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Utah Court of Appeals

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Recommended Citation
Reply Brief, *Wilkinson Family Farm v. Babcock*, No. 981769 (Utah Court of Appeals, 1998).
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IN THE UTAH COURT OF APPEALS

WILKINSON FAMILY FARM, LLC, a Utah Limited Liability Company, Plaintiff/Appellant, vs. LARA L. BABCOCK, and all other parties known or unknown that may who may claim an interest in the real property described herein, Defendant/Appellee.	UTAH COURT OF APPEALS BRIEF UTAH DOCUMENT (F U 0 A10 OCKET NO. 981769-CA Case No. 981769-CA Priority No. 15

APPELLANT'S REPLY BRIEF

Appeal from Second Judicial District Court
of Weber County, State of Utah
The Honorable Michael J. Glasmann, District Court Judge

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FILED
JUL 12 1999
COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

SUMMARY OF ARGUMENT

I. THE COURT PROPERLY FOUND INDOLENCE.

II. WHETHER THE ACTS OF THE PARTIES CONSTITUTE A MUTUAL ACQUIESCENCE IN THE FENCE AS A BOUNDARY IS A QUESTION OF LAW.

III. WHETHER THE ACTS OF THE PARTIES CONSTITUTE A MUTUAL ACQUIESCENCE IN THE FENCE AS A BOUNDARY IS A QUESTION OF LAW.

ARGUMENT

POINT I

THE COURT PROPERLY FOUND INDOLENCE.

Appellee attempts to show that the trial court refused to find indolence. As stated in Appellant's Brief, the court did use the word indolence. In fact, the court specifically ordered the findings of fact and conclusions of law to include a finding that the Babcock and their predecessor did not prevent or interrupt the usage of the property by Wilkinson. (September Transcript, p.14-15). The court also made it clear that he was not finding that the parties entered into any type of agreement on the use of the property. (September Transcript p.8-9).

It is clear from the court's bench ruling and subsequent statements that the court found that there was an existing fence, which is referred to by the court as a

containment fence and that Wilkinson used the property enclosed by that fence for raising of crops and the grazing of cattle. Babcock and her predecessors did not disallow or interrupt that use by Wilkinson. The court referred to the inaction of Babcock as indolence and concluded that Babcock's failure to take actions to kick the Wilkinson off of the disputed property constituted indolence and an acquiescence in the Wilkinson' use of the disputed property.

The court concluded that when the containment fence was first put, by Babcock's predecessor, Williams, the true boundary line was known. The fence was placed because of the land topography and convenience. (Bench ruling, page 1, Appendix A; June 24, 1998 hearing transcript, page 28, lines 15 through 22). The court found that the fence was originally not intended as a boundary line, but was a fence of convenience. (June 24, 1998 hearing transcript, page 29, lines 12 through 13). Babcock, in her argument before the court contended that the second element of "mutual acquiescence in the line as a boundary" must be interpreted to mean that the parties intended the fence to be a boundary as opposed to a fence or line evidencing the parties occupation and use of the land. (June 24, 1998 hearing transcript, page 13, lines 3 through 8). This definition is contrary to the law in the State of Utah.

As previously discussed, this doctrine was discussed in the case of Carter v. Hanrath 885 P.2d 801 (Utah App. 1994). Carter was then reversed on appeal by the Utah Supreme Court because of a lack of access to the disputed property. 925 P2d 960 (Utah 1996).

However, the language used by the Court of Appeals defining acquiescence is applicable. The Court of Appeals in Carter embellished upon and defined some of the requirements set forth in Staker v. Ainsworth, 785 P.2d 417 (Utah 1990). In discussing occupation, the court stated, that the land must be occupied to a visible line and normal and appropriate use made of the disputed parcel. In discussing the requirement of acquiescence the Court stated,

> . . . that the actual knowledge of the fence or monument marking the disputed boundary line is not a prerequisite in boundary-by-acquiescence cases. . . ."

Id. at 805.

The Court went on to say,

> . . .'[a]cquiescence' is more nearly synonymous with 'indolence,' or 'consent by silence,'--or a knowledge that a fence or other monuments appears to be a boundary,--but that no one did anything about it. Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1199, 1200 (1973). This accords with the dictionary definition of acquiescence as [p]assive compliance or satisfaction . . . [conduct from which assent may be reasonably inferred. . . . Equivalent to assent inferred from silence with knowledge or from encouragement, and presupposes knowledge and assent. Black's Law Dictionary 24 (6th ed. 1990).
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> . . .
>
> . . .Moreover, our holding that acquiescence may be imputed from long-term indolence is consistent with the policy upon which boundary by acquiescence is based, namely 'that the peace and good order of society require that there be stability . . . in the ownership of lands. . . . [B]oundary lines which have been long established and accepted by those who should be concerned should be left undisturbed in order to leave at rest matters which may have resulted in controversy and litigation.'

Id. at 806. (quoting James Backman, The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy, 1986 Olsen v. Park Daughters Inv. Co., Utah 2d 421, 425, 511 P.2d 145, 147 (1973) B.Y.U. L. Rev. 957, 965 (1986); (quoting Olsen v. Park Daughters Inv. Co., Utah 2d 421, 425, 511 P.2d 145, 147 (1973)).

Babcock contends that acquiescence in the Wilkinson's use of the property inside of the fence cannot constitute a boundary line by acquiescence unless the fence originally was intended to establish a boundary line. Clearly, that is in error. Wilkinson contends that the acquiescence in the use of the property enclosed by the fence line regardless of the purpose of the installation of the fence constitutes an acquiescence in a boundary which after a long period of time establishes the boundary line between the adjoining property owners. This is precisely the situation in the case at bar. The Babcocks have done nothing about the use of the property by the Wilkinsons despite knowing a different monument may be the boundary and without any agreement with the Wilkinson. Given these findings, the Appellant has met the elements of boundary by acquiescence.

POINT II

WHETHER THE ACTS OF THE PARTIES CONSTITUTE A MUTUAL ACQUIESCENCE IN THE FENCE AS A BOUNDARY IS A QUESTION OF LAW.

Babcock next argues that the Appellant has not or cannot challenge the trial court's conclusion that there was no mutual acquiescence. Such an argument ignores the issues raised by the Appellant throughout this litigation. Appellant has consistently argued that the

facts in this case, as discussed above, fulfill the legal requirements for mutual acquiescence as defined in Carter, Olsen and Staker.

Babcock attempts to further confuse the issue by claiming that mutual acquiescence is a factual, instead of a legal conclusion. This is an interesting position since Babcock's first issue and its level of review under his Statement of Issues, is that "establishing mutual acquiescence in the fence as a boundary" presents a question of law. Nevertheless, whether the facts and circumstances of this case amount to a mutual acquiescence, as defined by appropriate case law, is an application of facts to law, regardless of its categorization by the Appellee, and should be reviewed for correctness. The characterization by the Appellee has no impact on its review. As the Utah Supreme Court stated in 50 W. Broadway v. Redevelopment Agency, 784 P.2d 1182 (Utah 1989),

> Furthermore, we are not bound by the trial court's classification of a finding of fact or a conclusion of law; we will make that classification ourselves.

Id. 1171.

Clearly, determining whether a party who condones the use of his land by another, for a period of twenty or more years by an adjoining landowner, amounts to mutual acquiescence is an ultimate question of law. Calling it a fact and asking for the clearly erroneous standard of review is inappropriate.

POINT III

THERE IS NO CATTLE FENCE EXCEPTION TO THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.

Appellee also argues that the doctrine of boundary by acquiescence does not apply to this case because Utah law has created an exception to the doctrine of boundary by acquiescence for fences purportedly installed for cattle containment purposes. In fact, paragraph 7 of the Conclusions of Law drafted by the Appellee perpetuates this error in law by stating: "The doctrine of boundary by acquiescence or agreement does not apply in this action."

However, in the most recent case involving cattle containment fences and the doctrine of boundary by acquiescence which was decided by the Utah Supreme Court, Jacobs v. Hafen, 917 P.2d 1078 (Utah 1996), the Court applied the same boundary by acquiescence analysis that would apply to a fence or other boundary created for any other purpose. Id. at 1080. The court declined to find boundary by acquiescence in that case since the fence did not exist for the necessary twenty year period and the court refused to find an exception to that rule. Id. at 1081.

Babcock cites several cases for the claim that "a fence installed to control cattle cannot create a boundary by acquiescence." (Brief of Appellee, p.22) (emphasis in original). Yet Babcock fails to cite any language stating such a rule. None of the cases cited state that there is an exception for a cattle containment fence. All of these cases pre-date Staker and

implicitly require some objective uncertainty as to the true location of the boundary. These cases ultimately led up to the explicit adoption of objective uncertainty as an element in the doctrine of boundary by acquiescence which has been rejected in Staker. As the Court in Staker found, requiring objective uncertainty confuses the doctrine of boundary by agreement with the doctrine of boundary by acquiescence and effectively eliminates boundary by acquiescence as a viable doctrine for settling property disputes in Utah. Id. at 423.

The most recent case cited by Appellee is Grayson Roper Ltd. v. Finlinson, 782 P.2d 467 (Utah 1989) which also pre-dates Staker. In Grayson, the Court did not rule on whether a fence built to control cattle could not be acquiesced in as a boundary, rather, the Court ruled held that there was no objective uncertainty as to the true location of the boundary and refused to limit the requirement of objective uncertainty from Halladay v. Cluff, 685 P.2d 500 (Utah 1984) to an "urban scenario." Id. at 472.

Babcock attempts to distinguish Carter v. Hanrath, 885 P.2d 801 (Utah App. 1994) rev'd on other grounds, 925 P.2d 960 (Utah 1996). In Carter, this Court stated that indolence for an extended period of time was sufficient to establish mutual acquiescence. The Supreme Court later reversed on the ground that the property in dispute was not accessible by the owners. However, in the case at bar, there was no evidence introduced that the property was inaccessible to the Babcocks and, as Babcock so often points out, there has

been at least one fence constructed on the true boundary. This demonstrate that the property has been and continues to be accessible to the Babcocks.

CONCLUSION

There is no exception to the doctrine of boundary by acquiescence for cattle fences, rather, the standard analysis applies. The trial court has found indolence on the part of the Babcocks and a lack of agreement between the parties or their predecessors regarding the disputed property. Indolence, together with the other facts of this case amount to mutual acquiescence.

DATED this 12 day of July, 1999.

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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing document, postage prepaid, to the following individual:

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DATED this 12 day of July, 1999

ATTORNEY