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State of Utah and its Agency The Utah Department of Transportation v. Harvey Real Estate, limited partnership : Reply Brief

Utah Supreme Court

Steven F. Alder; Assistant Attorney General; Mark L. Shurtleff; Attorneys for Appellant.
Robert E. Mansfield; Attorney for Appellant.
ROBERT E. MANSFIELD (#6272) Parry Anderson & Mansfield 1270 Eagle Gate Tower 60 East South Temple Salt Lake City UT 84111 Telephone (801) 521-3434 Attorney for Defendant/ Appellant
STEVEN F. ALDER (#0033) Assistant Attorney General MARK L. SHURTLEFF (#4666) Attorney General P.O. Box 140857 Salt Lake City UT 84144-0857 Telephone (801)366-0218 Attorneys for Plaintiff/Appellee

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH and its Agency THE UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellee, vs. HARVEY REAL ESTATE, Limited Partnership, Defendant/Appellant.	Case No. 20001149-SC Priority No. 10 Oral Argument Requested

REPLY BRIEF OF APPELLEE

STEVEN F. ALDER (#0033)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General
P.O. Box 140857
Salt Lake City UT 84144-0857
Telephone (801)366-0218

Attorneys for Plaintiff/Appellee

ROBERT E. MANSFIELD (#6272)
Parry Anderson & Mansfield
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City UT 84111
Telephone (801) 521-3434

Attorney for Defendant/Appellant

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The Appellant seeks to differentiate this case from the many Utah cases holding that abandonment of a highway requires an affirmative formal action by a public entity with authority. Appellant argues that the law is different if the road is located upon a right-of-way that is held in less than fee simple. This view is simply without any support by either the statutes or the cases that have been decided for most of the past 100 years.

A. The statutory language.

Utah Code Ann. § 36-1-3 (1943) provided "**all highways once established** must continue to be highways until **abandoned by order of** the board of county commissioners of the county in which they are situated, or other competent authority." Utah Code Ann. § 27-1-3 (1953) provided "**All highways once established** must continue to be highways until **abandoned by order of** . . . competent authority." Utah Code Ann. § 27-12-102 (additional provisions enacted in 1963) provided "The commission shall act to abandon **any easement** or to vacate any highway by resolution."; and Utah Code Ann. § 72-5-105

(1999) "**All public highways** once established shall continue until **abandoned or vacated by order of the highway authorities** having jurisdiction . . . ." This has been the rule in Utah since statehood with the exception of a period from about 1907 until 1911 when a period of five years of non-use was itself sufficient to constitute abandonment[1].

It is not possible to insert into this broad and clear language a separate rule for an easement that is held in less than fee simple title. First, the language of the statute is plain and clear: it expressly refers to all highways in a generic way without qualification as to easements or title in fee. To differentiate between highways based on the nature of their title would be a significant departure from the common meaning of the wording used in these long standing statutes. Such an interpretation would be contrary to the standard rules of construction set forth at Utah Code § 68-3-11(2001); OSI Indus., Inc. v. Utah State Tax Comm'n, 860 P.2d 381 (Utah Ct. App. 1993); and State v. Hendrickson, 67 Utah 15, 245 P. 375, 57 A.L.R. 786 (1926) requiring that statutory words be interpreted in accordance with their plain meaning.

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[1]This was the law in effect when the case Tuttle v. Sowadzki, 126 P. 959, (Utah, 1912), was decided. The repeal of this provision evidences a clear intent, perhaps in response to the Tuttle decision, to change the law, and to no longer permit abandonment by non use.

The immediately preceding section in the same statutory chapter includes a section providing that rights-of-way can be acquired by ten years public use.[2] Such easements established by adverse public use are not rights in fee, but only easements over the fee[3]. It would be inconsistent for the statute to create rights-of-way by public use that are less than fee, and not intend to include the same rights-of-way when in addressing the means of their being abandoned or vacated. Rather, the obvious construction is that the requirements for abandonment of highway rights-of-way apply without distinction to highways on fee and to those on less than fee. Appellant's argument does not have any place within the applicable statutory language.

B. Utah case law.

There have been numerous cases decided by the Utah court applying the statutes on abandonment of rights-of-way for public highways. The court has never created a judicial exception to the statutory requirements, based on the right-of-way being held in less than fee simple.

Appellant has tried to use the distinction concerning title to support their argument that the law is different for this case. It is true that the nature of title to an easement may

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[2]Utah Code § 72-5-104; previously Utah Code § 27-12-89.

[3]See for example Premium Oil Co. v. Cedar City, 112 Utah 324, 187 P.2d 199 (1947).

make a difference as to the *effect* of an abandonment of a highway. If a right-of-way not held in fee is abandoned by proper statutory action, then the *effect* of the abandonment is to revert title to the owner of the fee, whereas if the title is held in fee then the effect of the abandonment does not give title to the abutting land owner. But this distinction as to *effect* does not and never has been applied to modify the statutory requirement concerning the *means* of abandonment. Abandonment in either event requires compliance with the statute, and the statute requires formal action by the entity with jurisdiction. Appellant cites cases in support of their argument, that do not apply: either the statute was not the same at the time of the decision, the case did not involve a right-of-way for a public highway, or the cases are from other jurisdictions. This is a question of statutory interpretation of a Utah statute and out-of-state cases based on different statutes have no application.

The only Utah case involving a highway right-of-way, Tuttle v. Sowadzki, 126 P. 959, (Utah, 1912), was decided under a 1907 statute which for a brief 4 year period permitted a determination of abandonment based on five years of non-use. Even in that case, the issue was not the nature of the right-of-way but the evidence of non-use. The language quoted by Appellant in support of their argument from Am. Jur. 2d, Eminent Domain § 939, cites as its authority this early Utah case. The Am. Jur. statement quoted

is directly contrary to the law as contained in all subsequent Utah statutes and in the current Utah statute. The statutory language upon which the decision was based, was changed shortly before the appellate decision in Tuttle, supra and was apparently changed to preclude abandonment by non-use.

Many of the cases cited by Appellee in support of its argument, are cases of roads established by public use. For example see Ercanbrack v. Judd, 524 P.2d 595 (Utah 1974); and Western Kane County Special Service District No.1 v. Jackson Cattle Company, 744 P.2d 1376 (Utah 1987). As has been noted these road rights-of-way are not rights acquired in fee, but easements across the underlying fee; see Premium Oil Co., supra. The court has applied the statute with equal force to such rights-of-way. If there were to be a distinction between roads acquired in fee and roads acquired by easement, it would be expected to arise in the context of such easements created by operation of law since it would be reasonable that the rights of an underlying fee owner would be considered greater when an easement is acquired by such acts of public use, rather than by purchase and express grant of an easement from the owner. However, these cases have uniformly upheld the application of the statute to such easements. If the rule applies equally to such easements created by implication, it should *certainly* apply to easements created by deed where consideration was paid.

The public policy for such uniform application of the statute is based in part on the judicially recognized need for a public process when disposing of public rights. Courts have recognized the wisdom of requiring affirmative and formal acts of a public official when eliminating a public right, to such an extent as to preclude adverse possession of public land; see Averett v. Utah County Drainage Dist. No. 1, 763 P.2d 428 (Utah Ct. App. 1988). Such a rule is preferable to one permitting loss of a public right due to the vagaries of time and memory, the ambiguities of public and private actions, and the potential for abuse or fraud. The safer rule is to require evidence that an agency with jurisdiction has taken the required affirmative action before finding a public right-of-way to be terminated. This policy should not be less, if the highway right-of-way is held by an easement rather than fee. The same reasoning applies. As was stated in the decision of Western Kane County Special Service District No.1, supra (a road established by public use was not used and another route was used instead, for more than 50 years) it is necessary that the "strict statutory procedure be followed for the vacation of a public road." Id. at 1378.

Olsen v. Board of Education.571 P.2d 1336 (Utah 1977) is the only other Utah case cited by Appellants as authority for the distinction involving title. This was not a highway case and consequently the statute at issue in this case is not applicable and the

decision does not provide authority. The case involved the interpretation of a deed with a conditions subsequent, not rights-of-way used by the public for highway purposes..

2. APPELLANT MISREPRESENTS THE FACTS IN SUPPORT OF THE ALLEGED ABANDONMENT, AND THIS FACTUAL DISPUTE ILLUSTRATES AND SUPPORTS THE NEED FOR STRICT ENFORCEMENT OF THE STATUTORY RULE REQUIRING FORMAL ACTION BY THE AGENCY.

Appellant asserts *inter alia* that the land within the 1936 Right-of-way was fenced after 1951, that the land was not used as a highway after 1951, and that the land was re-acquired in the 1951 condemnation and in a later 1967 condemnation. (Appellant's Reply Brief at 17.) Each of these allegations are misleading or false. The actual facts show that the 1951 fence was located along a line equal distant from the highway surface consistent with the limited access nature of the highway, which line did not correspond with the centerline nor with either boundary of the allegedly abandoned 1936 right-of-way.(R at 252 and 258.) In the 1951 condemnation the reason for retaining the land and acquiring additional land at the corner of Old Mountain Road and the new highway alignment was challenged. UDOT's engineer testified that the highway purposes for the acquisition (and by implication the reason for retention of the adjacent right-of-way) was to preserve it for future highway expansion, to preclude development requiring dangerous access near the

intersection, and to prevent short-cutting across the property in order to protect public safety. (R at 378 to 384.) The language of the deed is that the land was to be used for "highway purposes" not as a highway. Finally, the subsequent condemnations did not acquire the land already within the right-of-way, but explicitly and carefully excluded the land in the 1936 deed when calculating the amount to be paid (see the right-of-way contacts R at 145 and 152, Appellee's Brief at 10 f.n. 4 and 5.) As previously argued in the Appellee's Brief on cross appeal, the exclusion of the land in the existing right-of-way demonstrates that the land was not considered abandoned.

This recitation of the disputed facts in this case demonstrates the reason for the statutory requirement for a formal act of abandonment by an entity with jurisdiction. It illustrates the endless number of circumstances where the State would continually be defending itself against such claims. **The evidence was undisputed that there had never been a deed or other action by UDOT abandoning the right-of-way.** (R. at 268). There was never even such a claim. Strict adherence to the statutory requirement that there be such a deed or action, will avoid innumerable disputes relying on long-cold memories, on disputed interpretation of events, or willful misrepresentation. The statute was intended to protect the public investment in the state's highway rights-of-way. Such a purpose is sound, clear, and should be followed.

CONCLUSION

The testimony of the witnesses was undisputed that the 1936 Right-of-Way has not been vacated or abandoned in accordance with Utah Code §72-5-105 (1999) and its predecessors. The court erred in considering the possible evidence of actions of abandonment. The requirement for formal action should not ignored, and a judicial exception should not be created. Since the right-of-way that was acquired in 1936 has not been abandoned as required by statute, UDOT should not need to re-acquire it in this action.

Respectfully submitted this 16th day of January, 2002

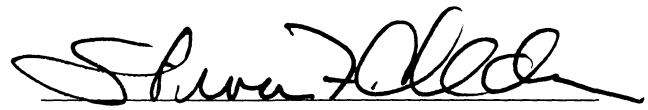
MARK L. SHURTLEFF
Attorney General

STEVEN F. ALDER
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLEE was mailed, first class postage prepaid, this 16th day of January 2002, to the following:

ROBERT E. MANSFIELD
Parry Anderson & Mansfield
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City UT 84111



STEVEN F. ALDER
Assistant Attorney General