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

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 PARTNER-
SHIP (Substituted)

Plaintiffs-
Appellants

vs.

PINE MEADOW RANCHES,
a corporation, et al,

Defendants-
Respondents.

Case No. 16900

APPELLANTS' REPLY BRIEF

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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IN THE SUPREME COURT OF THE STATE OF UTAH

LEO M. BERTAGNOLE, INC.,
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INVESTMENT COMPANY LIMITED
PARTNERSHIP (Substituted),

Plaintiff-
Appellant,

vs.

PINE MEADOW RANCHES,
a corporation, et al,

Defendants-
Respondents.

Case No. 16900

APPELLANTS' REPLY BRIEF

As in the previous brief, appellants will be referred to as plaintiffs and respondents will be referred to as defendants.

ARGUMENT

I

THE LIS PENDENS WAS SUFFICIENT
UNDER STATE LAW

With respect to defendant's statement of facts, reference is made to Section 78-40-2, UCA 1953, relating to Lis Pendens. The cited statute provides a means of giving constructive notice of the pendency of an action which in effect is a republication of the pleadings in the underlying

action. See Hansen v. Kohler, 550 P2d 186.

In the instant case, appellants recorded a Lis Pendens describing the property to which plaintiffs claimed ownership and to which plaintiff owned legal title on August 19, 1974. (R 221, 222) The Lis Pendens stated the court and cause, described the property in question and certainly would have led anyone who wanted more information to the case file. Neither defendants nor anyone else was claiming any right or interest in the subject property in Section 35, Township 1 North, Range 4 East, by written or recorded document.

At the time the lawsuit was filed, plaintiff served all those of which plaintiff was aware who might be using the road in question, making them parties of the action, and in addition served unknown defendants by publication. It should be noted that the actual parties to the lawsuit received summonses and complaints, which is actual notice and more encompassing than any notice in a Lis Pendens.

Defendants' argument that the Lis Pendens should have been more specific and included lands miles away from the subject property would have the effect of requiring plaintiffs to anticipate and speculate as to every possible user of the land and place no burden on one claiming some possessory interest in property to which he has no legal title to ascertain his legal rights. Certainly if one intends to exercise some possessory right over property, such as using it as an

access road, he should have some obligation to investigate his title or claim of right to that property over which he is claiming a possessory interest.

It is well established that in a quiet title action plaintiff can prevail by showing his own record title. In such case, constructive possession is presumed in absence of evidence to the contrary.

Gibson v. McGurrian, 37 Utah 158, 106 P 669.

Any person interested in property above plaintiff could have checked the County records to see who owned property over which access is dependant. Such an investigation would have disclosed the Lis Pendens and led to the pleadings of the instant case.

II

THE EVIDENCE AND LAW DO NOT SUSTAIN THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

In defendant's brief, at page 16, defendant asserts that plaintiff "has refrained from citing any of the mountain road cases such as Lindsay Land & Livestock v. Churnos, Sullivan v. Condas, Jeremy v. Bertagnole, and Boyer v. Clark."

Defendants' brief further states, "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 v. Sudbury, 18 Utah 2d 140, 417 P2d 646 (dead

end street called McClelland Street in Salt Lake City) and Peterson v. Combe, 20 Utah 2d 376, 438 P 2d 545."

The above-cited cases represent all of the cases cited by defendant in his brief.

The following is a discussion of each of the cases referred to by defendants with an explanation below each case as to why it is not in point in the instant case:

1. Lindsay Land and Livestock v. Churnos, 75 Utah 285 P 646:

The trial court found that in 1876 a described roadway was laid out over the land in question when it was part of the public domain. The evidence is further summarized as follows:

A. At the end of the road were public and private lands suitable for grazing and was used extensively for grazing.

B. In 1876, a sawmill was constructed and the road used by people generally to haul logs to the sawmill and lumber from the sawmill.

C. Other sawmills were set up along this road before 1890.

D. In 1885 mining was developed and houses were built, a post office established and hundreds of people resided in the mining camp for more than five years.

E. The road was traveled extensively by the general public in going to and from the mining camp.

F. During all periods the road was used by numerous owners of sheep, "a hundred herds", as many as seven herds a day going over the road.

In the instant case the road in question dated back to 1915 and was then used for hauling supplies to sheepherders on private land. There was also some evidence which was not tied to specific periods when deer hunters and fishermen were seen and when picnics were held, but this evidence was at best very sketchy. There was no evidence of any general use by the public until about 1972 when subdivision lots were sold just two years before this lawsuit was commenced.

In holding that a public road had been established in Lindsay Land and Livestock v. Churnos, the following was stated:

"We think the evidence established a general public use of the road. If the claim rested alone upon the use of the road for sawmill purposes, or for mining purposes, or for the trailing of sheep, the question would be more difficult. But here the road connected two points between which there was occasion for considerable public travel. The road was a public convenience. When sawmills were established on or near the road, it was used, not only by those conducting the sawmills, but by many others who went to the sawmills to get lumber, etc. During the period when the mining camp existed in the vicinity, the road was unquestionably used very extensively by the general public for general purposes. And all the time 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 to 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.

The facts of the above-cited case with its road established before patent and very extensive use for a number of purposes is not a precedent for and is very different from the use which has been proven in the instant case.

2. Sullivan v. Condas, 76 Utah 583, 290 P 954:

It is again important to look at the facts set forth in the case. The road in question existed as early as 1873 while the land on which it was established was part of the public domain and before the patent was issued. Specific evidence of use is not discussed in the case except to say that the road was used generally by the public as occasion required in going up and down the canyon. The court stated that because the public uses were established over public lands before the patent was issued, the patent was taken subject to that public right.

No evidence has been presented in the instant case as to existence of a road or use before the patent was issued. Because the facts of Sullivan v. Condas do not describe actual use to establish the public right, it cannot be compared to the instant case in determining a standard of necessary use.

3. Jeremy v. Bertagnole, 101 Utah 1, 116 P 2d 420:

The facts again indicate that the public use was established before patent to the ground in question was issued. It should further be noted that the road in question connected State Highway U.S. 30-S with U.S. 40-530 and had been continuously used for 60 years by ranchmen, stockmen, owners of land contiguous and adjacent thereto and by the public generally for all necessary and convenient purposes. In addition, both Morgan and Summit Counties intervened to have the road declared public. The Court held the road to be public based upon extensive use.

The instant case is very different in that no use was established before patent. The road does not connect two state roads and the extensive public use is not present. Summit County has not intervened in the present case.

4. Boyer v. Clark, 7 Utah 2d 395, 326 P 2d 107:

This case was cited by plaintiff at page 13 of the plaintiffs' brief.

Again, this case concerned a road for which use was established as public before the patent was issued. The road in question was used to haul coal, drive sheep and cattle, ride horses or wagons, deer hunting, visiting people in the vicinity, going to dances held in Grass Creek, as well as trailing sheep or cattle. This road ran from State Highway No. 133 to Grass Creek, thus connecting a residential area with a state highway.

The facts again are different from the instant case in that there are not two points of public area to be connected as in Boyer v. Clark. Instead the road in question goes to private land used in the past for livestock grazing. The present subdivision and residential uses were not in existence during any ten year period prior to filing the lawsuit, and there is not the evidence of the consistent regular public uses as in Boyer v. Clark.

Taking all of the above cases together, they all concern roads established prior to patent, they all had roads used for purposes for which there was a public need, such as grazing on public lands, serving residential establishments and connecting state highways or communities. None of these public needs exist in the instant case. The land above the road in question is private land. Except for sheep men who may have acquired some prescriptive right, the uses of the road were by guests, trespassers or owners of land using the road without permission. Defendants are seeking to have the road declared a public road to serve defendants' subdivision which came into existence only two years before the lawsuit was filed. Even this use does not serve the public as all land is privately owned.

With respect to the other cases defendants cited, Bonner v. Sudbury relates to a dead end alley located in Salt Lake City which was platted in 1915 as a city street; it was paved by the city; street signs were maintained by the city;

the owner had not paid taxes for 25 years on the ground, and it was used by the general public for a variety of activities. These facts are clearly far removed from the instant case.

The last case cited by defendant, Peterson v. Combe, 20 Utah 2d 376, 438 P2d 545, is a case which related to a road originally built by the owner to serve his own property and dead ending at his property boundary. A subdivider acquired the property adjoining the dead end and proceeded to build houses served by the road. The trial court found a public road, but the Utah Supreme Court reversed holding that the road was not a public road and stated the principal in these types of cases that there must be competent evidence of witnesses who are not self-serving to show by clear and convincing evidence that the public generally, not just a few having their own special and private interest in the road, had used it continuously for ten years. The court further stated that the road would have to be condemned for a public use. The time frame involving the subdivision in the instant case and in Peterson v. Combe is similar and the principles of that case are applicable to the present case. The witnesses called by defendants were either present owners of all or some of the property above the property in question or predecessors in interest and are therefore self-serving witnesses as described in Peterson v. Combe, having a direct interest in the outcome. This is not the clear and convincing evidence mentioned in Peterson v. Combe.

CONCLUSION

The cases cited in the defendants' brief are not in point for the reasons stated above. There is no evidence that a highway 30 feet wide had been continuously used as a public thoroughfare for a ten year period prior to the filing of this suit in 1974. No evidence has been presented that a road was in existence before a patent was issued. There is no evidence in this case of a public need for a public road. All of the land served by the road in question is and during all uses in evidence was private land. Deer hunters, fishermen, picnickers were all trespassing, not only on the road, but in most cases on the land where they were carrying out their activities. Private land owners and their guests may or may not have some private prescriptive right, but they have an obligation to inquire into and assure their access rights. There is no public interest served by providing an access road to a private subdivision as is the case here and in Peterson v. Combe. For the reasons stated, the judgment of the lower court should be reversed and the title to the road in question quieted in plaintiff.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing
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Secretary