1980

Leo M. Bertagnole, Inc, Bertagnole Investment Company Limited Partnership (Substituted) v. Pine Meadows Ranches, A Corporation Et al. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEO M. BERTAGNOLE, INC., a corporation, BERTAGNOLE INVESTMENT COMPANY LIMITED PARTNERSHIP (Substituted) Plaintiff-Respondent vs. PINE MEADOW RANCHES, a corporation, et al, Defendants-Respondents.	Case No. 16900

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court in and for Summit County
The Honorable Ernest F. Baldwin, Jr., District Judge

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action to quiet title to the portions of two roads crossing a section of real estate in which the legal title is owned by Plaintiffs-Appellants.

DISPOSITION IN LOWER COURT

After trial, a Judgment and Decree was entered against Plaintiff-Appellant in favor of Defendant-Respondents, declaring that Plaintiff-Appellant's title to the real estate in question is subject to a public road thirty (30) feet in width.

RELIEF SOUGHT ON APPEAL

That the lower court's judgment be reversed and title to the real estate in question be quieted in appellants subject to easements of record.

STATEMENT OF FACTS

For the purpose of this brief, appellant shall be referred to hereafter as plaintiff and respondents shall collectively be referred to hereafter as defendants.

The property involved in this action is Section 35, Township 1 North, Range 4 East, Salt Lake Base and Meridian, and is located at the mouth of a canyon known as Tollgate Canyon. Section 35 is divided into two parts by Interstate 80, a non-access highway (previously Highway 30), Silver Creek, and some railroad tracks. When the freeway was constructed, during 1962 - 1965, an overpass was built and designated "Ranch Exit". There are two roads crossing the West portion of Section 35 which are the principal subject of the action. Exhibits P-16 through 19 are aerial photographs depicting Section 35 and the roads. At page 179 of the record is a copy of one of the aerial photographs showing the roads in yellow. The following page is a reproduction of that page colored as in the Exhibit. The black line near the "Y" in the road is the boundary of plaintiff's property.

This action was commenced August 12, 1974 (R. 07), a short time after plaintiffs became aware of the development of a subdivision and use of the subject road as an access to said subdivision.

The evidence is that there was a road in Tollgate Canyon dating back as early as 1915 used for hauling supplies to sheepherders in the area to the North and West of the Bertagnole land in Section 35. The road, to the middle 1960s, was generally described by the witnesses as a "2 rut" road. It was also used by deer hunters and for picnics. The sheep men who used the road were Fay Bates, John Bates, the Richins and Bittners who owned grazing land adjoining and in close proximity to the Bertagnole land.

Fay Bates testified that he owned Section 26 which was likewise divided by Silver Creek, the railroad track, and the highway. He grazed sheep on the part of Section 35 located West of Silver Creek and the Bertagnoles grazed the Bates land in Section 26 East of Silver Creek. Bates never asked permission to use the road across Section 35. See Fay Bates' deposition (R. 216, pp. 27-29). It is apparent that this exchange of use of portions of the sections mentioned was for practical reasons.

The Bates sold their grazing land to Darrell Christenson in 1965, who bought the property for resale. He sold about 480 acres in 1966, and leased the remaining land to sheep men for grazing purposes. There is no evidence of any change of use or substantial improvement of the roads crossing Section 35 between 1966 and 1970. The evidence is that Christenson, or his corporation, sold acreage in the sections North of Tollgate

Canyon for subdivision and resale to Brent Jensen and his corporations in 1970. A program of road widening and construction took place from 1970 through 1977. In 1977, Amoco constructed and improved roads to its oil or gas well.

A table showing issuance of building permits was offered in evidence, Exhibit D-3 (R. 158). It shows the permits issued through 1974 as follows:

1972	8
1973	11
1974	10

Brent Jensen testified that 595 lots have been sold and 49 to 50 miles of road constructed since 1972 (T-135 and T-148). Lot owners have constructed 120 cabins. Exhibits D-6 and D-7 show the roads constructed in the subdivided area.

Brent Jensen testified that he improved the road by grading it (T. 106); that the wearing surface of the road was 12' to 13' wide in 1970 (T. 113); that he had never been told by the Bertagnoles that the road crossing the Bertagnole property was not a public road; that he had never been denied access; and that he was unaware of any objection to the use of the road and land in Section 35 until this suit was filed. (T. 120-121) On cross-examination, he admitted receipt of the several letters, showing that over a period of nearly a year before this suit was filed there had been correspondence and negotiations between the Bertagnoles' attorney and agents and

Brent Jensen and his corporations and agents relating to the unauthorized use of the road and of the Bertagnole land West of the freeway as a site for a sales office. Several deadlines for the filing of the suit were mentioned in the letters and the filing of the suit was delayed pending negotiations for the purchase by Jensen of Section 35 or that part of the Section located West of the freeway. (T. 165-176)

The negotiations relating to the use and proposed sale of land in Section 35 were described generally by Greg Lawson who participated in them. With Brent Jensen's admissions on cross-examination and the testimony of Leo Bertagnole, Harold Bertagnole, and Greg Lawson (R. 168), there can be no doubt about the Bertagnoles' objections to the use of the road well before the suit was filed.

ARGUMENT

I

THE ROADWAYS IN QUESTION HAVE NOT BEEN DEDICATED AND ABANDONED TO THE USE OF THE PUBLIC BY CONTINUOUS USE FOR A PERIOD OF TEN YEARS PRIOR TO THE COMMENCEMENT OF THE LAW SUIT

A. THE BURDEN OF PROOF ESTABLISHING PUBLIC USE FOR THE REQUIRED PERIOD OF TIME IS ON THOSE CLAIMING IT.

The law is well settled in this State that the burden of proof that a road has been dedicated and abandoned to the use of the public is on those claiming it.

We quote from Bonner v. Sudbury, 18 Utah 2d 140, 417 P 2d 646 at p. 648:

> "In connection with this review we deem it appropriate to note our agreement that the dedication of one's property to a public use should not be regarded lightly and that certain principles should be adhered to. The presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it. The mere fact that members of the public may use a private driveway or alley without interference will not necessarily establish it as a public way..." (Emphasis added)

In Peterson v. Combe, 20 Utah 2d 376, 438 P 2d 545 (1968) at Page 546, the following is held:

> "....we think the burden of proving a real public use continuously for 10 years was not met here in the light of principles to the effect that dedication of right to the public generally must be displayed by clear and convincing evidence. This we say even in view of the other principle that on review we canvass the facts in a light more favorable to the conclusions of the arbiter of the facts. These principles clash somewhat, but where individual property rights are at stake we must not treat such rights lightly."

See also Harkness v. Woodmansee, 7 Utah 227, 26 P 291; and Thompson, Real Property, Vol. 2, Sec. 525.

The defendants are seeking a judgment declaring that the part of the Tollgate road in Section 35 has been dedicated and abandoned to the use of the public on the theory that the road has been used by the public continuously for a period of ten years as provided by Section 27-12-89 UCA, 1953. This section provides:

> "A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

The Supreme Court of Utah has construed the above quoted section in several cases and has defined its terms.

The case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, holds that there must be evidence of intent by the owner to dedicate a road to the public and an acceptance by the public to establish a public road.

The Court in the case of Thompson v. Nelson, 2 Utah 2d 340, 273 P 2d 720, at p. 723, quotes with approval a definition of the word "thoroughfare" and points out that the mere fact that a private way is also used by the public, without objection by the owner, will not make it a public way.

The recent case of Harding v. Bohman, 26 Utah 2d, 439, 491 P 2d 233, was an action by a landowner to have a certain strip of land declared a public highway. The record showed use by sheepmen and deer hunters and that the road was not maintained at public expense. The finding of the trial court that the evidence failed to show a public dedication was sustained and the judgment affirmed.

In Peterson v. Combe, 20 Utah 2d 376, 438 P 2d 545, the Court held that evidence that a road was used by property owners abutting or straddling the road and that property at the end of the road had no allure for the public was insufficient to show public use.

In the case of Gillmor v. Carter, 15 Utah 2d 280, 391 P 2d 426, the Court affirmed a Summary Judgment where there was

no showing of intent of the landowners to establish a public road.

The case of Thompson v. Condas, 27 Utah 2d 129, 439 P 2d 639, holds that "....clear and convincing quantum and quality of proof...." is necessary for the establishment of a public thoroughfare.

Text writers state the rule that the intent of the landowner to dedicate the road to public use and acceptance by the public must be shown by clear and convincing evidence. In Tiffany Real Property (3rd Ed), Vol. 4, Section 1102, it is stated that the mere fact that the land has been used by the public does not, of itself, show a dedication thereof by the owner. We quote:

> "And the owner's mere acquiescense in the use of land by the public for purposes of travel or recreation can furnish but slight evidence of dedication when such land is unenclosed land, not in use for the purpose of cultivation or otherwise. Dedication will not be inferred from mere permissive use of unenclosed land."

In Powell on Real Property, Vol. 6A, Section 934, it is stated:

> "The operative facts requisite for the finding of a dedication have two aspects, the objectively manifested desire of the landowner to devote a land interest to public use, and the public acceptance of the offer."

B. THE RECORD DOES NOT SHOW THE REQUISITE INTENTION OF THE LANDOWNERS TO DEDICATE OR ABANDON THEIR LAND TO THE USE OF THE PUBLIC AND ACCEPTANCE BY THE PUBLIC.

The defendants have not in their pleadings or at the trial indicated over what ten year period the Bertagnoles or their predecessors dedicated or abandoned their land to public use. During the period from the 1930s to 1971, the land, which is now subdivided by Brent Jensen and his corporations, was used by the Bates and other sheep men for summer grazing of sheep. Darrell Christensen testified that he purchased the land in 1965 and leased it for sheep grazing from 1966 to 1971. Subdivision and lot sales took place from 1972 to date and unquestionably the road was improved and used by numerous cabin owners during and after 1972.

In view of the fact that this action was filed in 1974, it is obvious that the only ten year period which can be relied upon to show dedication of the Bertagnole land to public use would include at least eight years when the use of the road was by sheep men, deer hunters, and people on picnics. These uses were not for public benefit, but were for private uses to property owners own land or were for persons who were trespassing on or using private land with or without permission. The evidence did not show any public land accessible only by the road in question. Section 27-12-89 should not be construed to grant access to the general public to areas under private

ownership where no public need is shown. In the present case no evidence was presented showing a public allure as referred to in Peterson v. Combe, supra. There is also no showing of any kind that the county or other public entity improved the road or otherwise showed any intention to accept it as a public road.

On the contrary the evidence is clear and beyond dispute that the State of Utah acquired a strip of land lying West of the West line of the freeway in Section 35 North of the overpass for a stock trail and East of the East line of the freeway South of the overpass for a stock trail. It will be noted that the Final Order of Condemnation, referred to above, requires the State of Utah to "....keep, maintain and repair in reasonable and satisfactory condition the livestock fence located on the condemned premises and adjoining the remaining land of the defendant herein...." The testimony is that the fence was constructed and that a gate in the fence constructed by the State of Utah and blocking the new Tollgate road had been removed and destroyed (Exhibit 1).

The State of Utah acquired the easement for a livestock trail by order of condemnation in 1967 which is quoted from above. Any claim of a public road based on use since that date would be subordinate to the State Easement.

In the earlier years, before the construction of the freeway and the fence along the stock trail, there is evidence

from disinterested witnesses Gillmor (R. 209-221), Willis Bittner (R. 221-235) and Frank Toole (R. 176-187) that there was a fence across the mouth of Tollgate Canyon and a gate. It will be noted that the deed quoted from above from Boley to Uinta Pipeline Company requires the grantee to erect gates and to provide good locks with keys.

Another significant fact which negates any claimed intent on the part of the landowners to dedicate the road to the public is that the two-rut road went nowhere except to private livestock grazing land. It is impossible to believe that sheep men who are always on the alert to protect the herd from public interference intended to establish a public road to give the public access to the herd. See the deposition of Fay Bates (R. 216, pages 30 and 31), where he stated that he often wished someone would control the road. There is evidence that the present owners have tried to exclude deer hunters. This is inconsistent with a public road.

The aerial photos show a change of approach and road location in Section 35 between 1962 and 1967. There is no evidence to indicate that the Bertagnoles intended public use of the new approach from the overpass to a road on the North of the creek. This possibility must be entirely disregarded because there was no ten-year period between the completion of the highway project and 1974 when this action was filed. Further, the correspondence and negotiations between Brent Jensen and the

Bertagnoles proves that the Bertagnoles actually did not intend to abandon their property to public use.

There is a dispute in the evidence as to whether the old road went up Tollgate Canyon from the old state highway on the South or North side of the creek. It is undisputed that the road constructed by the pipeline company and other utility companies was on the South side in Section 35 and shows very clearly on the aerial photos. Fay Bates testified that between 1949 and 1958 the utility companies made major repairs on the road. See Fay Bates' deposition (R. 216, pages 42 and 43). It is very clear from his testimony that the road up the canyon was on the South side. There was a major change in the road location after construction of the freeway.

The testimony that for practical reasons the Bertagnoles and Bates exchanged the use of the part of Section 35 West of the highway, track and Silver Creek for the part of Section 26 lying East of the barriers mentioned shows that any use of Section 35 West of the highway was permissive and for the convenience of the parties. It could not, therefore, be evidence of intent to abandon to a public use.

II

THERE IS NO EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING AND JUDGMENT THAT A PUBLIC ROAD THIRTY FEET IN WIDTH WAS ABANDONED TO THE PUBLIC

For the purpose of argument only, if it is assumed that the road in question was in fact dedicated to the public

in accordance with Section 27-12-89, UCA, 1953, then an appropriate width must be determined for the road.

The above-referenced statute does not contain any guide as to how the width is determined. In the instant case the trial court in its memorandum decision inserted the notation that the roadway is "15' wide" (R. 178). In the Findings of Fact at R. 203 and the Conclusions of Law at R. 204, 50 feet in width was typed and the trial court made a pen and ink change with initials to 30'. This doubled the width of the road from that found in the original memorandum decision (R. 178).

In Boyer v. Clark, 7 U 2d 395, 326 P 2d 107 (1958), where a public road was determined to have been dedicated in accordance with Section 27-12-89 UCA 1953, the Supreme Court remanded for the lower court to determine the width of the road with the following instruction:

> "....the width of the highway, which must be determined in accordance with what is reasonable and necessary for the uses to which the road has been put."

See also Blonquist v. Blonquist, 30 U 2d 234, 516 P 2d. 343 (1973).

The determination as to width must therefore be based upon uses to which the road was put during the applicable 10 year period provided for in Section 27-12-89 UCA 1953. In the present case, the testimony concerning the use of the road was that it was limited to hauling sheep supplies, picnics, deer hunting and fishing, and there was no evidence of other uses

prior to the development of subdivision in 1970 when Brent Jensen acquired property above the road in question in Section 35 (R. 105). Mr. Jensen testified that the road in 1970 was passable by car (R. 105), and as follows at Page 113 of the transcript:

> "A. Oh, the wearing surface of the road I would say would probably be maybe twelve feet wide, thirteen feet wide.
>
> "Q. The travelled portion of the road was twelve or thirteen feet wide?
>
> "A. Right, the wearing surface.
>
> "Q. Now, where would that width be, was it that wide in 19-- or in Section 35?
>
> "A. I would say probably.
>
> "Q. Did you ever measure it?
>
> "A. No, not really.
>
> "Q. Was that road in Section 35 North of the creek gravelled?
>
> "A. No."

There was no evidence of any building permits having been issued in the areas above the road in question prior to 1972. In view of this, and the other testimony previously cited that there is no evidence of use of the road as primary access to a subdivision during any ten year period required by Section 27-12-89, UCA, 1953, prior to the commencement of this lawsuit in August 1974.

The question to be resolved is what width of road is reasonable and necessary for use by sheepmen, picnickers, hunters

and fishermen. The road across plaintiffs' property is approximately 1100 feet. (R. 21) In each of the uses established prior to the filing of the lawsuit, a single lane road wide enough for one vehicle is all that is reasonable and necessary. There was no evidence presented as to the number of cars traveling the road during any period of time, the necessity for cars passing one another, nor any evidence as to why the road should be more than one lane. It should be noted that the road in question does not connect to any public road or land and that during any ten year period before the lawsuit was commenced in 1974 there has not been a continuous use of the road in question to serve a subdivision.

The width of the road existing for any period of ten years prior to the commencement of the lawsuit was 5 to 6 feet in 1915 (R. 216, p. 39) to the 12 to 13 feet quoted above. In view of the private land surrounding the road and the minimal use of the road if in fact a public road were established, there was no support for a road exceeding 12 to 13 feet as existed prior to the development of the subdivisions beyond plaintiffs' land here in question. Any larger area dedicated to roadway would constitute a taking of private property with compensation and would be unconstitutional.

In the event a public road is determined, it should be no wider than 13 feet, as this is adequate room for a vehicle to traverse the area.

CONCLUSION

The evidence of use of the portion of Section 35 by sheepmen, deer hunters and picnickers prior to 1971 under the facts and circumstances of this case falls far short of meeting the requirements of Section 27-12-89, UCA, 1953, and the Supreme Court cases that there must be clear and convincing proof of intent to dedicate or abandon property to the public and of acceptance by the public. One undisputed fact which has great significance is that the road went only to private grazing land and that there was no public need for access to the land. As has been held in Thompson v. Nelson, supra, the mere use of a private way does not create a public way. The Supreme Court has held in cases cited that use by deer hunters is not sufficient. The judgment finding a public way should be reversed in accordance with Section 27-12-89, UCA, 1953.

Even if a public way were established, it should only be wide enough as is reasonable and necessary for the uses to which the road has been put. During the applicable period the only uses were as outlined above with no proof of regularity of use or need for more than a single lane. During any ten year period, the evidence was that the travelled portion did not exceed 13 feet. Based upon the evidence of use and the actual width of the road prior to this lawsuit, 13 feet is a reasonable width for such a road and the Judgment and Decree should be modified accordingly.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Brief of Appellant was mailed to Defendants-Respondents' attorneys, postage prepaid, addressed as follows:

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on this 30th day of July, 1980.

L. Chadwick