

1980

Richard Diamond and Peggy Diamond v. Robert E. Christofferson et al : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Diamond v. Christofferson*, No. 16642 (Utah Supreme Court, 1980).

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IN THE SUPREME COURT FOR THE
STATE OF UTAH

RICHARD DIAMOND & PEGGY
DIAMOND,

Plaintiffs and
Appellants,

vs.

ROBERT E. CHRISTOFFERSON,
RUTH R. CHRISTOFFERSON,
husband and wife, and GLEN
R. CHRISTOFFERSON, LAURA
CHRISTOFFERSON, husband and
wife, and the UNKNOWN WIVES,
DEVICES, HEIRS AND CREDITORS
OF THE ABOVE-NAMED PARTIES
and ALL OTHER UNKNOWN PERSONS
WHO HAVE OR CLAIM TO HAVE
ANY RIGHT, TITLE OR ESTATE,
LIEN OR INTEREST IN THE
PROPERTY DESCRIBED HEREIN,

Defendants and
Respondents.

Case No. 188

BRIEF OF RESPONDENTS

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FILED

MAR 21 1980

TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1, 2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2, 3
 ARGUMENT	
POINT I. THE COURT CORRECTLY DETERMINED THAT THE ROADWAY WAS CONSTRUCTED THIRTY-THREE FEET IN WIDTH IN CALENDAR YEAR 1926.....	3, 4, 5, 6
POINT II. THE RESPONDENTS ARE ENTITLED TO A PRESUMPTION THAT THEIR USE OF THE ROAD- WAY AT THIRTY-THREE FEET WAS ADVERSE TO THE OWNER.....	6, 7
POINT III. THERE IS NO EVIDENCE WHATEVER THAT THE RESPONDENTS HAVE ABANDONED THEIR PRESCRIPTIVE RIGHT OF WAY.....	7, 8, 9
CONCLUSION	9, 10, 11

CASES CITED

Richins vs. Struhs, 17 Utah 2d 356, 412 P.2d, 314...	6
Richards vs. Pines Ranch, Inc., 559 P.2d 948.....	8
Western Gateway Storage Company vs. Treseder, 567 P.2d, 181.....	8

IN THE SUPREME COURT FOR THE
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RICHARD DIAMOND & PEGGY)	
DIAMOND,)	
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vs.)	Case No. 16642
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RUTH R. CHRISTOFFERSON,)	
husband and wife, and GLEN)	
R. CHRISTOFFERSON, LAURA)	
CHRISTOFFERSON, husband and)	
wife, and the UNKNOWN WIVES,)	
DEVICES, HEIRS AND CREDITORS)	
OF THE ABOVE-NAMED PARTIES)	
and ALL OTHER UNKNOWN PERSONS)	
WHO HAVE OR CLAIM TO HAVE)	
ANY RIGHT, TITLE OR ESTATE,)	
LIEN OR INTEREST IN THE)	
PROPERTY DESCRIBED HEREIN,)	
)	
Defendants and)	
Respondents.)	

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an appeal by the plaintiff from a judgment entered by Calvin Gould dated the 15th day of June, 1979, denying the plaintiff a permanent restraining order.

DISPOSITION IN LOWER COURT

The lower court refused to grant the plaintiff a permanent restraining order and entered an order holding that

the plaintiffs' property was burdened with a thirty-three (33) foot right-of-way in favor of the defendants.

RELIEF SOUGHT ON APPEAL

The respondents seek to have this Court affirm the judgment of Judge Gould.

STATEMENT OF FACTS

The plaintiffs-appellants, Richard Diamond and his wife, Peggy Diamond, purchased a parcel of real property located in Pleasant View, Utah, sometime in 1968. The parcel was located on the south immediately adjacent to a roadway extending from a road known as 900 West in Pleasant View, running to the east to the property owned by the respondents.

Subsequently the plaintiffs-appellants purchased an additional parcel of property this time located on the north side of the roadway extending to the respondents' property. That parcel was acquired in approximately 1975 (T99).

The roadway was not owned by the respondents but was donated for the construction of the roadway extending from 900 West in Pleasant View to the respondents' property to the east prior to 1926.

After the appellants acquired the property, Mr. Diamond caused the fence on the north side of the first parcel he purchased, to be rebuilt and in the process of rebuilding the fence, he moved to the north (T224) making the roadway much narrower. At the time the appellant moved his fence

into the roadway, although the respondents did not tear it down, or file a lawsuit, they did talk to him about it.
(T238)

Subsequently when Mr. Diamond, the appellant, bought the property to the north of the roadway he began changing the location of the fence on the south side of the land. He was installing the fence poles to the south of the fence line thereby narrowing the roadway from the north. At that time the respondents simply removed the fence posts and it was the removal of the posts that caused the plaintiffs-appellants to file their action for temporary restraining order.

The issues that were presented to the trial court for determination were:

- (1) When was the roadway constructed?
- (2) What was the width of the roadway?
- (3) What is the width of the roadway to which the respondents are entitled?

ARGUMENT

POINT I

THE COURT CORRECTLY DETERMINED THAT THE ROADWAY WAS CONSTRUCTED THIRTY-THREE (33) FEET IN WIDTH IN CALENDAR YEAR 1926.

There were few witnesses available to testify with any degree of accuracy as to what occurred in 1927, however there is a living witness to the building of the road, Mr. Lucien V. Critchlow. At the time of trial he was 80 years

old and testified that he knew the father of the defendants and that he was familiar with the real property in question in the lawsuit. He testified that Ray Christofferson, father of the respondents, hired him to maintain the lane by hauling rocks, filling it with dirt, etc. (T176) and testified that he even built the fence. He testified that he helped build the roadway in question in the year 1926 and was paid 17 or 18 cents an hour.. (T178)

There was substantial discussion at that point in the trial as to the admissibility of Mr. Critchlow's testimony concerning the width of the road. Defendants' counsel asked Mr. Critchlow, "Give us your best estimate as to the width of the road that you built?" (T182) Plaintiffs' counsel objected. The Court then stated, "He was there and he built the road, and he can give me a judgment. It may go to the weight but it is certainly not inadmissible." The question was asked, "In you best estimate Mr. Critchlow, how wide was the road you built?" Answer, "Well I think it was two rods." Question, "Do you know how far - how big two rods are?" To which he responded, "Yes. It is thirty-three feet." Question, "And did the road appear to you to be thirty-three feet in width?" Answer, "Yes it did." (T182)

Mr. Mac Wade, a long time resident of the area and an owner of property immediately adjacent to the roadway, testified that he moved into the neighborhood in 1932 and when asked his opinion as to the distance between the fences

on the north and south side of the roadway he stated, "Well, I would just guess thirty-two feet to two rods. I would just guess, because I never measured it." (T199) And when asked, "What is your best estimate as to the width of that road?" he responded, "Thirty-three feet." (T200)

Mr. Glen R. Christofferson, one of the respondents, testified he lived in the family home on the east end of that roadway in 1925. (T223) He testified that in 1946 or 1947 that they were going to remove the family home down the roadway, that the house was 24 feet by 30 feet so he measured the distance between telephone poles down along the road to see whether there would be adequate clearance. (T227) There was 31 feet between the posts. He further testified that on the north side of the road, the fence was about two feet north of the existing telephone poles. He further stated, "I remember when the power company installed those poles in 1931. At that time, when they dug the holes, they was tamping it in, they didn't put it in the fence line." The question was asked, "They put it in which direction from the fence?" to which he responded, "They put the poles inside the lane." The question was then asked, "Now, you say you measured the distance between the telephone poles on the north and the fence line on the south. How much distance was there?" to which he responded, "From the telephone pole to the south fence the line was 31 feet." (T228)

Thereafter the Court concluded in his memorandum decision that the road was thirty-three feet in width and that it was constructed in 1922. Counsel had consistently

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The Appellants here have misinterpreted the law, it is not the burden of the Respondents here to establish the prescriptive use by clear and convincing evidence, they have a presumption that it is legitimate. It is up to the Plaintiff to overcome the presumption by clear and convincing evidence.

ARGUMENT

POINT III

THERE IS NO EVIDENCE WHATEVER THAT THE RESPONDENTS HAVE ABANDONED THEIR PRESCRIPTIVE RIGHT OF WAY.

Subsequent to the construction of the roadway in 1926, the roadway was narrowed from the south lot by Joe Alkema in 1942. (T211) This was the testimony of Mac Wade, who was the owner of the property on the other side of the road. At the time Joe narrowed the roadway the Defendants spoke to him about it but did not attempt to tear up his fence. (T245)

Each time the roadway was diminished in width, because of the moving of the fences, the Defendants objected to it. In approximately 1957, Royal Buice, the owner of the parcel to the south of the road, put in a new fence which narrowed the roadway and again the Defendants talked to him about it and voiced their objection. (T237)

In 1968 when Diamond purchased the property and moved the fence into the roadway again the Defendants registered their complaint with him, but Diamond ignored them. (T246)

In 1978 when Diamond started to install the fenceposts on the north side of the roadway, thereby diminishing the width

from the north, the Defendants had enough and pulled the fenceposts out which gave rise to this action.

The Appellants have attempted to show that during a period of time, commencing in 1957, a Mr. Keith Hansen surveyed the area for Pleasant View Culinary Water Association that the distance between the fences was 19 feet on one end of the road and 21 feet on the other and have therefore concluded that the Respondents have abandoned their easement.

This is not a correct statement of the law. The law is clearly enunciated in Richards v. Pines Ranch, Inc., 559 P.2d 948, where the Court said at page 949,

"A right-of-way by prescription is established by open, notorious, adverse use thereof for a period of twenty years. Once the adverse use is established for the twenty-year period, the burden of showing that it was not adverse is upon the owner of the servient estate."

and the Court continued:

"If a twenty-year adverse use was established then that could only be defeated by a prohibition of use for a like period."
(Emphasis added).

The Utah Supreme Court has spoken on the question of abandonment in Western Gateway Storage Company vs. Treseder, 567 P.2d, 181, where the Court said at page 182:

"It is well recognized that an easement or right of way may be abandoned. However, to determine the issue of abandonment several factors need be considered among which are whether or not the right was acquired by prescription or grant, the extent of its use, and the actual intent of the owner.

"This Court has previously recognized that a right gained by conveyance may not be lost by non-use alone and that an actual intent to abandon be evident. The same principle was reaffirmed in

Tuttle v. Sowadzki and in Riter v. Cayias.

"In regard to the quantum of proof required on the issue of abandonment, the court was confronted with the question in connection with a prescriptive easement in Harmon v. Rasmussen and it was therein determined that the degree of proof required was that of clear and convincing actions releasing the ownership and right of use and an intentional abandonment, not a mere preponderance of the evidence." (Emphasis added).

There is no evidence here that the easement was abandoned, in fact quite the contrary, when the Appellants narrowed the roadway by moving the fence line of the south property to the north, the Respondents objected, the Appellants apparently ignored their pleas, but in 1978 when the Appellants again attempted to narrow the roadway from the north, the Respondents forcibly removed the posts, and it was that act which precipitated the lawsuit.

If the testimony of Mr. Keith Hansen were true, it places the width of the road at 19 feet to 21 feet in 1957. There was no evidence concerning the width at 21 feet or 19 feet at any time prior to 1957. And in 1968, the Respondents objected to the narrowing of the roadway, hence there is no showing that the roadway was diminished in width for the requisite 20 years.

CONCLUSION

The Court had an opportunity to hear numerous witnesses involved with the construction and operation of the roadway in question. He heard Mr. Critchlow, who is now 80 years

that road -- he helped build it, he knew how wide it was, and it was 2 rods in width.

He heard Mac Wade, who became a property owner of the adjacent property in 1932 and Mr. Wade testified that he too believed that the property was 2 rods in width. The testimony of the Respondents was consistent.

The Court heard witnesses testify that property owners prior to Mr. Diamond had attempted to narrow the roadway by moving the fence from the south parcel to the north, and from the north parcel to the south, and on each occasion they objected to the narrowing of the roadway. The Court saw old fence posts and old barb wire marks on trees close to the roadway. He saw photographs and heard oral testimony as to the location of the old fences. He obviously believed the witnesses and considered the physical evidence he saw to be consistent with that testimony. There was nothing difficult about the Court's conclusion that the roadway was indeed 2 rods in width.

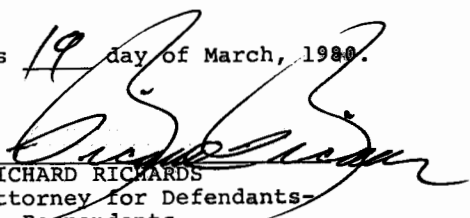
Mr. Diamond did not become an owner of the adjacent property until 1968 and immediately thereafter encroached further into the roadway from the south and met objections from the respondents. When he attempted to encroach into the roadway from the north, the respondents had had enough. They then tore the fence posts out, which gave rise to the lawsuit.

By no stretch of the imagination could the Court have concluded that the roadway was any less than 2 rods in width

or that the respondents here had in someway acquiesced in the narrowing of the roadway or abandoned their right of way. The respondents had been there for a long time; it was the appellant who was the newcomer and who wanted to change the old fence lines to increase the size of his parcels of property.

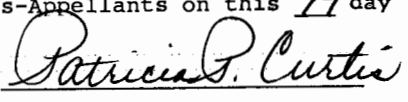
The Court's decision was logical and it was fair and it ought to be sustained.

Respectfully submitted this 19 day of March, 1980.


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CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing Brief of Respondents were mailed to Robert Echard, Attorney for Plaintiffs-Appellants on this 19 day of March, 1980.


Patricia G. Curtis