1980

Victor Brown, Et al. v. Leon Peterson and Peterson Development Co. : Brief of Respondents Leon Peterson and Peterson Development Co. In Support of Petition For Rehearing

Utah Supreme Court

STEVEN H. STEWaRT; Attorney for Respondents;M. RICHARD WALKER; Attorney for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

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VICTOR BROWN, et al., Plaintiffs and Appellants,	*	
v.	*	Case No. 16785
LEON PETERSON and PETERSON DEVELOPMENT CO., Defendants and Respondents.	*	

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BRIEF OF RESPONDENTS LEON PETERSON AND PETERSON DEVELOPMENT CO. IN SUPPORT OF PETITION FOR REHEARING

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APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DAVID K. WINDER, Judge

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT AND SUPREME COURT . . .	1
RELIEF SOUGHT ON PETITION FOR REHEARING	1
STATEMENT OF MATERIAL FACTS	2
ARGUMENT	5
POINT I	
THE APPELLATE COURT ERRED IN FAILING TO AFFIRM THE TRIAL COURT'S DECISION THAT GREATER INJUSTICE AND INEQUITY WOULD RESULT FROM FINDING THAT THE OLD FENCE LINE IS A TRUE BOUNDARY LINE THAT WOULD RESULT FROM ESTABLISHING THE BOUNDARY IN ACCORDANCE WITH THE TRUE SURVEY LINE . . .	5
POINT II	
THE APPELLATE COURT IMPROPERLY INVADED THE PREROGATIVE OF THE TRIAL COURT IN THE INSTANT CASE	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15

CASED CITED

Florence v. Hiline Equipment Company 582 P.2d 998 (1978)	5, 6, 7, 11, 12, 15
Hobson v. Panguitch Lake Corporation 530 P.2d 792 (1975)	6, 7, 12, 15

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Appellants,	*	
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PETERSON DEVELOPMENT CO.,	*	
	*	
Defendants and	*	
Respondents.	*	

* * * * * * * * * * * * * * *

BRIEF OF RESPONDENTS LEON PETERSON AND PETERSON DEVELOPMENT CO. IN SUPPORT OF PETITION FOR REHEARING

* * * * * * * * * * * * * * *

STATEMENT OF THE NATURE OF THE CASE

This action was commenced by Plaintiffs-Appellants, all property owners of Lots 36 through 46 of the Meadow Cove No. 2 Subdivision, against Defendants-Respondents Leon Peterson and Peterson Development Company to obtain title to a strip of land ("the disputed property") between the easternmost boundary lines of their respective lots and an old fence.

DISPOSITION IN THE LOWER COURT AND SUPREME COURT

In the lower court, the Honorable David K. Winder granted judgment in favor of Respondent and quieted title to the disputed property in Peterson Development Company.

This Court, in a decision filed December 18, 1980, reversed the decision of the trial court and remanded the case to the District Court with instructions to enter findings and a decree quieting title to the disputed property in Appellants.

RELIEF SOUGHT ON PETITION FOR REHEARING

Respondents Leon Peterson and Peterson Development Company seek reversal of this Court's reversal of the judgment of the trial court.

STATEMENT OF MATERIAL FACTS

Each of the Appellants is the owner of a home and lot (Lots 36 through 46) in the Meadow Cove No. 2 Subdivision, Salt Lake County, Utah. (R. 66) The official plat of the Meadow Cove No. 2 Subdivision, No. 2544093, was recorded and filed at the request of Security Title Company on June 1, 1973, at 3:53 p.m., Book 73-6 at Page 15 of the official records of the Salt Lake County Recorder's Office. (Id) Each of the Appellants executed the final closing documents in connection with their respective lots after June 1, 1973, the recording date of the Meadow Cove No. 2 Subdivision Plat. (Id)

Sometime prior to April 3, 1973, Bush & Gudgell Engineers ("Bush & Gudgell") was employed by Porter Brothers Realty & Construction, Inc., a Utah corporation ("Porter Brothers") the developer of the Meadow Cove No. 2 Subdivision, to make a survey of the proposed Meadow Cove No. 2 Subdivision. (Id) On April 3, 1973, as a result of said survey, Robert B. Jones, a licensed land surveyer with Bush & Gudgell, certified that the true and correct location of the easternmost boundary of the Meadow Cove No. Subdivision is as follows, to-wit:

> Beginning at the North Quarter Corner of Section 21, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 89°51'21" East 1318.385 feet to the East line of the Northwest quarter of the Northeast Quarter of said Section 21; thence South 0°36'40" East along said East line 989.19 feet. (Id)

None of the deeds conveying to Porter Brothers the parcels of land comprising the Meadow Cove No. 2 Subdivision contain legal descriptions which extend the easternmost boundary line beyond the east line of the Northwest Quarter of the Northeast Corner of Section 21, Township 3 South, Range 1 East, Salt Lake Base and Meridian ("the east survey line"). (Id)

In connection with the survey of the Meadow Cove No. 2 Subdivision, Bush & Gudgell, through its employees and agents, caused survey stakes and hubs to be placed at the lot corners along the easternmost boundary lines of Lots 36 through 46 so that prospective purchasers of those lots could determine the easternmost boundaries thereof; and no such survey stakes were placed by Bush & Gudgell or its employees beyond the east survey line. (Id) In connection with the initial phases of the survey of the Meadow Cove No. 2 Subdivision, Bush & Gudgell caused a preliminary plat to be drawn on which an old fence line ("the old fence line"), located roughly 60 to 70 feet beyond the east survey line, was shown. (Id) After having observed the old fence line, Robert B. Jones contacted Porter Brothers and Security Title Company to determine if any deed conveying to Porter Brothers or its predecessors the parcels of land comprising the Meadow Cove No. 2 Subdivision contained descriptions extending the easternmost boundaries of said parcels beyond the east survey line to the old fence line. (R. 67) Because Security

Title Company could not produce any deed extending the easternmost boundary of any parcel comprising the Meadow Cove No. 2 Subdivision beyond the east survey line, Robert B. Jones informed the principals of Porter Brothers that the true and correct easternmost boundary line of the parcels conveyed to Porter Brothers was the east survey line, not the old fence line. (Id)

Porter Brothers purchased parcels of land comprising Meadow Cove No. 2 Subdivision from American Mining Corporation on the basis of a price per surveyed acre as determiend by a Bush & Gudgell survey, which survey did not include any land beyond the east survey line and which further calculated the acreage to be purchased by Porter Brothers at 24.740 acres. (Id) On May 8, 1978, Reynolds Q. Johnson and Mildred Argyle Johnson executed a quit-claim deed purporting to convey the disputed property to the Appellants. (Id) On May 12, 1978, R. Gordon Porter, President, and J. Stanton Porter, Secretary, of Porter Brothers, executed a quit-claim deed purporting to convey the disputed property to Appellants. (Id) With respect to the quit-claim deeds from both Mr. and Mrs. Johnson and Porter Brothers, Appellants neither paid money nor gave anything of value to the grantors. (Id) Sometime after April 3, 1973, Porter Brothers caused a fence to be constructed along the east survey line ("the white fence"), which fence coincides with the Bush & Gudgell certification of the easternmost boundary of the Meadow Cove No. 2 Subdivision. (Id)

At the conclusion of the trial of this matter, the Honorable David K. Winder held that from and after June 1, 1978, at 3:53 p.m., Appellants were charged with actual or constructive notice of the boundary descriptions contained in the official plat of the Meadow Cove No. 2 Subdivision, including the specific boundaries and distances shown thereon with respect to Lots 36 through 46; that none of the Appellants could reasonably have relied upon the old fence line as being the true easternmost boundary line of their respective lots in the Meadow Cove No. 2 Subdivision; and that greater injustice and inequity would result from finding that the old fence line is the true boundary line than would result from establishing the bounding in accordance with the true survey line. (R. 68) Title to the disputed property was quieted in the Respondents. (Id)

ARGUMENT

POINT I

THE APPELLATE COURT ERRED IN FAILING TO AFFIRM THE TRIAL COURT'S DECISION THAT GREATER INJUSTICE AND INEQUITY WOULD RESULT FROM FINDING THAT THE OLD FENCE LINE IS A TRUE BOUNDARY LINE THAN WOULD RESULT FROM ESTABLISHING THE BOUNDARY IN ACCORDANCE WITH THE TRUE SURVEY LINE.

The Findings of Fact and Conclusions of Law entered by the Honorable David K. Winder in the trial court were based upon two recent Utah Supreme Court decision which clearly apply to the facts of the instant case: Florence v. Hiline Equipment

Company, 582 P.2d 998 (1978), and Hobson v. Panguitch Lake Corporation, 530 P.2d 792 (1975). Neither of these cases were distinguished or even cited in this Court's Opinion written by the Honorable Maurice Harding, District Judge, sitting pro tem. In the Florence case, supra, one of the Defendants, James Saracino, sought title to a disputed strip of land beyond the boundary of his subdivision lot out to an old fence line. The trial court determined that the doctrine of boundary by acquiescence did not apply to the facts of that case. Florence, supra, at 1000. Affirming the trial court, this Court stated:

> "A fence may be maintained between adjoining proprietors for the sake of convenience without the intention of fixing boundaries. Thus agreement to or acquiescence in the establishment of a fence, not as a line marking the boundary, but as a line for other purposes are acquiescence in the mere existence of the fence as a mere barrier, does not preclude parties in claiming up to the true boundary line.
>
> A further reason for the court ruling as it did is that there is no allegation that any of these specific parties relied upon the fence as being the true boundary. Both Saracino and plaintiffs knew where the true boundary was located and treated it as such. Defendant Groll purchased from Saracino a subdivision lot bordering the disputed boundary line. He testified that the property conveyed to him by deed went only to the legal description, and that he has not been deprived of any footage for which he bargained. This gave rise to the trial court's conclusion "[t]hat none of the parties' interests will be interrupted or cause any inequities by holding that each party is to be the owner of their legally described tracts." This is consistent with our analysis of the facts in Hobson v. Panguitch Lake Corporation. In weighing the equities in that case we stated as follows:

> We cannot see the circumstances as justifying a conclusion that the parties acquiesced in regarding this fence as a boundary for the sufficiently long period of time, nor that any greater injustice will result from rectifying the error and establishing the boundary in accordance with the true survey line as described in the Deeds, than would result from depriving the defendants of the property conveyed to them.

> Likewise, on the facts now before us, we must conclude as did the trial court that the parties have not by their actions relied upon the fence as being the true and actual boundary. Equity will not allow us to do other than to enforce those subtle intentions." Id. (Emphasis added)

The Findings, Conclusions, and Judgment of the trial court in the instant case bring it squarely within the holdings of Florence and Hobson, supra. This Court's decision in the instant case characterizes the doctrine of boundary by acquiescence a "legal" rather than "equitable" doctrine. What the trial court must do in any boundary by acquiescence case is, as this Court stated in Florence, supra, "weigh the equities". 582 P.2d at 1000. The equities must be substantially in favor of the party claiming boundary by acquiescence because, as this Court stated in Hobson, supra, ". . . it must be appreciated that the recognition of such boundaries does not have the effect of transferring ownership of disputed strips of property without compliance with the statute of frauds; and it may be at variance with recorded conveyances." 530 P.2d at 794.

In this Court's decision in the instant case at page 3, the following statement is found:

> "It is understandable why the Meadow Cove surveyors fixed the subdivision east boundary line at the white fence line. That was where the record title description placed the line. The subdivider would need to furnish title insurance policies to the lot buyers showing the record title to the lots to be clear and marketable, and the buyers' financiers would also demand clear record titles. To have gone beyond the record title line at the white fence to the old fence line would have necessitated either a quiet title action and the securing of a court decree, or the securing of quitclaim deeds from the holders of the record title, procedures the subdivider probably would prefer to avoid."

It is clear from the evidence adduced in the trial court that Porter Brothers, the developer of the Meadow Cove No. 2 Subdivision, never at any time relied upon the old fence line as the correct easternmost boundary line of the property they had purchased from the American Mining Corporation:

> "Q (BY MR. STEWART): So referring you to Exhibit D-2 which is a signed subdivision plat, signed by both you, R. Gordon Porter and Mr. Jones as a surveyor, are you telling us that you accepted the boundary description as contained in the plat?
>
> A Yes, that is true."
>
> "Q (BY MR. STEWART): Do you recall the conversation that took place in connection with the

presentation to you of Exhibit D-9 and your signature on it? Was there a conversation?

A Yes. The conversation was that they were having--that they felt like that there was an interest between the fence line and the fence that we had established out there as the back of our lots. And they said that they were having a great nuisance factor and they wondered if we would cooperate with them in taking care of this and if we would--if we had any interest in the property. We said that we felt we did not have any interest in the property or we would not represent to have any interest in the property. We would certainly give them a Quit Claim Deed if they wished one. They said that they--they came in sometime later and said they did wish one, so we executed this Quit Claim Deed with them.

Q As a real estate broker, Mr. Porter, you recognize the difference between a Quit Claim Deed and a Warranty Deed, don't you?

A Yes.

Q Do you recall if anyone asked you to give a Warranty Deed?

A I can't recall, but I am sure I would not give a Warranty Deed." (R. 132, 133; 141, 142, emphasis added)

The only evidence adduced in the trial court with respect to the purpose of the old fence was given by Reynolds Johnson, who testified that as far as he knew, the purpose of the fence was ". . . to keep the animals from going back and forth". (R. 134, 135). Mr. Johnson further testified that after he sold the subject property to South Mountain Land Company, he no longer had any interest in the disputed strip:

"Q (BY MR. STEWART): Mr. Johnson, as far as you are concerned, isn't it true that the description that is contained in Exhibit P-14 contains and also encompasses the area between--up to and including this fence on the east side of your property, doesn't it? You have already answered the question.

A East side of the property?

Q In other words, you thought you sold to South Mountain Land Co.--

A To the fence.

Q --to the fence?

A Right.

Q So the description that is contained in P-14, as far as you are concerned, went to the fence?

A Right.

Q As far as you knew?

A Right.

Q So after you conveyed to South Mountain Land, you no longer had any interest to any of the property as far as you were concerned?

A Right. No interest at all." (R. 225, 226, emphasis added)

In balancing the equities as the trial court is required to do in any boundary by acquiescence case, the trial court in the instant case concluded, as did this Court in the Florence case, supra, that none of these specific parties relied upon the old fence as being the true boundary; that none of the parties' interests will be interrupted or cause any inequities by holding that each party is to be the owner of their legally described tracts; nor that any greater injustice will result from rectifying the error and establishing the boundary in accordance with the true survey line as described in the deeds, than would result from depriving the Plaintiffs of the property conveyed to them by Quit Claim Deeds. Florence, supra, at 1000.

In short,under the facts of the instant case, every purpose of the equitable doctrine of boundary by acquiescence will have been frustrated if the decision of this Court is allowed to stand. Plaintiffs will, in fact, receive a windfall, and Defendants will be required to look to the grantors under Warranty Deeds or contractual provisions for reimbursement of the amount

lost because of this Court's decision, resulting in even more litigation. There simply is no justification for this Court's failure to affirm the decision of the trial court in the instant case, particularly in light of the fact that both Leon Peterson and Porter Brothers were willing to treat the survey line as the true and correct boundary line. The trial court's decision is supported by the evidence and applicable case law, and even if the decision of this Court in the instant case is allowed to stand, the published Opinion should at least cite and distinguish the Florence and Hobson cases, supra.

POINT II

THE APPELLATE COURT IMPROPERLY INVADED THE PREROGATIVE OF THE TRIAL COURT IN THE INSTANT CASE.

It was clearly the trial court's prerogative in the instant case to weigh the evidence, balance the equities, and enter findings of fact, conclusions of law, and judgment based upon the evidence. The prerogative of the Appellate Court is limited to a review of the trial court's findings, conclusions, and judgment and to reverse only where the trial court's decision was clearly erroneous as a matter of law. Where both Porter Brothers and Leon Peterson were willing to treat the survey line as the correct boundary line between their respective tracts, it cannot be said that Judge Winder's decision to establish the

boundary line on the survey line was clearly erroneous, notwithstanding the fact that the predecessors of Reynolds Johnson and Albert Dean had constructed a fence a number of years earlier ". . . to keep the animals from going back and forth." (R. 134, 135)

It is illuminating to examine what will now happen if the decision of this Court is allowed to stand. Plaintiffs and Appellants, all of whom purchased lots in a recorded subdivision and got what they bargained for, will have been able to extend the boundaries of their respective lots roughly 60 to 70 feet at the exepnse of Defendants and Respondents. The fact that Plaintiffs paid nothing for their quit claim deeds to the disputed property is not, as Judge Harding pointed out, of legal significance but it is certainly of equitable significance in a boundary dispute case. Moreover, by virtue of a stipulation entered into in the trial court, this case will be remanded to the trial court for the second phase of the trial which will require the trial judge to determine the respective values of the disputed strip and the remaining portion of the appropriate lots in the Brandon Park Subdivision. Defendants will then purchase the disputed property from Plaintiffs for the amount determined by the court, or Defendants will be required to sell to Plaintiffs the remaining portion of the appropriate lots in the Brandon Park Subdivision at a reduced price. (R. 39, 40; 57) If this Court were to affirm the decision of the trial court, however, additional litigation would be avoided, Plaintiffs would not

receive a windfall, and the case would, in fact, be "disposed of".

Interestingly, of the four Justices and one trial Judge sitting pro tem who heard oral arguments in the instant appeal, two (Mr. Justice Crockett and Mr. Justice Stewart) disqualified themselves; one (Mr. Justice Wilkins) has retired from the Court; and one (the Honorable Maurice Harding) would not ordinarily have heard the case. Defendants and Respondents Peterson Development Company and Leon Peterson respectfully submit that under the circumstances, the instant appeal should be heard before four members of this Court as presently constituted, toegther with one Justice pro tem to sit in the place of Mr. Justice Stewart.

CONCLUSION

The decision of this Court, if allowed to stand, and as it affects the parties in the instant case, will result in the frustration of every purpose of the doctrine of boundary by acquiescence. Even assuming that Reynolds Johnson, Albert Dean, and their predecessors in interest had treated the fence line as the boundary line of their respective tracts for a number of years, that fact does not preclude subsequent grantees from repudiating the old fence line as the boundary line and relying upon a survey to fix the boundary. That both Porter Brothers and Leon Peterson did so is undisputed, and it was not clearly

erreneous for the trial court to enter findings, conclusions, and judgment to that effect.

Moreover, the published Opinion in the instant appeal, filed December 18, 1980, neither cites nor distinguishes the two most recent cases from this Court involving the issue of boundary by acquiescence. Even if the present decision is allowed to stand, the cases of Florence v. Hiline Equipment Company, 582 P.2d 998 (Utah, 1978), and Hobson v. Panguitch Lake Corporation, 530 P.2d 792 (Utah, 1975), should at least be cited and distinguished. Defendants and Respondents, therefore, respectfully urge the Court to grant their Petition for Rehearing of the above-entitled appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondents in Support of Petition for Rehearing were served upon the Appellant by hand delivering the same to

M. RICHARD WALKER, Walker & Hintze, Attorney for Appellants, 202 Heritage Plaza, 4685 Highland Drive, Salt Lake City, Utah 84117, this 21st day of January, 1981.

STEVEN H. STEWART