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IN THE SUPREME COURT OF THE STATE OF IDAHO

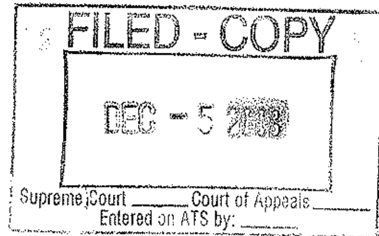
GERALD E. WEITZ and CONSUELO J. WEITZ, husband and wife and WEITZ & SONS, LLC, an Idaho limited liability company,

Plaintiffs/ Counterdefendants/ Appellants and Cross-Respondents,

vs.

TODD A. GREEN and TONIA L. GREEN, husband and wife, STEVEN R. SHOOK and MARY E. SILVERNALE SHOOK, DANIAL T. CASTLE and CATHERINE C. CASTLE, and U.S. BANK N.A.,

Defendants/ Counterplaintiffs/ Respondents and Cross-Appellants.



Docket No. 33696

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Second Judicial District for Latah County

The Honorable John R. Stegner, District Judge, Presiding

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FACTS OF THE CASE

The vitriol of the Respondents' Brief is probably seen as a wise tactic to be used by Mr. Green when the facts and the law do not support his position.

For example, no one was found "guilty" of anything. *See* p. 3 of Respondents' Brief.

For example, on the first page of the Respondents' factual statement (*see* p. 3 of Respondents' Brief) Green states:

> On page 1 Weitz makes the ***cute*** statement that "the fence line acted as a peaceful and mutually respected property boundary through the . . . . [here follows a long list of historic events] . . ." Unfortunately, the word "mutually" is false, and the trial court's decision explains that the only testimony to this effect was ***"undermined"*** and thus not credible.

Emphasis added.

Actually, if the Amended Memorandum Decision is looked to, the lower court clearly states:

> The Weitz family claims ownership of the disputed property because of Consuelo Weitz's family history and association with the property. Mrs. Weitz's father, Harold Schoepflin, and her grandfather, Fred Schoepflin, previously ran dairy cattle on the disputed property. It appears this was done until about 1975. **Prior to that time, the Schoepflins treated the disputed property as their own. They graded the trail in question at will and connected it with numerous other roads traversing their property to the north.** They maintained the fence, which encroached on the Rogers' property. During the 1970's Homer Ferguson leased the Rogers' property from Inez Rogers, the Rogers' family matriarch, to run cattle on it. Mr. Ferguson testified that Mrs. Rogers told him in the mid-1970's that the fence, which borders the disputed property, constituted the boundary between the Schoepflin's property and the Rogers' property. However, Mrs. Rogers' son, Thomas Rogers, **undermined** the testimony **attributed to his mother** when he testified that he doubted his mother had ever seen the fence in question. He also testified his mother died in 2001 and he managed the property as the trustee for his

> family's trust following her death. He also testified he considered the property boundary to be the quarter section line, not the disputed fence.

See pages 3-4 of the Amended Memorandum Decision (emphasis added); R Vol. VIII, p. 1638-1639.

Thus, compare the lower court's finding to that which Green has espoused on page 3 of the Respondents' Brief. There is no doubt in anyone's mind that up until 1975 the disputed property was a dairy farm operated by Mrs. Weitz's family from 1929 up until 1975. These facts remained uncontroverted throughout the trial and the Respondents are only now attempting to contradict these facts by a twisted reading of the word "undermined" by Green in his Respondents' Brief. The Appellants herein invite this Court to read Mr. Ferguson's testimony with care. He leased the Rogers' property, he ran his cattle up to the fence line in question, and treated the fence line in question as the boundary based upon the conversation he had with Mrs. Rogers. Mr. Ferguson has no axe to grind or benefit to gain. He did what he did and he testified to it fully and honestly. Mr. Rogers' brief testimony was used in an attempt to **undermine** that of Mr. Ferguson with the rationale that Mr. Rogers had entered into an agreement with Mr. Green to defend the title so he "had no interest in the outcome of the case." Really? Mr. Rogers lost over $46,000.00 to Mr. Green because of the claim the Weitzes had made to the disputed property in question. Mr. Rogers was trustee of a trust holding the property in question. Can he turn to the beneficiaries of that trust and state, "Oops, I shouldn't have given up over $46,000.00 to Mr. Green back in 2005"?

Mr. Ferguson is the witness that truly had no interest in the outcome of the case. Even Mr. Rogers acknowledged that he would have to defer to Mr. Ferguson's account because Mr. Roger's mother dealt with Mr. Ferguson directly. Tr Vol. II. p.1769, LL. 17-20. As has been noted, Mrs. Rogers passed away in 2001 and has never testified in this matter in any capacity and her son did not become involved with the property until 2001 when he managed the family trust following his mother's death.

On a separate issue within the Respondents' Brief, Green states on page 3:

> On page 8 it is asserted that Weitz (actually the predecessor in interest) **leased a portion of the disputed property to others**. The lease, however, does not purport to lease property in the disputed area, **but leases only in the area included in Weitz's predecessors' deed.**

Emphasis added.

Exactly! This is actually a factually accurate statement, but now let us take away Respondents' twist. This assertion is totally supportive of the Appellants' position in this matter. The lease which Green references is in regard to the 10-year lease entered into with the County of Latah and the City of Moscow to allow for the establishment of the radio station which was then recorded as Instrument No. 223360 in Latah County. Thus, the legal description of the lease is what was inserted in the lease, but the City of Moscow, the County of Latah, and all others placed the radio station on the disputed property in question. Not only did they place the radio station on the disputed property in question, then they cut a straight swath through the trees so as to place power lines to the radio station. This swath of trees was cut on the disputed property in question. The

access to the radio station is and was on the disputed property in question. The lease even had the specific language that states:

> It is agreed and understood between these parties that the first party will make arrangements with the Washington Water Power for the building of a power line to said premises and for necessary access roads to said premises, but the second party will assist in such arrangements if such assistance becomes necessary.

See Plaintiffs' Exhibit #24, p. 1.

Thus, not only did the City of Moscow, the County of Latah, the Latah County Sheriffs' office and officers, and the Moscow Police Department and officers think and act as though the disputed property belong to the Weitzes' predecessor in title, but so did Washington Water Power.

Let us simply pause and think for a moment. Were all of these political entities, police officers, sheriffs deputies, and Washington Water Power representatives trespassers at the time? Or, did all of these good people go about their business in a professional and competent way, assuming that the disputed property in question belonged to the Weitzes' predecessor in title. So, again, when Green states ". . . leases only in the area included in Weitz's predecessors' deed" that is Appellants' point in its entirety. All of the people in the surrounding area that had any involvement with the property did not question Weitzes' title, but actually in their own minds and hearts believed, that the property belonged to the Weitzes. Mr. Norman Clark testified extensively regarding his work concerning the building and maintaining of the repeater station with Mr. Merle Hart. He clearly establishes that the radio station was located within the disputed area. Mr. Clark's knowledge of the

details included within the repeater station lent even more credibility to his testimony. Tr Vol. II, p. 1245.

Mr. Allen Drew also located the radio station upon the disputed property and talks about hearing the relays clicking when he was on the perimeter road. Tr Vol. II, p. 1230, LL. 14-17.

Respondents' Brief makes a dramatic acknowledgment: the lease was for areas within the Weitzes legal description, and all of the parties know that the radio shack and the road was clearly within the disputed property. That is the essence of what this case is all about. The location of the lines between the section lines was not known. No survey locating the northern boundary line existed in 1929 or when the lease was signed, or when the dairy cattle covered the area. All these good people lived with the fence line being the property line for years until Mr. Green arrived and put his blinders on and went about his business.

Next, the last paragraph of page 3 and the top of page 4 of the Respondents' Brief makes reference to Mr. Richards' testimony. Green attempted to use Mr. Richards' testimony to somehow establish that their alleged damage in removing some of this shrubbery amounted to over $186,000.00 after trebling. Again, Weitzes invite this Court to read the cross-examination of Mr. Richards. Not only did Mr. Richards conclude, as their expert, that replacing such shrubbery at such costs would be "stupid" and "unwise," (Tr Vol. II, p. 1642, LL. 6-15) but he also answered question after question as an objective person approaching the property in question. Mr. Richards was a biased expert in the sense that he was a paid expert witness by the Greens, but he answered candidly and honestly when questions were put to him on cross-examination concerning how certain

things would alert him to the fact that someone else was laying claim to the property in question. He agreed that the location of the radio station, the road, the blue steel gate, and the swath cut through the trees for the power line, and the fact that the power line at one time fed the radio station in question, would all alert him to the fact that someone else was asserting ownership of the disputed property in question. Tr Vol. II, pp. 1643, LL. 23-25; 1655, LL. 1-4.

Anyone going upon the disputed property in question, as Mr. Green did prior to his purchase, would be put on notice of another's claim to the property in question. Let me provide a scenario of *what a person might see and think upon traversing the property:*

Large blue steel gate:

- Who placed it there?
- At what cost?
- For what purpose?

Radio Station:

- Who placed it there?
- For what purpose?
- How long had it been there?
- How many people over the many, many years of its existence had accessed it and used it?
- If they were accessing it and using it, whose permission did they have?

- If it was leased by the Sheriff's Department and Police Department, i.e. public entities, did they feel comfortable and secure with the fact that they were dealing with whom all parties felt was the proper and lawful owner of the disputed property?

The swath through the trees:

- Who would actually cut trees down on property owned by another?

- If they cut the trees down, from whom did they obtain permission?

- Why would they cut a swath through the trees? For the power line? If it involved a power line, wouldn't this deal with a public utility, such as Washington Water Power (at the time)?

The road on the disputed property:

- Who placed it there?

- What other roads did it connect to?

- This road interconnects with many other roads that have a meeting point at the Weitzes home. Would you follow that road to its end? **[Remember, even the lower court found they (Weitzes predecessor in title) graded the trail in question at will and connected it with numerous other roads traversing their property to the north.** *See* p. 4 of Amended Memorandum Decision; R Vol. VIII p. 1639.]

Would you talk to the many neighbors in the immediate area who had lived there for years?

- Mr. Green testified that he did not talk to any of the neighbors.

- Mr. Green testified that he did not even attempt to talk to the Weitzes before his purchase.

- Mr. Green testified that he had been living in the Viola area since 1995, (Tr Vol. II, pp. 1116) and he still did not make inquiry concerning the disputed property in question.

Would one talk to the predecessor in title?

- Mr. Green testified that he did not even talk to the people from whom he purchased the property as to the disputed property. (*See* Tr Vol. II, pp. 1138, LL. 92-5; 1139, LL. 1-9)

- Mr. Green testified that he had at least three surveyors on the property in question and still did not make inquiry as to the ownership of the disputed property.

- Mr. Green's surveyor testified that he placed the fence line of the property in question on his survey, and it was his surveyor who was able to clearly demark where the fence line in question was located. (*See* Plaintiffs' Exhibit #3.)

Even Mr. Green in trying to create a basis for their defense was quite helpful. Mr. Green noticed the disputed fence line nineteen times.

Q. Okay. Along the fence line you located a minimum of 19 points that you felt were significant enough to photograph; is that correct?

A. There's 19, yes.

Tr Vol. II, p. 1482, LL. 16-19.

Respondents' Brief argues that this occurred <u>after</u> Mr. Green's purchase, it can be surmised he had his blinders on earlier.

In the Respondents' Brief on page 1, Green states:

> As part of the sale agreements to Shooks and Castles Mr. and Mrs. Green agreed to defend any suit brought by Weitz, and the Greens have done so. In addition, the agreements specified that if any land was lost to Weitz, the Greens were to reimburse Shook and Castle at the purchase price per acre for any land lost. This has not been necessary since the Greens were successful in defending their title against Weitz.

See p. 1 of Respondents' Brief.

Thus, what Green is admitting is that by putting his blinders on in a convenient manner when he viewed the disputed property on his "25, 30 trips up there," (Tr Vol. II, p. 1124, L. 6 and p. 11 of Appellants' Brief) he obtained a reduction of over $46,000.00 in contract price based upon the Weitzes' claim against the Rogers. Thus, he has now pocketed that money, has not paid Shook nor Castle a dime of it, and is now reaping the benefit of his ingenuity.

At this juncture, one should take a moment to pause and think. When Mr. Green and the attorneys were upon the disputed property in question and after the Weitzes made their claim known, did Mr. Green argue the spuriousness of the Weitzes' claim or the legitimacy of the claim? The litigation with the Weitzes had not yet commenced. Mr. Green was demanding financial concessions from the Rogers. Apparently, they saw enough evidence to warrant reducing the purchase price to Mr. Green by an exact per acre figure for the land clearly marked on Mr. Monson's survey from the "existing fence" to the north. Did Rogers and his attorneys just brush aside the legitimacy of Weitzes' claim, or did they concede over $46,000.00 due to the legitimacy of the claim?

Green saw the opportunity of a life time. Green pocketed the $46,000.00 and then Green tried to take his ingenuity, colored with greed, and lay claim to damages in excess of $186,000.00 for bramble bush his own expert said would be "stupid" and "unwise" to replace in any manner, and that it was nothing more than fuel for forest fires.

RESPONSE TO ADDITIONAL ISSUES PRESENTED ON APPEAL

1. The first "Additional Issue on Appeal" argued by Respondents is that Idaho Code § 6-202 was violated by the Weitzes in cutting down these "240 trees." However, when the record is addressed, it is clear that what occurred at that moment in time is what should have occurred.

Mr. Green had obtained legal counsel. Mr. Green's legal counsel had calculated out the amount of damages that he was pursuing against the Rogers. *See* Plaintiffs' Exhibit #48 and also p. 40 of Appellants' Brief which read as follows:

Item	Amount	Total
Repay Dan Castle – Tract 1 1.91 acres @ $4,000.00/acre =	$7,640.00	
Repay Steve and Mary Shook – Tract 2 3.66 acres @ $4,745.82/acre =	17,369.70	
Loss of value of Green's parcel – Tract 3 3 acres @ $4,745.82/acre =	14,237.46	
Cost to re-survey property and Re-write legal descriptions	2,500.00	
Legal fees	4,500.00	
TOTAL DAMAGES/COSTS		$46,247.16

This correspondence again reveals that the settlement amount of $46,247.16 was specifically calculated on a per acre basis. In other words, despite the Greens' characterization of the settlement, the payment did in fact represent compensation from the Rogers for the property that Weitzes claimed.

Good! The matter was settled. As the lower court finds in its Amended Memorandum Decision:

> However, the gravamen of the testimony was that it appeared the dispute would go away. Mrs. Weitz testified at trial that she was advised by her lawyer, Mr. Landeck "[t]hat he anticipated settlement with the Rogers and he looked for the whole problem to just go away." (citation omitted) Ron Landeck, former counsel to the Weitz family, testified at his deposition that he advised Mrs. Weitz that the "problem may go away." (citation omitted)

See p. 11 of Amended Memorandum Decision; R Vol. VIII, p. 1646 (emphasis added).

What would a normal, reasonable human being who had been in possession of the disputed property personally or through her grandfather expect? She and her family laid claim to the property since 1929, and they thought of the property as their own. Mr. Green has made claim against the Rogers, the predecessors in title in regard to the value of the disputed property and that matter is now settled and done. Is this not what a normal human being *in a normal world would conclude*? Case closed. *Is this the mind set of a trespasser as contemplated by* I.C. § 6-202 and the case law that has already been briefed?

Mr. Green, of course, was spurred on by greed. He had his $46,247.16 and now he wanted more, more, and more.

2. Mr. Green cannot help himself. Even on this appeal, despite his own expert's testimony, and despite the facts of the case, he cannot restrain himself alleging his second "Additional Issue on Appeal:"

> The court made a legal error in the award of damages for the 240 trees cut by Mr. and Mrs. Weitz when it based its award for the temporary injury to property on the merchantable value of the trees cut, instead of using the correct measure of the cost of restoring the trees.

See p. 5 of Respondents' Brief.

The facts of the case are clear– **<u>there were not 240 trees cut</u>**. For Green to make such an allegation in this Respondents' Brief is in direct contradiction to the testimony given by his own experts, by the arborist who cut the shrubbery, and by the various dimensions that have been set forth in the record of the shrubbery that was removed.

On this appeal, Green is contending that "240 trees were cut." Yet, if there really were 240 trees located upon the disputed property in question, would not Green have made a claim for the value of said timber against the Rogers? Again, look above at the itemization of the damages by Green's legal counsel (*see* Plaintiff's Exhibit #48). He is very careful to include a per acre value of the land, cost to resurvey the property, and to rewrite the legal descriptions and even their legal fees. He puffed the dollar figure up as high as he possibly could. Do you think Green would not have pounced upon the opportunity to lay claim to 240 trees that were standing on this pristine property, the value of which he would now be denied?

ARGUMENT

I. BONA FIDE PURCHASER FOR VALUE

Of course, Green has to rely upon the Amended Memorandum Decision issued by the lower court who had made an on-site visit to the property in question, but when did this on-site visit occur?

- Approximately 76 years after the original fence was erected.
- 31 years after the disputed property was used as a dairy farm.
- Over 25 years after Homer Ferguson ran his cattle upon the property in question.
- Of course, the lower court was not able to observe the usage that was made by the Weitzes of the disputed property in question from 1929 onward.
- The lower court was not even able to observe the property as Mr. Green observed it on his 25 to 30 visits while using his four wheeler with its 46" axle base traversing the "road in question numerous times." *See* Tr Vol. II, p.1123, LL.22-25; p.1124, LL.1-13.

Is the lower court's visual observation on a singular day going to brush aside the entire history of the property in question?

The lower court in its Amended Memorandum Decision states:

> Prior to the Greens' purchase, the trail had been most recently bladed by Mrs. Weitz's father around 1994.

See page 6 of the Amended Memorandum Decision; R Vol. VIII, p. 1641.

Is not this evidence of continued use and ownership by the Weitzes of the disputed property in question and the fact that a road indeed did exist at least from 1975 (when the dairy farm ceased).

The disputed property was last used as a dairy farm up until 1994 when the lower court indicated that it was last bladed by Mrs. Weitz's father. Thus, at least, prior to1994 the Weitzes would bring a bulldozer upon the property and blade the roadway clear of fallen trees and debris. (Remember, Mr. Green moved to the Viola area in 1995.) Thus, as of 1994 the lower court's finding would reflect:

> **They graded the trail in question at will and connected it with numerous other roads traversing their property to the north.**

See p. 4 of Amended Memorandum Decision; R Vol. VIII, p.1639 (emphasis added).

Then the lower court says of the roadway upon its visit:

> ***It did not appear,*** on the ground, to be part of the seamless web of roadways extending onto the Weitzes' family property.

See p. 6 of Amended Memorandum Decision; R Vol. VIII, p. 1641 (emphasis added).

Again, the lower court is clearly stating that the road was bulldozed by the Weitzes as recently as 1994, both parties agreed that it was again bulldozed in 2002 after which an injunction was obtained and no further activity on the disputed property was allowed. Does this history of use: dairy farms, bulldozing, radio stations, power lines, large blue steel gate, and all other activities of ownership, possession, and control have to be ignored simply because the lower court found that **"It did not appear** . . .". *Id.*

Perhaps the most surprising finding is the following:

> Prior to the Greens' purchase, the trail had not been used by the Weitz family in a continuous fashion for the required five years. Although there was evidence the Weitz family and their friends used the trail periodically during the period in question, the use was not continuous. Consequently, the Weitz family has failed to establish the elements necessary to establish a prescriptive easement to the trail.

See p. 6 of Amended Memorandum Decision; R Vol. VIII, p. 1641 (emphasis added).

So, the lower court finds that the Weitzes used the property in question, used the roadway in question as an extension, but did not use the roadway "in a continuous fashion." Given the circumstances, what is a "continuous fashion?" The trail was "bladed," using the lower court's words, by a bulldozer operated by Mrs. Weitz's father around 1994. Additionally, the evidence presented by the Weitzes was replete with evidence of usage throughout the decades, from 1975 onward.

The testimony was varied, complete, and overwhelming concerning usage.

Gerald Rockford "Rocky" Weitz testified at the trial concerning his usage as follows:

Q. Well, let's talk about the perimeter road and I'll come back to the loop road.

A. On the perimeter road we would ride either single file or two abreast or passing, kind of just depended on who was riding and who was in front and who was in back. And so we would go along the entire length from the west end where it connects into the Weitz road network there and then all the way up and then down the other side. That was the most frequent route, but sometimes we would go through the bench roads as well because with snowmobiling especially, like my brother and I, he would like to hit powder, fresh powder and so we pretty much all of the road would be snowmobiled on throughout the winter. And so, yeah, that's the usage.

Tr. Vol. I, p. 864, LL. 11-24.

Dr. Tory Eugene Lawrence, an Associate Professor at the School of Music for the University of Idaho, who now lives in Eugene, Oregon, working on his doctorate, testified that in December of 2001 he was upon the property from late 2001 through the summer of 2002 and thereafter. He was

an avid hiker and he testified concerning the status of the road prior to the bulldozing by Mr. Weitz in the fall of 2002. *See* Tr. Vol. II, pp. 1842, 1847, and1848. He described the road leading up to the road on the disputed property being in the same condition as the perimeter road:

> A. I would say they were the same as the perimeter road or this ridge road. I don't think they were as heavily used, but they certainly were the same scope of road. I mean, I actually asked Mrs. Weitz, who made all these roads? There's roads everywhere up there.

Tr. Vol. II, p. 1848, LL. 4-8.

In describing the disputed fence he stated:

> A. I remember seeing barbed wire, again the point of -- you're speaking of this June?
>
> Q. I'm speaking the time period before fall of 2002.
>
> A. Okay. What I remember most clearly was the tour that I referred to with Mrs. Weitz. In a number of places around the property she would point out where the fence was. The purpose of this was to show me where their property began and ended. So I do remember as there were certain places you could see, obviously because it was closer to that fence because of the wind of that road and we saw that, yes. I remember barbed wire. . . . And I don't know how many wires there were, but there were multiple wires anyway.

Tr Vol. II, p. 1848, LL. 18-25 and p. 1849, LL. 1-8.

Another witness was Dr. Curtis Wiggins, a dentist from Lewiston, Idaho. As to the disputed property and the road in question, he testified:

> A. We moved in '81 and for the first oh, I would say through the 80s my family, we went up to their property and we snowmobiled up on those roads on several different occasions. And we were also on them in the summertime also.

Tr Vol. II p. 1256, LL. 9-13.

Q. Could you describe to the Court your familiarity with that -- that network of roads?

A. We did a lot of our snowmobiling at night. And I do remember, with my poor sense of direction, that if you got on one of those auxiliary roads and followed it downhill you ended up to the Weitzes' house. And this was all done at night, so getting lost was not an issue.

Tr Vol. II. p. 1257, LL. 1-7.

In regard to obtaining firewood from the disputed property, Dr. Wiggins testified:

Q. What did you use, what vehicle did you use up there?

A. They used a four-wheel drive John Deere tractor and attached to the back of the John Deere tractor is a -- a wagon or a cart or a trailer I should say. And the trailer would hold about a cord of wood and that's how we accessed the area that we got wood.

Tr Vol. II, p. 1259, LL. 8-14.

As to his last visit to the property in question, in 2001, Dr. Wiggins states:

Q. Okay. What was the purpose for being on the property then?

A. It was an evening snowmobiling trip or snowmobile ride on their property.

Q. And did that trip take you to the perimeter road, the disputed property?

A. That's correct. Went through the perimeter road, out through the gate and to Moscow Mountain.

Tr Vol. II, p. 1261, LL. 8-15.

The gate Dr. Wiggins is referring to is the large, steel, blue gate that has been referenced multiple times.

Mr. Josh Ritter was also asked to testify:

Q. What type of things -- and I'm going to come back to that. What type of activities would you do on the Weitzes' property in general?

A. Well, with the Weitzes, besides the -- besides, you know, just on my own walking to the Weitzes', you know, quite often, I would, you know, we did all sorts of things from, from around '85 onwards. You know, we did all kinds of playing in the woods when I was little, you know, running around, you know, just all over the place up there. And then, you know, as we got older, motorcycling, snowmobiling, we did both of those as well, all the time.

See p. 10, LL. 11-23 of the Deposition of Joshua Ritter which was submitted to the lower court for evidentiary purposes.

Mr. Ritter also testified:

Q. And then in your own words, just describe to me the type of activities that would have taken place, that you would have enjoyed or taken place in and on that area of the land that we've described as the disputed property during that time period?

A. Oh, I would say it was, it was, you know, it was always -- it was always recreational. You know, it was either snowmobiling in the winter or, or motorcycling. Or a lot of times, you know, in the summer just playing along there. I mean, that was the ridge. You know, that was where you could look.

Id. p. 11, LL. 15-25.

A. Well, yeah, like driving around, I mean, all the time, you know, there was always one part of the road that was getting kind of, I guess, **replowed by Jerry in particular like along with the Caterpillar, you know, and, you know, I can remember him doing that all the time, up through there, taking the Caterpillar and just kind of working on a road here and there and just kind of redoing it, just kind of running the Cat over the road.**

> So, there's that. I can also, we -- you know, I went up with the Weitzes four or five times at least helping them get wood for the winter in different, in different places.

Id. p. 18, LL. 10-22 (emphasis added).

Thus, as can be seen by Mr. Ritter's childhood memories, plowing the roads in general, plowing the perimeter road on the disputed property in particular, was the norm. As noted above, even the lower court noted that the property was plowed in 1994 with specificity. Thus, it is perplexing when the lower court states on page 3 of its Amended Memorandum Decision that after the surveyor placed some survey markings that:

> As an apparent result of the surveyor's actions, the Weitz family sprang into action.

R Vol. VIII, p. 1638.

Was it springing into action when the Weitzes bulldozed in 1994, as found by the lower court; was it springing into action when Mr. Ritter testified openly and honestly in his deposition that his childhood memory was of Mr. Weitz bulldozing the various roads throughout the property in order to maintain the interconnecting road system that they had established over the many years that they owned the property in question?

The testimony not mentioned by the lower court in its Memorandum Decision concerning Weitzes usage of the disputed property was overwhelming:

Gerald Rockford Weitz	Tr Vol. I, pp. 839 to 891; 917 to 922
Homer Ferguson	Tr Vol. I, pp. 892 to 917
James Henry Hagedorn	Tr Vol. I, pp. 922 to 943
Jack Freeland	Tr Vol. I. pp. 943 to 962
Nancy Flisher	Tr Vol. I, pp. 975 to 991
James Edward Weitz	Tr Vol. I, pp. 991 to 1013
Allen Drew	Tr Vol. II, pp. 1225 to 1233
Walter Carlson	Tr Vol. II, pp. 1235 to 1243
Norman Clark	Tr Vol. II., pp. 1243 to 1254
Curtis Wiggins	Tr Vol. II., pp. 1255 to 1264
Consuelo Weitz	Tr Vol. II, pp. 1266 to 1271; 1286 to1364
Dustin F. Weitz	Tr Vol. II., pp. 1272 to 1286
Harold Osborne	Tr Vol. II, pp. 1365 to 1415
Tory Eugene Lawrence	Tr Vol. II, pp. 1841 to 1859

In the Respondents' Brief, Green tried to establish that he was a bonafide purchaser, but he ends up trying to argue around the following:

- The fence.
- Mr. Green traversing the fence many times.
- Mr. Green traversing the road in question many times with his four wheeler.
- The radio station.

- The rusted steel drum attached to a tree with word "line" cut in it.

Then he has to ignore the following:

- The swath through the trees.
- The blue steel gate.
- That although the fence is in disrepair, was specifically attached to numerous large trees that were acting as fence posts for the fence in question. (Slices of these trees are in evidence.)

II. SHELTER RULE

It is impossible to argue that Shook and Castle were BFP's when the very contract that they signed with Green put them on notice of the Weitzes' claim (*see* Exhibit #8 & #9), but more importantly, if Mr. Green was not a BFP neither were Shook and Castle, because the shelter rule as cited by Respondents does not apply.

III. SITE VIEW BY THE TRIAL JUDGE

The discussion as set forth above concerning bonafide purchaser already takes issue with the site viewed by the trial judge.

IV. BOUNDARY BY AGREEMENT

There is no doubt in this matter that the Appellants have met the two elements quoted by Green to establish boundary by agreement.

1. First, Green states that the Weitzes would have "to prove an uncertain or disputed boundary involving adjacent properties." *See* p. 12 of Respondents' Brief. There is no doubt that the properties in question are adjacent and there is no doubt that the fence line in question was

erected in 1929, before any surveys were ever conducted. The parties did not know where the boundary was, they put up the fence and treated it as the boundary for over 74 years. By the lower court's own finding, it clearly established the fence line as the boundary from 1929 to 1975. From 1975 onward the fence did go into disrepair, but even by the lower court's own finding, the Weitzes were bulldozing the road in question up until 1994. Thus, the evidence is set to establish that from 1975 to 1994 the Weitzes went to the extent of bulldozing the road in question as only a property owner would. The Weitzes again bulldozed in 2002, but now it was viewed as an act and violation of Mr. Green's property rights; whereas, in 1994 it was viewed as a continuation of the Weitzes claim to the property in question. The Weitzes fence line or "boundary by agreement" should not be diminished because the road did go into an overgrown state simply because the Weitzes are following a court order.

2. Secondly, the Weitzes "would have had to prove a subsequent express or implied agreement fixing the boundary." See p. 12 of Respondents' Brief. It would appear that the use of the fence line from 1929 onward would be evidence of an agreement fixing the boundary. To ignore that would be a revision of history which already speaks so loudly in this matter. Green relies upon *Luce v. Marble*, 142 Idaho 264, 127 P3d 167 (2005), but when the law of the case is set forth and the case is viewed, it is totally supportive of the Weitzes' position in this matter. Green attempts to argue that the disputed area of land encompassed by the fence line is an "irregular" piece of property. By Green's own surveyor, the fence struck off in a direction that was closely parallel to what would ultimately be viewed as the survey boundary line many decades later. *See* Plaintiffs' Exhibit #3

which also contains detailed reference points. Was it exactly straight? No. Given what they had to work with in 1929, was it a fairly straight rendition of a boundary line as between two neighbors? Absolutely.

Green relies upon *Cox v. Clanton*, 137 Idaho 492, 495, 50 P. 3d 987, 990 (2002) which talks about temporary fence to house cattle. The testimony in this matter at hand has shown that the fence was in existence since 1929; not only that, but it showed that it was in constant repair and replenishment from 1929 until 1975 in order to maintain dairy cattle and support a dairy farm. There is nothing temporary about the Weitzes' fence.

Finally, Green relies upon *Downey v. Vavold*, 144 Idaho 592, 166 P.3d 382 (2007) which involved the fence next to some unimproved property. It did not involve a fence established in 1929 for the purpose of maintaining dairy cattle. It did not include facts which clearly showed that the neighboring property (in this case, the Rogers' property) was leased for the purpose of running cattle and that the fence in question was used as the demarkation of the boundary line for cattle running purposes. Nor did it involve the fact that aerial views show the separate properties over the years have been clearly distinctive. *See* Plaintiff's Exhibit 40B, which also contains a beautiful overlay that juxtaposes the location of the property precisely. The Weitzes have done selective logging over the many years, maintaining the heavy forest growth on the disputed property and north of the disputed property line in question. The Rogers primarily clear-cut their property and used it for cattle grazing purposes. The Rogers' property was actively used, logs cut and hauled, and leased out with instructions to Mr. Ferguson that the fence line was the boundary line.

V. PRESCRIPTIVE EASEMENT

The argument in regard to prescriptive easement is already addressed above and also in Appellants' initial brief in this matter. But, let there be no uncertainty in regard to the adverse possession claim, which was clearly established in this matter by the lower court's own opinion, the right to simply amend Weitzes' Complaint months before trial was requested in a reasonable fashion and before any noteworthy discovery had occurred.

VI. QUASI-ESTOPPEL

Green's brief does not add any illumination to the quasi-estoppel position that the Weitzes have expressed in the Appellants' Brief. It must be remembered that Mr. Green's agreement with the Rogers was a secret and it was attempted to be kept from the Weitzes when depositions were initiated. The fact that they were using the Weitzes' claim to get paid money by the Rogers and then turn around and seek the same property from the Weitzes, along with over $186,000.00 and some odd measure of damages, is simply, by definition, unconscionable.

VII. DENIAL OF WEITZ'S MOTION TO AMEND TO ADD A CLAIM FOR ADVERSE POSSESSION

1. **Prejudice.** In the Respondents' Brief, Green sets forth various deadlines in March and June of 2005, which existed immediately prior to the Weitzes making their motion to amend their Complaint. It must be remembered that the Complaint already contained a prescriptive easement claim. On appeal, Green is arguing that somehow these deadlines posed an imposition for him, but he did not argue that at the time of the motion to amend because there would have been no

need to revise any of those deadlines. The Weitzes would not have changed their experts; the Weitzes would not have changed their lay witnesses; the Greens would not have disclosed different experts; and the Greens would not have disclosed different lay witnesses. This was a court trial not a jury trial. Given the fact that prescriptive easement had already been plead by the Weitzes, Green cannot now, at this late date, claim that he somehow would have been prejudiced, when in fact such did not occur in 2005.

2. **Failure to State a Valid Claim.** The proposed amended complaint was sufficient. The substantial enclosure must have been substantial enough to enclose dairy cattle for almost 50 years. In regard to the payment of taxes, this issue has already been addressed in the Appellants' Brief and the government lot exemption applies in a situation such as this, as has been briefed. The facts of this case become very clear – that no metes and bounds survey existed prior to that which Mr. Green created. The disputed fence was the boundary for almost 50 years and thereafter. The government lot exemption, as discussed in Appellants' Brief, clearly addresses this issue. The elements of prescriptive easement are almost identical to that of adverse possession.

3. **Futility.** The motion to amend the complaint to allow for adverse possession certainly cannot be futile when the lower court has found that adverse possession existed from 1929 to 1975. As already briefed, once adverse possession occurs title to the property vests.

A peculiar aspect of the adverse possession claim is that the Court in its Amended Memorandum Decision found:

> In 1988, the Idaho Department of Lands put up a marker on the northeast corner of the Rogers' property. That boundary marker constituted notice that the true property line between the Weitz family's property and the Rogers' property was north of the fence in question.

See p. 5 of the Amended Memorandum Decision; R Vol. VIII, p. 1640.

Thus, by the lower court's own finding, as of 1988 the Weitzes would have known where the true boundary line was, and, thus, their use, possession, and control of the property from 1988 forward would have definitely been adverse. This adversity would have included bulldozing the property, removing firewood from the property, snowmobiling and motorcycling with friends and family, felling some trees from the property, maintaining the road in question, etc.

VIII. COLLATERAL ESTOPPEL AND REMAND

BFP Status of Green. The issue of whether or not Mr. Green is a true BFP has already been argued above and in Appellants' Brief.

Exclusive use. The exclusivity of the Weitzes' use is unchallenged, including firewood removal, bulldozing, maintenance of the road, etc. etc. Adverse possession and/or the boundary by acquiescence had been established for decades and allowing others to traverse your property over the last few years does not mean that you are abandoning any and all property rights that had been established for decades before. Did a hiker or neighbor walk upon the property? Yes, of course, on occasion, but this does not void the ownership interest established by the Weitzes over decades.

Enclosure. The lower court's own finding and the facts of the case clearly supported the use of the disputed property in question for dairy farm purposes and that the fence must have been secure enough to have contained the dairy cattle over the years.

The lower court originally ruled in the Weitzes' favor as to the slander of title issue as a result of the evidence presented at trial in October of 2005. Without further testimony, the lower court changed its mind the following year. In June of 2006, the lower court found that when the Weitzes were placing some hog wire up and the hog wire fell 60 feet short of connecting in a corner where there was heavy brush that this somehow gave rise to a slander of title claim. Idaho is and always has been a notice pleading state. For the lower court to reverse itself and find that somehow, by the filing of a quiet title action by the Weitzes, that the Weitzes somehow slandered the title of Mr. Green's property is simply unimaginable.

TAXES

Respondents argue that the Assessor's Office would use aerial photographs in order to establish taxability of the private property in question. This truly would have been a sight to see in 1929.

The affidavit of Mr. Steve Fiscus, the tax assessor for Latah County from 1989 until 2005, clarifies that he does not rely upon aerial photography that never existed at the relevant times in question.

Mr. Fiscus specifically states on pages 27 and 28 of Appellants' Brief:

> 6. On the tax assessment valuations, when you see, for example 160 acres, that is just the tax assessor's estimate of the number of acres in a given quarter section, but your affiant can represent to you without any doubt that said acreage is an estimate and is not accurate. The boundary between the two properties in question was not located by tax assessors for tax assessment purposes.
>
> 7. If the property that is being assessed is not given a specific metes and bounds description, then the exact boundaries of the property of the respective landowners is a matter of guesstimating and the amount of acreage within a quarter section is also a matter of guesstimating. The exact quantum of property being assessed is impossible to determine from the tax assessment records. The exact location of the section line or quarter section line is unknown for tax assessment purposes.

See R Vol. III, pp. 720-721.

IX. SLANDER OF TITLE

The lower court's ruling on the slander of title is simply not understandable. Not only did the lower court change its opinion without having additional testimony, but it also seems to pounce upon a singular sentence contained in the complaint in a quiet title action. The lower court then states that this statement was made maliciously by the Weitzes in pursuing their quiet title action.

On page 34 of Respondents' Brief, they state:

> The most important witness was Gerald Weitz himself when a portion of his deposition testimony was accepted in evidence and read by the court as a deposition of a party opponent.

Id.

Mr. Gerald Weitz was not even called as a witness at the trial in this matter, and only a portion of his deposition was given to the court. The fact that the Weitzes tried to maintain and repair the fence, and ran out of some hog wire down in a corner of the property is now the basis of a slander of title which the lower court enters in June of 2006, some 9 months after Dr. Weitz's deposition was taken in September of 2005. The deposition was not even submitted in its entirety.

The court originally found no slander of title, and no malice.

X. THE LOWER COURT SHOULD HAVE APPLIED I.C. § 6-202. ACTIONS FOR TRESPASS

The facts concerning this aspect of Respondents' case have been exhaustively addressed above, as well as in Appellants' Brief. Mrs. Weitz was "unreasonably optimistic" when she assumed after Mr. Green's claim against the Rogers had reached a settlement that it would bring this matter to an end, and that he would leave her and the property with which she (and her family before her) had been associated with since 1929 alone. How could she have known Mr. Green had the agenda that he did?

XI. MEASURE OF DAMAGES

Again, Mr. Green's attempt to turn the shrubbery that was fuel for a forest fire into some type of claim exceeding $180,000.00 is simply untenable. As discussed above, it is inappropriate. Additionally, expert testimony was given at trial (*see* Tr Vol. II, pp. 1837-1938) by Mr. Dean Vahlkamp that the impact upon the property in question was absolutely none.

XII. ATTORNEY FEES ON APPEAL

As discussed in detail above and in Appellants' Brief, the basis for the Weitzes' appeal in this matter is certainly well-founded.

CONCLUSION

For the reasons set forth above, the Weitzes hereby respectfully request this Court to:

1) Determine that they are the proper owners and in possession of the property in question by reason of the boundary by agreement and/or acquiescence argument, and/or that Mr. Green is estopped from contesting the Weitzes' claim to the property in question, and that title should be quieted to the Weitzes.

2) Award them ownership, possession, and control of the property in question based upon the adverse possession claim, due to the fact that all of the facts that are before this Court are sufficient to establish such a ruling, and that title be quieted to the Weitzes. Or, in the alternative, remand the matter to allow for the complaint to be amended as had been requested and for the adverse possession claim to proceed accordingly.

3) Dismiss the slander of title claim, and, thus, the award of attorney fees and costs for the reasons set forth above.

4) Dismiss the finding of trespass against them and find that the award of damages was done so in error.

5) Find the Weitzes' claim for trespass and damages was incorrectly dismissed by the lower court.

6) Award of attorney fees on appeal and also request they be deemed the prevailing party, and that this matter be remanded in order to establish the appropriate amount of attorney fees and costs by the lower court for handling the underlying matter.

RESPECTFULLY SUBMITTED on this 4th day of December, 2008.

Charles A. Brown
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& Cross-Respondents

I, Charles A. Brown, hereby certify that two (2) true and correct copies of the foregoing were mailed by regular first class mail, and deposited in the United States Post Office to:

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