

1981

Reuel S. Kohler and Dolores M. Kohler v. Town of Garden City, Utah, A Municipal Corporation and Birdie Properties, a Partnership v. Town of Garden City Utah A Municipal Corpotation, Mack J. Madsen, and Leola S. Madsen : Brief of Respondent/Cross-Appellant Birdie Properties

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

REUEL S. KOHLER and
DOLORES M. KOHLER,

Plaintiffs/Respondents,

vs.

TOWN OF GARDEN CITY, UTAH,
a municipal corporation,

Defendant/Appellant.

BRIEF OF RESPONDENT
AND CROSS APPELLANT
BIRDIE PROPERTIES

BIRDIE PROPERTIES, a
partnership,

Plaintiff/Respondent/
Cross-Appellant,

vs.

TOWN OF GARDEN CITY, UTAH,
a municipal corporation,
MACK J. MADSEN, and
LEOLA S. MADSEN,

Defendants/Appellant/
Respondents/Cross-
Respondents.

Case No. 17346

BRIEF OF RESPONDENT/CROSS-APPELLANT
BIRDIE PROPERTIES

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BRIEF OF PLAINTIFF/
RESPONDENT/CROSS-
APPELLANT BIRDIE PROPERTIES

BIRDIE PROPERTIES,

Plaintiff/Respondent/
Cross-Appellant,

vs.

Case No. 17346

TOWN OF GARDEN CITY, MACK
J. MADSEN, and LEOLA S. MADSEN,

Defendants/Appellant;
Respondent/Cross-Respondent.

NATURE OF THE CASE

Plaintiff Birdie Properties brought this action for a declaratory judgment to quiet title against claims of Town of Garden City (herein called Town) to an alleged 66 foot public highway along the north portion of beach front property at Bear Lake that Birdie Properties is purchasing from defendants Mack and Leola Madsen (herein called Madsens) under an executory real estate contract. The action was consolidated with the Kohler suit as it involved similar claims by Town against the Kohlers.

DISPOSITION IN THE LOWER COURT

The lower court, Judge VeNoy Christofferson, found that a lane along the northerly portion of Birdie Properties land had been dedicated to the public as a highway by user, at a width of 20 feet, rather than 66 feet claimed by Town, and dismissed the claim against the Madsens which alleged damages for failure to provide good title based upon Town's claims.

NATURE OF RELIEF SOUGHT ON APPEAL

Birdie Properties seeks a reversal of the judgment that its property is encumbered by a public highway dedicated by user, and a judgment quieting title in Birdie Properties against any claim by Town. If this Court finds in favor of Appellant Town, or upholds the decree finding a 20 foot highway, then Birdie Properties seeks relief in damages against Madsens for loss of the property determined to belong to Town in excess of 10 feet from the northernmost boundary of its parcel.

STATEMENT OF FACTS

Appellant's statement of facts is inadequate and Birdie Properties sets forth its view of the evidence as follows, by numbered paragraphs, to aid in referencing.

1. In the spring of 1978, Madsens entered into an oral agreement with Max Hill, a real estate salesman, on a one-party listing agreement, to sell a parcel of undeveloped real property consisting of 177 feet fronting Bear Lake, and approximately 400 feet deep. TR-116.

2. Madsens had previously approached Otto Mattson, a real estate agent, who was also part-time Mayor of Town, about selling the property and he declined because of the title problem involving the claims of Town to the north 66 feet of the property as a public highway dedicated by user. TR-181, TR-149, TR-177.

3. On July 4, 1978, Hill met with Dr. Gerald W. Davis, a Kemmerer, Wyoming, physician, and Jack Scott, the principals in Birdie Properties, a partnership, who responded to an advertisement placed by Hill in the Salt Lake Tribune. TR-117, 133-34. At that time Hill had no knowledge of any claim by Town to a right of way or a 66 foot street along the north boundary of the parcel. TR-119.

4. Hill took Dr. Davis and Scott to the property and they walked to the corners. Hill pointed out the north boundary as being the center of a partially oiled driveway leading in a meander from the top of the hill at the end of 200 North Street to the Cherrington home on the north of the parcel. TR-118, 136. The northeast corner (next to Bear Lake) was obscured by a large pile of trash. Hill told Dr. Davis that the corner marker was covered by the rubbish. TR-136-38, 178-79. In fact, the north property boundary was not the center of the driveway, but was nearly 40 feet north of the center of the driveway along an existing, but uneven, fence line and Cherrington's garage. This fact was not discovered by Dr. Davis or Scott until after the closing and a down payment of \$55,000 had been made to Madsens on a total contract price of \$110,000.

The discrepancy was discovered during the course of a survey paid for by Madsens after Madsens arranged for the removal of the trash pile, but after the closing. TR-136-38; 178-79. Plaintiff's Exhibit 50, handwritten agreement dated Aug. 13, 1908. Plaintiff's Exhibit 38, real estate contract dated Aug. 14, 1908.

5. The closing documents state that the title is subject to "the rights of Garden City (if any) in and to the street on the North part of this property." Plaintiff's Exhibit 38. This meant nothing particularly to Dr. Davis or Scott since this meant to them and Hill that the north 10 feet of the property was to be claimed by Town. At the time of the survey paid for by Madsen after the closing, the surveyor told Dr. Davis where the boundary really was located some distance to the north and Dr. Davis confronted Hill and Mr. Madsen as follows:

TR-146

19 Q. (By Mr. Lloyd): Were you present at the time that survey was made?

20 A. (By Dr. Davis): Yes.

21 Q. And was Mr. Hill also present?

22 A. Yes, Mr. Hill was present.

23 Q. Did you have a conversation with the surveyor and Mr. Hill at that time?

24 A. Well, as the survey was taking place, the first

TR-147

1 thing that was evident was that the northeast corner was
2 where we were told it was but approximately 35 feet from
3 north and east.

4 Q. And so what did that do with the boundary of your
5 property? Where was your property then located?

6 A. Well, the property was located farther north than
7 we thought and the driveway was coming more out of our
8 property instead of on the edge of it. It was on our
9 property in its entirety.

10 Q. In addition another twenty feet beyond the roadway?

11 A. Yes.

12 Q. Did he also establish the northwest corner and
13 discover the same thing?

14 A. Yes, the northwest corner was clear off of the
15 driveway to the north.

16 Q. Right up to the fence line?

17 A. Yes.

. . .

TR-148

3 Q. After you discovered that the property was in a
4 different location, what happened next?

. . .

7 A. . . . Then we went and found Mr.

8 Madsen, Max Hill and I did.

9 Q. Did Mr. Madsen come down to the property with you?

10 A. He came down to the property with us.

11 Q. And was there a conversation at that time/

12 A. Yes.

13 Q. What was the conversation and who said what?
14 A. Max Hill said, "You told me that the corner was
15 under this pile of trash in the middle of the roadway and
16 actually its more or less down here out in the lake." And
17 Mr. Madsen said, "Yes, that's right, that's where it is."
18 Q. Did you have any further conversations with Mr.
19 Hill or Madsen or any of their representatives?
20 A. Well, this particular conversation carried on for a
21 few minutes. Mr. Hill was quite upset, and he at that
22 time - - - Mr. Madsen suggested that we talk to his attorney
23 about the thing, and see if we could work it out.

5. Shortly thereafter, Dr. Davis and Scott met with Mayor Otto Mattson to see what the nature of "rights of Garden City (if any) in and to the street on the North part of this property" were, and first learned of a claim by the City to 66 feet. TR-149. They also learned from the Mayor at this time that the Mayor had turned down the listing because of this cloud on the title, and that "Madsens were aware of that at the time," TR-149 (lines 21-25), and further that Madsens had been to the Town Council to get it cleared up without success. TR-150. Plaintiff's exhibit 39 is a postmarked envelope (September 10, 1978) received by Dr. Davis from Hill nearly a month after the closing which contained a legal opinion dated July 18, 1978, two weeks after the earnest money agreement (Plaintiff's exhibit 37), from Madsens' attorney to Madsens, which describes the Town's demand to widen the road. Madsens failed to disclose these facts.

to Hill or to Dr. Davis or Scott. The letter states, "I can find no authority for Garden City's demand to widen the road, although the road must remain at least as wide as it presently is." TR-151, Plaintiff's exhibit 39. None of these facts were refuted by Mr. Madsen, who testified, or Mr. Hill, who was subpoenaed by plaintiff. Hill actively led Dr. Davis and Scott to believe that only 10 feet of the north portion of the parcel would be affected by the right-of-way use of the property owner to the north (Cherrington) or any possible claim by Town. TR-142.

6. During the course of arriving at a price for the parcel, Hill set \$500.00 per running foot for lakefront property at the time of the sale, or \$88,500 for the front two lots. Hill told Dr. Davis and Scott that the land could be subdivided into six lots, with a value of \$21,500 for the rear, non-lakefront property. TR-152-53. The effect of the present judgment is to decrease the frontage of plaintiff's property from 177 feet to 122 lakefront feet, at a loss of \$27,500. If this Court determines that Appellant Town is entitled to the 66 feet Town demands, it will decrease the number of building lots by at least one half, or cause plaintiff \$55,000 in damages. TR-153.

7. The parties stipulated at the trial that there is no record title of any kind in Town of Garden City to the Madsen and Birdie Properties parcel. There are few platted streets in Town other than the main State highway, and platted 200 North Street is only 1-1/2 blocks long, ending at the brow of the hill looking down into the wooded property and the lake.

Even at its best, 200 North Street, as shown in the photograph Plaintiff's exhibits 41 and 44, is a twelve foot wide semi-private and maintained driveway. The driveway down into plaintiff's property is a sad affair, as depicted on Plaintiff's exhibits 46, and 47. Also, as the driveway goes over the brow of the hill, it separates into a driveway across the west brow to the property owners at the south of plaintiff's property. It does not lend by any conceivable stretch of the imagination to be a 66 foot wide public highway. TR-166.

8. Town bases its claim to a twenty foot or 66 foot wide public highway dedicated by user on the following evidence which is digested as follows:

a. Abe Cherrington built a home on the north of the Birdie Properties parcel in 1966, and used as access the north strip of the Birdie parcel, variously described by residents as "Cook" lane, after previous owners. At the time he built his home, it was a dirt path, weed covered, unkept by Town. In 1972, at his insistance, Town graded it and put down gravel and oil to Cherrington's garage. It does not maintain the lane as it goes onto Birdie's land. TR-165-68. According to Cherrington, in 1966 5 or 6 cars a year would use the drive attempting to gain access to Bear Lake, and finding none, they would turn around and leave. TR-169. The oiled portion is 12 feet wide where not worn away, and snow is not removed. TR-170.

b. Mayor Otto Mattson testified that he rode bicycles down the "Lake" road to swim in Bear Lake, TR-183, has launched boats off of the Lake road, TR-184, and ruined his car's paint job in 1972 driving to the Lake to drink beer just after the lane was oiled, TR-188. He did not recall any instances of restrictions by Cooks in using the lane. Town has no property at the end of the lane and there is no development of any kind at lake shore. TR-195. There is no parking area, no paving, no boat launch, nothing but Dr. Davis' undeveloped private property. TR-196. The Town spends no funds to clear or develop the beach. TR-201

c. Roadbeds were constructed by the WPA during the 1930's as public works projects on lanes extending into Bear Lake, which were described by George Patience, an engineer, as being shown on an aerial photograph, exhibit 34. Such roadbeds are visible for two lanes to the south of the Birdie property, but are conspicuously absent from the Birdie property. TR-221.

d. Ross Pope, a life long resident of Town, except for a twenty year period, testified that he rode his horse on the back streets of Town, including the two lanes in this suit, to the Lake, and used them to go swimming and for coasting in the winter, and for ice skating. TR-238. People used the lanes to walk to the Lake. TR-239. As to the "Cook" lane to the Birdie property, it was not fenced liked the other "lanes" to the Lake. TR-241.

e. Eldon Pope, a life long resident of Town (79 years),

and he lived near the south end of town by the Kohler lane. TR-244. He did not describe any use of the "Cook" lane at all.

f. LaVon Sprouse, a life long resident of Town (age 79 yrs) described the Cherrington fence as being moved out from its original location. TR-252. He stated that the Cook property was used as a park. TR-254. He then stated that people in Town also used the north part as a park, owned by the Hodge brothers. TR-261.

g. Ora Lutz, who lived 35 years at the corner of State Street and 200 North Street, described the lane as a "little dusty road" and "mostly a footpath". TR-110. She described walking down to swim in the Lake with her children and going over the Cook and Spencer property, and that people went to the Lake down the lanes closest to their homes. TR-114-15.

There was no evidence presented of any traffic counts, of any surveys of who used the "Cook" or "Spencer" or "Lake" lane other than the people who lived at the bottom of the hill near the Lake, or that the lane was continuously or notoriously open to the public. Of the number of residents of Town who could have testified, plaintiff called Ora Lutz, and none of the other witnesses had any direct or carefully observed testimony, other than they used the several lanes to get to the Lake, and usually on foot or horseback.

9. Several documents should be mentioned in addition for clarification. Plaintiff's exhibit 35, prepared by Max Hill, the real estate agent for Madsens, is a hand drawn plat map given to Dr. Davis. It shows the entire 177.0 feet

of lake fromage as south of the "Roadway". Plaintiff's exhibit

36, a survey shown to Dr. Davis by Hill, shows a "South R/W Line" approximately 51 feet south of the property line, which is the Utah Power & Light Company recorded easement and power transmission line into the property, TR-139, and was so described by Hill, TR-139.

ARGUMENT

POINT I. THE EVIDENCE FAILS TO DEMONSTRATE BY CLEAR AND CONVINCING PROOF A DEDICATION TO THE PUBLIC.

The Town has no claim of title by any record instrument, as stipulated by the parties. It claims the property based upon Utah Code Ann. section 27-12-89 as follows:

27-12-89. 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.

27-12-90. Highways once established continue until abandoned.— 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.

There have been a number of cases decided under these statutes in interpreting the intent of the legislation.

The important legal principles regarding the burden of proof in user cases are indicated in Petersen v. Combe, 20 U.2d 276, 438 P.2d 545 (1968):

1. Dedication of rights to the public generally must be displayed by clear and convincing evidence.
2. Where individual property rights are at stake we must not treat such rights lightly.

3. Was there sufficient evidence by competent testimony by witnesses who were not self-serving, to show by clear and convincing evidence, that the public generally,—not just a few having their own special and private interests in the road, had used the road continuously for 10 years?
4. Property owners in the area cannot be considered members of the public generally, as that term generally is used in the dedication by user statute.
5. The ownership of property as evidenced by duly recorded written documents should be granted a high degree of sanctity and respect. Such ownership should neither be taken nor eroded away by stealth or inadvertance in the use or encroachment thereon by others. There must be evidence that the owner intended to dedicate his property to a public use.

The phrase "public thoroughfare" has been defined by this Court in Thompson v. Nelson, 2 U.2d 340, 345, 273 P.2d 771 (1954):

We quote with approval the definition of "thoroughfare" from our case entitled, Morris v. Blunt, 49 Utah 243, 249, 161 P. 1127, 1131:

"A 'thoroughfare' is a place or way through which there is passing or travel. It becomes a 'public thoroughfare' when the public have a general right of passage. Under the statute the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of ten years, but such use must be by the public. Use under private right is not sufficient. If the thoroughfare is laid out or used as a

private way, its use, however, long, as a private way does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change. Elliott, Roads and Streets, No. 5."

There has not been evidence of the requisite intent of the land owners to dedicate a street to the public. Birdie Properties has resisted such a claim. The Madsens resisted such a claim. The use of the driveway by Cherrington under a private right of way grant, or his guests, or by Brown his neighbor to the north, or his guests, or by Spencers or Cooks or the Hodge brothers or their guests, does not convert the lane to a public highway. That the property owners may have permitted the Popes to ride their horses over their property from time to time, or allowed Mrs. Lutz and her children to use the lane to reach the Lake to swim in, or for Mayor Mattson to bicycle to the Lake does not mean that the landowners would permit the entire public at large to widen the lane to 66 feet and then use it to reach the unimproved lakefront. With use by the public comes the disorderly parties described by Mr. Cherrington where he shoed away disorderly teenagers by calling the County Sheriff.

TR-172.

No improvements were made to the lane until Mr. Cherrington improved it to reach his garage. The gravel and oil added were done in 1972, by stipulation of the parties, and ten years did not expire between the time of the improvement of the lane until the commencement of this suit to challenge the Town's claims.

II. THE EVIDENCE FAILS TO SUPPORT A FINDING OF
TWENTY FEET WIDTH IN THE PUBLIC THOROUGHFARE DESCRIBED
IN THE JUDGMENT.

The evidence admitted in this matter shows that the width of the graveled portion of the lane is approximately twenty feet. At areas where the oil has worn away, which is more than half of the lane, the width is only a car track wide, as it was before the oil was added. This Court held in Lindsay Land & Livestock Co. v. Churnos, 75 Utah 384, 392, 285 P. 646 (1930), that the trial court should define the road for the uses which were made of the road, and to determine its width and to fix the width under the facts and circumstances of the user. Such a use does not permit an extension of a footpath, single car track covered with weeds, into a 66 foot wide, or even 20 foot wide public highway. Such a position as has been taken and urged by Town of Garden City is an unlawful taking of private property without compensation in violation of the Utah Constitution and the Fifth Amendment of the United States Constitution.

It would be to the advantage of Town of Garden City, faced with recent recreational development to have an outlet to Bear Lake. This would be of benefit to each of the long-term residents of the community who are large property owners. However, the Town has never had any legal title to any of the property going down to the Lake. All of the lanes are and have always been private lanes going into private property. The Town would prefer to seize one or more of these private lanes for a public highway without paying for them at \$500 per front foot.

as a community asset. Particularly would it be advantageous to seize 66 feet of property, as this would provide public parking and room for public improvements at no cost to the Town council. The pressures have been put on Dr. Davis in developing the property into lots that even if the Town loses this litigation, it will prohibit building permits until a 66 foot wide street to Bear Lake is dedicated to the public use. This sort of tactic is wrong, and the trial court should have addressed this issue in its judgment. A proposed judgment in accordance with the pleadings was prepared, but the Court deleted the reference to interference by the Town in normal division of the property to accomplish by other tactics that which could not be accomplished by this suit. Record p. 61.

III. IF GARDEN CITY PREVAILS ON ANY OF ITS CLAIMS,
BIRDIE PROPERTIES IS ENTITLED TO DAMAGES AGAINST
MADSENS FOR MISREPRESENTATION.

Plaintiff was justified in relying upon the representations of Max Hill, Madsens real estate agent. The description of the north boundary as being in the center of the driveway was an important misrepresentation. Had either Dr. Davis or Mr. Scott been aware of the Town's claim to 66 feet, or even the 45 feet found by the Court, neither party would have signed the contract, and given Madsens \$55,000 in down payment. It was represented to plaintiff that the property could be divided into six lots. It can now only be divided into two lots. Because of the active misrepresentation of Madsens through their agent, plaintiff was

not on any inquiry notice to check further into the extent of the right-of-way use of the, what appeared to be, north 10 feet of the property. All of the elements of fraudulent misrepresentation indicated in Pace v. Parish, 247 P.2d 273 (Utah 1953), are present in this case.

If it is determined that Town of Garden City has any part of a claim to Birdie Properties land of more than the northern 10 feet as a right of way, Madsens must answer in damages to plaintiff. The fact that the real estate contract is executory does not render this matter as not ripe for determination. In American Savings & Loan Association v. Blomquist, 465 P.2d 353 (Utah, 1970), this Court held that where "it is shown that there is no possibility that the vendor will be ever able to convey good title, the purchaser of property is not required to continue on the useless course of paying up in full and making demand for an obviously impossible performance. Whether this is the fact is something for the trial court to determine." In accord is Marlow Inv. Corp. v. Radmall, 485 P.2d 1402 (Utah, 1971) where this Court stated:

. . . It is true that ordinarily such a vendor does not necessarily have to have marketable title until the purchaser has made his payments. Nevertheless, if it plainly appears that he has so lost or encumbered his ownership or his title that he will not be able to fulfill his contract, he cannot insist that the purchaser continue to make payments when it is obvious that his own performance will not be forthcoming.

In the event the Court determines that plaintiff is damaged, the measure of damages is the difference between the value of the property purchased and the value it would have had if the representations were true. Pace v. Parrish, 246 P.2d 273

(Utah, 1952).

IV. THE TOWN OF GARDEN CITY SO-CALLED SURVEY MAP WAS INADMISSIBLE AS RULED BY THE COURT.

Town of Garden City attempted to admit into evidence a survey map used by the various individuals who lived in Garden City, in an attempt to show that the Birdie Properties lane and Kohler lane were 99 feet wide and were owned by the public. The survey was clearly contrary to the public record, as stipulated by counsel for Town. It also appears to have been at least 75 feet off from the County plats of the same property, and was timely objected to by all parties present. TR-256-261. The trial court's ruling on foundation and hearsay were appropriate and should be sustained.

CONCLUSION

The concern of the courts is always to see that substantial justice is done in each case. In this case, it appears that there is not a large burden to simply allow the public the same use of the lane as plaintiffs are permitting Cherrington and Brown, the north neighbors. However, the difficulty is that the lane meanders down from the brow of the hill (the end of 200 North) and effectively prevents the use of the property north of the south edge of the lane, or a parcel 400' x 55'. Permitting the public at large to use the lane will also result in parking and congestion near the lake front and no facilities for public use, which increases the

burden on the property owners. The Court's decision to dismiss the claim against the Madsens is also error and results in an injustice to Dr. Davis and Mr. Scott. They paid a considerable sum for property based upon a lake frontage advertised footage and as a result of the Court's decision, have lost a considerable piece of valuable property. This loss is a direct result of the misrepresentations made to them, unwittingly by Mr. Hill, but knowingly by Madsens, who had misled Hill, their agent. When confronted by the fraud, Madsens have hidden behind standard contract language and seek to wash themselves of the fraudulent inducements uttered by the misled Mr. Hill. They effectively dumped their title problems on plaintiff by clever devices when they had a clear duty to speak. This fact is borne out by the comments of Mayor Mattson at the trial. The plaintiff is now in the awkward position of owing the balance of the \$110,000 contract to Madsens which is bisected by a public highway and is now worth much less than the value represented by Madsens' agent. It seems appropriate for this Court to remedy this problem first by simply holding that Town of Garden City did not meet its burden of proof and closing the lane to the public and preventing Town from reacquiring the lane by restrictions on any division of the property into residential lots, but if not, then second, by remanding this case to the lower court to assess damages against Madsens for the loss of the property by the public highway claimed by Town of Garden City.

DATED January 30, 1981.

Respectfully submitted,



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CERTIFICATE OF SERVICE

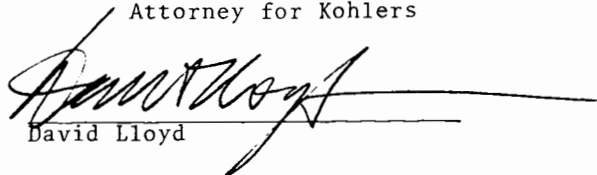
I certify I mailed two copies of the within brief to
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