

1977

Hidden Meadows Development Co. v. Dee Mills et al : Brief of Appellant and Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HIDDEN MEADOWS DEVELOPMENT COMPANY,

Plaintiff and Appellant,

vs.

DEE MILLS and EVELYN I. MILLS, his
wife, MILTON C. CHRISTENSEN, aka
MILTON A. CHRISTENSEN, PARADISE
VALLEY ESTATES, INC., LAKE MILLS
COMPANY, a Limited Partnership,
CAROLE LEE CHRISTENSEN, formerly
CAROLE LEE DAVIS, ENVIRONMENTAL
RESOURCES, INC., INTERNATIONAL
ENVIRONMENTAL SCIENCES, a Limited
Partnership, JOHN DENNIS HIGGINSON
and SHERREL HIGGINSON, aka RAYMA
SHERREL W. HIGGINSON, his wife,
R. W. DAVIS LIVESTOCK COMPANY,
VERL ROTHLSBERGER, EVE RHODES,
EVELYN I. MILLS TRUST, FIRST
SECURITY BANK OF UTAH, N.A., and
DALE A. ALLSOP and DONNA B. ALLSOP,
his wife,

Defendants and Respondents

NOS. 15027
15157
15188

BRIEF OF INTERNATIONAL ENVIRONMENTAL SCIENCES,
Appellant and Respondent

Appeal from Judgment of Fourth District Court of
Utah County
Honorable Ernest F. Baldwin, Jr., Judge

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FILED

DEC 19 1977

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

HIDDEN MEADOWS DEVELOPMENT COMPANY,

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IN THE SUPREME COURT OF THE STATE OF UTAH

HIDDEN MEADOWS DEVELOPMENT COMPANY,	:	
Plaintiff and Appellant,	:	NOS. 15027
	:	15157
vs.	:	15188
DEE MILLS, et al,	:	
Defendants and Respondents	:	

BRIEF OF INTERNATIONAL ENVIRONMENTAL SCIENCES,
Appellant and Respondent

STATEMENT OF CASE

This case presents unique issues for determination by the Court for which there is no precedence in this State, and very little authority from other jurisdictions.

Basically the case involves a title dispute to some 542 acres of land in the Heber Valley in Wasatch County, Utah. Not only are there important principles of law present, but there are also substantial values involved.

The case has been before this Court on a prior occasion. In that case this Court reversed a decision of the lower court which held that an option to purchase the land in question was invalid. The events that occurred between the date of the Judgment of the lower court and the date of reversal by this Court give rise to this phase of the litigation.

The first issue is the effect and duration of a Lis Pendens, a matter never before this Court. The second issue, should it be reached by the Court, is whether a change of zoning secured by an

occupying claimant which enhances the value of property is a proper element of damage to be awarded an occupying claimant.

STATEMENT OF FACTS

Dee Mills and Evelyn Mills, his wife, defendants, appellants, and respondents herein, owned, occupied, and farmed land in question for many years.

On December 28, 1964 Dee and Evelyn Mills granted an option to East Heber Development Company, predecessor of the present plaintiff. The option was recorded that day (Ex. 1-P). Later a dispute arose between plaintiff and Mills concerning the validity of the option, and this extensive litigation ensued.

A chronology of dates and events is important.

December 28, 1964	Option from Mills to plaintiff's predecessor.
September 14, 1971	Option from Mills to Milton C. Christensen (Ex. 5-P).
October 15, 1971	Lis Pendens, East Heber Development Company v. Dee Mills, et al (Ex. 3-P).
October 15, 1971	Warranty Deed from Dee and Evelyn Mills to Paradise Valley Estates, Inc.
October 15, 1971	Warranty Deed from Dee and Evelyn Mills to Lake Mills Company, a limited partnership.
December 10, 1971	Amended Lis Pendens, Hidden Meadows Development v. Dee and Evelyn Mills.
December 10, 1971	Hidden Meadows Development Company commenced suit seeking a Decree of Specific Performance with respect to the 1964 option.
August 10, 1972	Lower court, Judge D. Frank Wilkins presiding entered Judgment for the defendants Dee Mills, Evelyn Mills, Milton C. Christensen, Paradise Valley Estates, Inc., and Lake Mills Company holding plaintiff's option to be null and void.

August 10, 1972	Notice of Appeal filed by plaintiff.
October 12, 1972	Motion for Supersedeas filed by plaintiff.
November 29, 1972	Order by Judge D. Frank Wilkins granting supersedeas in the amount of \$50,000.00.
(Note: Plaintiff did not post the \$50,000.00 Supersedeas Bond.)	
January 3, 1973	Warranty Deeds from Lake Mills, a limited partnership, and Paradise Valley Estates, a corporation, convey to International Environmental Sciences.
July 5, 1973	Decision of Supreme Court reversing lower court's decision (29 U2d 469, 511 P2d 737).

Subsequent to the reversal by this Court, proceedings for specific performance and enforcement of that Decree were instituted by plaintiff and a Supplemental Complaint was filed naming as additional parties those persons who acquired an interest in the real property subsequent to the original judgment by the lower court. The only party now challenged is Carole Lee Davis (now Christensen) and her limited partnership, International Environmental Sciences. Plaintiff has elected to acknowledge the validity of certain contract sales for small tracts of land sold by International Environmental Sciences or its predecessor during the pendency of an appeal. Plaintiff does not, however admit that defendant had any title to convey. The sequence of events set forth above frames a fairly simple question, but one with complex and extremely important ramifications.

Can a landowner convey a marketable title after a judgment in his favor during the pendency of an appeal? A subsidiary issue applicable to this case is raised by the fact that the adverse claimant moved the Court to fix a supersedeas, but then failed to

post the requisite bond. The conveyances here involved were subsequent to those proceedings, but prior to the date on which the Supreme Court reversed.

The answer given by this Court will have an effect on matters concerning the finality of a judgment of the lower courts of this State and the presumptions surrounding that judgment. The answer must reach the matter of the duration and effect of a lis pendens and the interaction of supersedeas procedures.

In reaching its decision here, the Court must be mindful that its duty is to provide certainty and not confusion in real property titles, and it must seek that solution which will promote the free alienation of property.

It is the belief of the appellant, International Environmental Sciences, that a reversal of the lower court in this case will accomplish these desirable and necessary goals.

ARGUMENT

POINT I.

THE LOWER COURT ERRED IN RULING THAT THE TITLE ACQUIRED BY APPELLANT INTERNATIONAL ENVIRONMENTAL SCIENCES WAS SUBJECT TO THE LATER REVERSAL OF THIS COURT AND, THEREFORE, INVALID.

Dee Mills, a landowner, prevailed in the lower court against the option holder plaintiff. The lower court in an unequivocal judgment ruled that the option was invalid and that the title of Mills is good and valid. Feeling aggrieved, the option holder appealed to this Court. During the pendency of the appeal, in order to preserve the status quo, the option holder moved the Court to fix a supersedeas. However, when the Court set the amount of the supersedeas at \$50,000.00 the courage of the option holder wavered. If the judgment of the lower court were affirmed, defendants could easily have suffered \$50,000.00 damage during the pendency of the appeal. No bond was filed. Plaintiff elected to gamble. He took no risk. As it has now turned out, all of the risk was upon the defendants who took title in reliance upon the validity and finality of the lower court judgment which held that the option was invalid.

After the reversal additional defendants, including this appellant, were joined in the lawsuit. They defended their title on the ground that the lis pendens did not go beyond the judgment of the lower court and that the plaintiff could not preserve the status quo without filing a bond. The lower court

on the contrary ruled that the lis pendens has life and durability beyond a lower court judgment and that personal knowledge of an appeal will subject a person dealing with the title to the effect of a later decree of reversal by an appellate court (Fdg. 12 - R. 227).

Let us assume for the moment that this Court agrees with the lower court and affirms this decision. The Court should consider some practical examples of future results of such a ruling. It will not matter what type of title we use. It could be fee title, leasehold, mineral right, mining claim, mortgage or other lien, future interest or whatever. For this example let us assume that the interest in real property in this case is a mining claim. Suit is brought by title breaker, claiming a prior right from an earlier locator. A lis pendens is filed for record. The lower court, finding that title breaker's predecessor in interest had not done assessment work, rules in favor of the owner of the claim and quiets title against the adverse claimant. The owner then receives a handsome offer for his claim, but the third party will not accept title and pay over the money until the pending lis pendens is released. Landowner then goes to title breaker and requests a release of lis pendens. Title breaker consults his lawyer, who advises him that his chances of prevailing on appeal are not good, but that merely taking the appeal will cloud the title and prevent a sale of the mining claim or any mining activity. Title breaker goes back to landowner and advises him that he will not release the lis pendens and is going to take a timely appeal to the Supreme Court. Landowner then goes to pros-

pective purchaser and asks for time. Purchaser is anxious to begin development and advises landowner that if a sale cannot be consummated within 90 days it will place its risk capital elsewhere. The result is that the landowner won against a spurious claim, and yet he loses because without any risk to himself the title breaker can effectively tie up the real property in question during the pendency of an appeal or until all possibility of an appeal has ceased to exist.

The foregoing example might not seem of much compelling importance, but another example of critical significance exists in this State today. While not a matter of record in this case, it is a matter of common knowledge that the Ute Indians claim vast acreages outside the reservation and the claim embraces almost all of Duchesne County and part of Uintah County. So far only governmental control over those lands is sought. Certainly claim to title will follow. In other areas of the country various Indian tribes have claimed title to land where it was thought that the title had been settled for over two hundred years. The Indians in these matters are aided and encouraged by various groups including certain agencies of the United States government. The claims are not fanciful. One day they will have to be determined in the state and federal courts.

Assume that the Indians claim title to all or practically all of Duchesne County, whether suit be filed or whether administrative proceedings commence. Assume further that the Court ruled that the claim of title was without merit. It is easy to visualize appellate proceedings grinding on endlessly through state and federal courts.

If the Supreme Court affirms the lower court in this case, then with that precedent the appeals we describe would be without risk. The people of Duchesne County, although prevailing in the lower court, would be the losers because no one would dare touch a tit until appellate proceedings were concluded.

The problem, of course, is how to balance the rights of litigants under a self executing decree or judgment such as is here involved. A self executing decree is one determining status and requires no further implementation by court process. As an example, a decree denying a petition to oust a Board of Directors is a self executing decree. Is the Board then free to act during an appeal? What are the rights of third parties who deal with the Board in the interim during the pendency of the appeal?

This has been a troublesome problem for the courts, and treatment of the matter has not been uniform. Some courts have stated that the doctrine of supersedeas has no application to a self executing judgment or decree.

Merrimack River Sav. Bank v. Clay Center, 219 U.S. 527, 534 (1911); Solorza v. Park Water Co., 80 Cal. App. 2d 37, 183 P.2d 275 (2d Dist. 1947); State ex rel Kaplan v. Lamb, 239 Ind. 25, 154 N.E.2d 500 (1958); Willis v. Willis, 165 Ind. 332, 75 N.E. 655 (1905); Archer v. Bd. of Educ., 251 Iowa 1077, 104 N.W.2d 621 (1960); Quinn v. Bechly, 243 Iowa 1185, 54 N.W. 2d 492 (1952); Hewitt v. Hawkeye Gas Co., 212 Iowa 316, 232 N.W. 835 (1930); First Nat'l Bank v. Dutcher, 128 Iowa 413, 104 N.W. 497 (1905); Haaland v. Verendrye Electric Coop., 66 N.W. 2d 902 (N.D. 1954); Sakraida v. Sakraida, 192 Ore. 217, 217 P.2d 242 (1950); Nichols v. Ingram, 75 Ore. 439, 14 P. 988 (1915); Barnard v. Bd. of Educ., 19 Wash. 8, 52 P. 317 (1898)

Other courts, sensing the basic unfairness involved, have

exercised what is called the court's "inherent power" to preserve the status quo pending an appeal.

Blaustein v. Standard Oil Co., 43 Del. 238, 45 A.2d 527 (1945); Palmer v. Harris, 230 Okla. 500, 101 P. 852 (1909); Aetna Cas. & Sur. Co. v. Bd. of Supervisors, 160 Va. 11, 168 S.E. 617 (1933); Banach v. Milwaukee, 31 Wis. 2d 320, 143 N.W. 2d 13 (1966).

Although the precise question posed by this appeal has not been determined by the Utah Supreme Court, nonetheless the Utah Rules of Civil Procedure which have been adopted from the Federal Rules have codified the inherent power of the court and provided a very broad method that can be utilized by the court to preserve the status quo. All that is required is for the unsuccessful party in the lower court to act expeditiously and post an appropriate bond. The Rules obviously apply to self executing judgments and decrees. It is well that these Rules be reviewed at this point.

Rule 62

Stay Of Proceedings To Enforce A Judgment

(a) Stay Upon Entry of Judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these Rules. The bond may be given at or after the filing of the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the State, or Agency Thereof. When an appeal is taken by the United States, the State of Utah, or an officer or agency of either, or by direct order of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay in Quo Warranto Proceedings. Where the defendant is adjudged guilty of usurping, intruding into, or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) Power of Appellate Court not Limited. The provisions in this Rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction, writ of mandate, or writ of prohibition during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment Upon Multiple Claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i) Excepting to Sureties; Justification; Multiple Sureties; Deposit in Lieu of Bond. The adverse party may except to the sufficiency of the sureties to the undertaking filed pursuant to the provisions of this Rule at

any time within ten days after written notice of the filing of such undertakings; and, unless they or other sureties, within ten days after service of the notice of such exception, justify before a judge of the court in which the judgment was entered, or the clerk thereof, upon not less than five days notice to the party excepting to such sureties of the time and place of justification, execution of the judgment is no longer stayed. In all cases where the bond required exceeds \$2,000 and there are more than two sureties thereon, they may state in their affidavits that they are severally worth the amounts for which they agree to be bound if less than that expressed in the undertaking, provided the whole amount is equivalent to that of two sufficient sureties. In all cases where an undertaking is required by these Rules a deposit in court in the amount of such undertaking, or such lesser amount as the court may order, is equivalent to the filing of the undertaking.

Rule 73

Procedure For Taking An Appeal

* * * * *

(d) Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. (Emphasis supplied)

It is difficult to see how the lower court reached its decision in this case when the foregoing Rules are considered. It is even more difficult to see how the lower court reached its decision when it was confronted with the fact that the plaintiff had requested that supersedeas be fixed and failed to post the requisite bond after the court entered its order fixing the amount of the bond at \$50,000.00. It should also be remembered that the conveyance here attacked by the plaintiff was not made until after the plaintiff failed to post the bond.

The lower court was probably influenced by the fact that the plaintiff had filed for record a lis pendens at the time the initial proceedings were commenced. The Findings of the lower court (Fdg. 12 - R. 227) appear to indicate that the lower court felt that the lis pendens had life and durability beyond the entry of the original lower court judgment, which held that the option was invalid. The Findings also seem to indicate that Carole Lee Davis, the principal partner in appellant International Environmental Sciences, had knowledge of the pending appeal. This Finding by the court is not grounded in fact, and is not good law.

On the matter of actual knowledge of the pending appeal, Carole Lee Christensen testified:

- Q. Were you aware prior to January, say February 1 of 1973, that the property was the subject of some litigation?
- A. Before when?
- Q. Before February 1 of 1973.
- A. Well, I had read -- when I was interested in buying

the property I had read the court decree, so I guess, yes.

THE COURT: The court what?

THE WITNESS: The court decree.

THE COURT: Where did you read it?

THE WITNESS: Well, I was interested -- when I was interested --

THE COURT: Where? Where did you see it?

THE WITNESS: I saw it in my home.

THE COURT: You didn't go to the courthouse and check the courthouse records?

THE WITNESS: No, I didn't do that, it was brought to me.

Q. (Mr. Garrett) Were you aware that there were any proceedings pending in the Supreme Court?

A. No, I was not. (Tr. 226-227, Neil O. Cooley transcript)

The testimony of Carole Lee Christensen is uncontradicted in the Record. When she purchased the property for her limited partnership, International Environmental Sciences, she knew of the decree of the lower court ruling the option invalid because she saw it. She was unaware, however, of any appellate proceeding.

The judgment of the lower court on this appeal can only be justified on the grounds that the lis pendens survives the original judgment and gives constructive notice to all persons even during the pendency of appellate proceedings. The consequences of this court's adopting such a view have already been explored earlier in this Brief, but now must be reiterated and considered with supersedeas procedures.

By affirming, this court would sanction the basic unfairness of allowing a losing appellant in a real property case, without giving any security, to effectively remove real property from the market for the entire amount of time consumed by the appeals process. The landowner who already has a judgment entered in his favor, a judgment which is entitled to the protection of a presumption of its correctness, is stymied in his use and development of the land. Additionally, the appellant would not be required to put up security even though the Utah Rules of Civil Procedure clearly provide a method for maintaining the status quo in all cases during the pendency of appeal. Why should a real property case such as this be any different than where a party appeals from a money judgment against him? If he wishes to avoid execution, he must post adequate security.

The question thus posed as to whether a lis pendens is effective beyond the entry of judgment has been answered in the negative by Utah law.

The early Utah case of Dupee v. Salt Lake Val. Loan & Trust Co., 20 U. 103, 57 P. 845 states:

. . . The object of notice of lis pendens is to keep the subject of the suit, or res, within the power and control of the court until the judgment or decree shall be entered, so that courts can give effect to their judgments, and that the public shall have notice of the pendency of the action. Lis pendens may be defined to be the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action, and until its final judgment therein. This constructive notice of filing the complaint as required by the statute is equivalent to actual notice.

This case states in effect that lis pendens is a legal device to enable the court to keep control of the res until the entry of judgment or decree. It does not say that it is a device to enable the court to keep control until some indefinite future time after the entry of the decree.

The case goes on to state that lis pendens is the power a court has over property until its final judgment.

In the jurisprudence of this state the term "final judgment" has always been defined to be that act of a lower court from which an appeal could be taken.

Stubbs v. Third Judicial District Court, 150 P2d 783 (Utah)

In re Voorhees' Estate, 12 U2d 361, 366 P2d 977

Hartford Accident & Indemnity Co. v. Clegg, 135 P. 919 (Utah)

At the moment a judgment or decree is entered rights between parties are adjudicated, and that adjudication must be presumed to be correct. At that moment there is nothing pending before the court (unless issues were reserved or undetermined by the court, and that problem is not present here). There is no longer any need for the court to retain control of the property and, therefore, the purpose of lis pendens ceases to exist.

The only remaining question is the effect of appellate proceedings. Appellate proceedings in this state do not alter the finality of a judgment. Rule 62(a) of the Utah Rules of Civil Procedure, *supra*, provides that execution or other proceedings to enforce a judgment may issue immediately unless the court in its discretion otherwise directs. Clearly under Utah law the filing

of a Notice of Appeal does not stay execution on a judgment. Hence the filing of a Notice of Lis Pendens should not have effect beyond the entry of judgment in the lower court. Compare 36 A.L.R. 421 and 10 A.L.R. 415. The rationale of the cases cited in those two annotations should be rejected by this court because of the failure of those cases to recognize the fundamental unfairness of allowing the losing party in a title case to tie up the property through the appellate process without posting supersedeas.

Our court has adopted a very elaborate system to stay execution from the time the judgment is entered through appellate proceedings. Rule 62 and Rule 73(d). Judgments in actions involving title are clearly provided for in Rule 73(d). To affirm in this case would be to say that in matters involving real property a lis pendens will tie up property until appellate proceedings are concluded. The basic unfairness will be perpetuated, and the rules of procedure ignored.

The decision of this court should set forth the procedure to be followed in matters involving title. A lis pendens filed pursuant to Title 78-40-2 will legally maintain matters in status quo until the issues raised by the pleadings and the rights of the parties are adjudicated. Once the judgment or decree is entered, the losing party should not be able to stay proceedings until application is made to the District Court or the Supreme Court. Certainly this is not a cumbersome procedure. If the losing party in the lower court desires to maintain the status quo pending further hearing in the District Court or on appeal, he can ask

for a stay before judgment is entered. Upon giving appropriate security, the parties to that action can be enjoined from disposing of the real property until all later proceedings are ended. If he chooses not to obtain a stay by posting appropriate security, he should bear the risk of his gamble. He should not be allowed to recover the property from a third party. At that point if he gambles and wins he should then have to be satisfied with his remedy at law for damages. Notice of the appeal or lack of such notice, which seemed to impress the lower court, has absolutely no bearing on this principle. The decision we suggest gives effect to both the doctrine of *lis pendens* and the procedures available to obtain a stay subsequent to the entry of judgment.

For a comprehensive and scholarly discussion of the problems involved under this Point, see the article in 49 Notre Dame Lawyer 844 by Messrs. Robert Kratovil and Raymond J. Werner.

POINT II.

THE LOWER COURT ERRED IN FAILING TO AWARD INTERNATIONAL ENVIRONMENTAL SCIENCES AN AMOUNT COMMENSURATE WITH THE INCREASED VALUE ADDED TO THE LAND DURING ITS OCCUPANCY.

In the event that the Court does not reverse and award title to International Environmental Sciences under the reasoning of Point I of this Brief the Court will then consider the matters here involved.

The trial of this action was in two phases. The court first heard evidence relating to the purchase of the property by Carole Lee Davis (now Christensen). (It should be explained that Carole Lee Davis is the principal party in the limited partnership International Environmental Sciences. She married Milton Christensen a short time after she acquired title to this property. Milton Christensen has been a party to these proceedings since they were first instituted. However, as the record shows under Point I, Mrs. Christensen had no knowledge of the pendency of an appeal in this matter and the property was purchased with funds from her separate estate. The record is clear on this point and it is not controverted.) The court ruled at the conclusion of that phase of the hearing that plaintiff should be awarded title to the land. At a subsequent hearing, the court awarded International Environmental Sciences the sum of \$35,000 for value added to the property during the occupancy of defendants.

If we read the Brief of Plaintiff, Hidden Meadows, correctly the amount of \$35,000 is not disputed. The claim of plaintiff is

that a portion of the expenditures was made prior to the decision of Judge Wilkins and some made subsequent to the reversal by the Supreme Court; and that in all events the expenditures were made with knowledge that their title might be defeated and, therefore, the expenditures were not made in good faith as required by the statute. Plaintiff cites Utah cases on the subject in which, under the facts of those particular cases, it was held that the improvements made by the occupying claimant were not made in good faith.

Day v. Jones, 112 Utah 286, 187 P2d 181

Doyle v. West Temple Terrace Co., 47 Utah 238, 152 P. 1180

Erickson v. Doekes, 120 Utah 653, 237 P2d 1012

Reimann v. Baum, 115 Utah 147, 203 P2d 387

What constitutes "good faith" in a case involving occupying claimants is not defined by our statute on the subject, nor by this Court. It is apparent from reviewing those cases that each case must stand on its own facts as to whether the occupying claimant was in good faith when improvements were made. The decisions in those cases are sound and understandable. As an example, in the Day case and Erickson case the improvements were made under tax titles at a time when the claimant had been adequately informed that the record title holder had no intention of abandoning his title. The following litigation easily proved the tax title defective and invalid.

However, the cases cited by plaintiff are distinguishable from this case. The improvements in this case were made under a title granted by the record title owner which had been reinforced by a judicial determination of the District Court that the option of

the plaintiff was invalid. The correct legal principle applicable to this case is set forth in 41 Am. Jur. 2d, Improvements, Section 18:

In some jurisdictions, protection has been extended to one making improvements in good faith, in reliance upon a judicial order or decree awarding the land to him, so as to allow him to recover compensation for the improvements upon the reversal or setting aside of the order.

The defendants in this case had a right to rely upon the validity and integrity of the judgment of the District Court. To say that they were not in good faith in making improvements under that circumstance is to invite legal anarchy.

The good faith of defendants implicit in the Findings and Judgment of the court on this point (R. 238-241) is clearly supported by the evidence.

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We now ask the Court to consider the occupying claimant statute in the light of conditions as they exist today on the Wasatch front communities. The increase in the number of people in the populous areas of the State has created tremendous pressure on the communities involved. Sandy City, Utah as an example is one of the fastest growing cities in the United States. With the dynamic of population growth we see land use changing. Open areas and agricultural lands become subdivisions, shopping centers, and industrial parks. We try to avoid haphazard development. We pass zoning laws for that purpose. Not all growth is desirable, and many people resist growth of any kind. Zoning laws by their very nature dictate land values. Land has value only if it can be put to use, and the amount

of value is directly dependent upon the type of use to which it can be put. Land zoned agricultural has little value. Change the use to residential or commercial and, dependent upon demand of course, the value goes up dramatically. Changing the use of land through zoning processes is not easy. Community planners and city councils resist zoning change. For the developer it becomes an expensive and time consuming process to effect a change of use. A striking example of the problems inherent in zoning change is the area where this property is, the Heber Valley of Wasatch County. A county formerly pastoral and with a small stable population has suddenly experienced an unprecedented demand for housing. Growth, however, has been virtually stopped. There hasn't been a subdivision approved by the County for some years. Any use changes that have been effected result in dramatic increases in value.

What does the foregoing comment have to do with the law of occupying claimant?

The record shows that during the pendency of the appeal defendants were able to secure a change in use for a portion of the land in question from agricultural to residential. (Exh. 17-P, Tr. 32 Cooley Transcript). Exhibit 17-P is a small aerial photograph which was marked by the witness Christensen showing 80 acres involved in what was known as the Barnes Tract, and the Road and Mills lots. There are approximately 80 acres on the Barnes Tract, and approximately 90 acres on the Mills Tract. Whether the sale of lots on the Mills Tract was actually authorized by the County Commission is not altogether clear from the record. The testimony of Milton Christensen,

however, is to the effect that the County Commission actually authorized the sale of not only the Barnes property but also the nine lots on the Mills Tract.

The significance of this change in use is the dramatic increase in values. Portions of the Barnes property were sold during the pendency of appeal for amounts ranging from \$1,000 to \$1,400 per acre (Exhs. 20, 21, 22, 27, 28-D).

The evidence shows that the option given plaintiff for the full 542 acres was at a price of \$86,200.00 (Fdg. 15, R. 227). Carole Lee Davis Christensen paid \$110,000.00 for the land (Exh. 15).

The evidence shows that the sale of only the 80 acres that were re-zoned will bring a minimum of \$80,000.00. The other 90 acres would bring at least \$1,000 per acre. These amounts would more than pay for the land for the plaintiff, leaving approximately 370 acres free and clear. The position of the defendant in this case is that the re-zoning activities conducted by defendants resulted in an increase in the value of the land.

This issue was properly presented to the lower court and squarely ruled upon. The lower court held specifically that the re-zoning obtained by defendant was not an item of improvement contemplated by the occupying claimant statute (Concl. Law 4, R. 241). There are no reasons given by the lower court for its conclusion.

There is, however, no reason why a change in zoning should not be considered as a valuable improvement to be recovered by the occupying claimant.

The statutes read:

57-6-1. Stay of execution of judgment of possession. Where an occupant of real estate has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the plaintiff in possession of the same after the filing of a complaint as hereinafter provided, until the provisions of this chapter have been complied with.

57-6-2. Claimant to commence action--Complaint--Trial of issues. Such complaint must set forth the grounds on which the defendant seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried as in law actions, and the value of the real estate and of such improvements must be separately ascertained on the trial.

There is no limiting language in those two sections of the statute and no definitions are set forth in the chapter. The Reimann case, *supra*, gives a general definition which supports the position defendants ask the Court to take in this case. From page 391:

....the occupying claimant's measure of recovery is the extent to which his improvements enhance the value of the land, or in other words, the difference between the reasonable relative values of the land with and without the improvements. (Citing cases)

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. (Citing cases)

It seems clear that anything that is done to land that enhances its value should be considered an improvement under the statute.

The lower court found that the value of the property was \$221,000.00 (R. 240). This Finding does not include the re-zoning

because it was specifically excluded by the court in its Findings and Conclusions Of Law (R. 241). Based upon the lower court's finding of value, the land is worth approximately \$500 per acre. For at least the 80 acres in question the land has a value by reason of sales of at least \$1,000 per acre. There is, therefore, a minority of approximately \$500 per acre unaccounted for by the court on at least 80 acres. This amounts to some \$40,000 to which the occupying claimant is entitled.

The principle we ask the Court to adopt, namely that re-zoning of property, if it enhances the value of the property, is an element to be recovered by the occupying claimant, is clearly within the purview of the Reimann case, supra, and comports square with the underlying doctrine of occupying claimant which is to prevent unjust enrichment.

Text book authority supports the position of defendant.

41 Am. Jur. 2d, Improvements, Section 1. Generally speaking, the word "improvement" includes everything that permanently enhances the value of premises for general uses. The term includes, not only buildings and fixtures of all kinds, but many other things as well. Among the most common illustrations of such general improvements are the erection of a building; the replacing of old buildings with new ones; substantial repairs to a building or repairs necessary to preserve a building; the making of substantial additions to or changes in existing buildings; the construction of a necessary sidewalk alongside property; the erection of fences; the preparation of land for building sites; the preparation of wild or raw land for agricultural purposes; and the planting of a fruit orchard. . . .

The text cites the cases of Kester v. Bostwick, 153 Fla. 437, 15 So. 2d 201 (platting, grading, paving, and landscaping); and Kimmel v. Peach, 240 Mich. 697, 216 NW 374 involving surveying,

staking lots, seeding, and labor.

A case in point is that of Town of Little Compton v. Round Meadows, Inc., 276 A2d 471 (R. I.). In this case the town attempted to enjoin the defendant from allowing parking of camper trailers on the defendant's land which abutted the Atlantic Ocean and had been used as a campground.

The town points to the phrase "building or improvement" and then declares that since the parking area set aside for the trailers contains no "building or improvement," the southeasterly part of the parcel does not come within the shelter afforded by §45-24-10. In making this argument, the town cites nonconforming use provisions of the zoning enabling acts of other states wherein they specially safeguard the existing use of building, structures and land.

The town, in making this contention, has misconceived the import of the term "improvement". It is a relative term whose meaning must be ascertained from the context and the subject matter of the instrument or writing in which it is used. Wolff Chemical Co. v. Philadelphia, 217 Pa. 215, 66 A. 344. Little Compton obviously believes that unless a person has placed some type of structure or fixture on his land, he may not have the benefit of a nonconforming use. This is simply not so. As used in §45-24-10, the term "improvement" describes land which has been converted from its natural state to a different state and condition for the use and enjoyment of man. As we view the statute, such an improvement may consist of vacant land that has been improved by some betterment such as cultivation, clearing, drainage, irrigation, grading or something which otherwise enhances the value or usefulness of the land. See, Johnson v. Gresham, 5 Dana 542, (Ky. 1837); State ex rel, County of Ramsey v. Babcock, 186 Minn. 132, 242 N.W. 474. Even if we were to adopt the town's split view of the five acres in controversy, it is clear that the trailers were used on that portion of the premises which can be described as an "improvement."

Defendants ask this Court to hold that re-zoning accomplished by an occupying claimant can be, and was in this case, an improvement which has enhanced the value of the land.

CONCLUSION

Carole Lee Davis Christensen purchased this land in good faith, relying upon a judgment of the lower court which held that the option of plaintiff was invalid.

A Motion to fix supersedeas was filed by claimant, and the court entered an Order thereon which reads in part:

IT IS NOW THEREFORE HEREBY ORDERED that the execution of and any proceedings to implement and enforce the Judgment entered herein on the 10th day of August, 1972, be stayed pending determination of plaintiff's appeal from such Judgment and the defendants, and each of them, are hereby enjoined and restrained from encumbering or transferring the real property described in the Complaint and which is the subject of the foregoing action pending such determination of plaintiff's appeal, provided that the plaintiff file and have approved by this court a bond in the sum of \$50,000.00. . . . (R. 44)

The bond was not posted. Carole Lee Davis Christensen purchased the land subsequent to that order. The initial defendants were not enjoined and restrained, and obviously had a right to sell that property if they chose, and a third party such as Carole Lee Davis Christensen would have a right to rely on the judgment of the lower court. If that were not enough, she should certainly be able to rely on the fact that the court later entered its order enjoining the sale of the property, but only if plaintiff posted a bond.

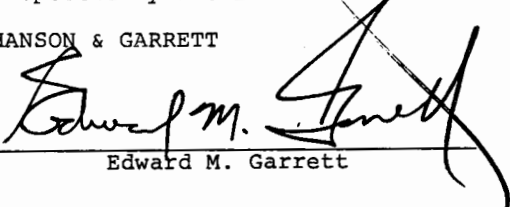
The misconceptions and errors of the lower court in this matter must be reversed.

In the event the Court disagrees with the reasoning of appellant under Point I above, then we ask that the Court consider

the fact that through the efforts of appellant a portion of the property was re-zoned and as a result thereof substantial value added to the land. We ask the Court to hold that re-zoning, if it adds value to land, is a proper element of recovery by an occupying claimant. The judgment of the lower court must, therefore, be reversed and the matter referred back for the purpose of increasing the amount awarded to defendant for improvements.

Respectfully submitted

HANSON & GARRETT



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