary line established thereby, Green still had the professional obligation to perform his surveys in an appropriate manner even if his client Tom Boyer was not happy with the long established fence line and "could not seem to leave it."

By refusing to acknowledge the duty a surveyor owes to adjoining landowners, the trial court has placed surveyors in an enviable position. Based upon the trial court's ruling, a surveyor has no accountability to adjoining landowners. Consequently, whether the surveyor's client's motives are honorable or not, the surveyor can take comfort in knowing that he can rely solely on the representations of his client, ignore the applicable surveying standards and only have liability to his client. Based upon the trial court's ruling and the facts of this case, a surveyor can perform an inaccurate survey, file the same as required by statute, cause an innocent adjoining landowner to incur costs and fees to correct the inaccuracies, and remain fully insulated from liability.

As a matter of public policy, surveyors, as professionals, should be held directly liable for their actions and be required to correct their errors. The trial court concluded in this case that Green's survey was in error. After the trial, Green filed the "Affidavit Of Dannie B. Green" which is attached as Exhibit 1 to the Brief Of Appellee Dannie Green to cure his errors. Thus, Green was essentially able to sit on the sidelines during this course of this litigation and await the trial court's determination regarding the accuracy of

the survey he completed. Not until the trial was over did Green correct his survey as filed with the county. Had Green simply completed his work properly in the first place, it is unlikely that the Boyer Appellees would have had any legal basis to pursue their claims and it is also doubtful that Helen Boyer would have had to incur the time and expense of the trial.

Good public policy should protect the interests of an innocent party. When a surveyor creates the need for a landowner to resort to court action to cure the surveyor's deficiencies, the surveyor should be held accountable for damages. Such a policy not only protects the innocent landowner, but also promotes professionalism and provides an incentive for surveyors to complete their work in an accurate manner in the first place. The facts in this record should not have precluded Green from being named as a party defendant in this case.

### **Point II**

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

When the Boyer Appellees trespassed onto Appellant Boyer's property it is undisputed that they removed trees and other foliage. As it set forth in the case law cited in Appellant's Brief, when property is damaged the landowner is either entitled to have the property restored to its original condition or to recover damages for the property destroyed. In this case, the trial court expressly found that trees and foliage were removed but declined to award damages. As trees and foliage were in fact removed, the trial court had a duty to award an appropriate amount for the resulting damages and erred in not doing so.



### Point III

#### **The Trial 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.*

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....

As was stated in Point I above, the trial court in commenting on Tom Boyer's actions in this case stated, “If such conduct is not in bad faith, it is certainly mystifying to the court.” In this matter, Tom Boyer himself placed the 1977-78 fence and agreed at the courthouse meeting that the fence had been properly located. He further caused the 1977-78 fence to be moved to a new boundary line despite his having commissioned two previous surveys and again agreeing to the 1977-78 fence line in 1985. He was well aware that a number of others had viewed the stone at the corner of the 1977-78 fence. It appears the trial court, however, made its bad faith determination on Tom Boyer's conduct outside of the facts established by the record in this case. The trial court stated, “Tom Boyer seemed, however, to the court to be a sensible person in other areas of his

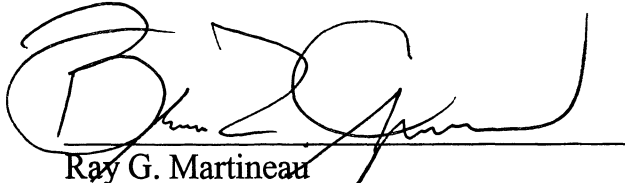
life. Based on a consideration of all factors, many no doubt unknown to the court, the court cannot find his actions in bad faith.”

The trial court should not have based its decision on its impressions concerning Tom Boyer’s sensibility in other areas of Tom Boyer’s life. What is relevant is Tom Boyer’s conduct in this case. The trial court should be required to focus on Tom Boyer’s conduct as established by the record in this case. The fact is his conduct forced Appellant, an elderly woman in her 80’s, to pursue litigation as her only means to remedy the situation. As such, 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 Appellant 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 21 day of November, 2007.



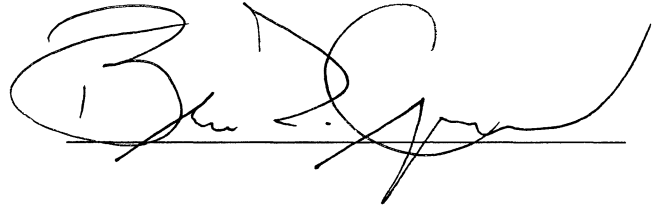
Ray G. Martineau  
Anthony R. Martineau  
Brett D. Cragun  
Attorneys For Plaintiff/Appellant

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Reply Brief Of Appellant was served upon the following individuals by mailing a copy thereof, postage prepaid, to said individuals at the following address this 21 day of November, 2007.

Robert H. Wilde  
935 E. South Union Avenue  
Suite D-102  
Midvale, UT 84047

John Braithwaite  
PLANT, CHRISTENSEN & KANELL  
136 East South Temple, Suite 1700  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "John Braithwaite", is written over a horizontal line. The signature is stylized and cursive.