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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 : Response Brief of Appellant

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsHILLYARD, LOW & ANDERSON; Attorneys for DefendantDavid Lloyd; Attorney for Plaintiff/ Respondent and Cross-APellant Birdie PropertiesEdwin C. Barnes, Bryce E. Roe; Attorneys for PlaintiffsJames c. Jenkins; Attorney for Defendants/Respondents Madsen

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IN THE SUPREME COURT
OF THE STATE OF UTAH

REUEL S. KOHLER, et al.,)
Plaintiffs/Respondents,)
vs.)
GARDEN CITY,)
Defendant/Appellant.)

RESPONSE TO
AFFIDAVIT
CITY OF
RESPONSE

BIRDIE PROPERTIES,
Plaintiff/Respondent
and Cross-Appellant,
vs.

GARDEN CITY, et al.,
Defendants/Appellants

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vs.)	RESPONSE BRIEF OF
GARDEN CITY,)	APPELLANT GARDEN
Defendant/Appellant.)	CITY TO BRIEF OF
		RESPONDENTS KOHLER

BIRDIE PROPERTIES,)	Case No. 17346
Plaintiff/Respondent)	
and Cross-Appellant,)	
vs.)	
GARDEN CITY, et al.,)	
Defendants/Appellants.)	

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PART I

THE LOWER COURT EXCLUDED ADMISSABLE EVIDENCE OFFERED NOT TO ESTABLISH THE FACT OF A MATTER, BUT TO DEMONSTRATE THE HISTORICAL BELIEF AND UNDERSTANDING OF THE LANDOWNERS, RESIDENTS, AND THE OFFICERS OF THE TOWN OF GARDEN CITY.

It is argued by the Appellant that Rule 63(27) of the Utah Rules of Evidence clearly outlines the basis upon which an ancient document like the one proffered by Appellant is admissible. At the risk of repetition, Rule 63(27) permits evidence of reputation in a community if it tends "to prove the truth of the matter reputed, if (a) the reputation concerns boundaries or use of, or customs affecting land in the community, and the Judge finds that the reputation, if any, arose before controversy."

Respondents spend a fair amount of time arguing that Rule 63(27) of the Utah Rules of Evidence cannot be used as a basis for claiming error by the trial court in refusing to admit the document inasmuch as the document was not technically rejected as hearsay evidence. It should be noted that the transcript of proceedings define no basis upon which the objection was made by Respondent (see transcript of proceedings page 257). It is inappropriate for Respondent to object to the introduction of the document without stating any basis for the objection, and to then resist arguments that the documents should have been admitted under an exception to the hearsay rule when they themselves failed to state a basis for the objection.

Further, Rule 67 of the Utah Rules of Evidence permits ancient documents to be received into evidence "if the Judge finds that a ruling (a) is at least 30 years old at the time it is offered, and (b) is in such condition as to create no suspicion concerning its authenticity" and there is no doubt or suspicion as to its place of discovery.

Although it is unclear from Respondent's brief or from the Transcript of Proceedings, it is assumed that Respondent resisted admission of the ancient document on the basis that a suspicion as to its authenticity existed. However, the transcript of proceedings at the time of trial revealed no such cause for concern and, in fact, no concern as to its authenticity was raised by Respondent. Respondent stated that the document was "inherently not trustworthy" (transcript

page 257). This notwithstanding the fact that the testimony of the son of the owner of the document was "that [the map] stayed with my grandmother for many years until her son took it, and he's had it ever since." (transcript page 256).

Respondent offers no reason why the map was "inherently suspicious", and offered the court no reason why the longstanding possession of Mr. Sprouse and his grandmother causes any suspicion whatsoever. It is important to recall that Rule 67 requires that the document be "in a place in which such a document, if authentic, would likely be found." Respondents made no objection to the place the document "would likely to be found," and cannot raise the objection for the first time on appeal.

Exclusion of the map by the trial court was a critical error because it so clearly demonstrated the historical intent of the early citizens of Garden City to establish 99 foot rights-of-way for public streets. Coupling that intent with the actual use of the right-of-way over a period in excess of 50 years shows clearly that a dedication of the property occurred pursuant to Utah Code Annotated §27-12-89.

PART II

THERE IS INSUFFICIENT EVIDENCE TO EXTINGUISH AS A MATTER OF LAW AND FACT THE RIGHT-OF-WAY HISTORICALLY ESTABLISHED BY THE APPELLANT GARDEN CITY, OVER THE PROPERTY IN QUESTION WHICH RIGHT-OF-WAY WAS EVIDENCED BY THE ROAD TO THE LAKE LONG USED BY THE PUBLIC.

Respondent apparently concedes that if a right-of-way was established over the property in question, they have no right to extinguish that municipal right-of-way. Respondent

argues that the major question was "whether or not such a right-of-way was ever in fact created." (See Respondent's brief, page 4) A number of witnesses for the Appellant testified to constant and continuous use by the public of the road in question, and testified that it has been used in excess of 50 years for purposes such as:

1. Public access to the beach (Transcript of Proceedings page 234).

2. Access for swimming (Transcript of Proceedings page 235).

3. Driving horses and cattle to the water's edge (Transcript of Proceedings page 236).

4. Horseback riding (Transcript of Proceedings page 234).

5. Access for fishing (Transcript of Proceedings page 238).

6. Access for boat riding (Transcript of Proceedings page 238).

7. Access for skating (Transcript of Proceedings page 238).

8. Access for picnicing (Transcript of Proceedings page 247).

9. "Most everything." (Transcript of Proceedings page 247).

Respondent attempts to distinguish the long line of Utah cases establishing a public right to a roadway by asserting that when a road which dead ends, which is not

intersected by another road as in the present case, then there cannot have been a dedication to the public. Such an interesting conclusion would result in an inability by the public in every instance to establish a right-of-way to any road not intersected by another road. This is not the intent of the Utah Code and not the proper interpretation of so many previous Utah cases. Jeremy v. Bertagnole, 101 Utah 1, 116, P.2d 420 (1941); Boyer v. Clark, 7 U.2d 395, 326 P.2d 107 (1958); and Deseret Livestock Co. v. Sharp, 259 P.2d 607 (1953).

PART III

THE TRIAL COURT ERRED IN ARRIVING AT A MEASURE OF DAMAGES OF \$5,700.00 IN THE KOHLER CASE WITHOUT PERMITTING DEFENDANTS A RIGHT TO REBUT THE EVIDENCE AS TO DAMAGES.

Respondent concede that Appellants should have been given the opportunity to rebut evidence as to damages proffered by Respondents "after hearing the testimony, if they feel they need the time to rebut it." (Transcript of Proceedings page 4). No specific hearing on damages was requested by the Appellants because the trial court issued its memorandum decision against Appellants and awarded damages in the same decision.

The trial court should properly have issued its judgment and notified the parties of the need for an additional hearing to rebut or accept the evidence proffered. No such opportunity was given. Appellant Garden City most assuredly desires the opportunity to challenge the sufficiency of the evidence, to show a mitigation of damages, to cross examine

the witnesses as to the actual costs incurred and to show an offset of damages. Such opportunity satisfies the minimum standard of fairness, and the absence of such opportunity is manifestly unfair. Hurley v. Hurley, 127 P.2d 147 (Okla. 1943); Bobo v. Bigbee, 548 P.2d 224 (Okla. 1976).

CONCLUSION

The trial court materially and substantially erred in refusing to admit evidence falling within the ancient documents exception to the hearsay Rule 67 as well as Rule 63(27) of the Utah Rules of Evidence. The trial court erred in ignoring evidence from multiple witnesses who had actual firsthand knowledge of the use of the road in question, and who testified as to the continuous public use of the road established in excess of 50 years. Utah Law requires continuous public use for only 10 years, and that standard was met five times over. Finally, the trial court erred in not allowing Appellants an opportunity to rebut the evidence as to damages offered by the original Plaintiffs in the case, although said opportunity was agreed to by the trial court. If allowed to stand, the decision of the trial court would seriously erode the longstanding principles of Utah Law regarding encroachment of rights-of-way properly established by a municipality.

RESPECTFULLY SUBMITTED this 10th day of February, 1981.

HILLYARD, LOW & ANDERSON



HERM OLSEN

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing instrument was mailed postage prepaid to David E. Leta and Bryce E. Roe at 340 East 400 South, Salt Lake City, Utah 84111, Edwin C. Barnes at 200 American Savings Plaza, 77 West Second South, Salt Lake City, Utah 84101, James C. Jenkins at 150 East 2nd North, Logan, Utah 84321, and David Lloyd at 1407 West North Temple, Suite 338, Salt Lake City, Utah 84116, this 10th day of February, 1981.

Roxie A. Bassett
Secretary