

2006

Helen W. Boyer v. Thomas Vern Boyer, Carrie Gibson Boyer, Fewkes Canyon, LLC : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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.

Robert H. Wilde; Attorney for Boyers; John Braithwaite; Plant, Christensen & Kanell; Attorney for Green.

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

Recommended Citation

Brief of Appellee, *Boyer v. Boyer*, No. 20061163 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/7040

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

OCT 12 2007

IN THE UTAH COURT OF APPEALS

Appeal from the Final Judgment of the Third Judicial District Court of Summit County,
Honorable Bruce Lubeck

Robert H. Wilde
935 East South Union Avenue, Suite D-102
Midvale, Utah 84047
Attorneys For Appellees Boyers
and Fewkes Canyon

DESIGNATION OF PARTIES

Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106
Attorneys for Appellant Helen W. Boyer

John N. Braithwaite
Plant, Christensen & Kanell
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Tel.: (801) 363-7611
Attorney for Appellee Dannie Green

Robert H. Wilde
935 East South Union Avenue,
Suite D-102
Midvale, Utah 84047
Attorney for Appellees Thomas Boyer
and Fewkes Canyon, LLC

TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES	1
STANDARDS OF APPELLATE REVIEW	1
DETERMINATIVE STATUTES AND RULES	3
STATEMENT OF THE CASE	3
Nature of the Case	3
Course of Proceedings and Disposition at Trial Court.....	4
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENT	8
ARGUMENT.....	11
I. HELEN BOYER HAD NO CONTRACTUAL RELATIONSHIP WITH GREEN, AND DID NOT USE OR RELY UPON GREEN’S SURVEY. AS A NON-RELIANT THIRD PARTY WITH NO CONTRACTUAL RELATIONSHIP, HELEN BOYER’S NEGLIGENCE CLAIM AGAINST GREEN FAILS	11
II. THE CASES RELIED UPON BY HELEN BOYER DO NOT SUPPORT HER CLAIM AGAINST GREEN, AS SHE WAS A NON-RELIANT THIRD PARTY, HAVING NO CONTRACTUAL RELATIONSHIP WITH GREEN	18
III. AFTER A TRIAL OF THE ISSUES BETWEEN THE ADJOINING LANDOWNERS, THE DISTRICT COURT DETERMINED THAT GREEN’S SURVEY WAS NOT OUTSIDE THE STANDARDS OF THE PROFESSION	25
IV. HELEN BOYER FAILED TO PROVE ANY DAMAGES, AND IS PRECLUDED BY THE LAW OF THE CASE OR BY THE DOCTRINE OF ISSUE PRECLUSION FROM RELITIGATING THE ISSUE OF DAMAGES	30

V. THE APPELLANT, HELEN BOYER, HAS FAILED TO MARSHAL THE EVIDENCE ON DAMAGES.....	31
--	----

CONCLUSION.....	32
-----------------	----

ADDENDUM

Certified Copy of Affidavit of Dannie B. Green on file with the Summit County Surveyor as Survey No. S0006440	Exhibit 1
--	-----------

District Court’s Ruling and Order, dated February 7, 2006	Exhibit 2
---	-----------

TABLE OF AUTHORITIES

Cases Cited

<i>Allphin Realty, Inc. v. Sine</i> , 595 P.2d 860 (Utah 1979).....	2
<i>Biakanja v. Irving</i> , 320 P.2d 16 (Cal. 1958).....	19, 20
<i>Buehner Block Co. v. U.W.C. Assoc.</i> , 752 P.2d 892 (Utah 1988)	2
<i>Bushnell v. Sillitoe</i> , 550 P.2d 1284 (Utah 1976)	9, 14, 15, 17, 18, 22, 24
<i>Carlotta v. T. R. Stark & Associates, Inc.</i> , 470 A.2d 838 (Md. App. 1984).....	13, 17
<i>Copper State Thrift and Loan v. Bruno</i> , 735 P.2d 387 (Utah App. 1987)	28
<i>DeCapua v. Lambacher</i> , 663 N.E. 2d 972 (Ohio App. 1995).....	12, 17, 22, 24
<i>Eggett v. Wasatch Energy Corp.</i> , 2004 UT 28, 94 P.3d 193.....	2, 32
<i>Finlayson v. Finlayson</i> , 874 P.2d 843 (Utah App. 1994).....	16
<i>Gipson v. Slagle</i> , 820 S.W. 2d 595 (Mo. App. 1991).....	12, 13, 17, 22, 24
<i>Goodsel v. Dept. of Business Reg.</i> , 523 P.2d 1230 (Utah 1974)	2
<i>Hutchinson v. Dubeau</i> , 289 S.E. 2d 4 (Ga. App. 1982)	19
<i>In re Knickerbocker</i> , 912 P.2d 969 (Utah 1996)	2, 29
<i>Johnson v. Higley</i> , 1999 UT App 278, 989 P.2d 61	2, 29
<i>Kent v. Bartlett</i> , 122 Cal. Rptr. 615 (Cal. App. 1975).....	19
<i>Larson v. Overland Thrift and Loan</i> , 818 P.2d 1316 (Utah App. 1991).....	3
<i>Lindey's Inc. v. Goodover</i> , 872 P.2d 764 (Mont. 1994).....	13, 17, 22, 24
<i>Price-Orem Investment Co. v. Rollins, Brown & Gunnell, Inc.</i> , 713 P.2d 55 (Utah 1986).....	22, 23, 24
<i>Ramsey v. Hancock</i> , 2003 UT App 319, 79 P.3d 423	12

<i>Rozny v. Marnul</i> , 250 N.E. 2d 656 (Ill. 1969)	14, 18
<i>SME Industries, Inc. v. Thompson, Ventulett, Stainback & Assoc., Inc.</i> , 2001 UT 54, 28 P.3d 669	22
<i>Thompson v. Jess</i> , 1999 UT 22, 979 P.2d 322.....	1
<i>Thurston v. Box Elder County</i> , 892 P.2d 1034 (Utah 1995).....	28
<i>Trimble Real Estate v. Monte Vista Ranch</i> , 758 P.2d 451 (Utah App. 1988)	28
<i>West v. Inter-Financial, Inc.</i> , 2006 UT App 222, 139 P.3d 1059	22, 23, 24
<i>Wilson Supply, Inc. v. Fradan Mfg. Corp.</i> , 2002 UT 94, 54 P.3d 1177	3, 29
<i>Young v. Salt Lake City School District</i> , 2002 UT 64, 52 P.3d 1230.....	11

Statutes Cited

Utah Code Ann. § 17-23-17.....	16
Utah Code Ann. § 78-2a-3(2)(j)	1

Rules Cited

Utah R. Civ. P. Rule 52(a).....	3, 29
Utah R. Civ. P. Rule 56	3
Utah Rule of Evidence 201(b)	16

Other Authorities Cited

Restatement (Second) of Torts, Section 552	12, 15, 22, 23
--	----------------

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES

With respect to Dannie Green (“Green”), this appeal raises the following issues:

1. Did the District Court correctly conclude that Helen Boyer, as a non-reliant third party with no contractual relationship with Green, could not maintain a negligence claim against Green?
2. Did the District Court err in its determination, after a trial of the issues between the adjoining landowners, that Green’s survey complied with the standards of the profession?
3. Did the District Court err in its determination that the Appellant failed to sustain its burden of proof on damages?
4. May the Appellant challenge the factual findings of the trial court without marshaling the evidence to show that the evidence was legally insufficient to support the findings even when viewed in the light most favorable to the findings?

STANDARDS OF APPELLATE REVIEW

The applicable standard of appellate review on issue no. 1 above is correction of error. This Court reviews the District Court’s grant of summary judgment for correctness. *Thompson v. Jess*, 1999 UT 22, ¶ 12, 979 P.2d 322.

The standard of appellate review on the District Court's factual findings on issue no. 2 and issue no. 3 is the clearly erroneous standard. In reviewing the District Court's factual findings, this Court should not disturb the factual findings unless they were clearly erroneous. *Johnson v. Higley*, 1999 UT App 278, 989 P.2d 61. The clearly erroneous standard does not permit findings to be overturned unless the great weight of the evidence contradicts the finding. *In re Knickerbocker*, 912 P.2d 969, 979 (Utah 1996).

Although this Court reviews the District Court decision on issues of law for correctness without according deference to the trial court's legal conclusions, under standards of appellate review, this Court should affirm the District Court if its decision is sustainable on any proper ground. The Utah Supreme Court has stated that:

Under the rules of appellate review, we affirm the trial court if we can do so on any proper ground even if the court below assigned an incorrect reason for its ruling.

Allphin Realty, Inc. v. Sine, 595 P.2d 860, 861 (Utah 1979). *See also, Buehner Block Co. v. U.W.C. Assoc.*, 752 P.2d 892 (Utah 1988). This rule of appellate review applies even if the proper ground was not raised in or considered by the lower court, and even if the proper ground is not urged on appeal. *Goodsel v. Dept. of Business Reg.*, 523 P.2d 1230, 1232 (Utah 1974).

In reviewing the District Court's findings of fact, this Court must assume that the record supports the findings since the Appellant has failed to marshal the evidence.

Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 10, 94 P.3d 193. "To mount a successful

attack upon a trial court's findings of fact, an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below."

Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶ 21, 54 P.3d 1177.

Finally, any issue not raised in Appellant's main brief should not be considered by this Court on appeal. *Larson v. Overland Thrift and Loan*, 818 P.2d 1316, 1320 (Utah App. 1991).

DETERMINATIVE STATUTES AND RULES

There are no statutes determinative of this appeal. The issues on this appeal are governed by Utah case law and Rules 52(a) and 56 of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

Nature of the Case

This case involves a property boundary line dispute between the Helen W. Boyer Revocable Trust ("Helen Boyer") and Thomas Vern Boyer and Fewkes Canyon, LLC ("Tom Boyer"). Helen Boyer and Tom Boyer own adjoining sections of property, with Helen Boyer owning section 31 and Tom Boyer owning section 32 of Township 3 North, Range 6 East, Salt Lake Base and Meridian. These property owners disputed the proper location of a fence line between the two sections of property. The dispute had been pending for many years, and most recently concerned a new fence erected by Tom Boyer. Helen Boyer claimed that the new fence had been installed inside the eastern boundary of Section 31, thereby encroaching upon her property. Helen Boyer filed this action against

Tom Boyer seeking an order requiring Tom Boyer to remove the new fence and install a fence on the line where an old 1977-78 fence was previously located. Helen Boyer further sought declaratory judgment, seeking an order declaring the rights of the adjoining property owners and establishing the common boundary line.

By Second Amended Complaint, Helen Boyer joined Green as a defendant, alleging that Green negligently performed a survey of Section 32 for Tom Boyer, the adjoining property owner. The District Court granted Green's Motion for Summary Judgment, ruling that Green owed no duty to Helen Boyer, an adjoining landowner, who did not contract for the survey services and did not rely upon the survey services.

This matter went to trial between Helen Boyer and Tom Boyer, with the Court considering several past surveys that concerned the common boundary line. After trial of the evidence concerning the boundary line and the plaintiff's alleged damages, the District Court determined the boundary line between Section 31 and 32 and quieted title in each section to that boundary line. The Court further concluded that Helen Boyer had not proven damages as claimed, and rejected the testimony about damages. The Court ordered that the new fence erected by Tom Boyer be removed.

Course of Proceedings and Disposition at Trial Court

Helen Boyer filed the original complaint in this action against Tom Boyer on June 28, 2004. (R.1.) A Second Amended Complaint was filed on August 4, 2005, naming Green as a defendant, and asserting a negligence claim against Green in count III of the Second Amended Complaint. (R.192, 197.) Green filed a Motion to Dismiss or

alternatively, Motion for Summary Judgment on August 31, 2005. (R.203.) Upon completion of the briefing on Green's motion, a hearing was held on the motion on February 6, 2006. (R.283.) The Court granted Green's Motion for Summary Judgment by Ruling and Order dated February 7, 2006. (R.284-299; Addendum Exhibit 2.)

The case went to trial between Helen Boyer and Tom Boyer on September 27-29, 2006. By Memorandum Decision of the Court dated October 4, 2006, the Court quieted titled in the disputed property and ordered the newly erected fence to be moved to match the property line determined by the Court. (R.593-619.) The Court denied Helen Boyer's claim for damages, finding that the damages were not proven by a preponderance of the evidence. (R.626.) The final order and judgment of the Court was entered on December 11, 2006. (R. 625.)

STATEMENT OF FACTS

Helen Boyer's statement of facts primarily sets forth the findings of fact entered by the District Court following trial. Green does not dispute the findings of fact that are accurately recited from the trial court's memorandum decision, and the trial court's findings of fact provide background and much information concerning the claims between Helen Boyer and Tom Boyer. However, a more limited statement of facts is material to Helen Boyer's claim against Green. These facts are as follows:

1. Helen Boyer is the record title owner of Section 31, Township 3 North, Range 6 East, Salt Lake Base and Meridian ("Section 31"). (R.193, 596.)

2. Tom Boyer is the record title owner of Section 32, Township 3 North, Range 6 East, Salt Lake Base and Meridian (“Section 32”). (R. 194.)

3. Green surveyed the boundary of Section 32 for Tom Boyer at the request of Tom Boyer. (R. 206-7, Exhibit A – Affidavit of Dannie Green.)

4. In connection with Green’s survey of the property for Tom Boyer, Green filed a survey plat with the Summit County surveyor’s office. He did not file any survey or any other documents with Summit County other than the survey documents filed with the Summit County surveyor’s office under Title 17, Chapter 23 of the Utah Code. (R. 206-7, Exhibit A – Affidavit of Dannie Green.)

5. Count III of the plaintiff’s Second Amended Complaint asserted a claim against Green based upon negligence. Specifically, Helen Boyer asserted that Green’s actions in connection with his survey were carried out negligently and unprofessionally. (R. 197.)

6. At trial, the District Court heard and considered testimony from numerous witnesses concerning the boundary line between Sections 31 and 32, and specifically concerning a common corner at the north edge of the properties. (R. 605.) The Court heard and considered the testimony of various surveyors concerning surveys of the property in question. (R. 603; R. 636 pp. 144-236, 250-292, 338-380; R. 637 pp. 488, 602-610.)

7. After considering the evidence at trial, the District Court did not agree with the line determined by Green’s survey but concluded that “the process he engaged in was

not so flawed as to be without some merit and it was certainly not willfully 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.” (R. 613; and Appellant’s Addendum.)

8. In installing the 2003 fence, Tom Boyer pushed a fence line to allow access to the presumed boundary line. Helen Boyer claimed that her property had been damaged by this pushed line. Tom Boyer 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, pp.628-29.)

9. After trial, the District Court found the following as to the evidence presented by Helen Boyer on damages:

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 ten years. Moreover, this being range land it is not clear to the Court that any such costs are legitimate in any fashion. (R. 607-8; and Appellant's Addendum.)

10. The fence, which was the subject of the boundary line dispute between Helen Boyer and Tom Boyer, and which the District Court ordered to be removed, has now been removed by Tom Boyer. (See Tom Boyer's Suggestion of Mootness, filed with this Court on July 11, 2007.)

11. Following the District Court's declaratory judgment declaring the common boundary line and quieting title to the properties, Green filed an affidavit with the Summit County Surveyor's office attaching the District Court's Memorandum Decision so that the declaration of the common boundary by the District Court was made part of the record of survey. (See certified copy of Affidavit of Dannie B. Green, on file with the Summit County Surveyor as survey no. S0006440, attached as Addendum Exhibit 1.)

SUMMARY OF ARGUMENT

This case involves a boundary dispute between adjoining landowners, Helen Boyer and Tom Boyer. Green conducted a survey for Tom Boyer that concerned the subject boundary line. Helen Boyer disputed the surveyed property line and sued Tom Boyer for a judicial determination of the disputed line. Helen Boyer also attempted to

sue Green, contending that Green's survey was performed negligently. Helen Boyer never used or relied upon the survey, but simply disputed the accuracy of the survey.

Several courts have analyzed negligence claims asserted by a landowner against a surveyor hired by an adjoining landowner, where there was no contractual privity and where the claimant had not relied upon the survey. These cases have determined that the non-reliant third party has no cause of action based on negligence against the surveyor. The cases essentially reason that absent reliance, a claim for negligent misrepresentation fails.

The Utah case of *Bushnell v. Sillitoe*, 550 P.2d 1284 (Utah 1976) has similarly indicated that a property owner in Helen Boyer's position has no cause of action against the surveyor hired by another property owner, as she was not within the class of persons for whose guidance the information was supplied.

Helen Boyer's remedy in the instant matter was to seek a declaratory judgment determining the boundary line and quieting title. Her claim against Tom Boyer sought just that, and the District Court determined the boundary line and quieted title to that line.

The case law relied upon by Helen Boyer does not provide her with a cause of action against Green. The cases generally involved circumstances where a person was damaged by their reasonable reliance upon the survey. Accordingly, unlike the present case, the requisite elements of a cause of action for negligent misrepresentation were present in the cases relied upon by Helen Boyer.

The public policy reasons urged by Helen Boyer also fail to support her cause of action in this case. The District Court correctly determined that where there are competing surveys and the court is called upon to determine the appropriate boundary line, public policy does not require a cause of action in negligence against each of the surveyors involved by each of the property owners. Indeed, public policy suggests the opposite result under the circumstances of this case. Where the elements of a negligent misrepresentation claim do not exist, the plaintiff's remedy should lie with the declaratory judgment fixing the boundary and quieting title.

Subsequent to the dismissal of Green, this case went to trial between Helen Boyer and Tom Boyer to determine the boundary line. As part of the evidence at trial, Helen Boyer presented testimony from her own expert surveyors and also called Green as a witness. Helen Boyer maintained her contention that Green's survey was in error and that it was performed unprofessionally. In ruling on this issue, the District Court disagreed with the result of Green's survey, but determined that Green's survey was not done outside the standards of the survey profession. This determination by the District Court operates to preclude, by the issue preclusion branch of res judicata or by the law of the case doctrine, relitigation of the issue of Green's performance of the survey even if it is determined on this appeal that some basis could exist for Helen Boyer's negligence claim against Green. Helen Boyer contended that Green's survey was unprofessionally done, and the District Court determined the issue against her after a trial of the facts. The District Court's determination of this issue should be upheld on appeal as it involved

findings of fact, which are supported by the evidence and are not clearly erroneous.

Moreover, Helen Boyer, as the appellant, has failed to marshal the evidence in favor of the court's determination, and the court's ruling should be upheld on that basis.

At trial, Helen Boyer failed to prove damages. The District Court ordered that the fence be moved, and Tom Boyer has now moved the fence in accordance with the order. The court otherwise found the alleged damages to be speculative and unsupported. This finding as to damages should be upheld on appeal as the evidence showed that Helen Boyer had sustained no damages. The great weight of the evidence is certainly not contrary to that finding, but indeed supports the finding, and Helen Boyer has failed to marshal the evidence on the issue.

ARGUMENT

I. HELEN BOYER HAD NO CONTRACTUAL RELATIONSHIP WITH GREEN, AND DID NOT USE OR RELY UPON GREEN'S SURVEY. AS A NON-RELIANT THIRD PARTY WITH NO CONTRACTUAL RELATIONSHIP, HELEN BOYER'S NEGLIGENCE CLAIM AGAINST GREEN FAILS.

Green performed his survey work at the request of Tom Boyer, and Green's duties accordingly ran toward Tom Boyer. Green had no contractual relationship with Helen Boyer, and owed no independent duty to Helen Boyer. In order to prevail on a negligence claim under Utah law, a plaintiff must establish, among other things, that the defendant owed the plaintiff a duty of care. Absent a showing that the defendant owed any duty, the claim of negligence has no merit. *See Young v. Salt Lake City School District*, 2002 UT 64, ¶ 12, 52 P.3d 1230. The question of whether a duty exists is a

question of law to be determined by the Court and a motion to dismiss for failure to state a claim is properly granted where the defendant owed no duty to the plaintiff. *Ramsey v. Hancock*, 2003 UT App 319, ¶¶ 8, 20, 79 P.3d 423.

Several cases around the country have analyzed negligence claims brought by landowners against surveyors hired by adjoining landowners, and have held that the surveyors owed no duty to the landowner lacking contractual privity, and that claims of negligence and negligent misrepresentation failed for a lack of duty and a lack of reliance. In *DeCapua v. Lambacher*, 663 N.E. 2d 972 (Ohio App. 1995), a property owner brought an action for negligent misrepresentation against a surveyor hired by a neighboring property owner to establish the boundary line between the neighboring properties. The Court acknowledged that Ohio had recognized the doctrine of negligent misrepresentation as stated in section 552 of the Restatement (Second) of Torts. The Court held, however, that the duty acknowledged by section 552 does not extend to persons who do not rely upon the information, and hence does not extend to adjoining property owners who dispute the survey conducted. *See DeCapua* at 974.

In *Gipson v. Slagle*, 820 S.W. 2d 595 (Mo. App. 1991), the Missouri Court of Appeals similarly held that a surveyor hired by a landowner owed no duty of care to adjoining landowners. In *Gipson*, Mijal and the Gipsons were abutting property owners. Mijal hired a surveyor, Slagle, to perform a survey of the west boundary line of Mijal's property, which was a common boundary between Mijal's property and Gipson's

property. The appellate court affirmed the trial court's dismissal of the plaintiff's negligence claims against the surveyor, stating:

Here, as in *Baublit*, the Gipsons failed to show that the surveyor owed a duty of care to them or that they had relied upon the survey. The survey at issue was prepared by Slagle on behalf of the Mijals and there was no allegation of any action taken by the Gipsons in reliance upon the survey. In fact, the Gipsons disputed the boundary line established by the survey, rather than relied upon it.

Gipson, at 598.

Other cases around the country analyzing similar situations involving claims by landowners against surveyors, where the surveyor was hired by an adjoining landowner, have determined that the surveyor owed no duty to the adjoining landowner. *See, e.g., Lindey's, Inc. v. Goodover*, 872 P.2d 764 (Mont. 1994). Goodover hired surveyor Greg Martinsen to locate the boundary between Goodover's and Lindey's property, and plaintiff Lindey's hired a different surveyor. Lindey's filed suit alleging that Martinsen was negligent, and contended that Martinsen had a general duty to anyone affected by his survey. Lindey's also argued that Martinsen was negligent because he had an ongoing duty to change a survey if it was in error. The Montana Supreme Court concluded that Lindey's "failed to sustain its burden to show that an issue of material fact exists or that Martinsen owed it a legal duty. If no duty exists, there can be no tort of negligence." *See Lindey's*, at 767. *See also, Carlotta v. T. R. Stark & Associates, Inc.*, 470 A.2d 838, 840 (Md. App. 1984), ("a surveyor of a disputed boundary line does not owe a duty of care to a non-reliant third party adjacent landowner.")

The Utah Supreme Court has also addressed this issue and has indicated that a surveyor hired by one landowner owes no duty to the adjoining landowners. In *Bushnell v. Sillitoe*, 550 P.2d 1284 (Utah 1976), the Utah Supreme Court determined that a surveyor hired by one landowner owes no duty to the adjoining landowners. Appellant Helen Boyer relies upon certain language in *Bushnell* quoted from an A.L.R. annotated article, but misreads the law actually recognized and established by the Utah Supreme Court in *Bushnell*. *Bushnell* states, in no uncertain terms, that a party in Helen Boyer's position has no claim against the surveyor hired by an adjoining landowner. In *Bushnell*, plaintiff Bushnell brought an action against a neighboring property owner, Sillitoe, alleging encroachment. Bushnell joined the builder of the Sillitoes' home, who had constructed the home and sold it to the Sillitoes. Bushnell also joined Sandberg Engineers, who had surveyed the property for the builder. The builder filed a cross-claim against Sandberg, alleging that it had employed Sandberg to survey and stake the boundaries. A stipulation was entered in the case, whereby Bushnell's action was dismissed, and only the cross-claim by Sillitoes against the builder and Sandberg remained. The issue before the Supreme Court actually involved an issue of contribution between the builder and the surveyor. In ruling upon this issue, the Court stated that "Sandberg [the surveyor] owed no duty to the adjoining landowners, the Bushnells." *Bushnell*, at 1285. After reciting the case of *Rozny v. Marnul*, 250 N.E. 2d 656 (Ill. 1969), the Court in *Bushnell* again reiterated that:

In the instant matter, Bushnells are not within the class of persons for whose guidance the information was supplied by Sandberg. Thus, Sandberg could not be held liable to Bushnells.

Id. at 1286. (Emphasis added.)

The above determination by the Utah Supreme Court in *Bushnell* demonstrates that Helen Boyer does not have a cause of action against Green in the instant matter, where Green performed his survey work for Tom Boyer, an adjoining landowner. Helen Boyer had no contractual relationship with Green, and Green therefore owed no contractual duties to Helen Boyer. As to any alleged tort duty, Helen Boyer was not within the class of persons for whose guidance the survey was supplied by Green, and Green therefore could not be held liable to Helen Boyer, as indicated by the Supreme Court in *Bushnell*. Furthermore, Helen Boyer did not rely upon or use Green's survey in any way, but instead contested the survey, and therefore could not maintain a cause of action under section 552 of the Restatement (Second) of Torts, having not relied upon the survey. The District Court therefore correctly concluded that Helen Boyer could not maintain a negligence claim against Green.

Helen Boyer argues on appeal that her property was encumbered by Green's survey, that Green refused to amend or otherwise correct the alleged inaccuracies, and that the District Court's ruling in favor of Green precluded her from seeking any meaningful redress. (See Appellant's Brief, p. 22.) To the contrary, Helen Boyer had a remedy and pursued her remedy against the adjoining property owner, Tom Boyer. As the District Court ruled in deciding Green's motion for summary judgment, where there

are competing surveys in the case and the court is called upon to determine the proper boundary and quiet title to the properties, the declaratory judgment claim provided the plaintiff with a remedy. (*See District Court's Ruling and Order*, dated February 7, 2006, pp. 11-13, R. 294-296; Addendum Exhibit 2.) At trial, the District Court did just that – determined the boundary and quieted title in the properties.

Following the District Court's declaratory judgment, Green filed an affidavit with the record of survey in the Summit County Surveyor's Office, attaching the District Court's Memorandum Decision and Order and Judgment, which judicially determined the boundary line. *See* Affidavit of Dannie B. Green, filed with the Summit County Recorder, designated as depositor for survey plats in compliance with Section 17-23-17, Utah Code, Addendum Exhibit 1. (A certified copy of the Affidavit as filed with the Summit County Surveyor is attached as Addendum Exhibit 1.)

Green urges this Court to take judicial notice of the Affidavit of Dannie B. Green filed with the Summit County Surveyor. While the taking of judicial notice on appeal is discretionary and will be taken only where there is a compelling countervailing principle to be served, Green submits that the exercise of such discretion would be appropriate here. *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah App. 1994). Pursuant to Utah Rule of Evidence 201(b), the filing of the affidavit is a fact that is not subject to reasonable dispute and is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Green submits that taking judicial notice of the filing of the affidavit does not run contrary to procedural policy that

prohibits a party from raising issues on appeal that were not raised below, since the fact is not one that could have been raised in the court below. The affidavit was filed with the Summit County record of survey following the District Court's final order and judgment declaring the boundary line so that the District Court's determination of the boundary could be accurately set forth and made a part of the survey records affecting the subject properties.

As shown by Appellee Tom Boyer, the fence has been moved to the boundary line established by the declaratory judgment, as ordered by the District Court. (*See* Appellee Tom Boyer's Suggestion of Mootness, on file with this appeal, and Appellee Tom Boyer's Brief, p.2.) The District Court granted the declaratory relief sought by Helen Boyer. The common boundary line was determined by the District Court, title was quieted, the record of survey in Summit County reflects the District Court's determination of the boundary line, and the fence has been moved in accordance with the court's order. Helen Boyer has thus obtained her appropriate remedy.

Appellant Helen Boyer's negligence claim against Green fails as Green did not owe Helen Boyer a duty as an adjoining property owner. Helen Boyer did not rely upon Green's survey, but instead relied upon other surveys. As a non-reliant third party, Helen Boyer had no claim against Green according to the law set forth by the Utah Supreme Court in *Bushnell v. Sillitoe*, and recognized by other courts around the country. *See, e.g., DeCapua v. Lambacher*, 663 N.E.2d 972 (Ohio App. 1995; *Gipson v. Slagle*, 820

S.W.2d 595 (Mo. App. 1991); *Lindey's Inc. v. Goodover*, 872 P.2d 764 (Mont. 1994); and *Carlotta v. T.R. Stark & Associates, Inc.*, 470 A.2d 838 (Md. App. 1984).

II. THE CASES RELIED UPON BY HELEN BOYER DO NOT SUPPORT HER CLAIM AGAINST GREEN, AS SHE WAS A NON-RELIANT THIRD PARTY, HAVING NO CONTRACTUAL RELATIONSHIP WITH GREEN.

Helen Boyer first relies upon the Utah case of *Bushnell v. Sillitoe*, 550 P.2d 1284 (Utah 1976). As discussed, *supra* at p.14, Helen Boyer misreads the Court's discussion and holding in *Bushnell*, and simply relies upon language recited from an A.L.R. article in *Bushnell*. The Court in *Bushnell* stated that "Sandberg [the surveyor] owed no duty to the adjoining landowners, the Bushnells." *Id.* at 1285. The Court determined that the Bushnells were not within the class of persons for whose guidance the information was supplied by the surveyor, and that the surveyor could therefore not be held liable to the Bushnells in tort. Helen Boyer is similarly situated to the Bushnells, and Green cannot be held liable to Helen Boyer in the instant matter.

Helen Boyer next relies upon the case of *Rozny v. Marnul*, 250 N.E.2d 656 (Ill. 1969). Helen Boyer's reliance on *Rozny* is also misplaced. The plaintiff in *Rozny* was the vendee of the person for whom the survey was made. Thus, the plaintiff in *Rozny* was in the chain of title to the property for which the survey was conducted, and was within the class of persons for whose guidance the survey information was supplied. Moreover, the court's holding in *Rozny* was based in part upon an express guarantee provided by the surveyor. *Id.* at 663. *Rozny* therefore does not support Helen Boyer's position in this case.

The case of *Hutchinson v. Dubeau*, 289 S.E.2d 4 (Ga. App. 1982) also fails to support Helen Boyer's claim against Green. In *Hutchinson*, a Georgia statute imposed liability on the defendants so long as the plaintiff relied upon the survey. *Hutchinson* is therefore based upon a Georgia statute, which does not govern here. Moreover, the surveyor, Dubeau, was employed to prepare the plat for the plaintiff's predecessor in title, who subsequently sold the land to the plaintiff. *Hutchinson* stands for the proposition that a surveyor may be liable to third persons with whom he has no privity for negligent misrepresentation where the surveyor knew or should have known that such third persons would use or rely upon the plat in subsequent transactions involving the property. In dicta, the court in *Hutchinson* recognized that certain authority existed for holding a surveyor liable to third parties for negligent misrepresentations "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." *Id.* at 5. (Emphasis added.) Here again, Helen Boyer in the instant matter was not within the class of persons for whose guidance the Green survey was supplied, and Helen Boyer did not rely upon or use the Green survey. *Hutchinson* fails to support Helen Boyer's claim.

Helen Boyer's reliance upon *Kent v. Bartlett*, 122 Cal. Rptr. 615 (Cal. App. 1975) and *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) is similarly misplaced. In *Kent*, the plaintiff again was in the chain of title, having purchased the property in question from the person who had hired the surveyor. The Court held that the absence of privity of contract between the parties did not preclude the plaintiff's claim of negligence against

the surveyor, reasoning that the surveyor “could reasonably anticipate that it would be used and relied upon by persons such as plaintiffs, who purchased the property surveyed by defendant.” *Id.* at 619. Again, the necessary element of reliance is lacking in the instant matter.

Biakanja involved a negligence claim for the preparation of a will by a person who was determined to be engaged in the unauthorized practice of law. The California Court held that such conduct should be discouraged and determined that the beneficiary of the will would have a cause of action against the drafter of the will. The factors analyzed by the California Court in *Biakanja* are not governing here. Nevertheless, the public policy factors analyzed in *Biakanja* would not lead to a cause of action against Green in the instant case. In ruling on Green’s motion for summary judgment, the District Court ruled as follows:

. . . 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 property owner could claim negligence against a surveyor who disagrees with other surveyors, there would be no reason whatever that defendant [Tom] Boyer could not file a negligence claim against Kent Wilde or others who performed a previous survey.

* * *

However, on balance, as a matter of public policy, where there [sic] 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.
...

In this case, each surveyor will presumably testify, and the court will make findings 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.

... 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 property owner.

(District Court’s Ruling and Order, dated February 7, 2006, R. 292-295; and Addendum Exhibit 2.)

In this case, Helen Boyer did not use or rely upon Green’s survey, just as Tom Boyer did not use or rely upon other surveys. The District Court correctly concluded that negligence claims by adjoining, non-reliant, property owners should not be permitted under the circumstances of this case. To allow such claims could indeed result in a “free-for-all” of negligence claims against surveyors retained by adjoining property owners attempting to establish their property rights. Under different circumstances, such as those where the requisite elements for a claim of negligent misrepresentation are present, a different result may be warranted. Here, however, the elements for negligent misrepresentation do not exist.

The cases relied upon by Helen Boyer primarily address situations where the party making the claim against the surveyor purchased the property in question from the landowner who hired the surveyor. The plaintiffs in those cases relied directly upon the survey and a cause of action for negligent misrepresentation was acknowledged despite the lack of direct contractual privity. Those cases do not provide Helen Boyer with a cause of action against Green in the instant matter. Helen Boyer did not rely upon Green's survey, and in fact, contested the survey. Helen Boyer's status in the instant matter is therefore much like the plaintiffs' status in the cases of *DeCapua v. Lambacher*, 663 N.E.2d 972 (Ohio App. 1995), *Gipson v. Slagle*, 820 S.W.2d 595 (Mo. App. 1991), and *Lindey's, Inc. v. Goodover*, 872 P.2d 764 (Mont. 1994), which hold that a non-reliant third party has no cause of action against the surveyor hired by an adjoining landowner. The single Utah case that has examined this issue, *Bushnell v. Sillitoe*, has similarly stated that a surveyor hired by one landowner owes no duty to the adjoining landowners.

The case of *West v. Inter-Financial, Inc.*, 2006 UT App 222, 139 P.3d 1059 does not lead to a different result. *West* held that a real estate appraiser, like other real estate professionals, has an independent duty to non-contracting parties who rely upon the work of the appraiser. This Court in *West* cited prior Utah Supreme Court cases where the Supreme Court had "under certain circumstances recognized that economic losses are recoverable in tort under section 552 [of the Restatement (Second) of Torts]." *West*, at ¶13, quoting *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Assoc., Inc.*, 2001 UT 54, 28 P.3d 669. "For example, in *Price-Orem Investment Co. v. Rollins, Brown &*

Gunnell, Inc., 713 P.2d 55 (Utah 1986), the supreme court held that the plaintiff was not barred from pursuing its negligent misrepresentation action against a defendant surveyor even though the party was not in privity of contract.” *Id.* In *Price-Orem*, the surveyor had surveyed and staked buildings for a shopping center being developed by Price-Orem Investment. The surveyor’s contract was with the general contractor, John Price Associates. The Supreme Court upheld Price-Orem Investment’s cause of action for negligent misrepresentation against the surveyor despite the lack of contractual privity. The court specifically recognized the viability of a cause of action for negligent misrepresentation against the surveyor, indicating that both John Price Associates and Price-Orem Investment “were entitled to reasonably rely upon the information provided by [the surveyor]. And Price-Orem, as the owner of the property for whose benefit the shopping center was being constructed, was clearly a party whose justifiable reliance upon the accuracy of the survey might be reasonably foreseen.” *Price-Orem*, at p. 59-60. Importantly, the tort cause of action recognized was one of negligent misrepresentation. The developer was within the group of persons for whose benefit the survey was performed and the developer reasonably relied upon the survey.

In *West*, this Court recognized that under section 552 of the Restatement (Second) of Torts, a real estate appraiser “is liable to ‘a limited group of persons for whose benefit and guidance he [or she] intended to supply’ the information if it justifiably relied on it.” *West*, at ¶27. Unlike the circumstances in *West* and *Price-Orem*, Helen Boyer is not within the group of persons for whose benefit the Green survey was performed.

Moreover, Helen Boyer did not rely upon Green's survey. The circumstances here are far different in that Helen Boyer contested Green's survey and had other surveyors upon whom she relied. Helen Boyer does not have a claim for negligent misrepresentation against Green, just as Tom Boyer would not have a claim for negligent misrepresentation against surveyors hired by Helen Boyer.

The law set forth in *West* should not apply to a non-reliant third party. Numerous decisions around the country have held that a non-reliant third party has no cause of action against a surveyor hired by an adjoining landowner. The Utah Supreme Court, in *Bushnell v. Sillitoe*, 550 P.2d 1284, has also stated that a surveyor hired by one landowner owes no duty to the adjoining landowners. Green acknowledges that the law set forth in *Price-Orem* recognizes a negligent misrepresentation claim where the facts give rise to such a cause of action. However, where the claimant is not within the group of persons for whose guidance the information was supplied and where there is no reliance, the tort of negligent misrepresentation is not viable. *Bushnell v. Sillitoe* governs the instant matter. As set forth in *Bushnell*, and other cases around the country, such as *DeCapua v. Lambacher*, *Gipson v. Slagle*, and *Lindey's v. Goodover* dealing with claims against surveyors by non-reliant third parties, there is no duty owed to a non-reliant third party property owner.

The cases relied upon by Helen Boyer do not govern or apply to this matter, and the claim against Green was accordingly properly dismissed by the District Court.

III. AFTER A TRIAL OF THE ISSUES BETWEEN THE ADJOINING LANDOWNERS, THE DISTRICT COURT DETERMINED THAT GREEN'S SURVEY WAS NOT OUTSIDE THE STANDARDS OF THE PROFESSION.

After the dismissal of Helen Boyer's claim against Green, this case went to a bench trial before the Honorable Bruce Lubeck for three days. (R.635-637.) The Court considered the testimony of various surveyors who had performed surveys affecting both Section 31 and Section 32, owned by Helen Boyer and Tom Boyer, respectively. The Court heard and considered the testimony of Helen Boyer's two expert witness surveyors, John Stahl (R.637, pp. 488-539.), and Kent Wilde (R. 636, pp. 338-368.), and also heard and considered Green's testimony concerning the boundary line in question. (R.636, pp.144-237; R. 637, pp.602-610.) Indeed, the court heard testimony about numerous surveys that concerned the common north corner of the properties. (R.637, p.539.) After considering all of the evidence, the Court made the following findings of fact pertinent to Green's performance of the survey work:

16. . . . 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,

Green explained his procedures and the reasons for his results. . . . 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.

* * *

18. . . . The [original 1874 field] 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.

(District Court’s Memorandum Decision, dated October 4, 2006, Findings of Fact nos. 16, 18, R. 603-607.)

Ultimately, based upon its findings of fact, the District Court agreed with other surveyors and disagreed with Green’s survey, declaring the boundary between Section 31 and Section 32 to be along the old fence line. While the District Court disagreed with Green’s survey, the Court expressly determined that Green’s survey was not done outside the standards of the profession. The Court’s pertinent conclusions of law, based upon its findings of fact, are as follows:

2. . . . There is certainly a conflict whether the stone was at a common boundary, but on balance the Court concludes it was. . . . 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. . . . 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'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 willful 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 willfully 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.

(District Court's Memorandum Decision, dated October 4, 2006, Conclusion of Law no. 2, R. 610-613.)

Based upon a trial of the evidence, the Court found and concluded that Green's survey work did not fall outside the standards in the survey profession, although the Court disagreed with the boundary line determined in Green's survey. This determination by the trial court came after hearing much testimony from several different surveyors concerning the disputed property line, and after hearing argument from Helen Boyer's counsel, contending that Green did not comply with standards in the profession. (R.637, pp. 651-657.) Having presented its evidence concerning Green's survey, and having contended that the survey was erroneous and performed unprofessionally, Helen

Boyer is bound by the District Court's determination that Green's survey did not fall below the standard of care in the surveying industry. Thus, even assuming some duty owed to Helen Boyer by Green, Green would not be liable to Helen Boyer, by virtue of the law of the case doctrine or the issue preclusion branch of res judicata, as the District Court has determined that Green's survey complied with the standards in the survey profession. The "law of the case" doctrine provides that a decision made on an issue during one stage of a case is binding in successive stages of the same case. *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). Under one branch of the doctrine, a court is justified in refusing to reconsider matters resolved in a prior ruling in the same case for reasons of efficiency and consistency. *Id.* at 1038. Under issue preclusion, the relitigation of factual issues that have once been litigated and decided is precluded even if a different claim for relief is brought, and even if only "the party *against whom* the doctrine is asserted was a party or in privity with a party to the prior adjudication." *Trimble Real Estate v. Monte Vista Ranch*, 758 P.2d 451, 453 (Utah App. 1988), quoting *Copper State Thrift and Loan v. Bruno*, 735 P.2d 387, 390 (Utah App. 1987).

Applied to the instant matter, the law of the case doctrine or issue preclusion should preclude Helen Boyer from relitigating the issue of Green's conduct in performing his survey for Tom Boyer. Although Green was not a party to the case at the time of trial, nothing prevented Helen Boyer from putting on evidence concerning Green's survey or the basis for Green's survey, and Helen Boyer in fact called Green as a witness during her case in chief. She also presented testimony from her two surveyor experts,

John Stahl and Kent Wilde, contending that Green's survey was in error. (R. 636, pp. 338-368; R. 637, pp. 488-539, 641-644.) The District Court fully considered Green's performance of the survey for Tom Boyer, and made findings and conclusions regarding Green's performance. Helen Boyer is precluded from relitigating this issue.

Accordingly, the District Court's ruling dismissing Helen Boyer's claim against Green should be affirmed even if some theoretical basis exists for a cause of action against Green in favor of Helen Boyer, as the District Court found after a trial of the issues that the survey conducted by Green was not outside the standards in the survey profession.

The District Court's determination of this issue was based upon its findings of fact at trial, which should not be disturbed unless they are found to be clearly erroneous.

Johnson v. Higley, supra. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. Proc. 52(a). "The trial court is not required to recite each indicia of reasoning that leads to its conclusion, nor is it required to marshal the evidence in support of them." *In re Knickerbocker*, 912 P.2d 969, 979 (Utah 1996). Although the trial court need not marshal the evidence to support its findings, the appellant must marshal the evidence if it seeks to overturn the trial court's findings. *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶21, 54 P.3d 1177. Because Appellant Helen Boyer has failed to marshal the evidence on this issue, the findings have not been properly challenged on appeal and the findings must be upheld.

IV. HELEN BOYER FAILED TO PROVE ANY DAMAGES, AND IS PRECLUDED BY THE LAW OF THE CASE OR BY THE DOCTRINE OF ISSUE PRECLUSION FROM RELITIGATING THE ISSUE OF DAMAGES.

After considering the evidence on damages offered by Helen Boyer at trial, the District Court determined that no damages had been proven. Indeed, there were no damages sustained, and the declaratory judgment fixing the boundary line and quieting title provided Helen Boyer with the necessary remedy. The fence was then moved by Tom Boyer and there is nothing further to remedy. In its finding of fact no. 19, the District Court found as follows:

19. The evidence presented by plaintiff as to damages was not persuasive. . . . 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.

(District Court's Memorandum Decision, dated October 4, 2006, Finding of Fact

no. 19, R. 607, 608.) (Emphasis added.) In Conclusion of Law No. 5, the District Court stated:

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 the 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.

(District Court's Memorandum Decision, dated October 4, 2006, Conclusion of Law no. 5, R. 615, 616.)

Having made the factual finding that the plaintiff's evidence on damages was based upon conjecture, and having determined that the evidence was too speculative, the District Court's decision precludes Helen Boyer from relitigating the issue of damages by the law of the case and/or the issue preclusion doctrines. As set forth, *supra*, the doctrines of law of the case and/or issue preclusion preclude the relitigation of these issues by Helen Boyer. Thus, even assuming a potentially viable cause of action by Helen Boyer against Green, Helen Boyer failed to prove any damages in the trial between the Boyer parties, and is bound by the factual findings as to damages. Without damages, any potential claim of negligence against Green fails as a matter of law.

Following entry of the District Court's final order and judgment, Tom Boyer removed the encroaching fence as ordered by the court, and the fence has been placed along the line declared in the order and judgment. (*See* Appellant's Brief, p. 24.)

V. THE APPELLANT, HELEN BOYER, HAS FAILED TO MARSHAL THE EVIDENCE ON DAMAGES.

In the interest of brevity and to avoid duplication, Green hereby incorporates and adopts by reference the arguments and authorities contained in the brief of Appellees Tom Boyer and Fewkes Canyon, LLC on the issue of the Appellant's failure to marshal

the evidence on damages. The appellate court “does not review the trial court’s factual findings where the party challenging those findings fails to marshal the evidence. Instead, the court of appeals must ‘assume that the record supports the findings of the trial court.’” *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶10, 94 P.3d 193. As the Appellant has failed to marshal the evidence on damages, to show that the trial court’s findings were clearly erroneous, the appeal from the trial court’s decision on damages fails. The trial court’s decision on the issues of damages should therefore be affirmed.

CONCLUSION

The negligence claim against Green fails, as Helen Boyer was a non-reliant third party and therefore cannot satisfy the elements required for negligent misrepresentation. Her remedy was to seek a declaratory judgment for a judicial determination of the disputed boundary, which is exactly what occurred in the District Court. At trial, the court determined that Green did not breach the standard of care in the surveying profession. The law of the case doctrine and/or issue preclusion prevent Helen Boyer from relitigating this issue. The determination is based upon findings supported by the evidence, which findings are not clearly erroneous and have not been properly challenged by the Appellant.

Helen Boyer’s asserted damages were found to be based upon conjecture. Indeed, there were no actual damages. The District Court’s findings as to damages are supported by the evidence. They are not clearly erroneous, and were not challenged by Helen

Boyer by marshaling the evidence. Without damages, any theoretical negligence cause of action against Green further fails.

The District Court properly granted Green summary judgment. Green requests that this Court affirm the District Court's order granting summary judgment to Green, and requests that this Court affirm the District Court's findings and conclusions with regard to Green's performance of the survey and affirm the findings and conclusions with regard to damages.

DATED this 12th day of October, 2007.

PLANT, CHRISTENSEN & KANELL

A handwritten signature in cursive script, reading "John N. Braithwaite", is written over a horizontal line.

JOHN N. BRAITHWAITE
Attorney for Appellee Dannie Green

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Brief of Appellee Dannie Green were served by U.S. Mail, first class, postage prepaid, on this 12th day of October, 2007 to the following:

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

Robert H. Wilde
935 East South Union Avenue, Suite D-102
Midvale, Utah 84047



ADDENDUM

Certified copy of Affidavit of Dannie B. Green, on file with
the Summit County Surveyor as survey no. S0006440 Exhibit 1

District Court's Ruling and Order, dated February 7, 2006 Exhibit 2

Tab 1

136 E. South 1st Apt
Suite 1700
Salt Lake City, UT 84111

FILE No	S0006440		
FILED AT THE REQUEST OF:	Plant Christensen & Kanell		
	ALAN SPRIGGS SUMMIT CO. RECORDER		
FEE \$	70.00	By	J. Bowen
FILED	3-15-07	at	9:45 A.M.

AFFIDAVIT OF DANNIE B. GREEN

STATE OF UTAH)
)
) :ss
COUNTY OF Washington)

Dannie B. Green, being duly sworn, deposes and states as follows:

1. I am a licensed surveyor, licensed as such under the laws of the state of Utah.
2. I performed a survey of Section 32, Township 3 North, Range 6 East, Salt Lake Base and Meridian, which survey is dated September 24, 2003, and was filed with the Summit County Surveyor's Office according to Utah Code Ann. §17-23-1 on or about December 10, 2004, as Survey No. S-5664.

3. I also performed a survey covering Sections 28, 29, 32, N ½ 33, Lot 3 Middle Canyon Ranch, Township 3 North, Range 6 East, Salt Lake Base and Meridian, which survey is dated April 5, 2001, and was filed with the Summit County Surveyor's Office according to Utah Code Ann. § 17-23-1 on or about July 11, 2001, as Survey No. S-4041.

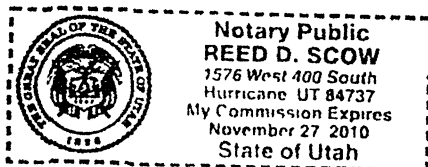
4. The location of the common corner to sections 29, 30, 31 and 32 of Township 3 North, Range 6 East, Salt Lake Base and Meridian, and the boundary between Section 31 and Section 32 were the subject of a civil lawsuit, Case No. 040500429, filed in the Third Judicial District Court, in and for Summit County, State of Utah. The Court in that case entered a Memorandum Decision on October 4, 2006 concerning the common corner and the boundary line between Sections 31 and 32. The Court's Decision states, in part, on page 21 of the Memorandum Decision:

[T]he 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.

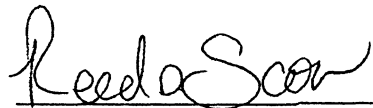
A true and complete copy of the Court's Memorandum Decision dated October 4, 2006 is attached hereto. A copy of the Court's Order and Judgment signed by Judge Bruce C. Lubeck on December 8, 2006 and filed with the clerk of the court on December 11, 2006, is also attached hereto.

DATED this 6th day of March, 2007.




Dannie B. Green

SUBSCRIBED and SWORN to before me this 6 day of March, 2007.


Notary Public
Residing at: Hurricane, Utah

My Commission Expires:

11-27-2010

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.	MEMORANDUM DECISION Case No. 040500429 Judge BRUCE C. LUBECK DATE: October 4, 2006
---	--

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), Edlson (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 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 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 found on section 31 and on section 32.

Mr. 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 determine what principles were violated and what were followed is rather unrealistic. In 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 no one right answer but that there is a range of error 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 an endeavor

Green explained that the common corner of sections 29, 30, 31 and 32 is where it is shown on plaintiff's exhibit 4. That is, favoring defendants, is about 120 feet west of the north boundary of where plaintiff claims the boundary is. Green explained that he considered the previous survey 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.

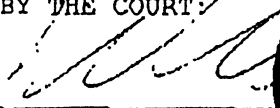
9. The court believes it probably cannot force this result or force any cooperation but believes that what makes sense in this case is for the existing 2003 fence to be relocated to the boundary as found herein. It is a quality fence, lasting and effective for its purposes. Rather than have it torn down,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



2006 DEC 11 AM 11:02

FILED BY JS

ROBERT H. WILDE #3466
ROBERT H. WILDE, ATTORNEY AT LAW, P.C.
Attorneys for Defendants
935 East South Union Avenue Suite D-102
Midvale, Utah 84047
Telephone: (801) 255-4774

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 MJ
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.

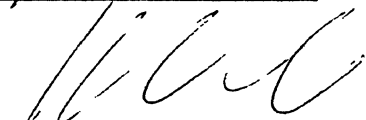
2. The Plaintiff's claim for damages is denied. Damages were not proven by a preponderance of the evidence.

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 May, 2006.



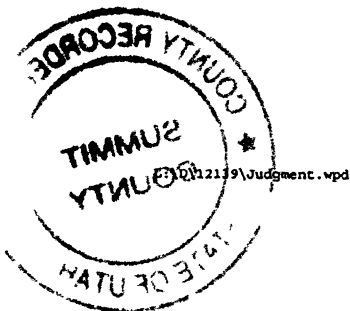
Bruce C. Lubeck
District Judge

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 16th 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

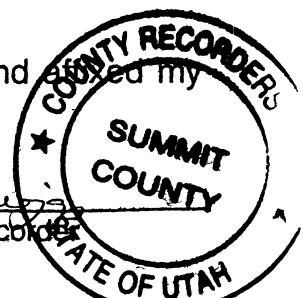


STATE OF UTAH } ss.
County of Summit }

I, Alan Spriggs, Summit County Recorder, State of Utah, designated as depositor for Survey plats filed in compliance with Section 17-23-17 Utah Code Annotated, do hereby certify that the attached is a full, true and correct copy of that certain Officiant filed on the 15th day of March, 2007, as File No. S-6440.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 1st day of October, 2007.

Alan Spriggs
Summit County Recorder



Tab 2

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

HELEN BOYER, Trustee, Plaintiff, vs. THOMAS VERN BOYER, FEWKES CANYON LLC, and DANNIE B. GREEN, Defendants.	RULING and ORDER Case No. 040500429 Honorable BRUCE C. LUBECK DATE: February 7, 2006
---	--

The above matter came before the court on February 6, 2006, for oral argument on various motions. Plaintiff was present with Ray G. Martineau, and defendants Boyer and Fewkes were present through Robert H. Wilde and defendant Green was present through John N. Braithwaite.

Green filed a motion to dismiss or in the alternative motion for summary judgment on August 31, 2005. Boyer and Fewkes filed a concurrence with the motion on September 6, 2005. Plaintiff filed an opposition response on October 4, 2005. Plaintiff filed an opposition on October 12, 2005. Green filed a reply on November 2, 2005, as well as a notice to submit.

Boyer and Fewkes moved on October 12, 2005, to strike the expert report of Stahl. Plaintiff filed an opposition response on October 31, 2005. Boyer filed a reply on November 9, 2005. Plaintiff filed a notice to submit this motion on November 14, 2005.

Oral argument was scheduled previously and postponed and

then held February 6, 2006. The court took the matter under advisement.

The court has reviewed the pleadings of the parties, heard oral argument, and concludes as follows.

BACKGROUND

Plaintiff filed a complaint June 28, 2004. After motion and argument, the court allowed an amended complaint to be filed. Plaintiff filed a second amended complaint on August 4, 2005. In summary, that complaint alleged plaintiff is the trustee of the L.E. Boyer and Helen W. Boyer Revocable Trust. The plaintiff alleged that she and her predecessors have an interest and record title in Section 31 TS3N, R6E in Summit County, which boundaries were set in 1875 by a U.S. Survey. Boyer and Fewkes have an interest in adjoining Section 32, and the complaint alleges that the common boundary between those two sections has been marked by a fence erected in 1977 or 1978. In July, 2003, defendant Boyer attempted to change the location of the boundary by removing the old fence which served as the boundary and erecting a new fence that impinges upon Section 31 owned by plaintiff. Green was engaged to survey the boundary in May 2002 by Boyer and it is alleged Boyer mislead Green by failing to provide certain documents, and Green negligently and unprofessionally failed to

perform his duties properly, and thus improperly advised Boyer as to the boundary. Green also filed a plat in December, 2004, and thus clouded title to Section 31.

The complaint alleges causes of action for (1) tortious conduct against Boyer; (2) she seeks an order requiring Boyer to replace the old fence and remove the new fence; (3) alleges negligent conduct against Green in undertaking the survey; (4) seeks declaratory judgment as to the common boundary; and (5) seeks punitive damages against Boyer for his willful conduct.

ARGUMENTS

1. MOTION TO DISMISS, ALTERNATIVELY MOTION FOR SUMMARY JUDGMENT.

Green moves to dismiss under rule 12(b)(6), or alternatively for summary judgment on all claims against him, alleging those are for negligence and for wrongful lien and slander of title. Only causes three and four are alleged against Green.

Green asserts as facts that he performed a survey at the behest of Boyer to determine the boundary of Section 32. Green filed a survey plat with the Summit County Surveyor's Office.

As to the filing of the plat, Green contends that the fourth cause of action is for wrongful lien. The filing of the survey by Green under UCA 17-23-17 is not a wrongful lien, as it does not purport to create an encumbrance or lien on real property, and the filing of the plat is authorized by Utah statute.

Further, Green is not a lien claimant, as he claims no interest in any of the properties involved. Further, because under Utah law the plat was filed with the county recorder as there is no county surveyor, the filing was not with the recorder and so no wrongful lien could be created.

As to the negligence claim, Green performed the work for defendant Boyer, not plaintiff, and he owed no independent duty to plaintiff. Contract duties ran to Boyer, not plaintiff. As there was no duty to plaintiff, no negligence claim can be valid. Green attaches his affidavit.

In opposition, plaintiff disputes that Fewkes owns Section 32 as there is a contest over a corner of that section. Plaintiff also disputes the survey by Green, alleging it was negligently performed. Plaintiff alleges earlier surveys, from 1875 and 1974, showed the common boundary between Section 31 and 32, and that boundary was marked by the fence erected in approximately 1978, well before defendant Boyer put up a new fence in 2003. A 1960 survey by Clark showed that there was a common corner between sections 29, 30, 31 and 32. A fence was erected based on that 1960 survey and it marked the boundary. In the early 1960s a survey was done by Burton which confirmed the fence as the north boundary of Section 31. In 1976 a survey was done by Malan on Section 32 which also confirmed the old fence as the common boundary. In 1978 Wilde undertook to retrace the Malan

survey for plaintiff's husband and did so, locating the stone that had been placed by Malan. Based on that, defendant Boyer installed a fence on the common boundary. In 1985 Christensen did a survey at the request of Boyer which confirmed the boundary. Boyer is claimed to have agreed in 1985 that the Malan, Christensen, and Wilde surveys accurately located the fence and common boundary.

Boyer and Kent Henrie, owner of Section 29, hired Green in 2002 and Green did a survey that year and prepared a plat purporting to place the location of the north end of the common boundary approximately 500 feet west of the common corner, thereby taking approximately 25 acres from Section 31 and adding them to Section 32. Boyer did not provide information he knew and had acknowledged to Green and Green did not find an affidavit on file with the county recorder concerning Sections 31 and 32, and Green, though aware of Wilde and his survey, did not contact him nor seek his input, nor did Green contact plaintiff and Green did not follow standard procedures for surveying. Boyer then wilfully removed the old fence he had previously erected and completed a new fence between Sections 31 and 32 according to the Green survey. Wilde has since then informed Green of his errors, but Green refuses to acknowledge those errors and will not amend his plat that was filed in December, 2004. Plaintiff argues there is a duty to neighboring landowners by surveyors, regardless of who

hires them, a duty in tort not affected by a contractual relationship.

As to the lien claim, plaintiff claims again the plat was wrongly filed as it is incorrect, as the result of negligence. Even though Green is not a lien claimant, the statute provides a wrongful lien by any person may be compensable.

In reply Green challenges plaintiff's disputes as not being relevant, as the issues are issues of law. The court should interpret the recording of the plat as a matter of law, not fact. Green asserts it is immaterial what the previous surveys showed or did not show. Green argues as a matter of Utah law there is no duty to plaintiff and thus there can be no negligence. As to the lien claim, Green again argues the plat was authorized by law to be recorded with the recorder instead of the surveyor, it was "filed" and not "recorded" and is simply not a lien.

As to the slander of title claim, plaintiff has not alleged and cannot prove that any action of Green was with malice. Further, plaintiff can show no special damages.

Boyer's arguments in favor of dismissal as to Green urge that plaintiff has at most alleged negligence against Green. The second amended complaint does not allege a wrongful lien. The complaint does not allege malice or wilfulness against Green. Plaintiff has not pleaded slander of title. Plaintiff has not relied on the survey which is allegedly defective. If the survey

is in error, plaintiff can be compensated and recover against the other defendants. If the survey is correct, there would be no damages.

2. MOTION TO STRIKE EXPERT REPORT OF STAHL.

Boyer moves to strike the expert report of John B. Stahl. Boyer argues that the Rule 26(f) plan was submitted and expert reports were to be submitted by April 30, 2005. Further, the report contains improper legal conclusions.

Plaintiff opposes the motion. Plaintiff argues that she learned on December 15, 2004, that Green had filed his survey on December 10, 2004. Thus, plaintiff sought to add Green as a defendant and that was allowed July 18, 2005. Plaintiff had no reason to file an expert report until that was allowed. As to the content, that is for the weight and does not go to whether the report should be filed.

In reply Boyer argues plaintiff has an expert, Wilde, and that Stahl is merely surplus and is late and if allowed as an expert, would have to be deposed.

DISCUSSION

1. MOTION TO DISMISS, OR FOR SUMMARY JUDGMENT.

The court treats the motion as one for summary judgment as there are attachments to the motion which have not been stricken.

This is a most interesting question, made more difficult by

Green's reading of the complaint. The court does not read the complaint as does Green.

Previously, the court allowed the second amended complaint so plaintiff could file a wrongful lien claim. The court does not see in the second amended complaint a direct cause of action for wrongful lien, though plaintiff and Green seem to agree such a cause of action is implied. As to Green, plaintiff alleges negligence in the third cause of action and in the fourth, seeks a declaratory judgment as to the boundary involved. The second amended complaint incorporates previous allegations, but none state directly, in the court's reading, that a wrongful lien is claimed.

As to the wrongful lien claim, if there is one in the second amended complaint, the court believes it cannot stand. The court reads the wrongful lien statute as does Green.

First, Green must be a lien claimant, a person claiming an interest in the property. The liability section, UCA 38-9-4, sets forth possible damages as to the actions of a lien claimant, not to "any person, " UCA 38-9-4(3), but to "a person" which refers to the previous subsections (1) and (2), which require a lien claimant. Plaintiff reads UCA 38-9-4(3) as allowing a claim by any person, and the court believes that statute applies only to lien claimants.

Thus, the court need not consider whether this was a

"wrongful lien" under UCA 38-9-1(6), nor whether any exceptions thereunder apply.

Green was not and is not a lien claimant and thus there was and is no wrongful lien filed by Green when he filed the plat.

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 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 property 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 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 known 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 findings 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 property owner.

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 conclusion of the court as to duty owed.

The parties argued about slander of title and whether that is included in the second amended complaint. The court again does not believe it is pleaded, and the second amended complaint certainly does not include a claim of malice to support a claim of slander of title against Green. Plaintiff suggests that she ought to be allowed to amend again and correct that deficiency if it exists.

The court believes the declaratory judgment claim of the fourth cause of action remains and that claim offers plaintiff a remedy.

No slander of title cause of action is in the complaint and to the extent it is "implied" it should be dismissed, as no malice has been pleaded and the court believes, even though it is not determining facts at this point, that no malice could be proven, even if plaintiff is able to show Green was told his survey was wrong. Again, to allow a survey to serve as a slander of title action would allow each surveyor to be sued in competing survey cases, such as this case. Each property owner relying on a survey could claim the other survey slandered their title.

The third cause of action is DISMISSED, Green's motion being GRANTED.

The fourth cause of action for declaratory judgment remains, but not as a wrongful lien claim or as a slander of title claim.

Green's motion is GRANTED as to the wrongful lien claim and slander of title, to the extent they are included in the complaint.

2. MOTION TO STRIKE DEPOSITION OF STAHL.

The court understands the timing involved and believes that based on plaintiff's claims and theories, the additional expert should be allowed to testify. No party is restricted in the number of experts, but of course the court will not allow needlessly cumulative testimony, even if it is from an expert. Plaintiff's timing was based on theories held by plaintiff, rejected above, but those theories are not without merit.

Thus, the court will allow Stahl to be a witness. His testimony will be as that of any other expert, and his conclusions must not invade the legal province of the court.

If defendant desires to depose Stahl, there will be time to do so. Assuming the trial is more than one day, any trial to be set will be several months from now.

The court will not at this point affix fees or costs of the

deposition. That will be reserved for trial and the court will deal with whether plaintiff should be required to pay the fees and costs involved in deposing Stahl.

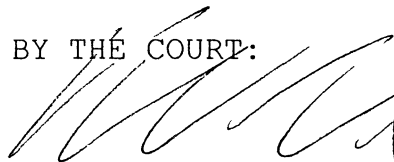
The parties are to indicate clearly to each other immediately what experts will be called so defendants may determine whether to depose Stahl or not, and the court will not indicate now who will bear those costs at this point.

The parties are to contact the scheduling clerk soon, in a joint telephone conference, so that a scheduling conference may be set with the court, who will then affix a trial date.

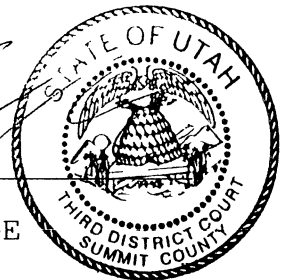
This Ruling and Order is the Order of the court and no other order is required.

DATED this 7 day of Feb., 2006.

BY THE COURT:



BRUCE C. LUBECK
DISTRICT COURT JUDGE



Case No: 040500429
Date: Feb 07, 2006

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	JOHN N BRAITHWAITE ATTORNEY DEF 136 E S TEMPLE STE 1700 SALT LAKE CITY, UT 84111
Mail	RAY G MARTINEAU ATTORNEY PLA 3098 HIGHLAND DRIVE SUITE 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 7th day of February, 2006.


Deputy Court Clerk