

1980

Robert L. Crimmins And Rose Crimmins v. Michael Simonds And Barbara Simonds : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Crimmins v. Simonds*, No. 17186 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

ROBERT L. CRIMMINS and
ROSE CRIMMINS,

Plaintiffs-Respondents, :

vs. :

Case No. 17186

MICHAEL SIMONDS and
BARBARA SIMONDS,

Defendants-Appellants. :

BRIEF OF RESPONDENTS

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL
DISTRICT COURT OF TOOELE
COUNTY, THE HONORABLE
HOMER F. WILKINSON, PRESIDING

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FILED

DEC 23 1985

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BARBARA SIMONDS,	:	
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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

Respondents filed an action for a permanent injunction to enjoin the operation of a beauty parlor by Appellants, basing their claim upon a restrictive covenant.

DISPOSITION IN LOWER COURT

After a bench trial, the District Court granted judgment in favor of Respondents permanently enjoining the operation of Appellants' beauty parlor on Appellants premises.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the trial court's judgment and a ruling that the restrictive covenant is void and unenforceable.

STATEMENT OF FACTS

Respondents do not dispute Appellants Statement of Facts as set forth in the first four paragraphs of Appellants Brief. However, Appellants statement

as to what George Buzianis testified to at trial is misleading. Although it is correct that George Buzianis testified that he operated a real estate business in his residence, what Appellants failed to mention is that George Buzianis further testified that his residence is located at Number 36, Benchmark Village Subdivision, 300 feet away from Respondents property line (outside and not a part of the Upland Terrace Subdivision in question). Further, George Buzianis did not testify that four or five businesses were in operation within the subdivision close to Plaintiffs' residence. What he in fact testified to was that he knows "of four or five businesses within a couple of blocks of our entry" and that "they are in the Upland Terrace" which consists of several subdivisions. There is "A", "B", "C", and "D". He further testified that "I am aware of three beauty parlors, one real estate office, are the ones that I am aware of" and that they are mostly in subdivisions "C" and "A". (Tr., pp. 113-117). What Appellants further failed to mention is that George Buzianis testified that to his knowledge there are no commercial structures anywhere in Upland Terrace Subdivision, Plaintiff "C" and that any businesses were in homes.

It is correct, as Appellants state in paragraph 6 of Appellants' Statement of Facts, that Plaintiff Rose Crimmins testified on cross-examination that she had her hair done by Defendant Barbara Simonds prior to the commencement of the instant action. However, what the Appellants failed to state is that on redirect examination, Plaintiff Rose Crimmins testified that this was done long before Defendant Barbara Simonds opened her beauty shop and performed a business out of her home. (Tr., pp. 144-151).

Although it is correct that the Defendant, Barbara Simonds that she had actual knowledge of the restrictive covenant prior to being notified by Mrs. Crimmins, as set forth in the final paragraph of Appellants' Statement of Facts

it is important to note that the trial court found that the Defendants-Appellants, had constructive notice of the restrictive covenants at the time they purchased the property and that they would be bound by them. (Tr., p. 188).

ARGUMENT
POINT I

THE TRIAL COURT CORRECTLY RULED
IN REFUSING TO VOID THE COVENANT
IN QUESTION AND IN REFUSING TO
VALIDATE THE MODIFICATION AGREEMENT

Defendants-Appellants incorrectly cite the case of Metropolitan Investment Co. v. Sine, 14 Utah 2nd 36, 376 P. 2d 940 (1962). The Plaintiff, and not the Defendant as in the present case, brought action to invalidate a restrictive covenant which stated that the property could not be used for the erection of a motel thereon. The District Court ruled for the Plaintiff and the Defendants appealed.

The Supreme Court of Utah ruled that the findings of the lower court invalidating the restrictive covenant were clearly against the weight of the evidence. The Supreme Court reversed and remanded the District Court deciding that the restrictive covenant was valid.

Defendants-Appellants cite the case of Hayes v. Gibbs, 169 P.2d 781 (Utah 1946). In that case the Supreme Court of Utah, upholding a restrictive covenant, came to the following conclusion:

That if the general plan has been maintained from its inception, if it has been understood, accepted, relied on, and acted upon by all in interest, it is binding and enforceable on all. It goes with the land, and is equally binding on all purchasers with notice. 169 P. 2d At 784.

It is undisputed that the area is residential in character. Plaintiffs Robert and Rose Crimmins bought a home relying on this very fact with the notice that the area was subject to a restrictive covenant. The trial court concluded

that the Defendants, as well as the Plaintiffs, had constructive notice of those restrictive covenants at the time they purchased their property and so they would be bound by them. (Tr., p. 188).

Defendants-Appellants cite the case of Hecht v. Stephens, 204 Kan 559, 464 P. 2d 258 (1970), which sets forth the factors to be considered in determining whether a neighborhood has changed sufficiently to warrant voiding a restrictive covenant. In Hecht, the lower court specifically found there had been numerous violations of the restrictive covenants and concluded that the violations had been so general and substantial as to indicate a purpose and intention of the residents of the area to abandon the general building plan or scheme.

In Hecht, the Supreme Court of Kansas in deciding whether injunctive relief would be granted to restrain the violation of restrictive covenants, stated it is a matter within the sound discretion of the trial court to be determined in the light of all the facts and circumstances. Absent manifest abuse of that discretion, the Appellate Court will not interfere. 964 P.2d 20.

In the present case, the trial court found that two or three businesses were in violation of the restrictive covenants. The other businesses, the trial court noted, were not businesses but the normal aspects of running a home and neighborly life. The trial court concluded that the area had not changed in its character and is still residential, not business (Tr. pp. 189-190).

POINT II
THE TRIAL COURT CORRECTLY APPLIED THE
DOCTRINE OF BALANCING OF THE EQUITIES

The last case Defendants-Appellants cite is Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates, 535 P. 2d 1256 (Utah, 1975).

In Papanikolas, the Utah Supreme Court considered the issues of covenant validity versus changed conditions and the ambiguity of the covenant. The Court upheld the validity of the restrictive covenant deciding there were no changed conditions and that there was no ambiguity in the restrictive covenant.

In the present case, the trial court found that the character of the property is still residential and that the covenants are not ambiguous. (Tr. pp. 189-190).

In Papanikolas, the Utah Supreme Court applied the "balancing of injury test". The Court held that the Defendants wilfully and intentionally encroached upon the parking easement. The Court concluded that there is no basis to find an abuse of discretion on the part of the trial court in ordering its removal". 535 P. 2d at 1259.

In the present case, the trial court applied the doctrine of "balancing of injuries" stating "that it is regretful that the Defendants have expended the money that they have as far as building the beauty parlor and improving their premises for that operation". (Tr. p. 140).

In the recent case of Leaver v. Grose, 610 P. 2d 1262, (Utah, April, 1980), the facts are similar to the instant case. Defendant brought action claiming the restrictive covenants were unenforceable and seeking to invalidate them. The Supreme Court of Utah, in Leaver, stated:

Plainly and simply stated, Defendants untenable position was occasioned by her own action and there is no basis in equity to shift the responsibility therefore, to the plaintiffs. Defendant and plaintiffs obviously had a difference of opinion as to the enforceability of the restrictive covenants. At the outset (i.e. from the time she was able to obtain a building permit), Defendant convinced herself that the restrictive covenants were unenforceable. Plaintiffs promptly objected

to her remodeling project in July, and again in September, at which time Defendants attention was specifically drawn to the covenants in question. Then being faced with a controversy as to the enforceability of the restrictive covenants, Defendant agreed to cease construction until she could check the matter further. However, the validity of the legal position she had previously chosen, for she resumed the remodeling project. In doing so, we can only conclude that she totally discounted the merits of plaintiffs objections to the project, or that she took a calculated risk that plaintiffs would not seek a judicial determination of the issues, or, if they did that they would not achieve success. Thus it is to be seen that it was not plaintiffs actions, or inactions, which induced defendants to proceed with the project but her own erroneous legal conclusion that the restrictive covenants were no longer enforceable. 610 P. 2d Ut. 1264.


In the present case, Defendants-Appellants were notified by Plaintiffs-Respondents that they were in violation of the restrictive covenants. In spite of this, Defendants-Appellants proceeded to circulate a petition trying to modify the restrictive covenants. Since it was the Defendants own erroneous conclusion that the restrictive covenants were unenforceable, they should assume responsibility of the expenditures they made on the beauty parlor.

CONCLUSION

Plaintiffs-Respondents respectfully request that this Court deny Defendants-Appellants appeal and affirm the judgment of the trial court upholding the restrictive covenant.

DATED THIS 9th day of December, 1980.

Respectfully submitted,


JOSEPH H. GALLEGOS,
Attorney for Plaintiffs-Respondents

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed two copies of the foregoing Brief of Respondents to J. Franklin Allred, 321 South Sixth East, Salt Lake City, Utah 84102, postage prepaid, this 21st day of December, 1980.

W. J. B. B. B.