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Jess W. Pickett v. California Pacific Utilities et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JESS W. PICKETT,

Plaintiff,

vs.

CALIFORNIA PACIFIC UTILITIES, a California corporation, and THE COUNTY OF IRON, a political subdivision of the State of Utah,

Defendants.

Case No. 16627

APPELLANT'S BRIEF

Appeal from Judgment of the Fifth Judicial District Court for Iron County, State of Utah, The Honorable J. Harlan Burns, District Judge, Presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action by the Plaintiff to estop the COUNTY OF IRON, a political subdivision of the State of Utah from expanding or modifying a public thoroughfare acquired by a prescriptive right to allow a private person or legal entity by franchise to use property of the Plaintiff's for personal profit and requesting that the Defendant, CALIFORNIA PACIFIC remove their pole line property from that land now owned by the Plaintiff in fee.

This is an appeal from an action brought before the Fifth Judicial District Court for Iron County, State of Utah. The Plaintiff, alleged that the Defendant UTILITY COMPANY, did trespass upon his property and continues such trespass after having erected power poles and stringing transmission lines. Said

power poles and transmission lines interfere with Plaintiff's right to full enjoyment and use of his fee. Specifically, the structures present a dangerous hazard of electrocution to the Plaintiff as he conducts his agricultural irrigation operation through the use of sprinkler pipes. The poles and lines being so close as to present an obstruction when the sprinkler pipes are moved from located to location within the Plaintiff's fields.

Furthermore, Defendant UTILITY COMPANY erected the power poles and transmission lines along a right-of-way over the Plaintiff's fee which was acquired through adverse prescriptio Under operation of the laws of the State of Utah, such an easement or right-of-way becomes a public thoroughfare for transportation of people and livestock. By Defendant's actio they imposed an additional use upon the easement thus creating an additional servitude upon the servient estate whose title is now held by the Plaintiff. Such additional burden constitu a taking of the Plaintiff's property which was without just compensation to the Plaintiff, thereby depriving him of due process of law as guaranteed by the constitution of the United States of America and the constitution of the State of Utah.

The questions therefore before this Court are as follows:

Should an abutting land owner incur an additional burden upon his fee from an additional use of a public right-of-way by a company for its own commercial purposes without compensat

Does an abutting land owner have no course of relief for damage as a result of a power company erecting power poles and transmission lines upon a public right-of-way or easement in which the abutting landowner has the fee?

May a power company enter into a highway and occupy and portion thereof, without consent of the landowner, when such entry is not for a purpose incidental to the use of the highway by the public for travel?

DISPOSITION IN LOWER COURT

The case was tried to the court. Judgment was granted to Defendants. The Court ruling that the placement of a power line enchances the public use of a prescriptive easement, was a benefit to the public, and was included within the public easement for travel obtained by prescription. Judgment was granted with prejudice.

RELIEF SOUGHT ON APPEAL

Appellant seeks an Order of this Court reversing the Judgment of the Trial Court and ordering Defendants, CALIFORNIA PACIFIC to remove their pole line property from the property of the Plaintiffs and that the Plaintiff be awarded damages for the period of time that the Defendant, CALIFORNIA PACIFIC has trespassed upon the property of the Plaintiffs and until same is removed from the Plaintiff's property; and cost of this action incurred by the Plaintiff as determined by this Court; and that the COUNTY OF IRON be estopped from

further expansion or modification of public thoroughfares acquired by prescriptive right without authorization of the legal abutting owner.

STATEMENT OF FACTS

Plaintiff is the owner of the Northeast quarter of the Northeast quarter, Section 7, Township 34 South, Range 9 West, Salt Lake Base and Meridian and said fact was stipulated by the parties hereto, (T 6, 10-15). On or about January 26, 1976, the Defendant, CALIFORNIA PACIFIC did place their power pole line on and over the property of the Plaintiffs for personal profit (T 28, 14-17).

The COUNTY OF IRON previously acquired a prescriptive right-of-way for public use in the nature of vehicular traffic and that of driving livestock over said property has been used by the general public and was stipulated to and shown in the record (T 8, 4-13).

Prior to the installation of the pole line by the Defendant CALIFORNIA PACIFIC, the Plaintiff did notify said Defendant on January 22, 1976 that the Plaintiff was the fee owner of said property and that an easement authorized by the Plaintiff would be required to construct the power line on said property (T 28 17-22), and the Defendant, CALIFORNIA PACIFIC did in fact place their pole line on said property on or about January 26, 1976 without authorization by the Plaintiff, (T 28, 14-17).

The Defendant, CALIFORNIA PACIFIC built said line to replace a line that existed on neighboring property for a benefit to the neighboring property (T 13, 16-28), and said line could have crossed the roadway at the end of the existing line (T 14, 18-26) and does in fact cross the roadway at the west end of the pole line in question and said line could have been built on the south side of said right-of-way (Map, T 15, 10-19).

Said line as placed over said property in question does create a hazard to the Plaintiff (T 36, 9-22), and said power line could have crossed the right-of-way at the service pole of the Plaintiffs and could have been installed on the south side of the roadway on the neighboring property for whose benefit the old original line was removed (T 37, 1-5). The service pole installed for the benefit of the Plaintiff (T 35, 11-20) does have cross arms that extend over the fence and over the property of the Plaintiff, and the newly constructed line extending west to the first pole of the new construction does cross over the fence of the Plaintiff thereby encroaching on to the property of the Plaintiff (T 35, 5-15, T 42, 30, T 43, 1).

POINT I

THE TRIAL COURT COMMITTEED REVERSIBLE ERROR WHEN IT RULED THAT THE COUNTY COULD AUTHORIZE PERMANENT INSTALLATION OF POLES AND POWER LINES OVER A PRESCRIPTIVE EASEMENT FOR PUBLIC TRAVEL, THEREBY EXPANDING AND MODIFYING SAME BEYOND U.C.A. 17-5-39 (1953, as amended).

The brief of the Defendant the COUNTY OF IRON to the Trial Court in relying on U.C.A. 17-5-39 (1953, as amended) authorizing a permanent installation, failed to cite any precedent as to a prescriptive right-of-way within this State or any sister state. To date, the only reference on a similar matter was White v. Salt Lake City, 121 U. 134, 239 P.2d 210, and this matter pertained to a dedicated right-of-way by reason of a platted map being filed as a subdivision, and this Court ruled that the fee rested with the County when said property was dedicated. Counsel for the COUNTY OF IRON states that such an act is authorized by IMPLICATION, but without authority or precedent this can only be an assumption on the part of counsel.

The Plaintiff in his original brief to the Trial Court did refer to White v. Salt Lake City and the fact that this Court dealt with the question of dedication of the entire fee. The Plaintiff also cited other precedent that concerned itself with similar circumstances to this action of a prescriptive right-of-way from other states with the rulings vesting the fee to the abutting owner subject only to the right-of-way for public thoroughfare. It was found by the Courts that conduits of public utilities or foreign municipalities which do not serve the abutting property constitute an additional servit is borne out by the following authorities: Sterling's Appeal, 1886, 111 PA. 35, 2A. 105; Kincaid v. Indianapolis Natural Gas

Co., 1890 124 Ind. 577, 24NE. 1066, 8 L.R.A. 602; Ward v. Triple State Natural Gas & Oil Co., 1903, 24 Ky. Law Rep. 116, 74 S.W. 709; Van Brunt v. Town of Flatbush, 1891, 128 N.Y. 50, 27 N.E. 973; and Hofius v. Carneghie-Illinois Steel Corp. 1946, 146 Ohio St. 574, 67 N.E. 2nd 429. The rule announced in these cases is that abutting property owners have a right in the roadway paramount to all uses except public travel, and additional servitudes cannot be imposed without payment of compensation, Kincaid v. Indianapolis Natural Gas Co., supra. The ruling in Cathey v. Arkansas Power & Light Co., 1936 193 Ark. 92, 97 S.W. 2nd 624 stated that:

> "A land owner is entitled to compensation for additional servitudes that may be placed upon the servient estate. Such would be the case if the highway is used for the erection of poles and the stringing of wires for the tramsmission of electricity where the original burden was merely for highway purpose."

In trial, the Court determined that a right-of-way over the property was created over 50 years ago. Title to the land and right-of-way passed through owners until coming to rest in the hand of Plaintiff. While title to the servient estate remains in the Plaintiff, the public has a right-of-way for travel over the easement. The Trial Court erroneously ruled that Defendant, CALIFORNIA PACIFIC also had perfected a right to use the road for commercial transmission of their energy, without affording any compensation to the Plaintiff.

The Trial Court determined the utility could, with

impunity, erect power poles and string transmission lines. Perhaps the court did so as it considered the use of the easement by the UTILITY COMPANY to be incidental to the established use of the highway by the public for travel.

Alternatively, the Trial Court considered that the COUNTY OF IRON could confer such a right upon the Defendant, CALIFORNIA PACIFIC, to establish such an obstruction under the language of U.C.A. 17-5-39 (1953, as amended). In either case, the Trial Court erred.

At one time the courts would consider the distinction bet uses indigenous to urban roads and uses indigenous to rural ro Montgomery v. Santa Ana Electric Railroad Co., 104 Cal 186, 37 P 786; Dooly Block v. Salt Lake R.T. Co., 9 Utah 31, 33 P 229. Now the trend is away from making such a distinction between types of roads. Rather, as in Palmer v. Larchmont Electrical Co., 52 N.E. 1093; ancillary fixtures such as water mains, gas pipelines, electrical transmission lines, or light poles have a relationship to the highway in either one of two manners, (1) those uses directly related to use of the thoroughfare by the public; and (2) those uses not directly related to public use of and travel upon the thoroughfare. In the matter at hand, the original use of the easement or right-of-way, was for public travel by people and livestock only. (T 8, 4-13).

Extending the logic of such an objective or a highway purpose, sewers or culverts drain surface water from the road, thus relieving the highway from impairments. Therefore, sewers or culverts are for valid highway purposes. Water mains may be used to supply water to clean and sprinkle streets. Light poles may aid in night travel upon highways. Such burdens upon an easement are both used for highway purposes and municipal purposes, which are incident to the highway purposes. Not so with telegraph, telephone or power wires and poles. They are not related to preserve in travel upon the street, road or highway along which such wires are strung.

Addressing such a dichotomy in manner of highway uses by utility companies is Carpenter v. Capitol Electric, 178 Ill 29, 52 N.E. 973. The court there recognized in that the erection of poles and wires by an electric company, not for the purpose of lighting public ways and places, but for the purposes of supplying light to individual and firms in the transaction of its own corporate and commercial business, constituted an additional burden or servitude upon the servient tenement, for which the owner of the same may demand and receive compensation.

Even in jurisdiction still recognizing the distinction between rural roads and urban roads, occupation of a rural highway, the fee of which belongs to the abutting owner and by the telegraph company for the erection of its poles and

transmission lines, is an additional burden to the easement for a highway, for which the owners of the fee are entitled to compensation. Eels v. American Telephone and Telegraph Co. 143 NY 133, 38 N.E. 202.

In the final analysis, whether the use of the easement in question by the Utility Company is incidental to the use of the highway by the public for travel, some jurisdictions have held although the poles and wires are reasonably necessary and proper for lighting the right-of-way, their further use for the furnishing of electricity to private parties is unauthorized Gurnsey v. Northern California Power Co., 160 Cal 699, 117 P 906; French v. Robb, 67 NJL 260; 51 A 509. In the instant case, the power line is not used for lighting or any road-related purpose.

Relevant to the issue of a local municipality conferring the right of the Utility Company to enter onto the easement for the purposes of erecting poles and stringing lines is Gurnsey v. Northern California Power Co., supra. In this instance the land was dedicated to the public for a highway while the owner retained his right to the soil for all purposes not inconsistent with the public's easement. The only control which the County Board of Supervisors could exercise was such as was necessary to maintain the highway in a proper condition for use by the public. Hence, a municipality embracing the highway could not confer on a third person the right to enter

on the highway and occupy any portion thereof, without the consent of the landowner, when such entry was not for a purpose incidental to the effective use of the highway by the public for travel.

In conclusion, a fundamental principle which is basic to the use of all easements, is that the owner of the easement cannot increase the burden upon the servient estate or impose thereon a new burden. Duet v. Louisiana Power and Light Co., 169 F Supp 184; Wall v. Rudolph, 198 Cal App 684, 18 Cal Rptr 123, 3 ALR 3d 1242; Big Cottonwood Tanner Ditch Co. v. Moyle, 109 Utah 213; 175 P2d 148, ALR 175; Haines v. Golles, 76 WY 411, 303 P2d 1004, Likewise, Davis v. Jefferson Co. Tel. Co.; 82 WVA 357, 95 SE 1042; it has been widely held that erecting electric light poles and wires over and along a right-of-way constitutes a new and additional burden upon the abutting fee and is an obstruction in one way or another, Carpenter v. Capitol Electric, supra; Crullen v. Edison Electric Illumination Co., 254 Mass 93, 149 NE 665.

It has been widely held that electric light and power lines in a public street or highway, so placed for the power company's commercial and corporate purposes of furnishing electric current to private individuals or concerns, do constitute an additional servitude or easement for the owner of the abutting property. Gurnsey v. Northern California Power Co., supra Carpenter v. Capitol Electric Co., supra; Potomac Edison Co. v. Routlahn,

192 Md 449, 65 A2D 580; Berry v. Southern Pine Electric Power Assn., 222 Miss 260, 76 So2D 212; Brown v. Asheville Electric Light Co., 138 NC 533, 51 SE 62. A number of courts have held that power poles and transmission lines are an additional servitude even where the public has a qualified fee in the street for street purposes. Callen v. Columbus Electric Light Co., 66 Ohio St 166, 64 NE 141.

In one instance, even where the power company acquired the right to string wires along the side of a highway through eminent domain, it was held to be an additional burden on the servient estate. Such additional burden thereby interfered with the fee owner's raising of crops thereon, thus entitling the fee owner to damages. Otter Tail Power Co. v. Von Bank. 72 ND 497, 8 NW 2d 599.

Again amplifing the right of the fee owner to receive damages is Carpenter v. Capitol Electric, supra, where it was held that the owner of the fee may demand damages when a power company erects poles and strings transmission lines for its own commercial purposes. Likewise, where the landowner had previously granted to the electric company an easement for the purpose of constructing and maintaining power lines, the power company, subsequently authorized the local municipality to attach wires and appurtenances to the power company's poles In this instance the court held that the additional lines of the municipality, with a corresponding right to enter upon

lands for maintenance purposes, placed an additional burden on owner's land without his consent, thus entitling the owner to compensation. Therefore, any additional burden upon a grant of an easement entitles the landowner to just compensation. Grimes v. Virginia Electric and Power Company, 96 SE2d 713.

In giving grounds for relief or damages, a few courts have held that should the easement exceed his rights either in the manner or in the extent of it's use, the easement owner becomes a trespasser to the extent of the unathorized use. Adams v. Winnett, 25 Tenn App 276, 156 DE2d 353. Raven Red Ash Coal v. Ball, 185 VA 534, 39 SE2d 231.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT THE PUBLIC THOROUGHFARE INCLUDED THE ENTIRE FEE FOR PUBLIC USE AS STATED IN PARAGRAPH 4, CONCLUSIONS OF LAW.

In the brief to the Trial Court by the Defendant, CALIFORNIA PACIFIC, the counsel makes a point that a highway is deemed to have been dedicated when it is used for a period of 10 years as per U.C.A. 27-12-89 (1953, as amended). U.C.A. 27-12-89 merely refers to a "thoroughfare for the public use" and not to a permanent installation for commercial gains or personal profit. The word "thoroughfare" was defined as a place or way through which there is passing or travel. It became a "public thoroughfare" when the public acquired a general

right of passage. Morris v. Blunt, 49 U 243, 161 P. 1127.

U.C.A. 27-12-101 (1953, as amended) reads as follows:

> "TITLE TO PROPERTY ACQUIRED BY STATE. Title to real property acquired by the state road commission or the counties, cities and towns, either by gift, agreement, exchange, purchase, condemnation or otherwise, for highway rights-of-way or other highway purposes, may be in fee simple or any lesser estate or interest. A transfer of land bounded by a public highway on a right-of-way for which the public has only an easement passes the title of the person whose estate is transferred to the middle of the highway." (Emphasis added)

By reading both U.C.A. 27-12-101 and U.C.A. 27-12-89 (1953, as amended), it is clear that the intent of the State Legislature was that any implied dedication after a period of 10 years use by the public, is merely a dedication to the public of the right of thoroughfare or passage and cannot constitute a dedication of the entire fee interest in the property of the abutting owner over which the easement exists.

If it is the premise by the Trial Court and Defendant, CALIFORNIA PACIFIC, that the entire fee is to be dedicated aft a 10-year period, it could also be held that, in an area withi this State where there are many miles of roads similar to the road which is the subject of this action, over lands that are subject to oil and hydrocarbon deposits, by the dedication of the entire fee under U.C.A. 27-12-89 (1953, as amended), any revenues derived from the production and sale of said minerals would belong to the public by reason of such dedication of the fee of the thoroughfare for public use. Profits from minerals

and those of a utility placing a power line for commercial gains are similar in that they are personal profit. It is hard to conceive that the State Legislature intended that more than the right to passage and thoroughfare was included in U.C.A. 27-12-89 (1953, as amended), rather than the entire fee interest as presented by the Trial Court and the Defendant Utility Company, and the State Legislature did in fact spell out the title to fee of an abutting owner in U.C.A. 27-12-101 (1953, as amended). If the intent were that the entire fee were to pass, this would constitute the taking of a person's property without just compensation, thereby depriving a person of his or her due process of law as guaranteed by the Constitutions of the United States of America and the State of Utah.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT POWER LINES OF THE DEFENDANT FOR PERSONAL PROFIT WAS FOR THE PUBLIC BENEFIT AS STATED IN PARAGRAPH 6, CONCLUSION OF LAW BY THE TRIAL COURT.

If the power line in question are for the purpose of aiding in travel for the public over this section of highway, it could be said that this installation was for the "Public Benefit". However, in trial by the lower court, it was determined that the installation of the power poles and lines was for the Defendant. CALIFORNIA PACIFIC's use for profit and in no way benefited the thoroughfare or highway.

The erection of poles and wires by an eletric company, not for the purpose of lighting public way and places, but for th purposes of supplying light to individuals and firms in the transaction of its own corporate and commercial business, constitutes an additional easement or servitude on the highway, for which the owner of the fee may demand compensati Carpenter v. Capitol Electric, supra.

CONCLUSION

In view of all the foregoing, and the equities which overwhelmingly preponderate in Plaintiff's favor:

1. This Court should reverse the Judgment of the Trial Court and remand the case with instructions to order the Defendant, CALIFORNIA PACIFIC to remove its pole line and wires from the property of the Plaintiff;

2. The Trial Court should be instructed to award damages to the Plaintiff for the period of time that the Defendant, CALIFORNIA PACIFIC has trespassed upon the property of the Plaintiffs;

3. This Court should order the Trial Court to enjoin and restrain the Defendant, COUNTY OF IRON from further authorizing the expansion or modification of public thoroughfares acquired by prescriptive right or by U.C.A. 27-12-89 (1953, as amended), unless authorized by the abutting legal owner of the fee; or unless proper condemnation procedures

are employed.

4. Instruct the Trial Court to Order the Defendants to pay all cost incurred by the Plaintiff in this action.

DATED: _____November 1979.

Respectfully submitted.

JESS W. PICKETT
Attorney pro se

CERTIFICATE OF MAILING

I certify that on____November 1979, I mailed two copies of the written and foregoing Brief of Appellant to Mr. Patrick H. Fenton, Attorney at Law, 13 West Hoover Avenue, Cedar City, UT 84720; and to Mr. James L. Shumate, Iron County Attorney, at 110 North Main Street, Cedar City, UT 84720; first-class postage fully prepaid.

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