1977

Western Gateway Storage Co. v. Fred G. Treseder And Antonia Treseder, Hls Wlfe, and the United States of America : Petition For Rehearing And Brief In Support

Utah Supreme Court

W. Brent West & Darrell G. Renstrom; Attorneys for Defendant-AppellantsRICHARD W. CAMPBELL; Attorney for Plaintlff--Respondent

IN THE

SUPREME COURT

OF THE

STATE OF [illegible]

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WESTERN GATEWAY STORAGE CO.,

Plaintiff/Respondent,

vs.

FRED G. TRESEDER and [illegible]
TRESEDER, his wife, and [illegible]
STATES OF AMERICA,

Defendants/[illegible]

PETITION [illegible]

Appeal from a [illegible]
Weber County, [illegible]

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

* * * * * * *

WESTERN GATEWAY STORAGE CO.,	)	
Plaintiff/Respondent,	)	
vs.	)	Case No. 14816
FRED G. TRESEDER and ANTONIA TRESEDER, his wife, and THE UNITED STATES OF AMERICA,	)	
Defendants/Appellants.	)	

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PETITION FOR REHEARING AND BRIEF IN SUPPORT

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Appeal from a judgment of the Second Judicial District in and for Weber County, the Honorable John F. Wahlquist, Judge.

* * * * * * *

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IN THE

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Defendants/Appellants.	)	

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PETITION FOR REHEARING

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Respondent, herein called Gateway, respectfully asks this Court for rehearing upon the following grounds:

This Court erred in finding as a matter of law the Treseder right of way not abandoned.

WHEREFORE, Gateway asks for a rehearing, and upon such a hearing the Court vacate its decision on file herein, and for such other relief as may be proper.

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

* * * * * * *

WESTERN GATEWAY STORAGE CO., Plaintiff/Respondent, vs. FRED G. TRESEDER and ANTONIA TRESEDER, his wife, and THE UNITED STATES OF AMERICA, Defendants/Appellants.	Case No. 14816

* * * * * * *

BRIEF IN SUPPORT OF PETITION

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NATURE OF THE CASE

This action is one filed by the owner of the servient tenement, Gateway, to have a right of way attached to the dominant tenement, Treseder, declared abandoned.

DISPOSITION IN LOWER COURT

The Trial Court found the right of way abandoned, and entered judgment in favor of Gateway.

RELIEF SOUGHT ON APPEAL

Treseder asks this Court to reverse the Trial Court findings

and judgment. This Court did so by unanimous opinion of July 21, 1977, HALL, Justice. Gateway now asks in this Petition this Court to rehear the issues involved in the July 21 decision.

STATEMENT OF FACTS

Reference is made to the factual recital of our earlier brief; they will not be reproduced here. Some facts will be referred to in Argument.

ARGUMENT

POINT ONE

THIS COURT ERRED IN FINDING AS A MATTER OF LAW THE EASEMENT WAS NOT ABANDONED.

We do not argue with the authorities cited in this Court's opinion of July 21, 1977; we suggest their application to the facts of this case inappropriate. The opinion states:

> "While the evidence does reflect the right of way is somewhat obstructed by debris, undergrowth and items of personal property, there is clear evidence that it was used, is presently in a condition as will allow continued use, and that defendants have access thereto through a portion of removable fence utilized as a gate. In fact, the trial court made a specific finding of occasional use."

The "occasional use" referred to is a finding by the Trial Court (R-39):

> "The Court does not believe that the easement has been used with a frequency of more than <u>once every several years</u> because of the great difficulty in opening the rear fence and then renailing it." (Emphasis Added).

The evidence clearly supports this finding; we think once every several years is not "occasional use." This Court's opinion also reflected the evidence as showing the right of way "somewhat obstructed." In this regard, the Trial Court found (R-39):

> "The use of this easement has been only on a basis of once every few years and could be made from either direction so long as the right-of-way is kept clear of cumulative trash or other blockages such as old cars, etc. The Court believes that a study of the photographs in question and the growth of the foliage indicate that the easement has not been used for through traffic, that is all away around the 'U', since it was used as a coal delivery passage. Some of the trees growing in the right-of-way are four inches in diameter, and there is no record of any snow having been removed from the right-of-way."

As set forth with citations on Page 8 of our original Brief on Appeal, several factors are to be considered on the question of abandonment:

1. Non-use;

2. Allowing the way to be blocked;

3. Closing off the access from the dominant tenement;

4. Allowing the way to become in a state of disrepair and unusable;

5. Change of conditions eliminating the need for the easement.

Each of the above are present in our case. It is difficult to conceive of what evidence (other than a written declaration of

abandonment by the owner of the way) is necessary to support a finding of abandonment if the record in our case is insufficient as a matter of law.

The question of abandonment is factual, and if there is evidence to support the Trial Court it will be upheld. Jensen v. Brooks, Nev. 1973, 503 P. 2d 1224; Dahnken v. George Romney & Sons, Ut. 1947, 111 Ut. 471, 184 P. 2d 211.

We respectfully submit a use once every several years, while competent evidence on the issue, does not mandate a finding of non-abandonment in the face of all the other evidence that factually supports the Trial Court.

POINT TWO

THIS COURT DID NOT CONSIDER THE ISSUE OF CHANGED CONDITIONS.

In Gateway's Brief on Appeal, Point Two urged that the undisputed findings of change of conditions fully supported the Trial Court judgment. This Court did not consider that issue in its decision of July 21, 1977, yet the Trial Court (Finding of Fact #17; Conclusion of Law #1) placed heavy reliance on this issue in its decision.

There is no question but that change of conditions after creation of the right of way is competent and persuasive evidence on the issue of abandonment; Brown v. Oregon Short Line, 1909, 36 U. 257, 102 P. 740.

Additionally, as pointed out in the leading case of Hudson v. American Oil Co., 152 F.S. 757, D.C. Va. 1957; aff'd. 253 F. 2d 27, 4th CCA 1957; an easement comes to an end when its purpose expires. The question to be answered in each case, is what is the purpose it was created to serve, and this is a question of intention for the trier of fact.

In our case, the Trial Court found (R-55-57) the easement here was created for the delivery of coal to the rear of the original 6 homes (4 of which are gone, and one vacant for over 2 years), and has not been needed or used for that purpose since the advent of natural gas in the 1950's.

We submit it is apparent from the record, and as found by the Trial Court, the purpose of the original way west of Treseder is gone. Tresseders' tenants have access, if they ever need it, to Doxey from the rear of the property. There is no reason (as opposed to when coal was being delivered) to use the entire U-shaped way and emerge on Doxey some 160 feet west of the Treseder property, and next to the dead-end. The Trial Court found (Finding #14) it had not been used for through traffic, that is all around the "U", since the 1950's.

Brown v. Railroad, supra, is cited in this Court's opinion of July 21, 1977. Brown recognizes the changed circumstance doctrine, and non-user on the question of abandonment:

"An easement may be extinguished by an act of the owner of the easement which is incompatible with the existance of the right claimed. If the owner of the easement himself obstructs it in a manner inconsistent with its further enjoyment, or permits the owner of the servient estate to do so, the easement will be considered abandoned."

"Keeping in mind, therefore, the following facts: That the easement was granted for the convenience of ingress and egress to and from a public street for the benefit of the occupants of the several parcels of land abutting on the strip over which the easement was granted; that the land was intended to be used for and was devoted to private purposes when the grant was made; that all the dwellings and other buildings, as well as the trees situated on the several parcels of land to which the easement was appurtenant, have been removed; and that the several parcels of land, as well as the strip, are now being, and will continue to be, used for an entirely different purpose which is incompatible with the original purpose for which the easement was created - we are of the opinion that the easement has been abandoned and has become extinguished within the rule laid down by all of the authorities that we have been able to find, some of which are cited above."

CONCLUSION

A finding by the Court of use once every several years does not override the overwhelming evidence in support of the Trial Court's findings on abandonment and change of conditions. We respectfully ask this Court to rehear the issues.

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