

1981

Gus Chournos and Veve Chournos v. Nick D'Agnillo, Et Ux. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

GUS CHOURNOS and)
VEVE CHOURNOS,)
)
Plaintiffs)
and Appellants,)
)
v.)
)
NICK D'AGNILLO, et ux.,)
)
Defendants)
and Respondents.)
)

CASE NO. 17362

BRIEF OF RESPONDENTS

Appeal From the Judgment of the Second
Judicial District Court of Weber County
State of Utah

THE HONORABLE JOHN F. WAHLQUIST
DISTRICT COURT JUDGE

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FILE

MAR 23 1981

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IN THE SUPREME COURT OF THE
STATE OF UTAH

GUS CHOURNOS and)	
VEVE CHOURNOS,)	
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)	
NICK D'AGNILLO, et ux.,)	
)	
Defendants)	
and Respondents.)	
)	

BRIEF OF RESPONDENTS

STATEMENT OF THE KIND OF CASE

This is an action to establish a right-of-way by prescription in favor of plaintiff and against adjacent landowner defendants.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a Judgment for the defendants, denying plaintiffs' claim of right-of-way by prescription, quieting title of defendants as against all claims of plaintiffs, and denying plaintiffs' motion for a new trial, plaintiffs have appealed.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmation of the Judgment of the District Court in their favor.

STATEMENT OF FACTS

Appellants' Statement of Facts fails to state the facts presented to and relied upon by the trial court in its finding of judgment in favor of respondents. The facts as determined and relied upon by the trial court are as follows: Appellants and respondents are adjacent property owners of property located in Riverdale, Weber County, Utah, fronting on the northerly right-of-way line of Riverdale Road. (Exhibits 4P, 5P, 6P) Both properties were essentially used for farming until 1946, at which time Riverdale Road and the viaduct over the railroad tracks and the Weber River were completed. (T 72) Thereafter, the use of the properties in the area gradually changed into commercial use.

Respondents acquired their property from the parents of Nick D'Agnillo, who had purchased the property from Hendrieka Becker in December of 1939. The Warranty Deed of conveyance described the whole 7.4 acres of land, excepting a right-of-way over the easterly fourteen feet, as reserved in a Deed dated August 23, 1911. (Exhibit 6P) Respondents have continually used the property, including the east fourteen feet subject to the right-of-way, from 1939 to the present for agricultural purposes. (T75, 75, 78, 79, 81, 82, 86, 99, 144, 162) Respondents utilized,

with other deeded owners, the east fourteen foot right-of-way portion of their deeded property as an access to their other farm land lying to the south of Riverdale Road, which road was constructed about seven years after respondent, Nick D'Agnillo's father and mother had acquired the property.

(T71) At least three other property owners and the power company held deeded rights to utilize the easterly fourteen foot right-of-way over respondents' property to gain access to their farm properties lying to the south of Riverdale Road and to service power lines. (T17, 18, 37, 40, 71, 72, 102, 103, 104, 118, 129, 139) A fence constructed of wooden posts and barbed wire separated appellants' and respondents' properties along appellants' west property line. (T73, 130) Sometime near 1946, the southerly portion of this fence fell down from disrepair, so that no fence existed on the boundary line between the properties of the parties, until a new fence was constructed by respondents in April of 1977. (T8, 11, 95, 107, 108, 130, 131) However, an irrigation ditch approximately three feet in width separated the two properties along the southerly portion of the boundary line of the old fallen fence; some time near 1946, the southerly portion of this open irrigation ditch was piped by using old hot water tanks with the tops and bottoms removed, placed end to end, and covered over with a few inches of dirt. (T12, 24, 25, 73, 74) Light vehicles could cross this covered ditch area

along the boundary line, but it would not support heavier vehicles. (T24) Approximately fourteen feet to the west of the boundary line of the parties, respondents maintained a barbed wire fence to enclose their farm equipment and calves in the pasture to the west of the fence. (T41, 77, 80, 104) In 1961, three telephone or electric light utility poles, thirty to forty feet in length, were placed along the southerly ninety feet, moreorless, of the boundary line of the properties, lying end to end a few feet to the west of the covered portion of the irrigation ditch. (T77, 78, 103, 104, 133, 145, 146, 162, 163) These utility poles remained for three or more years, and they constituted a ground barrier which prevented motor vehicle travel from appellants' property across the east fourteen feet of respondents' property to gain access to Riverdale Road. (T78, 106, 134, 163)

In March of 1977, appellants commenced construction of a drive-in window on the west side of their building. (T107) The trial judge inspected the properties of the parties at the commencement of the trial, and in the facts stated in his Memorandum Decision found that an out-cropping window was constructed on the west side of respondents' building which was the proper height to be used as a service window for sales to persons inside automobiles; the court termed it as a "take-out window". (Memorandum Decision, page 6; (T2, 3, 4, 5, 6)

In March of 1977, respondents' son, John D'Agnillo, had a conversation with appellant, Gus Chournos, in which Chournos informed John D'Agnillo that he was constructing a drive-in window, and that he intended to utilize the easterly portion of respondents' property for the access lane to Riverdale Road. John D'Agnillo informed Chournos that he could not make such use of his father's property. (T 107, 108) In April of 1977, respondents constructed a steel post barbed wire fence along the old boundary line between the parties, where the original fence had fallen down years before. (T 108) In September of 1978, appellants filed the within action claiming a right-of-way by prescription over the east fourteen feet of respondents' property adjacent and to the west of appellants' building and drive-in window, for use as an ingress and egress lane of travel onto Riverdale Road.

Prior to 1946, appellants' property was owned by the Childs family, who made no claim either by deed or use of any portion of respondents' property which is the subject of this dispute. (T13, 14) In 1946, the Childs conveyed the premises to Jesse M. Stephens, and it was Stephens who enclosed the southerly portion of the old irrigation ditch utilizing the old hot water tanks. (T12, 24, 25) At this time the old boundary line fence

between the properties had fallen down. (T8, 11, 95) Stephens constructed the first building upon appellants premises around 1946, which building he utilized as a blacksmith shop. The original building was located approximately twenty nine feet east of his west property line, and there were some doors on the west side thereof for vehicles to enter and egress. (T 9) Any use by Stephens or his customers of any portion of respondents' property was rare. (T10, 75) In 1951, Stephens sold the property to Myrtle Cornish, formerly Myrtle Warner. (T24)

Mrs. Cornish and her former husband, Mr. Warner, remodeled the building and then leased it to a series of successive tenants from 1951 through 1969, in which year they sold the property to appellants. (T 27) The first such tenant was an auction-liquidation house, occupying the premises for about one year. (T27, 31) In 1952, the second tenant, a Jim Knight, leased the premises for about three years and used it as a beer tavern or private liquor club; his customers did not drive vehicles across respondents' property in the area in which appellant claimed a prescriptive easement. (T 27, 31, 35) Thereafter, a Ray Nelson leased the premises and operated it as a beer tavern, but his customers did not drive across respondents' property now the subject of this dispute. (T 32) From 1961

through 1964, a Ray Hansen and his son, Bill Hansen, leased the property as a beer tavern, but their customers did not drive across the disputed area. (T 35, 36) Appellants first entered into possession of the property in 1964, under a five year lease from Mrs. Cornish, which extended until 1969, when appellants purchased the property from Mrs. Cornish. (T 27, 45, 46) Appellants operated the property as a beer tavern, and after adding a kitchen to the building in 1970, they thereafter operated the premises as a restaurant and a beer tavern. (T 50) Appellant, Gus Chournos, testified that his customers and delivery people drove across and parked motor vehicles in the area in dispute from 1964 through 1969. (T 49, 52, 53, 55, 56) Respondents' witnesses, Nick D'Agnillo, John D'Agnillo, Willis J. Mitchell, Joseph D'Agnillo, and William K. Taylor testified to the effect that the customers of appellants and the prior lessees extending from April, 1977, back twenty years to 1957, did not drive motor vehicles across, nor did they park motor vehicles in the area in dispute, as claimed by appellants. (TR 78, 105, 116, 130, 131, 132, 135, 136, 137, 143, 154, 157, 163, 165, 171, 175, 176)

Appellants' and respondents' evidence was presented to the court on May 21, 1980, and after respondents'

counsel rested their case, attorney for appellants stated to the court, "That's all I have. I have no rebuttal, your Honor. May I just ask Mr. Chournos here just one question. That's all, I promise." (T 182) Thereafter, counsel asked Mr. Chournos one other question, and then he stated, "I have nothing further. . . ." (T 182) The case was thereafter set for argument six days later on May 27, 1980. Prior to entering the courtroom for the presentation of arguments, the trial Judge, in chambers, asked the respective counsel if either had further evidence to present, and each counsel replied that he did not. Counsel thereupon entered the courtroom and presented their closing arguments, and the court stated to counsel that he would read their respective trial briefs and give his decision to his secretary. (T 184) At no time during the trial did appellants' counsel inform the court or respondents that Mr. Ray Hansen was going to appear as a witness, but that he became ill. At no time between May 21, 1980, when the evidence was presented, and May 27, 1980, when the closing arguments were presented, did appellants' counsel claim that he had any further evidence to present by any witness, nor did he inform the trial court or respondents' counsel that Mr. Hansen or any other witness was ill on May 21, 1980, at the time of trial. On June 11,

1980, twelve days after the entry of the trial court's Memorandum Decision in favor of appellants, is the first time that counsel for appellants notified the trial court and respondents' counsel that he desired to present to the court the testimony of Mr. Ray Hansen, who he stated was ill on May 21, 1980. This information was presented in appellants' Motion for a New Trial.

ARGUMENT
POINT I

APPELLANTS FAILED TO PROVE BY CLEAR
AND CONVINCING EVIDENCE A PRESCRIPTIVE
RIGHT-OF-WAY ACROSS RESPONDENTS' PROPERTY

Utah case law clearly recognizes the doctrine of "right-of-way by prescription", and the Utah Supreme Court has declared that such a right-of-way may be established by open, notorious, continuous, adverse use against the owner of the subservient property for a term of twenty years. Zolinger v. Frank, 75 P₂ 714, (1946). In the Zolinger case, Justice Wolfe defines the meaning of "adverse use" and states that the adverse use means a use that must be against the subservient owner as distinguished from under the owner.

In the case of Jensen v. Gerrard, et al., 39 P₂ 1070, (1935), at page 1072 of the opinion, Justice Hanson stated:

"The burden was upon them to establish such claim by clear and satisfactory evidence."

Thereafter, in Buckley v. Cox, et al, 247 P₂ 277 (1952), the court cited Jensen v. Gerrard, supra, and further clarified the burden of proof of a claimant of a prescriptive easement wherein Justice McDonough declared at pages 279 and 280 of the opinion:

"Furthermore, since the defendants claimed the right to use the driveway by prescription, they have the burden of establishing such claim by clear and convincing evidence."

Continuing on at page 80, the court said:

"It was defendant's burden to overcome this presumption and to establish his claim by clear and convincing evidence. Jensen v. Gerrard, supra. This, in the judgment of the lower court, he failed to do."

Morris v. Blunt, et al., 161 P. 1127, (1916) is a frequently cited Utah case on the law of prescriptive easements. This case is authority for the well recognized rule that the adverse use must be continuous, without interruption, for the prescriptive period of twenty one years. The rule is stated in the following language at page 1131 of the opinion:

"Under the well-established rule, the use, in order that it may ripen into a prescriptive title, must, in any case, not only be adverse and continuous, and under claim of right for a period of twenty years, but it must be uninterrupted throughout that period."

The necessity of an uninterrupted adverse use for a full twenty year period was again emphasized by the Utah Supreme Court in the more recent case of Thompson v. Griffiths, 344 P₂ 983, (1959) wherein Justice Wade,

at page 985, stated:

"Suffice it to say that there was sufficient evidence from which the trier of the facts could reasonably find that at no time was there a full twenty-year period when the use by the owner of the dominant estate was adverse and uninterrupted."

Another rule of law in regard to the establishment of prescriptive easements, that has relevant application in this action, is the rule enunciated in Nielson v. Sandberg, 141 P₂ 696 (1943) to the effect that the claimant of the prescriptive easement must show that he has acquired it by his own use. Respondents acknowledge that such a use would allow a claimant tacking onto any periods of use through his predecessors in title during any uninterrupted twenty-year period. At page 700 of the opinion, the rules was stated as follows:

"A party claiming the right must show that he has acquired it by his own use, independent of others; he cannot make his right depend in any degree upon the enjoyment of a similar right by others. (citations)"

The above principal of law was more recently cited by Judge Maughan in Richards v. Pines Ranch, Inc., 559 P₂ 948 (1977) at page 950 of the opinion.

Respondents have no quarrel with the case law cited in appellants' brief if applied in accordance with the facts as found by the trial court in this case. It is the duty and prerogative of this court to review both law and fact and to consider the weight and sufficiency of the evidence. Respondents are entitled to the benefit of the well established

rule that the facts as found by the trial court, as a trier of the facts, will be reviewed in the light most favorable to the prevailing party, and that the Findings of Fact will not be disturbed unless they are shown to be manifestly erroneous, as to demonstrate oversight, or mistake materially affecting the rights of appellants. Richins v. Struhs, 412 P2 314 (1966). The facts as set forth in respondents' Statement of Facts are supported by the evidence in the transcript and should be viewed from the point of advantage of the trial court because of its proximity to the parties, the witnesses, its examination of the site, and its observation of the trial.

An application of the recited rules of law to the facts established during the trial, supported by the cited record, and as stated in the court's Memorandum Decision and Findings of Fact, clearly demonstrates that a right-of-way by prescription against Respondents' property has not been established by appellants. In April, 1977, respondents re-established a barrier along the old fence line between the properties by their construction of the steel post and barbed wire fence which thereafter blocked access to any portion of respondents' property by vehicular traffic from appellants' property. Looking backwards twenty consecutive years from April 1977, through April 1958, there was a two year period of interruption of use in 1961, and 1962. This

interruption of use was caused by the telephone utility poles placed on the ground, end-to-end, along the old fence line, which blocked any possibility of vehicular use across respondents' property by appellants' predecessor Hansen, who leased and operated the property from 1961 until 1964. Regardless of any other acts of adverse use which appellants claim to have established, such use was not continuous, but was interrupted for a two year period in 1961 and 1962. The evidence clearly establishes that the boundary line fence between the properties fell into disrepair in 1946, and there was no evidence of any adverse use by appellants and their predecessors prior to that year. Looking forward from 1946 through a twenty year term, ending in 1966, the required twenty year restrictive use term was interrupted for a period of two years, in 1961 and 1962. The trial court, in fact, found that the evidence did not establish that there had ever been any open and notorious use by appellants and their predecessors in interest under any claim of right over and across respondents' property; there had been occasional intrusions of vehicles into the area that would constitute trespass. The trial court found and the evidence supports the fact that there was no open notorious claim of right to the use of respondents' adjacent property as a vehicle parking lot.

The two year period of interruption of any claimed use, in 1961 and 1962, would shorten the last claimed use

period ending in 1977, to fifteen years. There is no evidence of any claim of use by appellants' predecessors in title prior to 1946. Prior to 1946, the old wood and barbed wire fence constituted a barrier between the two properties, and the construction of Riverdale Road to which the ingress and egress right-of-way is claimed, was not completed until 1946. (T 72, 155) Appellants cannot base their claim of use upon the use of land owners who possessed deeded right-of-ways across the east fourteen feet of respondents' property. The case of Nielson v. Sandberg, supra, enunciates the rule that the claiming party must show that it has acquired its claim by its own use, independent of others.

Appellants have made no reference in their brief of any evidence that would in any way indicate the trial court was guilty of an abuse of its discretion in determining the facts, nor in making application of the law. This court may review the facts in the light of the evidence as believed by the trial court, and not necessarily as urged upon the court from the point of view of the appellants. Kier v. Condrack, 478 P₂ 327 (1970). One of the long established rules in regard to the basis upon which an appellate court views the findings of fact of a trial court is: That because of the advantageous position of the trial court with its first-hand observation of the testimony and demeanor of the witnesses, the appellate court will view the trial court's findings with considerable indulgence, and such findings will not be upset unless the evidence preponderates

against them, or the trial court has mistaken or mis-applied the law applicable to them. Pagano v Walker, 539 P₂ 452, 454. (1975)

An examination of the relevant testimony of all of the witnesses as set forth in the transcript and the other evidence before the court, including its physical observation of the premises during the trial, clearly establishes that appellants failed to carry their burden of proof by the clear and convincing evidence required. The facts presented at the trial simply did not support the requirements of law for the establishment of a prescriptive right-of-way across respondents' property through twenty years of open, notorious, continuous, adverse use.

POINT II

APPELLANTS'MOTION FOR A NEW TRIAL,
OR IN THE ALTERNATIVE, TO REOPEN
THE TRIAL TO RECEIVE ADDITIONAL
TESTIMONY WAS PROPERLY DENIED BY
THE TRIAL COURT

Under Rule 59(a) (3) of the Utah Rules of Civil Procedure, in an action tried without jury, the trial court may grant a new trial, open the judgment, take additional testimony, or amend the Findings of Fact and Conclusions of Law, or make new Findings and Conclusions of Law by reason of accident or surprise, which ordinary prudence could not have guarded against.

In the case of Jensen v. Thomas, 570 P₂ 695, (1977), which was a personal injury action wherein the plaintiff claimed surprise by the testimony of a physician, but plaintiff made no timely objection on the basis of surprise. the court in commenting upon the application of Rule 59 (a)(3) stated at Page 696 as follows:

"A ruling on a motion for a new trial will not be disturbed on appeal except when there is a clear abuse of the Court's discretion. We do not believe the Court abused its discretion in denying that motion on the basis of Rule 59 (a)(3), as that Rule speaks about surprise 'which ordinary prudence could not have guarded against.' On the contrary, the surprise could, we believe, have been guarded against."

Thereafter, in Anderson v. Bradley, 590 P₂ 339, (1979), at Page 341 of the Opinion this Court again emphasized that surprise as a ground for a new trial is only that which ordinary prudence could have guarded against.

It is submitted that in this action there was no surprise. Appellants made no objection or claim of surprise at the time of trial or six days later at the time of argument. For witnesses testified on behalf of respondents of the existence of the utility poles lying on the ground as an obstruction along the boundary line in 1961, and 1962, when a Ray Hansen leased the premises now owned by appellants. (T 77, 78, 103, 104, 133, 145, 146, 162, 163) Appellants made no claim of surprise or objection to any of the cited testimony.

Prior to the trial appellants' counsel informed respondents

counsel that, "I might use Mr. Hansen." at the trial as a witness. (T 183) At no time during the proceeding was Mr. Hansen called as a witness, nor was he subpoenaed as such. At the time respondents rested their case on May 21, 1980, appellants' stated:

"That's all I have. I have no rebuttal, your Honor." (T 182)

No mention of Mr. Hansen as a witness, and no claim of surprise by any testimony presented at the trial, was made between the day of trial on May 21, 1980, and the day of final argument on May 27, 1980. In chambers, prior to the presentation of the final arguments, the trial judge asked if either counsel had further evidence to present to the Court prior to arguments; both counsel stated that they did not have further evidence, and they thereafter entered the courtroom and presented their closing arguments.

It was not until after the Court had issued its Memorandum Decision on May 30, 1980 and its Findings of Fact and Conclusions of Law, and Judgment, on June 10, 1980, that appellants thereafter filed their Motion for a new trial on June 11, 1980. It was in appellants' motion for a new trial that the first mention of Mr. Hansen as a witness or of Mr. Hansen being ill was reported to the Court or to respondents' counsel. It was in the motion for a new trial that appellants' counsel first made any mention of surprise. It is submitted that there was in fact no surprise, and if

there had been any surprise, it could have easily been guarded against by a timely objection to the Court and by furnishing information to the Court and respondents' counsel about the claimed illness of Mr. Ray Hansen. Appellants did not take the oral depositions of any of respondents' witnesses prior to the trial.

In the interest of economy and justice, each trial must come to a timely conclusion. Counsel have the duty and responsibility to determine on behalf of their clients, during the trial proceedings, when they shall elect to conclude the presentation of evidence and rest their case. Attorneys are not granted the privilege and luxury of waiting until after the case has been argued, taken under advisement, and ruled upon by the Court, to then elect to present the original testimony of just one more witness. The time for such a decision has long since passed.

Ordinary prudence could have guarded against any such claimed surprise, by the proper utilization of the rules of discovery, by timely objection to the claimed surprise evidence, or by a request for continuance because of the illness of a necessary witness. None of these actions were taken by appellants. It was within the discretion of the trial court and in the interest of justice that appellants' motion for a new trial or in the alternative to reopen the trial proceeding, was denied.

POINT III

RESPONDENTS DO HAVE RECORDED TITLE TO THE RIGHT OF WAY CLAIMED BY APPELLANTS

Appellants' claim of right of way against respondents property is based solely upon a prescriptive use. Appellants make no claim of title by deed or any other source to any part of respondents' property. The status of the quality of respondents' title to the property conveyed to them through the recorded instruments in their chain of title is wholly immaterial to appellants' claims as tried by the court.

In the deeds of conveyance to respondents through their predecessors, the various deeds, after describing the whole 7.4 acres of property to be conveyed contained the following clause: "Excepting, a right of way 14 feet wide, the center line of which is described as follows: (metes and bounds description of center line set forth) . . . as the same is described and excepted in deed recorded August 23, 1911 in Book 67 of deeds at Page 78". Words of exception and reservation have been used so indiscriminately in reference to easements and rights of way that they may be treated as synonymous in meaning, and the legal intent is to be determined not by the word used but by the purport indicated in the entire grant. In discussing the use of words of exception and reservation, it is stated in Thompson on Real Property,

Sec. 3090, VOL. 6 Page 777, as follows:

"In order to determine whether a reservation or an exception has been made, the court must look to the substance of the right excepted or reserved, and make an independent determination, regardless of whether the right is termed an exception or a reservation in the instrument. . . .

It is often difficult to distinguish between an exception and a reservation in a deed, and the words, 'reserving' and 'excepting' are not conclusive in determining which is intended. The character and effect of the provision in which such words occur must determine what is intended."

The Conclusions stated in the trial court's Memorandum Decision dated May 3, 1980 properly ruled that the deed of conveyance to respondents transferred a fee simple title subject to a right of way. The court relied upon the principle that the law abhors small strips of land which are never conveyed, and attaches them to properties which are conveyed. The testimony presented at trial discloses that at all times subsequent to the deed of conveyance to the D'Agnillo family in December, 1939, that they have continually used all of the premises for agricultural purposes, subject only to the use of the fourteen foot right of way along the easterly portion thereof by those persons who held deeded interests therein.

Respondents again emphasize the fact that the quality or status of marketability of respondents' title is wholly immaterial to the claims made by appellants in this action, which is a claim based solely upon prescriptive use.

CONCLUSION

The appellants failed to present to the trial court clear and convincing evidence of a right of way by prescriptive use against the respondents. The trial court properly exercised its broad discretion in refusing to grant appellants a new trial or to reopen the case for the purpose of receiving additional testimony. The judgment of the trial court should be affirmed.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Repondents to counsel for Appellants, Pete N. Vlahos of the firm of VLAHOS, PERKINS & SHARP, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah, postage prepaid by first class mail on this 20th day of March, 1981.

Don Miller
Secretary