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

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),

Plaintiffs-Appellants,

vs.

PINE MEADOW RANCHES, a
corporation, et al.,

Defendants-
Respondents.

Case No. 16900

* * * * *

BRIEF OF RESPONDENTS

* * * * *

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

* * * * *

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* * * * *

BRIEF OF RESPONDENTS

* * * * *

NATURE OF THE CASE

Plaintiff filed its action to quiet title to Section 35, Township 1 North, Range 4 East, in Summit County, Utah. The defendants counterclaimed and alleged that a road up Tollgate Canyon had continually existed from as early as 1915 to the present date (over 60 years) and that the Tollgate Canyon road was deemed to be a public highway pursuant to Section 27-12-89, U.C.A., 1953, which provides as follows:

Public use constituting dedication.--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 10 years.

DISPOSITION IN LOWER COURT

The Honorable Ernest F. Baldwin, Jr., District Judge, tried the case without a jury and made several visits to the premises (Tr.18). He found by his Memorandum Decision (R.178) "That for many years, prior to the commencement of the action by plaintiff there was a continuous uninterrupted use of the road way across the plaintiff's land and up Tollgate Canyon west of the State Highway and alongside the creek, and as shown in the exhibit aerial photographs . . . " (Tr.178).

STATEMENT OF FACTS

The U.S.G.S. map (Exhibit 2) prepared from aerial photographs taken in 1963 shows that Interstate Highway 80 goes down Silver Creek Canyon into Wanship and at the mouth of Tollgate Canyon, in Section 35, there is an overpass structure with on-ramps and off-ramps. The only place this freeway exit leads to is the road up Tollgate Canyon and the private right-of-way lines for the telephone company and the gas company. Plaintiff's ownership of Section 35 is subject to the right-of-way for I-80, the old railroad right-of-way and a 100-foot stock right-of-way on the west side of the freeway (Tr.14). The plaintiff's expert witness Jay R. Bingham testified that it is 850 feet from the center of the overpass structure to the west line of Section 35 (Tr.201) or 470 feet from the west boundary of the stock trail to the west line of Section 35 (Tr.192). Plaintiff seeks to close this 470 feet of road, or deny access from the freeway to anyone using the Tollgate Canyon Road. The U.S.G.S. map shows that this road serves as the

only means of access to an area of 15 to 20 square miles. There is no passable road up Alexander Canyon. A rough road was built up Alexander Canyon in the 1950's (Tr.59), but it washed out (Tr.63).

Prior to his death in August, 1975 (Tr.29), Fay Bates had his deposition taken. He testified that he was born in Wanship in 1909 and that his father ran sheep at the head of Tollgate Canyon as early as he could remember. Their summer range for 2,000 to 3,000 sheep was the Silver Creek slope of Silver Creek Canyon (Dep.7). He testified that, historically it is pretty well established that, the original Silver Creek Road from Wanship westerly was built by private contract and the contractor had the prerogative of setting up a toll station to collect tolls from people who used the road. The tolls were collected at the mouth of Tollgate Canyon (Dep.11). In 1915 he rode up the Tollgate Canyon road on the back of his father's saddle horse. The Tollgate Road was a wagon road and used as a sheep camp road every summer (Dep.13). There was never any fence along the old highway 30 or along the west line of Section 35 from 1915 until the stock trail fence was put up by the State Road Commission sometime after 1963 (Dep. 22; Tr.32,52,70,93).

Fay's father sold out of the sheep business between 1915 and 1920 (Dep.14), but Fay reacquired land and inherited some from his mother to get back into the sheep business in this same area in 1934 (Dep.16). During these intervening years, the Bitners ran their sheep on this Silver Creek slope and they did considerable work on the road to get equipment up and down there

(Tr.51). Fay and his brother, John Bates, used the road every summer to trail sheep, haul a sheep camp and supplies with a truck and a jeep (Dep.23).

Fay Bates testified that Bertagnole ran sheep on the east side of Silver Creek Canyon and he ran his sheep on the west side of Silver Creek. The bottom of the canyon was used as the dividing line for grazing purposes (Dep. 28,29). Due to this type of use of the land for grazing purposes, no one ever challenged anyone's right to go up or down the Tollgate Canyon Road (Dep.23). While Highway 30 was still in place, the telephone company used the Tollgate Canyon Road to take big, heavy equipment for purposes of burying its telephone line which ran through Section 35 (see U.S.G.S. map, Exh.2, Dep.26). The gas company did the same thing when they buried a gas line sometime prior to 1949 (Dep.26). Fay Bates did some caterpillar work to improve the road further up the canyon on his own property (Dep.24). The road was travelled by anyone who felt they wanted to go in there . . . "I do know there was multitudinous deer hunters in there and we tried at times to control it, to some extent, I mean, but of course, at a place like that it is impossible for me, even if I tried, to control it, or anybody did, to prevent them from going in there (Dep.27). In the 1950's there were fellows from Spanish Fork who had cabins up by some fishing ponds in Sections 9 and 10, Township 1 North, Range 4 East, and at times in the summer there would be picnickers and people fishing (Dep.32,33; Tr.33). The cabins in Sections 9 and 10 show on the map, Exh.2. The use of the road was generally confined to the summer months, early May to late October. In later years snow

mobiles drove up and down the canyon for purposes of recreation (Tr.90). The road was wide enough for pickup trucks to pass in wide places (Dep.40; Tr.113).

Mae Bates testified that from 1938 to 1958 she went up there with her husband, Fay Bates, regularly every year (Tr.30-32); that there was never any fences or gates and that there were people that went up there hunting and fishing, meaning the local people from Wanship (Tr.33). There were four aerial photographs introduced into evidence by the plaintiff which were dated in 1952, 1962, 1967 and 1978. The aerial photographs clearly show a well-marked travelled road for this 26-year period and for 22 years prior to plaintiffs filing their Complaint. The Trial Court specifically mentioned in his Memorandum Decision (R. 178) that the road was shown in the aerial photographs. Mae Bates in the 1950's saw people fishing up near the beaver bonds and later Derral Christensen in the hunting season of 1967 or 1968 saw 40-50 vehicles containing deer hunters up above the mouth of Tollgate Canyon (Tr.93).

Plaintiffs' examination of the witnesses tried to describe the road as going on the left hand side of the creek and up the pipeline road shown on the U.S.G.S. map, but all of defendants' witnesses clearly described the road taking off from old Highway 30 and going up the right hand side of the creek (Tr.57,95). The aerial photographs clearly identify this location. Derral Christensen and Reed Robison bought the Bates property from Fay Bates in 1965 (Tr.95) and they sold it to Brent Jensen for mountain subdivision development in 1970 (Tr.105). By that time the road was passable by a car, better than a two-rut road, and each year a certain amount of grading of bar ditches and things

of this type were done (Tr.106). Mr. Jensen had been up and down the road thousands of times (Tr.107). Four stakes of the LDS Church bought land in Section 15 for a church recreation area (Tr.131; Exh.4) and in 1977 American Oil Company drilled an oil well in Section 15 called the Brinkerhoff site, which was 7-1/2 miles from the freeway to Section 15, and they did considerable improvement on the road (Tr.71,106,107,116). The road finally terminates at a KUED television transmitter station on Lewis Peak (Tr.150).

Brent Jensen bought the property in 1970 (Tr. 105) and he cut in 48 to 49 miles of mountain road prior to plaintiff's Complaint being filed in Summit County. These roads are in the North half of Section 28, 200 acres in Section 27, all of Section 22, the East 1/2 of Section 20, all of Section 21, 80 acres in Section 17 and the North half of Section 16 (Tr.118).

At the time of trial there were about 120 cabins that were built in the Forest Meadow Ranch and Pine Meadow Ranch subdivisions (Tr.125). There were approximately 380 sales of subdivision lots which occurred prior to January 1, 1975 ($495 - 115 = 380$) (Tr.146,147). The defendants answered the plaintiffs' Interrogatories (R.101-104 and R.114-126) furnishing plaintiff with the names of over 253 persons known to the defendants who own property with access which is by use of the Tollgate road over said Section 35. The plaintiffs never amended their Complaint to include any of these persons as defendants who bought lots prior to the filing of the lawsuit.

The actual date of filing of the lawsuit and compliance with the lis pendens statute is in dispute. Plaintiffs' Complaint was originally filed in Salt

Lake County on August 12, 1974 (R. 07). It was not until January 17, 1975, that the Clerk of Salt Lake County was ordered by Judge Stewart M. Hanson, Jr. to transmit the file to Summit County (R.03). The Complaint was filed January 23, 1975, in Summit County (R.07). Therefore, the record clearly shows that at least 380 sales of subdivision lots occurred prior to filing the Complaint in Summit County, and that these names were furnished to plaintiffs in Jensen's Answers to Interrogatories, which persons were not joined as parties to the action.

The lis pendens statute provides:

78-40-2. Lis pendens.--In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. [Emphasis added.]

Plaintiffs' lis pendens was recorded in Summit County August 19, 1974 (captioned in the District Court of Salt Lake County) but stating that "the above quiet title action is pending in the above entitled court for the purpose of quieting title to the real property located in Summit County, State of Utah" . . . describing Section 35, Township 1 North, Range 4 East (R.221,222). Where the object of

the action was to close the 470 feet of Tollgate road denying access to (finally) 800 or 900 landowners (Tr.130) and 15 square miles of land on the Silver Creek slope (Exh.2) the lis pendens should have been much more specific and should have stated that the property in that county affected thereby included all of the land in Township 1 North Ranges 4 and 5 East "which used the Tollgate Canyon road as a means of ingress and egress." Plaintiff never sought any preliminary injunction nor restraining order to keep the road closed, or notify the purchasers of subdivision lots of the object of the action from January 23, 1975 (date of filing its Complaint in Summit County) to the date of trial on November 13, 1979. Plaintiff procrastinated for nearly five years in bringing the case to trial.

After the lawsuit was commenced a chicken wire gate was put up in the most westerly stock trail fence (470 feet east of plaintiffs' Section 35 West boundary) (Tr.123) but the gate was seen by Brent Jensen lying along side of the fence all bent to pieces (Tr.124). There "was some six hundred landowners up in that area. So who felt deprived because the gate was across the only road they could get to their canyon ". . . did it." I don't know. I definitely did not (Tr.124).

The trial court was convinced, after a view of the road by clear and convincing evidence (Tr.178), that there was a continuous uninterrupted use of the roadway across the plaintiffs' land and up Tollgate Canyon. It was not disputed that there was a road there from 1915 to present date; that the plaintiffs never maintained a fence or gate to prevent use of the road by the public until after the freeway was built, and after the state fenced the stock trail. The trial

court believed the defendants' witnesses that multitudinous deer hunters, fishermen, lovers (Dep.56), picnickers and campers went up the road in the bottom of Tollgate Canyon each summer. John Bates testified that there were improvements made from 1933 to 1958; that these improvements were made by him and his brothers, and they were made by the Bitners who owned the property previously (Tr.58). It was obviously such an old Wasatch mountain road that there was no witness who testified he was shut out or couldn't use it, or that no improvements had been made. All that has to be shown under the statute, Section 27-12-89 is that "it has been continuously used as a public thoroughfare for a period of 10 years."

ARGUMENT

POINT I

THE EVIDENCE AND LAW CLEARLY SUSTAIN THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AND DECREE

The most important fundamental fact in this case is that canyons in the Wasatch Mountains, such as Silver Creek Canyon, Parley's Canyon, East Canyon, Emigration Canyon and Tollgate Canyon are the only natural courses for roads to follow. This Court, the same as the trial court, knows that roads as a means of access into large mountainous areas depart from a main canyon up the various tributary canyons. The necessity of roads is recognized in both federal and state statutes: The Utah Supreme Court explained in Lindsay Land & Live Stock Co. vs. Churnos, 75 Utah 384, 275 Pac. 646:

By Act of Congress passed in 1866, Revised Statutes U.S. §2477 (43 USCA §932) it was provided:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

"By this act" said the court in Streeter vs. Stalnaker, 61 Neb. 205, 85 N.W. 47, 48, "the government consented that any of its lands not reserved for a public purpose might be taken and used for public roads. The statute was a standing offer for a free right of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself a highway was established."

It has been held by numerous courts that the grant may be accepted by public use without formal action by public authorities, and that continued use of the road by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant is sufficient.

In Jeremy vs. Bertagnole (Summit County), 101 Utah 1, 116 P.2d 420, E.J. Jeremy sued for trespass against Angel Bertagnole and denied that any public road existed down East Canyon from U.S. 30S on the North to its junction with U.S. 40-530 on the South. From an adverse decree Jeremy appealed but the Supreme Court affirmed. The case demonstrates that it requires no high degree of proof to show that a roadway or trail existed; that the doctrines of dedication as a public road under the ten-year statute and prescription for more than twenty years' continuous use are practically synonymous where the evidence shows an old road (more than 20 years) gradually becoming improved. The court quoted from Lindsay Land & Live Stock vs. Churnos, supra, that "It was proper and necessary for the court in defining the road to determine its width and to fix

the same according to what was reasonable and necessary under all the facts and circumstances for the uses which were made of the road" (101 Utah, Page 8) * * *

"the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic."

(101 Utah, Page 9)

Testimony of the other witnesses was to the effect that at various times they drove sheep and cattle along the trail. Such testimony covers a period from the 1870's to the time of trial. True, such testimony does not reveal that any witness used the road at weekly, monthly, or even yearly intervals over a period of ten years but from the evidence adduced the inference is clearly a reasonable one that the road was used for the driving of cattle and sheep for a number of years in excess of that required, whenever it was necessary or convenient for the members of the public who were engaged in raising or herding stock to so use it.

(101 Utah at page 10)

A 1958 case from Summit County is that of Boyer vs. Clark, 7 Utah 2d 395, 326 P.2d 107. The road in question was a "wagon trail which runs in a northerly direction up Middle Canyon and over the ridge into Grass Creek from the State Highway 133 which goes easterly up Chalk Creek from Coalville to Upton, Utah, and beyond." The District Court found that no public road existed, but a unanimous Supreme Court reversed as a matter of law. In that case like the present one, there was heavy use of the road during deer hunting season and no one testified that permission was asked or obtained from any owner to traverse the trail (7 Utah 2d at 397).

The uncontradicted evidence in the instant case disclosed that for a period exceeding 50 years, the public, even though not consisting of a great many persons, made a continuous and uninterrupted use of Middle Canyon Road in traveling by wagon and

other vehicles and by horse from Upton to Grass Creek and various other points to and from Highway 133.

This road up Middle Canyon, the same as the East Canyon road, was never snowplowed in the wintertime. Plaintiffs' counsel cross-examined several witnesses who admitted they did not travel up Tollgate Canyon in the winter months, but in the early 1960's the witnesses Derral Christensen, Reed Robison and Brent Jensen all went up the Tollgate Canyon road via snowmobile. There is no Utah law that a road which has a long number of years' summer use does not become a public road because it is snowbound during the winter.

The short distance which the old road might have varied at the mouth of Tollgate Creek due to the construction of the on and off ramps for the Interstate overpass built at this junction fits the language of the Supreme Court in Lindsay Land & Live Stock Co. vs. Churnos, supra, where the Court made the following observation:

There was evidence that the travel over the road did not always follow an identical or uniform line, but at all times and in a few places varied somewhat therefrom and that sheep when trailing across would sometimes depart from the line of the road. There was ample positive evidence, however, that the road as described by the findings and decree was substantially the line and course of the road as it had been traveled and used for more than fifty years.

* * *

And at all times it was used as a general way for the driving or trailing of sheep. This latter use was not by a few persons, but by many persons, and it involved more than the mere driving of animals on the road. Camp outfits and supplies accompanied the herds and were moved over the road in camp wagons and on pack horses.

While it is difficult to fix a standard by which the measure what is a public use or a public thoroughfare, it can be said here that the road was used by many and different persons for a variety of purposes; that it was open to all who desired to use it; that the use made of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority. We therefore conclude that the court was justified in finding that the road had been continuously and uninterruptedly used as a public thoroughfare for more than ten years.

With respect to the certainty of the line or course of the road, the evidence was also sufficient to support the decree. While the public cannot acquire a right by use to pass over a tract of land generally, but only in a certain line or way, it is not indispensable to the acquisition of the right that there should be no deviation in the use from a direct line of travel. If the travel has remained substantially unchanged, and the practical identity of the road preserved, it is sufficient, although there may have been slight deviations from the common way to avoid encroachments, obstacles, or obstructions upon the road. [Emphasis added] (75 Utah at Page 392)

It is obvious that the road up or down Tollgate Canyon intersected Silver Creek Canyon onto U.S. Highway 30 and then in about 1961 it connected onto Interstate 80. It does not make any legal difference on which side of the creek the first Tollgate road existed. It was a road up Tollgate Canyon departing out of Silver Creek Canyon. It is exactly the same situation as the Middle Canyon Road departing from Chalk Creek as discussed in Boyer vs. Clark, supra.

All of the aerial photographs, Exhibits P-16 (1952), P-17 (1962), P-18 (1967) and P-19 (1978) clearly show the existence of the Tollgate road going up the right hand side of the creek.

POINT II

THE STATUTE 27-12-89 REQUIRES THAT "A HIGHWAY SHALL
BE DEEMED TO HAVE BEEN DEDICATED AND ABANDONED
TO THE USE OF THE PUBLIC . . . "

Plaintiffs-appellants complain of the Trial Court's decision to make highway 30 feet wide instead of 12 or 13 feet wide. The basis of this argument is that Mr. Skeen asked the witness to describe the width of the road and the Court asked how wide was the travelled portion of the road and the witness answered, "Oh, the wearing surface of the road I would say would probably be maybe 12 feet wide, 13 feet wide (Tr.113). There was also evidence that 2,000 sheep had been driven up Tollgate Canyon every summer for more than ten years. Heavy equipment (meaning cats, dozers, semi-trailers and large trucks) belonging to the telephone company, the gas company and to AMOCO had used the road. A highway needs bar ditches for drainage, cuts and banks to support it, culverts where it crosses a creek, and it needs to be wide enough to be safe. Plaintiffs act as though they would build a chain link fence or build a concrete wall on each side of the 13-foot "highway". The argument is silly. You don't need to drive a vehicle 30 feet wide, or have a "wearing surface" (area smoothed down by the tires on a dirt or gravelled road) 30 feet wide in order to have a highway deemed to have been dedicated or abandoned to the use of the public pursuant to the statute. The Supreme Court or one of its clerks could stop off the Interstate Freeway at this Silver Creek junction exit, and check out in five minutes the fact that thirty feet is a reasonable width for the highway across this first 470 feet to a 7-1/2 mile mountain road.

When Derral Christensen and Reed Robison sold the top mountain acreage to Brent Jensen, they granted and reserved a 66-foot right-of-way for road purposes over all their land in Sections 34, 33, 28, 27, 22, 21, 20, 16 and 15 over which prior mountain roads or jeep roads existed (Tr.100).

In Lindsay Land & Live Stock Co. vs. Churnos, et al., supra, a road existed for driving of sheep and hauling sheep camps, supplies and vehicles through a narrow canyon or pass called Davenport Canyon in southern Cache County. The eastern terminus of the road is a large area of mountain land valuable for grazing animals in the summer season. The facts are very similar to the present case. The Supreme Court said:

Under all of the evidence the court was justified in fixing the width of the road at one hundred feet.

In Jeremy vs. Bertagnole, supra, the Supreme Court affirmed a judgment which fixed the width of the first small fenced portion of the road at sixty feet and at five rods (82.5 feet) for the remaining portion. This road ran down East Canyon in Summit and Morgan Counties.

In Sullivan vs. Condas, 76 Utah 585, 290 Pac. 954, the Supreme Court affirmed a judgment establishing a mountain road in White Pine Canyon, Summit County, which was three rods wide (49.5 feet).

The trial court made its own visit to the road in question and changed the suggested 50 feet as set forth in defendants' Findings of Fact to 30 feet (R.203). This is a very modest width. In places where the road is cut along the steep creek banks of Tollgate Canyon the width of the road plus the cut and fill for banks amounts to more than 50 feet.

In conclusion, it should be noted that plaintiff-appellant has refrained from citing any of the mountain road cases such as Lindsay Land & Live Stock vs. Churnos, Sullivan vs. Condas, Jeremy vs. Bertagnole and Boyer vs. Clark. It is apparent that more stringent evidentiary tests have been applied by the Supreme Court in the valley, short distance road cases such as Bonner vs. Sudbury, 18 Utah 2d 140, 417 P.2d 646 (dead end street called McClelland Street in Salt Lake City) and Peterson vs. Combe, 20 Utah 2d 376, 438 P.2d 545. As soon as the public picnicker, deer hunter, fisherman and joy rider goes into the mountains, they will drive up and down every canyon that has an old sheep camp or truck road which is not closed by fence or posted. This is especially true of Tollgate Canyon which is the fourth exit with an on-ramp and off-ramp east of Salt Lake City on Interstate 80. None of the plaintiffs or their predecessors in title made any effort to stop public travel until the year before the Complaint was filed in 1975. The state fenced its stock right-of-way in 1964, or thereabouts, but there was no testimony that any travelers thereafter opened or closed any gate. It was always left open. The gate was seen bent and mangled lying to the side of the road (Tr.124). This Tollgate Canyon which crosses only 470 feet of plaintiff's property from the west line of Section 35 to the fence on the stock right-of-way extends 7-1/2 miles. It serves 15 to 20 square miles of land that would otherwise have no right of ingress and egress to the Interstate Highway. County governments in Utah have taken extremely little initiative in condemning mountain roads for the sake of saving costs of acquisition and expenses of maintenance, etc.

To permit the natural development of thousands of acres of mountain , privately owned lands and public access to vast areas of summer recreation , the Court should interpret the statute in the spirit in which it was written: "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 following statutory section states that "All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any such highway , or by other competent authority ." See Sullivan vs. Condas , 76 Utah at page 594. The Tollgate Road was a public thoroughfare for over 50 years prior to plaintiff asserting any right to stop public travel. It could not be abandoned as a highway by private individuals . In these type of cases the burden should be on the owner of the servient estate to fence or block the road , or to stop all public travel.

The Judgment should be affirmed.

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MAILING CERTIFICATE

I certify that two copies of the foregoing Brief of Respondents were mailed to R.C. Skeen and E.J. Skeen of Skeen & Skeen, attorneys for plaintiffs-appellants, 536 East 400 South, Salt Lake City, Utah 84102, this 29 day of August, 1980.

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