

1980

Richard Diamond and Peggy Diamond v. Robert E. Christofferson et al : Petition of Appellants for Rehearing

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *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. 16642

PETITION OF APPELLANTS FOR RE-HEARING

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RICHARD DIAMOND & PEGGY DIAMOND,)
 Plaintiffs and Appellants,)
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ROBERT E. CHRISTOFFERSON, RUTH R.)
CHRISTOFFERSON, husband and wife,)
and GLEN R. CHRISTOFFERSON, LAURA) Case NO. 16642
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.)

PETITION OF APPELLANTS FOR RE-HEARING

RELIEF SOUGHT ON RE-HEARING

The appellants request that the Supreme Court decision filed on October 21, 1980, be vacated and that the Court reverse the findings of the district court and remand this matter back for trial and/or enter an order in favor of the appellants against the respondents.

INTRODUCTION

The Supreme Court entered a decision on October 21, 1980, adverse to the appellants. The appellants now seek to have a re-hearing of that decision because: 1) the Supreme Court overlooked one of the major issues raised by

the appellants on appeal. The appellants contended that the trial court committed error when it ruled that the quantum of proof to establish a right-of-way was by a preponderance of the evidence rather than by clear and convincing evidence. The Supreme Court did not deal with this issue. 2) The Supreme Court, in ruling on the issue of whether or not the right-of-way had been abandoned, made a mistake as to the facts which were established at the time of the trial hearing. In addition, the Court required the appellants to show specific intent to establish abandonment of the right-of-way but did not require the same standard of proof of the respondents in establishing the right-of-way.

A R G U M E N T

POINT I

THE SUPREME COURT FAILED TO CONSIDER OR RULE ON THE ISSUE THAT THE DISTRICT COURT JUDGE HAD APPLIED THE WRONG STANDARD OF PROOF REQUIRING ONLY A PREPONDERANCE OF THE EVIDENCE INSTEAD OF CLEAR AND CONVINCING EVIDENCE.

At the trial in the lower court, the appellants conceded that a right-of-way existed that was approximately twenty-one (21) feet wide. This was based upon the fact that a survey had been conducted approximately twenty (20) years earlier that indicated the lane was nineteen (19) feet wide on one end and approximately twenty-one (21) feet

wide on the opposite end. The appellants did not at any time agree that the right-of-way had ever been thirty-three (33) feet wide. The burden was upon the respondents to prove by clear and convincing evidence any width they claimed in excess of twenty-one (21) feet. Judge Gould, in his Memorandum Decision, stated that the respondents were only required to demonstrate by a preponderance of the evidence that their easement was thirty-three (33) feet wide. The Judge went on to state in part as follows:

A true application of the rule of preponderance evidence in a civil case is a simple proposition is the fact alleged more probably true than not true. . . .

This court, on numerous cases, has indicated that the burden that must be born by a person claiming a right-of-way is that of proof by clear and convincing evidence. In fact, the Supreme Court, in the decision issued on October 21, 1980, applied that burden to the appellants when it ruled that the appellants had to meet that burden in order to demonstrate the right-of-way had been abandoned. It is inconceivable to believe that this court could allow the respondents to establish their case on the basis of a preponderance of the evidence but require that the appellants meet the burden of clear and convincing evidence.

This Court, in Peterson vs. Combe, 20 U.2d 376, 438 P.2d 545 (1968), held that a party claiming that a road was public had to bear the burden of proving by clear and

convincing evidence that constitutionally must be justified. The Court went on to state that a mere preponderance of the evidence was not sufficient to show clear and convincing evidence. This court has ruled in a similar manner in the cases of Buckley vs. Cox, 247 P.2d 277, 122 Utah 151, and in Western Gateway Storage Company vs. Treseder, 567 P.2d 181 (1977). A similar decision was reached in the case of Harmon vs. Rasmussen, 12 Utah 2d 422, 375 P.2d 762 (1962). This case was cited by the Supreme Court in its decision of October 21, 1980, in footnote No. 3, as supporting the fact that clear and convincing evidence was the quantum of proof that was required in this type of case.

As the record presently stands before this court, the district court judge determined that the right-of-way which is at issue was not proven by clear and convincing evidence but merely by a preponderance of the evidence. Since the quantum of proof required by this court was not met in the lower court, the court's decision must be reversed or the matter must be referred to the trial court for a re-trial to determine whether or not the respondents are able to present evidence which meets the quantum of proof of clear and convincing evidence.

POINT II

THIS COURT ERRED IN ITS DETERMINATION OF THE FACTS AND APPLICATION OF THE LAW AS IT APPLIES TO ITS OCTOBER 21, 1980 DECISION.

The decision reached by this court on October 21, 1980, stated in two places that during the last twenty (20) years the appellants had constructed fences and taken other actions which narrowed the roadway. This is not supported by the evidence. The evidence presented at the trial court demonstrated that a survey was taken by a qualified engineer in 1957, twenty-two (22) years before the difficulties arose between the appellants and the respondents. That survey demonstrated that the lane was nineteen (19) feet wide on the east and twenty-one and one-half (21-1/2) feet wide on the west. (R.132, lines 7 through 19, R.134, lines 20 through 23) The appellants introduced into evidence aerial photographs marked as Exhibits "A" and "B" which demonstrate that in 1958, twenty-one (21) years before the difficulties arose between the appellants and respondents, trees were in location on both sides of the lane which restricted the width of the lane from twenty (20) to twenty-two (22) feet. (R.136, line 20 through R.137, line 6) The engineer who made the survey testified that he has been familiar with the lane since he made the original survey in 1957 and that the width of the fences has not changed during that twenty-two (22) year period. (R.135, lines 16 through 18, R.145, lines 8 through 11) There was no evidence produced at the trial court which demonstrated

that the appellants or anyone owning the property prior to them had moved fenceposts or any other structures within the twenty-one (21) to twenty-two (22) foot width that was established in 1957. However, this court made such a determination in paragraphs 2, 8 and 9 of its decision. Consequently, the facts upon which this court based its October 21, 1980, decision were inaccurate and without foundation in the trial court records.

It is the contention of the appellants that the quantum of proof for an abandonment of a right-of-way should not be any greater than the proof required for the establishment of a right-of-way. The intent necessary to establish the right-of-way is generally demonstrated by the fact that a person uses a right-of-way without specific objections on the part of the person owning the fee for a period of twenty (20) years. Consequently, it is the appellants' contention that the abandonment of a right-of-way, likewise, can be demonstrated by the fact that a right-of-way is restricted without any objection being made to that restriction for a twenty-year (20) period of time. To hold otherwise would be manifestly unfair to all parties involved.

This court, in Richard vs. Pine View Ranch, Inc., 559 P.2d 948 (1977), stated that "if a twenty year adverse use was established, then that could only be defeated by a prohibition of use for a like period". The Utah Supreme

Court has also held that when parties have slept upon their rights they will not be heard to complain after a period of twenty (20) years. In a boundary dispute issue in the case of King vs. Fronk, 15 Utah 2d 135, 378 P.2d 1893 (1963) this court held that where a boundary is allowed to exist for a long period of time without protest there is established an implied agreement based upon the passage of time. These cases clearly indicate that intent is manifested by a failure to act over a passage of time. Similar decisions have been reached in other states. A California Appellate Court, in Hansen vs. Daniel, 289 P.2d 50 (Cal. App.), stated that an easement may be extinguished by non-use and abandonment by a use adverse to the easement for a period equalling the time required to establish the easement. A Nevada court, in the case of Brooks vs. Jensen, 483 P.2d 650, held that an easement can be abandoned and that non-use of the easement is evidence of such intent. Clearly in this case, the respondents failed to object to the approximately twenty-one (21) foot width for a period of approximately twenty-two (22) years. No greater proof of intent was required of the respondents or produced by them in attempting to establish an original easement of thirty-three (33) feet.

CONCLUSION

The trial court applied the wrong quantum of proof when it ruled that the respondents only had to demonstrate existence of a thirty-three (33) foot right-of-way by a preponderance of the evidence rather than by clear and convincing evidence. The Supreme Court incorrectly assumed that the appellants had narrowed the right-of-way since the survey was conducted in 1957. In fact, the right-of-way was not narrowed during this period of time but was used actively at the twenty-one (21) foot width for a period of twenty-two (22) years. This court's decision seemed to state that a right-of-way can be created merely from the use for a period of twenty (20) years without showing specific intent. However, an abandonment of a right-of-way can only be demonstrated by showing specific intent to abandon. The appellants request that this court have a re-hearing in this matter and an order reversing the lower court's decision in favor of the appellants or remand this matter back for trial to the district court.

DATED this 6th day of November, 1980.

Respectfully submitted,

ROBERT A. ECHARD
Attorney for Plaintiffs-
Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petition of Appellants for Re-Hearing to the attorney for the respondents, Richard Richards, Esq., at 2408 Van Buren, Ogden, Utah 84401, on this the ____ day of November, 1980.

JEANNINE C. DAMEWORTH