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Grand County v. Lester W. Rogers : Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GRAND COUNTY,)	
)	Case No. 20000672-SC
Plaintiff / Respondent,)	
)	ct. of appeals no. 990766-CA
v.)	
)	
LESTER W. ROGERS,)	
)	
Defendant / Petitioner.)	Priority No. 13

BRIEF OF PETITIONER

On Certiorari to the Utah Court of Appeals

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
STATEMENT OF JURISDICTION.	6
STATEMENT OF ISSUES / STANDARDS OF REVIEW.	6
DETERMINATIVE AUTHORITY.	8
STATEMENT OF THE CASE.	8
STATEMENT OF FACTS	10
SUMMARY OF ARGUMENTS.	
ARGUMENTS	
I. IN THE COURSE OF AFFIRMING THE SUMMARY JUDGMENT IN FAVOR OF GRAND COUNTY, THE COURT OF APPEALS FAILED TO CONSIDER THE GENUINE ISSUES OF DISPUTED MATERIAL FACT.	18
A. Summary Judgment Principles	18
B. Genuine issues of disputed material fact exist as to whether Grand County is estopped from enforcing its subdivision ordinance.	20
II. THE COURT OF APPEALS FAILED TO CONSIDER THE PROPERTY OWNERS OF THE SUBJECT PARCELS OF PROPERTY TO BE NECESSARY PARTIES THAT SHOULD BE JOINED PRIOR TO A FULL AND FAIR DETERMINATION OF THE MATTERS AT ISSUE.	25
III. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF UTAH CODE ANN. § 57-6-1, <i>et seq.</i> , AND FAILED TO CONSIDER THE GENUINE ISSUES OF MATERIAL FACT OF WHETHER THE ABSENT THIRD-PARTY PROPERTY OWNERS QUALIFY AS OCCUPYING CLAIMANTS.	31
CONCLUSION.	33

ADDENDUM35

Addenda A: Ruling on Motion for Summary Judgment

Addenda B: Judgment (Enjoining Violation of Subdivision Ordinance)

Addenda C: Utah Code Ann. §§ 57-6-3 (1994) and 57-6-4 (Supp. 2000)

Addenda D: Unpublished Memorandum Decision of the court of appeals: *Grand County v. Rogers*, 2000 UT App 162

Addenda E: Order granting Petition for Writ of Certiorari

TABLE OF AUTHORITIES

CASES CITED

State Cases

Page(s)

<i>Bonneville Tower Condominium Management Comm. v. Thompson Michie Assocs., Inc.</i> , 728 P.2d 1017 (Utah 1986).....	18,29,30
<i>Bowen v. Riverton City</i> , 656 P.2d 434 (Utah 1982).....	20
<i>Bushnell Real Estate, Inc. v. Nielson</i> , 672 P.2d 746 (Utah 1983).....	20
<i>Cassidy v. Salt Lake Fire Civil Serv. Council</i> , 976 P.2d 607 (Utah Ct. App. 1999).....	25
<i>CECO Corp. v. Concrete Specialists, Inc.</i> , 772 P.2d 967 (Utah 1989).....	20
<i>Ferree v. State</i> , 784 P.2d 149, 151 (Utah 1989).....	19,20
<i>Geneva Pipe Co. v. S & H Ins. Co.</i> , 714 P.2d 648 (Utah 1986)....	6
<i>Harper v. Summit County</i> , 2001 UT 10.....	7
<i>Higgins v. Salt Lake County</i> , 855 P.2d 231 (Utah 1993).....	18,19
<i>K & T, Inc. v. Koroulis</i> , 888 P.2d 623 (Utah 1994).....	19
<i>Kemp v. Murray</i> , 680 P.2d 758 (Utah 1984).....	26
<i>Lamb v. B & B Amusements Corp.</i> , 869 P.2d 926 (Utah 1993).....	19
<i>Landes v. Capital City Bank</i> , 795 P.2d 1127, 1130 (Utah 1990).....	5,6,7,8,25,26,27,30
<i>Madsen v. Borthick</i> , 769 P.2d 245 (Utah 1988).....	7,8
<i>Nunley v. Westates Casing Servs., Inc.</i> , 1999 UT 100, 989 P.2d 1077.....	20
<i>Parker v. Dodgion</i> , 971 P.2d 496 (Utah 1998).....	18,19

<i>Pasco County v. Tampa Dev. Corp.</i> , 364 S.2d 850 (Fla. Ct. App. 1978)	20,24
<i>Salt Lake County v. Kartchner</i> , 552 P.2d 136 (Utah 1976)	21
<i>Sandberg v. Klein</i> , 576 P.2d 1291 (Utah 1978)	21
<i>Seftel v. Capital City Bank</i> , 767 P.2d 941, 944 (Utah Ct. App. 1989), <i>aff'd sub nom., Landes v. Capital City Bank</i> , 795 P.2d 1127 (Utah 1990)	25
<i>Singleton v. Alexander</i> , 19 Utah 2d 292, 431 P.2d 126 (1967)	21
<i>State ex rel. M.W. and S.W.</i> , 2000 UT 79, 12 P.3d 80	7
<i>Stone v. Salt Lake City</i> , 11 Utah 2d 196, 356 P.2d 631 (1960)	18,27,31
<i>Stucker v. Summit County</i> , 870 P.2d 283 (Utah Ct. App. 1994)	21,24
<i>Town of Alta v. Ben Hame Corp.</i> , 836 P.2d 797 (Utah Ct. App. 1992)	21
<i>Utah County v. Baxter</i> , 635 P.2d 61 (Utah 1981)	21
<i>Utah County v. Young</i> , 615 P.2d 1265 (Utah 1980)	15,20,21,24
<i>Utah State Coalition of Senior Citizens v. Utah Power & Light</i> , 776 P.2d 632 (Utah 1989)	6
<i>van der Heyde v. First Colony Life Ins. Co.</i> , 845 P.2d 275 (Utah Ct. App. 1993)	21

Federal Cases

<i>Manygoats v. Kleppe</i> , 558 F.2d 556 (10th Cir. 1977)	27
--	----

STATUTES CITED

Utah Code Ann. § 17-21-6(1)(b) & (c) (1995)	14,23
---	-------

Utah Code Ann. § 17-21-22 (1995).....	14,23
Utah Code Ann. § 57-6-3 (1994).....	33
Utah Code Ann. § 57-6-4 (Supp. 2000).....	11,31,32
Utah Code Ann. § 78-22-1 (Supp. 1999).....	29

COURT RULES CITED

Utah R. Civ. P. 19.....	7,18,25,26,29,30
Utah R. Civ. P. 56.....	6,29,28

TREATISES AND OTHER AUTHORITY

7 C. Wright, A. Miller, & M. Kane, <i>Federal Practice and Procedure: Civil 2d</i> § 1602 at 21 (1986)).....	26
--	----

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2-2(3)(a) (1996).

STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether the court of appeals, in the course of affirming the summary judgment in favor of Grand County, failed to consider the genuine issues of disputed material fact concerning equitable estoppel. Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990) (citing Utah R. Civ. P. 56(c); *Utah*

State Coalition of Senior Citizens v. Utah Power & Light, 776 P.2d 632, 634 (Utah 1989); *Geneva Pipe Co. v. S & H Ins. Co.*, 714 P.2d 648, 649 (Utah 1986)). On certiorari, this Court does not review the decision of the trial court but rather that of the court of appeals, which this Court reviews for correction of error. *Harper v. Summit County*, 2001 UT 10 ¶ 10 (citing *State ex rel. M.W. and S.W.*, 2000 UT 79, ¶8, 12 P.3d 80, 82); see also *Landes*, 795 P.2d at 1129 (citing *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

2. Whether the court of appeals failed to consider the property owners of the subject parcels of property in the instant case to be necessary parties that should be joined as parties to the action prior to a full and fair determination of the matters at issue. The court of appeals' interpretation of Utah R. Civ. P. 19 is accorded no particular deference and is reviewed for correctness. *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990) (citing *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

3. Whether the court of appeals erred in its interpretation of Utah Code Ann. § 57-6-1, et seq., and failed to consider the genuine issues of material fact of whether the absent third-party property owners qualify as occupying claimants pursuant to the statute. The court of appeals' statutory interpretation is

accorded no particular deference and is reviewed for correctness. *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990) (citing *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)).

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, and regulations, whose interpretation is determinative in the instant appeal, are set out verbatim, with the appropriate citation, in the body and arguments of the instant brief.

STATEMENT OF THE CASE

This case arises out of the court of appeals' affirmance of the district court's summary judgment in favor of Grand County, the substance of which involves issues concerning necessary and indispensable third parties not before the court, substantial issues of material fact concerning equitable estoppel, and material issues of fact concerning the statutory interpretation of whether the property owners are occupying claimants pursuant to Utah Code Ann. § 57-6-1 et seq. Grand County initiated this action against Mr. Lester W. Rogers, solely, alleging that Mr. Rogers had failed to properly subdivide various parcels of property located in Grand County prior to selling the same. Grand County, among other things, prayed for (1) an order enjoining Mr. Rogers from further subdividing the subject property and from

selling any part of the entire parcel during the pendency of the lawsuit, and (2) an order requiring Mr. Rogers to conform the already conveyed parcels of property with the applicable zoning and subdivision ordinances. Mr. Rogers responded to Grand County's Complaint by denying the allegations in the Complaint and cross-claiming against various doe parties that occupied the parcels of property after having purchased the parcels from Mr. Rogers. By way of his Cross-Claim, Mr. Rogers sought judicial partition of the property previously sold to the third parties.

Grand County shortly thereafter filed a Motion for Summary Judgment. Mr. Rogers responded by filing a Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, together with the Affidavit of Lester Rogers, in which he raised various genuine issues of material fact. In addition, Mr. Rogers, through his counsel, requested oral argument on the Motion for Summary Judgment.

The district court, without oral argument, granted summary judgment by way of its Ruling on the Motion for Summary Judgment. Thereafter, the district court signed its Judgment (Enjoining Violation of Subdivision Ordinance). Mr. Rogers, through counsel, filed Notice of Appeal. This Court transferred the instant appeal to the Utah Court of Appeals on December 27, 1999.

On June 2, 2000, the Utah Court of Appeals issued an unpublished Memorandum Decision, in which it affirmed the district court's grant of summary judgment in favor of Grand County. See *Grand County v. Rogers*, 2000 UT App 162, a true and correct copy of which is attached hereto as Addenda D. Mr. Rogers filed a Petition for Writ of Certiorari, which this Court granted.

STATEMENT OF FACTS

1. The instant case arose some time after Mr. Rogers sold parcels of his property to various individuals not before the Court. The parcels of property sold by Mr. Rogers are located in Thompson, Utah, which is situated in the outermost part of Grand County.

2. The conveyances of the parcels of property were accepted and recorded by the Grand County Recorder's Office (R. 18-21, Uniform Real Estate Contract, Warranty Deed, and Vacant Land Sales Contracts attached to the Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment).

3. Subsequent to the aforementioned sales, the various third-party property owners obtained building permits and extensively improved their parcels of property.

4. Some five years after the sale of the first parcel of property by Mr. Rogers, Grand County filed a Complaint against Mr.

Rogers, alleging that he had failed to properly subdivide the lots prior to selling the same to the various third parties (R. 1-4, Complaint).

5. In its Complaint, Grand County, among other things, prayed for an order requiring Mr. Rogers to conform the already sold parcels of property with the applicable zoning and subdivision ordinances (R. 3, Complaint).

6. Mr. Rogers answered the Complaint, raising numerous affirmative defenses, which included estoppel and waiver (R. 7-14, Answer and Cross Claim, pp. 2-4). In addition, Mr. Rogers cross-claimed against various doe parties, alleging, among other things, that the property should be partitioned inasmuch as various third parties possessed the subject property under color of title as occupying claimants pursuant to Utah Code Ann. § 57-6-4 (See *id.* at R. 11-12, pp. 5-6).

7. Shortly after the aforementioned pleadings were filed, Grand County filed a Motion for Summary Judgment. Mr. Rogers responded in opposition by filing a Memorandum of Points and Authorities, supported by the Affidavit of Lester Rogers in which Mr. Rogers argued that various genuine issues of material fact, which included estoppel, partition, and the failure to join indispensable parties, precluded summary judgment (See R. 29-39, Memorandum of Points and Authorities in Opposition to Plaintiff's

Motion for Summary Judgment; R. 36-39, Affidavit of Lester Rogers). Mr. Rogers requested oral argument on the motion for summary judgment.

8. Without oral argument, the district court ruled that Grand County was "clearly entitled to an injunction . . .", and that Mr. Rogers "has not raised any genuine issue of material fact to preclude granting the relief." (See R. 59-62, Ruling on Motion for Summary Judgment, a true and correct copy of which is attached hereto as Addenda A).

9. Shortly thereafter, the district court signed the Judgment (Enjoining Violation of Subdivision Ordinance), ordering Mr. Rogers "to properly apply for and obtain subdivision approval as to those parcels, which he has already subdivided and/or sold contrary to law." (See R. 63-66, Judgment (Enjoining Violation of Subdivision Ordinance), a true and correct copy of which is attached hereto as Addenda B).

10. Mr. Rogers, through counsel, filed Notice of Appeal (See R. 67-70, Notice of Appeal).

11. On June 2, 2000, the court of appeals issued an unpublished Memorandum Decision, in which it affirmed the district court's grant of summary judgment in favor of Grand County. See *Grand County v. Rogers*, 2000 UT App 162, a true and correct copy of which is attached hereto as Addenda D.

12. Mr. Rogers filed a Petition for Writ of Certiorari, which this Court granted (See Order granting Petition for Writ of Certiorari, a true and correct copy of which is attached hereto as Addenda E).

SUMMARY OF ARGUMENTS

1. The equitable doctrine of estoppel requires proof of three elements, which are (i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. In this case, the Grand County Recorder accepted and recorded each document utilized to memorialize the sale and conveyance of properties by Mr. Rogers to various third parties. Grand County acknowledges accepting and recording the previously mentioned documents. By accepting and recording those instruments, Grand County performed acts that are inconsistent with its subsequent enforcement of the subdivision ordinance.

In its unpublished decision, the court of appeals held that "the recording of the relevant instruments is for notice purposes and is unrelated to the County's enforcement of zoning ordinances

. . . ." The court's legal conclusion is in direct contravention to the County Recorder's statutory duty to index deeds and other instruments "partitioning or affecting the title to or possession of real property" as well as the grantors and grantees of such as set forth in Utah Code Ann. § 17-21-6(1)(b) & (c) (1995). Moreover, the County Recorder is required by Utah Code Ann. § 17-21-22 (1995) to report changes in ownership "where only a part of the grantor's property is currently conveyed" and then "transmit an additional form showing a full legal description of the portion retained."

In addition to the acceptance and recording of instruments, the parties, to whom Mr. Rogers sold and conveyed the subject properties, possessed and made extensive valuable improvements to their individual parcels of property. At oral argument before the court of appeals, Grand County essentially acknowledged that the building permits issued to the buyers of Mr. Rogers' property obtained building permits, which allegedly were mistakenly issued by Grand County. The application of equitable estoppel to the instant case is particularly appropriate inasmuch as Grand County waited over five years after the sale of the first parcel of property by Mr. Rogers to Ms. Betty L. Relitz and almost a year and a half after the last sale to file a Complaint against Mr.

Rogers, alleging that he had failed to properly subdivide the subject property prior to selling the same to third parties.

The court of appeals failed to consider the disputed material facts that the subject parcels of property had been extensively improved or that Grand County had substantially delayed its enforcement of the subdivision ordinance. Moreover, the court of appeals' legal conclusion that Grand County was not estopped is in direct conflict with this Court's decision in *Young* where this Court stated that the doctrine of equitable estoppel applies "when a county committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses." Further, the court of appeals failed to consider that the disputed material facts in the instant case constitute "something beyond mere ownership of land" When properly considered, these disputed material facts constitute the exceptional circumstances contemplated for the application of estoppel against Grand County.

2. The court of appeals' decision evinces the failure to consider the arguments set forth in the Brief of Appellant squarely before the court, where Mr. Rogers argued that according to Rule 19(a)(1), the property owners to whom Mr. Rogers sold parcels of the subject property are necessary parties to the litigation because in their absence complete relief cannot be

accorded among those already parties. From 1994 through 1997, Mr. Rogers sold and conveyed various parcels of the subject property to bona fide third parties. By virtue of the claims asserted by Grand County, the interests of the third party property owners who are not parties to this action are directly adverse to the interests asserted by Grand County inasmuch as Grand County, by way of this case, now seeks to enforce the requirements of the subdivision ordinance on properties owned by the third-party property owners. Moreover, both Grand County's Complaint and its Motion for Summary Judgment demonstrate how necessary the third-party property owners are to the instant litigation. In its Complaint and Motion, Grand County asserted that Mr. Rogers' sales and conveyances of the subject parcels of property are void.

In addition to the arguments under subsection (1), the absent property owners are necessary parties under subsection (2) inasmuch as they have an interest relating to the subject property and are so situated that the disposition of the action in their absence may impair or impede their ability to protect that interest. For example, the district court's judgment constitutes a judgment lien upon the subject real property, thus encumbering the interests of the absent third party property owners and thereby serving as the basis of enforcement of the various

subdivision ordinance requirements upon the third-party property owners without any response or opposition to the enforcement.

The court of appeals also failed to consider that the district court's present disposition may subject Mr. Rogers to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations in order to comply with the district court's ruling as it is presently fashioned. Even if Mr. Rogers could legally comply with the district court's order, such compliance would subject Mr. Rogers to multiple obligations that would likely be incurred by actions filed by the absent third-party property owners against Mr. Rogers to defend their interests or otherwise shift responsibility for assessments incurred by the subdivision ordinance requirements.

Without little or no consideration of the joinder issue, the court of appeals affirmed the summary judgment, in which the district court ordered Mr. Rogers to apply and obtain subdivision approval for the parcels of property already sold to third parties not before the court. The district court ordered Mr. Rogers' compliance notwithstanding that he does not have the legal capacity or right to bring the previously sold and conveyed parcels of property into compliance with the applicable zoning and subdivision ordinances because ownership of the parcels, whether deemed legal or equitable, now lies with absent third parties.

In the course of concluding that the buyers to whom Mr. Rogers sold parcels of property are not necessary parties under Rule 19, the court of appeals failed to consider the two general factors in Utah R. Civ. P. 19(a). By so doing, the court of appeals ignored this Court's decision in *Bonneville Tower*, in which this Court held that the "failure to bring all parties before the court prevents it from properly reaching the merits of plaintiff's claim." Finally, the court of appeals' decision conflicts with this Court's decision in *Stone v. Salt Lake City*, 11 Utah 2d 196, 356 P.2d 631, 637 (1960), where this Court held "grantees of deeds, the validity of which is under attack" to be necessary parties.

ARGUMENTS

I. IN THE COURSE OF AFFIRMING THE SUMMARY JUDGMENT IN FAVOR OF GRAND COUNTY, THE COURT OF APPEALS FAILED TO CONSIDER THE GENUINE ISSUES OF DISPUTED MATERIAL FACT.

A. Summary Judgment Principles

"Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." See *Parker v. Dodgion*, 971 P.2d 496, 497 (Utah 1998) (quoting *Higgins v. Salt Lake County*, 855

P.2d 231, 235 (Utah 1993); Utah R. Civ. P. 56(c);¹. "The party moving for summary judgment must establish a right to judgment based on the applicable law as applied to an undisputed material issue of fact." *Lamb v. B & B Amusements Corp.*, 869 P.2d 926, 928 (Utah 1993). "[I]n reviewing a grant of summary judgment, [the appellate court] view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," which in this case is Mr. Rogers, the Petitioner. *K & T, Inc. v. Koroulis*, 888 P.2d 623, 624 (Utah 1994) (quoting *Higgins*, 855 P.2d at 233); see also *Parker*, 971 P.2d at 496-97.

The determination of whether a party is entitled to summary judgment is a question of law, and therefore, this Court accords no deference to the court of appeals' resolution of the legal issues presented. *Parker*, 971 P.2d at 497; *Higgins*, 855 P.2d at 235; *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989). In reviewing the court of appeals' determination as to summary judgment, this Court determines only whether the court of appeals "erred in applying the governing law" and whether the court "correctly held

¹Rule 56(c) provides in relevant part:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

that there were no disputed issues of material fact." *Ferree*, 784 P.2d at 151 (citing *Bushnell Real Estate, Inc. v. Nielson*, 672 P.2d 746, 749 (Utah 1983)); *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982)).

B. Genuine issues of disputed material fact exist as to whether Grand County is estopped from enforcing its subdivision ordinance.

The equitable doctrine of estoppel requires proof of three elements. Those three elements are "(i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act." *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶34, 989 P.2d 1077 (citing *CECO Corp. v. Concrete Specialists, Inc.*, 772 P.2d 967, 969-70 (Utah 1989)).

In *Utah County v. Young*, 615 P.2d 1265 (Utah 1980), the Utah Supreme Court stated that the doctrine of equitable estoppel applies "when a county committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses." *Id.* at 1267 (citing *Pasco County v. Tampa Dev. Corp.*, 364 S.2d 850 (Fla. Ct. App.

1978)); accord *Town of Alta v. Ben Hame Corp.*, 836 P.2d 797, 803 (Utah Ct. App. 1992). In short, "[e]stoppel, waiver or laches ordinarily do not constitute a defense to a suit for injunctive relief against alleged violations" asserted by a county "unless the circumstances are exceptional." *Salt Lake County v. Kartchner*, 552 P.2d 136, 138 (Utah 1976). To constitute exceptional circumstances, "something beyond mere ownership of land is required." *Stucker v. Summit County*, 870 P.2d 283, 290 (Utah Ct. App. 1994); *Utah County v. Baxter*, 635 P.2d 61, 65 (Utah 1981); *Young*, 615 P.2d at 1267; *Kartchner*, 552 P.2d at 138-39; *Town of Alta*, 836 P.2d at 802-03. Moreover, mere "[s]ilence or inaction will not operate to work an estoppel." *Young*, 615 P.2d at 1268.

A determination concerning estoppel involves material questions of fact that preclude summary judgment, especially when the parties dispute facts material to whether estoppel applies. See *van der Heyde v. First Colony Life Ins. Co.*, 845 P.2d 275, 280 (Utah Ct. App. 1993). Moreover, a determination of whether estoppel applies to a particular set of facts requires the fact finder to consider testimony and therefore make credibility determinations about such testimony as it pertains to the elements of estoppel. *Id.*; see generally *Singleton v. Alexander*, 19 Utah 2d 292, 294, 431 P.2d 126, 128 (1967); *Sandberg v. Klein*, 576 P.2d

1291, 1292 (Utah 1978) (stating that even in cases where facts are not in "complete conflict" but the "understanding, intention, and consequences" of the facts are disputed, the matters "can only be resolved by a trial").

In the case at bar, the Grand County Recorder accepted and recorded each document utilized to memorialize the sale and conveyance of properties by Mr. Rogers to various third parties (See R. 36-39, Affidavit of Lester Rogers, ¶9).² Grand County acknowledges accepting and recording the previously mentioned documents in the Affidavit of the Grand County Zoning Administrator, Mary Hofhine, which Grand County filed in support of its Motion for Summary Judgment (See R. 15-17, Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment, ¶¶2-4). By accepting and recording those instruments, Grand County performed acts that are inconsistent with its subsequent enforcement of the subdivision ordinance.

²See R. 19, Uniform Real Estate Contract attached to the Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment; R. 18.5, Warranty Deed attached to the Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment; R. 18, Vacant Land Sales Contract attached to the Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment; R. 21, Vacant Land Sales Contract attached to the Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment; and R. 20, Vacant Land Sales Contract attached to the Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment.

In its unpublished decision, the court of appeals held that "the recording of the relevant instruments is for notice purposes and is unrelated to the County's enforcement of zoning ordinances" See *Grand County v. Rogers*, 2000 UT App 162, pp. 1-2. This legal conclusion by the court of appeals is in direct contravention to the County Recorder's statutory duty to index deeds and other instruments "partitioning or affecting the title to or possession of real property" as well as the grantors and grantees of such as set forth in Utah Code Ann. § 17-21-6(1)(b) & (c) (1995). Moreover, the County Recorder is required by Utah Code Ann. § 17-21-22 (1995) to report changes in ownership "where only a part of the grantor's property is currently conveyed" and then "transmit an additional form showing a full legal description of the portion retained."

In addition to the acceptance and recording of instruments, the parties, to whom Mr. Rogers sold and conveyed the subject properties, possessed and made extensive valuable improvements to their individual parcels of property (See R. 36-39, Affidavit of Lester Rogers, ¶10). At oral argument before the court of appeals, Grand County essentially acknowledged that the building permits issued to the buyers of Mr. Rogers' property obtained building permits, which allegedly were mistakenly issued by Grand County. The application of equitable estoppel to the instant case

is particularly appropriate inasmuch as Grand County waited over five years after the sale of the first parcel of property by Mr. Rogers to Ms. Betty L. Relitz and almost a year and a half after the last sale to file a Complaint against Mr. Rogers, alleging that he had failed to properly subdivide the subject property prior to selling the same to third parties (See R. 1-4, Complaint).

Nowhere in its unpublished decision did the court of appeals consider the disputed material facts that the subject parcels of property had been extensively improved or that Grand County had substantially delayed its enforcement of the subdivision ordinance. The court of appeals' legal conclusion that Grand County was not estopped is in direct conflict with this Court's decision in *Young* where this Court stated that the doctrine of equitable estoppel applies "when a county committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses." *Utah County v. Young*, 615 P.2d at 1267 (citing *Pasco County v. Tampa Dev. Corp.*, 364 S.2d 850 (Fla. Ct. App. 1978)). Further, the court of appeals failed to consider that the disputed material facts in the instant case constitute "something beyond mere ownership of land" *Stucker*, 870 P.2d at 290. When properly considered, these disputed material facts constitute the

exceptional circumstances contemplated for the application of estoppel against Grand County.

II. THE COURT OF APPEALS FAILED TO CONSIDER THE PROPERTY OWNERS OF THE SUBJECT PARCELS OF PROPERTY TO BE NECESSARY PARTIES THAT SHOULD BE JOINED PRIOR TO A FULL AND FAIR DETERMINATION OF THE MATTERS AT ISSUE.

"To determine if a party is necessary, a court should consider the two general factors in rule 19(a)" of the Utah Rules of Civil Procedure.³ *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990). According to the first factor, a party is necessary if "in his absence complete relief cannot be accorded among those already parties." See Utah R. Civ. P. 19(a)(1). Under the second factor, a party is necessary if

he [or she] claims an interest relating to the subject of the action and is so situated that the disposition of the action in his [or her] absence may (i) as practical matter impair or impede his [or her] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

³In *Cassidy v. Salt Lake Fire Civil Serv. Council*, 976 P.2d 607 (Utah Ct. App. 1999), the court of appeals recently stated that "a party may raise the issue of failure to join an indispensable party at any time in the proceedings, including for the first time on appeal." *Id.* at 610 (citing *Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989), *aff'd sub nom.*, *Landes v. Capital City Bank*, 795 P.2d 1127 (Utah 1990)).

See Utah R. Civ. P. 19(a)(2). If the court determines that the party is necessary according to the aforementioned criteria, Rule 19 mandates that the party "shall be joined."⁴

"The basic purpose of rule 19 is 'to protect the interest of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.'" *Landes*, 795 P.2d at 1130 (quoting 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1602 at 21 (1986)); see also *Kemp v. Murray*, 680 P.2d 758, 760 (Utah 1984).

In the course of performing a Rule 19 analysis, "the court should discuss specific facts and reasoning that lead to the conclusion that a party is or is not necessary under rule 19(a) or

⁴Utah Rule of Civil Procedure 19(b), which addresses indispensable parties, provides:

If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him [or her] or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

indispensable under rule 19(b)." *Landes*, 795 P.2d at 1130 (citing *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977)).

In its unpublished decision, the court of appeals stated that "Rogers has not argued that subsection (1) [of Utah R. Civ. 19] applies and, under subsection (2), Rogers's buyers are not necessary parties." For the reasons set forth below, the court of appeals failed to consider Mr. Rogers' arguments pursuant to subsection (1) and erroneously concluded that the third-party buyers are not necessary parties under subsection (2).

First, the factors set out in subsections (1) and (2) of Rule 19(a) are disjunctive. Notwithstanding, the court of appeals' decision evinces its failure to consider the arguments set forth at pages 26-27 of the Brief of Appellant, where Mr. Rogers argued that according to Rule 19(a)(1), the property owners to whom Mr. Rogers sold parcels of the subject property are necessary parties to the litigation because in their absence complete relief cannot be accorded among those already parties. *Cf. Stone v. Salt Lake City*, 11 Utah 2d 196, 356 P.2d 631, 637 (1960) (holding "grantees of deeds, the validity of which is under attack" to be necessary parties). From 1994 through 1997, Mr. Rogers sold and conveyed various parcels of the subject property to bona fide third parties (See R. 15-17, Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment, ¶¶2-5; R. 36-39; Affidavit of Lester

Rogers, ¶¶8-10).⁵ By virtue of the claims asserted by Grand County, the interests of the third party property owners who are not parties to this action are directly adverse to the interests asserted by Grand County inasmuch as Grand County, by way of this case, now seeks to enforce the requirements of the subdivision ordinance on properties owned by the third party property owners. Moreover, both Grand County's Complaint and its Motion for Summary Judgment demonstrate how necessary the third-party property owners are to the instant litigation. In its Complaint and Motion, Grand County asserted that Mr. Rogers' sales and conveyances of the subject parcels of property are void (See R. 3, Complaint, ¶2 of the Prayer; R. 27-28, Amended Memorandum of Points and Authorities in Support of Motion for Summary Judgment; R. 41, Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment).

In addition to the arguments under subsection (1), the absent property owners are necessary parties under subsection (2) inasmuch as they have an interest relating to the subject property and are so situated that the disposition of the action in their

⁵The record reveals that Grand County failed to challenge or contradict the fact that Mr. Rogers sold the parcels of properties to various third parties not parties to the action. Rather, Grand County acknowledged the sales in the memorandum filed in support of its Motion for Summary Judgment (R. 15-17, Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment, ¶¶2-5; R. 36-29). Consequently, this fact became an uncontested fact for purposes of summary judgment. See Utah R. Civ. P. 56(e).

absence may impair or impede their ability to protect that interest.⁶ See Utah R. Civ. P. 19(a)(2); see also *Bonneville Tower Condominium Management Comm. v. Thompson Michie Assocs., Inc.*, 728 P.2d 1017, 1019 (Utah 1986) ("A plaintiff may not obtain relief adverse to the property rights of others who are not adverse parties to the case without bringing them before the court."). For example, the district court's judgment constitutes a judgment lien upon the subject real property, thus encumbering the interests of the absent third-party property owners and thereby serving as the basis of enforcement of the various subdivision ordinance requirements upon the third-party property owners without any response or opposition to the enforcement. See Utah Code Ann. § 78-22-1 (Supp. 1999).

The court of appeals also failed to consider that the district court's present disposition may subject Mr. Rogers to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations in order to comply with the district court's ruling as it is presently fashioned. See Utah R. Civ. P. 19(a)(2). Even if Mr. Rogers could legally comply with the district court's order, such compliance would subject Mr. Rogers

⁶By virtue of the sales and conveyances by Mr. Rogers, the absent third-party property owners have an interest in the subject real property (R. 15-17, Affidavit of Mary Hofhine in Support of Plaintiff's Motion for Summary Judgment, ¶¶2-5; R. 36-39, Affidavit of Lester Rogers, ¶¶8-10).

to multiple obligations that would likely be incurred by actions filed by the absent third-party property owners against Mr. Rogers to defend their interests or otherwise shift responsibility for assessments incurred by the subdivision ordinance requirements.

Without little or no consideration of the joinder issue, the court of appeals affirmed the summary judgment, in which the district court ordered Mr. Rogers to apply and obtain subdivision approval for the parcels of property already sold to third parties not before the court (See R. 64, Judgment (Enjoining Violation of Subdivision Ordinance)). The district court ordered Mr. Rogers' compliance notwithstanding that he does not have the legal capacity or right to bring the previously sold and conveyed parcels of property into compliance with the applicable zoning and subdivision ordinances because ownership of the parcels, whether deemed legal or equitable, now lies with absent third parties.

In the course of concluding that the buyers to whom Mr. Rogers sold parcels of property are not necessary parties under Rule 19, the court of appeals failed to consider the two general factors in Utah R. Civ. P. 19(a). See *Landes*, 795 P.2d at 1130. The court of appeals also ignored this Court's decision in *Bonneville Tower*, in which this Court held that the "failure to bring all parties before the court prevents it from properly reaching the merits of plaintiff's claim." *Bonneville Tower*, 728

P.2d at 1020. Finally, the court of appeals' decision conflicts with this Court's decision in *Stone v. Salt Lake City*, 11 Utah 2d 196, 356 P.2d 631 (1960), where this Court held "grantees of deeds, the validity of which is under attack" to be necessary parties. *Stone*, 356 P.2d at 637.

III. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF UTAH CODE ANN. § 57-6-1, *et seq.*, AND FAILED TO CONSIDER THE GENUINE ISSUES OF MATERIAL FACT OF WHETHER THE ABSENT THIRD-PARTY PROPERTY OWNERS QUALIFY AS OCCUPYING CLAIMANTS.

Utah Code Ann. § 57-6-4(2)(a) (Supp. 2000)⁷ provides the following:

Any person has color of title who has occupied a tract of real estate by himself [or herself], or by those under whom he [or she] claims, for the term of five years, or who has occupied it for less time, if he [of she], or those under whom he [of she] claims, have at any time during the occupancy with the knowledge or consent, express or implied, of the real owner made any valuable improvements on the real estate, or if he [or she] or those under whom he [or she] claims have at any time during the occupancy paid the ordinary county taxes on the real estate for any one year, and two years have elapsed without a repayment by the owner, and the occupancy is continued up to the time at which the action is brought by which the recovery of the real estate is obtained.

⁷A copy of Utah Code Ann. § 57-6-4(2)(a) (Supp. 2000) is attached hereto as Addenda C.

(Bracketed material added). The record on appeal reveals that the absent third-party property owners, to whom Mr. Rogers sold the subject parcels of property, have occupied the subject real property and have made valuable improvements to their respective parcels (See R. 36-39, Affidavit of Lester Rogers, ¶¶6, 8, and 10). In fact, at oral argument before the court of appeals, Grand County acknowledged the improvements to the subject property in the course of discussing building permits that had been issued to the property owners.

Notwithstanding the previously stated plain language of the statute, the court of appeals held that Utah Code Ann. § 57-6-1 through 8 (1994 & Supp. 2000) did not apply to the instant case.

See Grand County v. Rogers, 2000 UT App 162, pp. 2-3. In the course of its interpretation, the court of appeals stated that "[t]he remedy sought by the County seeks neither to expel them nor to encumber their property in any way." *See id.*

The court of appeals failed to consider both the plain language of the statute and the genuine issues of disputed material facts under which the absent third-party property owners and Mr. Rogers occupy the subject property and thereby have color of title as against Grand County. *See* Utah Code Ann. § 57-6-4 (Supp. 2000). Moreover, genuine issues of material fact exist concerning the interest and remedies that the property owners are

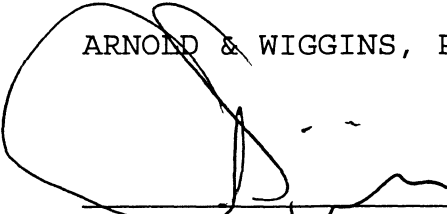
entitled to in light of the competing interests alleged by Grand County in this action and whether the zoning and subdivision ordinances of the County take precedence over the interests provided for in Utah Code Ann. § 57-6-1, *et seq.* (1994 & Supp. 2000). See Utah Code Ann. § 57-6-3 (1994) (providing remedy for parties to hold property as tenants in common).⁸

CONCLUSION

Based on the foregoing, Mr. Rogers respectfully asks that this Court reverse the court of appeals unpublished decision, affirming the district court's grant of summary judgment in favor of Grand County and remand the case for trial on the existing genuine issues of disputed material fact and for any other relief the Court deems appropriate.

RESPECTFULLY SUBMITTED this 7th day of February, 2001.

ARNOLD & WIGGINS, P.C.



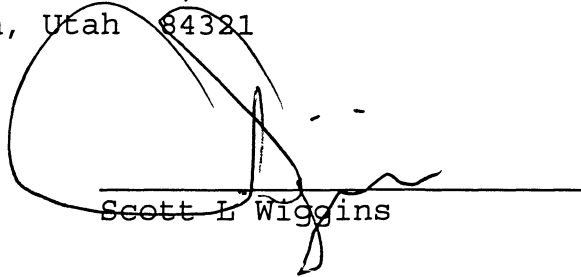
Scott L. Wiggins
Attorneys For Petitioner

⁸A copy of Utah Code Ann. § 57-6-3 (1994) is attached hereto as Addenda C.

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF PETITIONER** to the following on this 9th day of February, 2001:

Mr. W. Scott Barrett
Barrett & Daines
108 North Main, Suite 200
Logan, Utah 84321



Scott L Wiggins

ADDENDUM

- Addenda A: Ruling on Motion for Summary Judgment
- Addenda B: Judgment (Enjoining Violation of Subdivision Ordinance)
- Addenda C: Utah Code Ann. §§ 57-6-3 (1994) and 57-6-4 (Supp. 2000)
- Addenda D: Unpublished Memorandum Decision of the court of appeals: *Grand County v. Rogers*, 2000 UT App 162
- Addenda E: Order granting Petition for Writ of Certiorari

Tab A

FILED JUN 21 1999

CLERK OF THE COURT
BY J. R. Anderson
Deputy

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY
STATE OF UTAH

GRAND COUNTY,
Plaintiff,
vs
LESTER W. ROGERS
Defendant.

RULING ON MOTION
FOR SUMMARY JUDGEMENT

Case No. 9907-38
Judge Lyle R. Anderson

Plaintiff, Grand County (the "County" has moved the Court to issue an injunction requiring defendant Lester W. Rogers ("Rogers") to comply with the subdivision law and prohibiting further subdivision of his property. Rogers has objected and the matter has been fully briefed and submitted for decision.

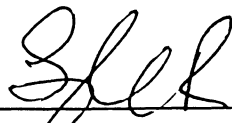
The County is clearly entitled to an injunction against additional sales. The County also seeks an order that Rogers comply with the law as to sales already made. Rogers defends on the theory that the title of the purchasers cannot be affected, that discovery is not complete, and that there are genuine issues of fact. In reply, the County disclaims any intention to cloud the title of those purchasers. It intends only to obtain Rogers' compliance with the law.

Rogers has not raised any genuine issue of material fact to preclude granting the relief. He has also not shown what

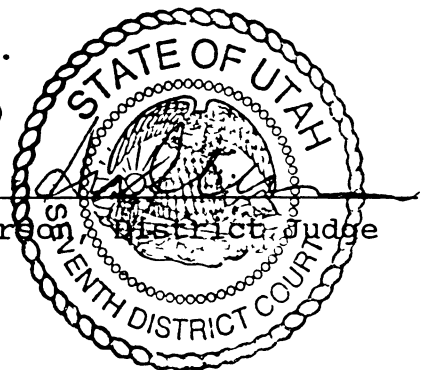
discovery is needed before the motion can be considered. The motion is therefore granted.

Counsel for the County should submit a formal judgement pursuant to Rule 4-504.

Dated this 21st day of June, 1999.



Lyle R. Anderson, District Judge




CERTIFICATE OF NOTIFICATION

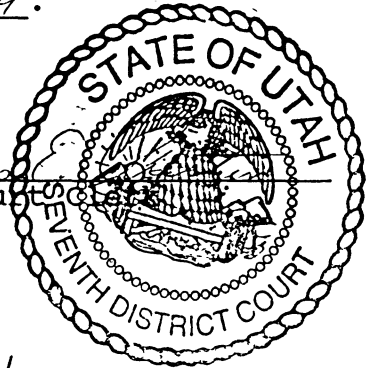
I certify that a copy of the attached document was sent to the following people for case 990700038 by the method and on the date specified.

METHOD NAME

Mail	MARK E. ARNOLD ATTORNEY AMERICAN PLAZA II, SUITE 404 57 WEST 200 SOUTH SALT LAKE CITY, UT 841010000
Mail	W. SCOTT BARRETT ATTORNEY 300 SOUTH MAIN STREET, #465 LOGAN UT 843210000

Dated this 9th day of June, 19 99.


Deputy Court Clerk



*See also
supplemental
certificate attached
to attorney's new
address*

FILED JUL 10 1999

CLERK OF THE COURT
BY Jim
Deputy

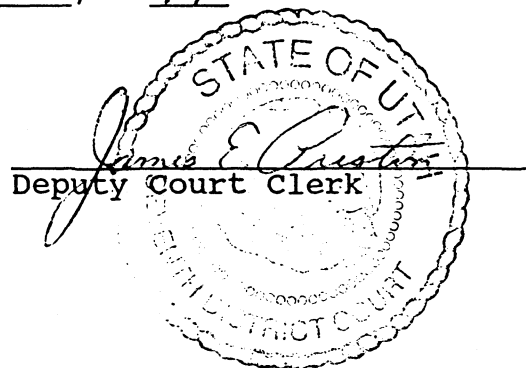
CERTIFICATE OF NOTIFICATION

(Ruling on Motion for Summary Judgment)
I certify that a copy of the attached document was sent to the following people for case 990700038 by the method and on the date specified.

METHOD NAME

Mail W. SCOTT BARRETT ESQ
ATTORNEY
SUITE 200
108 N MAIN
LOGAN, UT 84321

Dated this 6th day of July, 19 99.



Tab B

SEVENTH DISTRICT COURT
Grand County

FILED AUG - 4 1999

BY CLERK OF THE COURT
Deputy

W. Scott Barrett (0228)
BARRETT & DAINES
108 North Main, Suite 200
Logan, UT 84321
Telephone: (435) 753-4000
Facsimile: (435) 753-4002

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR GRAND COUNTY STATE OF UTAH

GRAND COUNTY,

Plaintiff,

vs.

LESTER W. ROGERS,

Defendant.

**JUDGMENT
(ENJOINING VIOLATION OF
SUBDIVISION ORDINANCE)**

Civil No. 9907-38

Judge: Anderson

The above entitled matter came on regularly for decision before the undersigned sitting without a jury on Plaintiff's Motion for Summary Judgment; and

The Court having determined that the matter has been fully briefed and submitted for decision and having examined the proofs of the respective parties and the written arguments submitted, W. Scott Barrett appearing for the Plaintiff, and Mark E. Arnold appearing as attorney for the Defendant; and

The Court having issued its written ruling on Plaintiff's Motion for Summary Judgment on the 21st day of June, 1999, granting the Plaintiff's Motion.

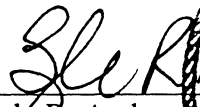
NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the Defendant and all persons acting under him be, and they hereby are, enjoined

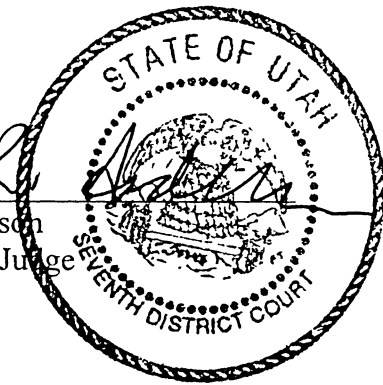
from further subdividing the property described in the Complaint.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant be required to properly apply for and obtain subdivision approval as to those parcels, which he has already subdivided and/or sold contrary to law.

DATED this 4th day of August, 1999.



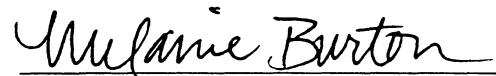
Lyle R. Anderson
District Court Judge



CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT,
postage prepaid, this 9th day of July, 1999, to the following:

Mark E. Arnold
Attorney at Law
American Plaza II, Suite 404
57 West 200 South
Salt Lake City, UT 84101

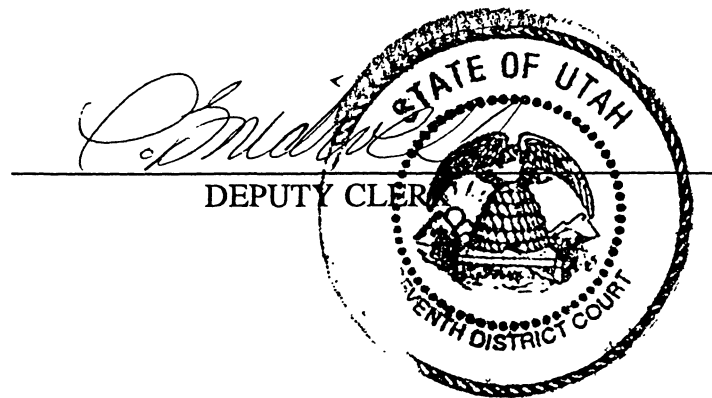

Secretary

COURT CLERK'S CERTIFICATE OF MAILING/HAND DELIVERY

I hereby certify that on the 5TH day of AUGUST, 1999, I mailed, postage prepaid, or hand delivered, a true and correct copy of the foregoing JUDGMENT to the following:

W. Scott Barrett
BARRETT & DAINES
108 North Main
Suite 200
Logan, Utah 84321

Mark E. Arnold
Attorney at Law
57 West 200 South
Suite 404
Salt Lake City, Utah 84101



Tab C

title, to recover value of his improvements to extent that they unjustly enrich record owner by enhancing value of his land. *Reimann v. Baum*, 115 Utah 147, 203 P.2d 387 (1949).

— **Separate action.**

This section contemplates a separate action. *American Mut. Bldg. & Loan Co. v. Jones*, 102 Utah 318, 117 P.2d 293 (1941), rehearing denied, 102 Utah 328, 133 P.2d 332 (1943).

Evidence.

— **Burden of proof.**

The burden is on the occupying claimant to prove by a preponderance of the evidence that he acted in good faith in placing the improvements on the property. *Erickson v. Stokes*, 120 Utah 653, 237 P.2d 1012 (1951).

— **Occupying claimants.**

Evidence sustained finding that defendants were not occupying claimants but were in possession as result of a trust. *Sorenson v. Korsgaard*, 83 Utah 177, 27 P.2d 439 (1933).

— **Permanent improvements.**

In action to quiet title to three parcels of realty and to recover damages, evidence was insufficient to support finding that occupying

claimants had constructed permanent improvements on the land. *Reimann v. Baum*, 115 Utah 147, 203 P.2d 387 (1949).

— **Value of improvements.**

This section recognizes the equitable rule that the reasonable cost of the improvements, alone, is not sufficient evidence of value, but may be considered together with all other evidence of value in determining the increase in value of the land on account of the improvements. *Reimann v. Baum*, 115 Utah 147, 203 P.2d 387 (1949).

Good faith.

Occupant who placed the improvements on the property during the pendency of the main action did not act in good faith, although that action remained pending for three years without the plaintiff's calling it up for trial, where there was no indication that the main action had been abandoned. The plaintiff's delay did not amount to laches barring him from asserting lack of good faith against the occupant, because the occupant could have called the case up for trial himself, or could have moved to dismiss for lack of prosecution at any time during the period. *Erickson v. Stokes*, 120 Utah 653, 237 P.2d 1012 (1951).

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Improvements §§ 42 to 47.

C.J.S. — 42 C.J.S. Improvements § 9.
Key Numbers. — Improvements § 4(6).

57-6-3. Rights of parties — Acquiring other's interest or holding as tenants in common.

The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property, but should he fail to do so after a reasonable time, to be fixed by the court, the defendant may take the property upon paying its value, exclusive of the improvements. If this is not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the real estate, including the improvements, each holding an interest proportionate to the values ascertained on the trial.

History: R.S. 1898 & C.L. 1907, § 2023; C.L. 1917, § 5033; R.S. 1933 & C. 1943, 78-6-3.

NOTES TO DECISIONS

ANALYSIS

Equitable basis of recovery.

Evidence.

— Permanent improvements.

— Value of improvements.

Right to sale or partition of property.

Value of improvements.

— Fair market value.

Equitable basis of recovery.

This section ameliorates strict common-law rule that record owner is entitled to improvements placed by another upon his property, and

is based upon equitable doctrine of unjust enrichment, which entitles bona fide claimant, who acted while in possession under color of title, to recover value of his improvements to extent that they unjustly enrich record owner by enhancing value of his land. *Reimann v. Baum*, 115 Utah 147, 203 P.2d 387 (1949).

Evidence.

— **Permanent improvements.**

In action to quiet title to three parcels of realty and to recover damages, evidence was insufficient to support finding that occupying claimants had constructed permanent improvements on the land. *Reimann v. Baum*, 115 Utah 147, 203 P.2d 387 (1949).

— **Value of improvements.**

This section recognizes the equitable rule that the reasonable cost of the improvements, alone, is not sufficient evidence of value, but such cost may be considered together with all other evidence of value in determining the increase in value of the land on account of the improvements. *Reimann v. Baum*, 115 Utah

147, 203 P.2d 387 (1949)

Right to sale or partition of property.

This chapter contains no provision for sale of the property or for application of the proceeds to satisfying the interests of the parties. It merely calls for a relationship of tenants in common in the premises. A partition or other separation of interests is the subject matter of a different action. *American Mut. Bldg. & Loan Co. v. Jones*, 102 Utah 318, 117 P.2d 293 (1941), rehearing denied, 102 Utah 328, 133 P.2d 332 (1943)

Value of improvements.

— **Fair market value.**

Since this section requires that if the owner retains the property he shall "pay the appraised value of the improvements," this was properly regarded by the trial court as being the fair market value in the usual understanding of that term and not as including any special concealed value the property may have had. *Alleman v. Miner*, 10 Utah 2d 356, 353 P.2d 463 (1960).

COLLATERAL REFERENCES

Brigham Young Law Review. — The Law of Practical Location of Boundaries and the

Need for an Adverse Possession Remedy, 1986 B.Y.U. L. Rev. 957.

57-6-4. Certain persons considered to hold under color of title.

(1) A purchaser in good faith at any judicial or tax sale made by the proper person or officer has color of title within the meaning of this chapter, whether

or not the person or officer has sufficient authority to sell, unless the want of authority was known to the purchaser at the time of the sale.

(2) (a) Any person has color of title who has occupied a tract of real estate by himself, or by those under whom he claims, for the term of five years, or who has occupied it for less time, if he, or those under whom he claims, have at any time during the occupancy with the knowledge or consent, express or implied, of the real owner made any valuable improvements on the real estate, or if he or those under whom he claims have at any time during the occupancy paid the ordinary county taxes on the real estate for any one year, and two years have elapsed without a repayment by the owner, and the occupancy is continued up to the time at which the action is brought by which the recovery of the real estate is obtained.

(b) The person's rights shall pass to his assignees or representatives

(3) Nothing in this chapter shall be construed to give tenants color of title against their landlords or give any person a claim under color of title to school or institutional trust lands as defined in Subsection 53C-1-103(6)

History: R.S. 1898 & C.L. 1907, § 2024; C.L. 1917, § 5034; R.S. 1933 & C. 1943, 78-6-4; L. 1995, ch. 299, § 25.

Amendment Notes. — The 1995 amend-

ment, effective May 1, 1995, added the subsection designations, added the second clause in Subsection (3) beginning "or give any person," and made related and stylistic changes

NOTES TO DECISIONS

Basis of claimant's right.

—Color of title.

The claimants to land allegedly owned by a trust had color of title to their lots where the trust knew that the claimants were improving

the land, encouraged them to do so, and in some cases consented to the improvements *Jeffs v Stubbs*, 970 P2d 1234 (Utah 1998), cert denied, 526 U S 1130, 119 S Ct 1803 143 L Ed 2d 1007 (1999)

Tab D

FILED

JUN 02 2000

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

Grand County,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 990766-CA
v.)	
)	F I L E D
Lester W. Rogers,)	(June 2, 2000)
)	
Defendant and Appellant.)	<div style="border: 1px solid black; padding: 2px;">2000 UT App 162</div>

Seventh District, Moab Department
The Honorable Lyle R. Anderson

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
W. Scott Barrett, Logan, for Appellee

Before Judges Jackson, Bench, and Davis.

JACKSON, Associate Presiding Judge:

"In reviewing a grant of summary judgment, we accord no deference to the trial court's conclusions of law and review them for correctness." Drysdale v. Ford Motor Co., 947 P.2d 678, 680 (Utah 1997). "[W]e view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993).

Rogers first argues that the County is estopped from enforcing its subdivision ordinance. The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act." State ex rel. Parker v. Irizarry, 945 P.2d 676, 680 (Utah 1997). Specifically, Rogers asserts that the County's acceptance and recordation of contracts and a deed for the sale of portions of his acreage are acts inconsistent with the County's current position. We disagree. A county recorder has no discretion and must record all instruments received. See Utah Code Ann. § 17-21-17(1) (1999). The recording of the relevant instruments is for notice purposes and is unrelated to the County's enforcement

of zoning ordinances; it did not justify Rogers's inference that the County was allowing subdivision of his property without approval. Rogers also does not allege specific impending injury if the County is allowed to enforce its ordinances here. On both the first and third of the essential elements of equitable estoppel, then, Rogers's defense fails as a matter of law.

Rogers next argues that the county waived its right to enforce its ordinances against him. We decline to consider this defense as it is not properly before us. For an issue to be preserved for appeal, the district court must be given the chance to consider it. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982). Because Rogers's memorandum to the district court did not address the defense of waiver, Rogers failed to properly preserve this defense for appeal.

Rogers also argues that his buyers are necessary parties within the meaning of Utah Rule of Civil Procedure 19(a). A party is necessary if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Utah R. Civ. P. 19(a). Rogers has not argued that subsection (1) applies and, under subsection (2), Rogers's buyers are not necessary parties.


Though they likely may claim an interest, Rogers points to no particular circumstance under which the buyers' ability to protect their interests will be impaired or impeded by the disposition of this case in their absence. Likewise, Rogers does not specify how he would be subject to the risk of "double, multiple, or otherwise inconsistent obligations." Id. Because Rogers alleges no facts which would meet the requirements of Rule 19, this argument also fails.

Though Rogers next invokes the Occupying Claimant's Act (the Act), it is not apparent how it applies to this case. See Utah Code Ann. §§ 57-6-1 to -8 (1994 & Supp. 1999). Rogers's buyers are not threatened with the kind of action against their property that the Act's protections contemplate. The remedy sought by the

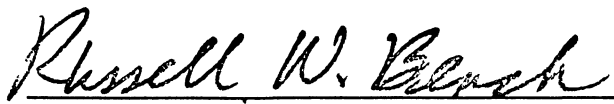
County seeks neither to expel them nor to encumber their property in any way. The Act thus does not apply here.

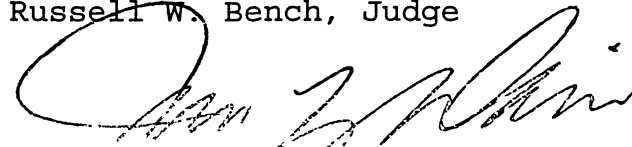
Rogers also argues that the district court's grant of summary judgment was improper before discovery. Such decisions regarding discovery will be reviewed for abuse of discretion. See American Towers Owners Ass'n v. CCI Mechanical, Inc., 930 P.2d 1182, 1195 (Utah 1996). Despite his argument that discovery must generally precede summary judgment, a court need not allow discovery when "the motion opposing summary judgment is dilatory or without merit." Downtown Athletic Club v. Horman, 740 P.2d 275, 278 (Utah Ct. App. 1987). The district court judge apparently determined here that Rogers's opposition to the County's motion was without merit. Further, Rogers did not then and does not now offer any theories as to what material facts he might obtain through discovery. Discovery is not allowed when the party opposing the motion for summary judgment is "merely on a 'fishing expedition.'" Id. (citations omitted). We thus cannot say the district court abused its discretion in denying Rogers's motion for discovery.

Affirmed.


Norman H. Jackson,
Associate Presiding Judge

WE CONCUR:


Russell W. Bench, Judge


James Z. Davis, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Grand County,
Respondent,
vs.
Lester W. Rogers,
Petitioner.

No. 20000672-SC
990766-CA

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed pursuant to Rule 48, of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Writ of Certiorari filed on August 2, 2000, by petitioner is granted.

FOR THE COURT:

Oct. 12, 2000
Date

Richard C. Howe
Richard C. Howe
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on October 13, 2000, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the party(ies) listed below:

W. SCOTT BARRETT
BARRETT & DAINES
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SCOTT L. WIGGINS
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57 W 200 S
SALT LAKE CITY UT 84101

and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the court(s) listed below:

SEVENTH DISTRICT, MOAB DEPT
ATTN: VICKY
GRAND COUNTY COURTHOUSE
125 E CENTER ST
MOAB UT 84532

Paulette Stagg
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SALT LAKE CITY UT 84114-0230

By 
Deputy Clerk

Case No. 20000672-SC
SEVENTH DISTRICT, MOAB DEPT , 9907-38