1982

Mack Halladay and Merle Halladay v. Madge Cluff et al : Reply Brief of Appellants

Utah Supreme Court

Brent D. Young; Ivie and Young; Attorneys for Appellants;
S. Rex Lewis; Howard, Lewis & Petersen; M. Dayle Jeffs; Attorneys for Defendants;

IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE HALLADAY,	)	
Plaintiffs-Appellants,	)	Case No. 18032
vs.	)	
MADGE CLUFF, PERRY K. BIGELOW and NORMA G. BIGELOW,	)	
Defendants-Respondents	)	

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, HONORABLE GEORGE E. BALLIF, PRESIDING

BRENT D. YOUNG
IVIE and YOUNG
Attorneys for Appellants
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

S. REX LEWIS
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants Bigelow
120 East 300 North
Provo, Utah 84601

M. DAYLE JEFFS
JEFFS & JEFFS
Attorneys for Defendant Cluff
90 North 100 East
Provo, Utah 84601

IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE HALLADAY,	)	
Plaintiffs-Appellants,	)	Case No. 18032
vs.	)	
MADGE CLUFF, PERRY K. BIGELOW and NORMA G. BIGELOW,	)	
Defendants-Respondents	)	

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, HONORABLE GEORGE E. BALLIF, PRESIDING

BRENT D. YOUNG
IVIE and YOUNG
Attorneys for Appellants
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

S. REX LEWIS
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants Bigelow
120 East 300 North
Provo, Utah 84601

M. DAYLE JEFFS
JEFFS & JEFFS
Attorneys for Defendant Cluff
90 North 100 East
Provo, Utah 84601

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE HALLADAY,	)	
Plaintiffs-Appellants,	)	Case No. 18032
vs.	)	
MADGE CLUFF, PERRY K. BIGELOW and NORMA G. BIGELOW,	)	
Defendants-Respondents.	)	

REPLY BRIEF

ARGUMENT

POINT I

THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE IS NOT APPLICABLE TO THE FACTS OF THIS CASE BECAUSE THERE WAS NOT MUTUAL ACQUIESCENCE BY ADJOINING LANDOWNERS FOR A LONG PERIOD OF YEARS.

Over the years, this court has issued a great number and variety of decisions dealing with the issue of boundary by acquiescence. As noted by Chief Justice Henriod, these decisions have "produced a Joseph's Coat of many colors" respecting the doctrine of boundary by acquiescence. In more recent opinions, this court has commonly set forth four elements which establish a presumption that a certain line has

become a boundary by acquiescence. Those four elements are: (1) occupation up to a visible line marked definitely by monuments, fences, or buildings and (2) acquiescence in the line as a boundary (3) for a long period of years (4) by adjoining landowners. Fuoco v. Williams, 15 Utah 2d 156, 389 P. 2d 143 (1964). If the party claiming boundary by acquiescence cannot establish all of these four elements, there can be no boundary by acquiescence.

The requirement that there be adjoining landowners is one of common sense. A third party cannot be deprived of his property by the agreement or acquiescence of neighboring parties. Any such ouster must result by compliance with the requirements of adverse possession.

Only in the "rarest of cases" will the court establish a boundary by acquiescence where the period of acquiescence is less than 20 years. King v. Fronk, 14 Utah 2d 135, 378 P. 2d 893 (1963); Hobson v. Panguitch Lake Corp., 530 P. 2d 792 (Utah 1975).

Acquiescence has been variously defined by the court. Essentially, if a party has acquiesced in a certain line as a boundary for more than 20 years, the court implies an agreement that the boundary between the respective parties' properties shall be fixed at that point. Obviously, such an implied agreement is not conclusive. A party may rebut such a presumption by evidence that there was no agreement or that there could not have been a proper agreement between the parties.

Wright v. Clissold, 521 P. 2d 1224 (Utah 1974). Furthermore, any such agreement would be void and unenforceable if the true boundary is known and the agreement does not result from the settlement of a dispute as to the correct boundary. Otherwise, the statute of frauds relating to the transfer of real property would be violated. Tripp v. Bagley, 276 P. 912 (Utah 1929).

Subsequent to the filing of plaintiffs' earlier brief, this court issued its opinion in Madsen v. Clegg, 639 P. 2d 726 (Utah 1981) wherein the court stated:

> The doctrine of boundary by acquiescence has long been recognized, and when the location of the true boundary between adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees. However, when the true boundary is known, any parol agreement of the owners establishing the boundary elsewhere is void and unenforceable by virtue of the statute of frauds, which requires a conveyance of real property to be in writing.
>
> This court has determined that in the absence of an express agreement as to the location of the boundary between adjoining owners, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing. However, when the evidence fails to support any implication that a fence has been erected by adjoining owners pursuant to an agreement between them as to the location of the boundary, the doctrine of boundary by acquiescence has no application.

639 P. 2d at 728, 729.

Plaintiffs have set forth their theory with respect to the doctrine of boundary by acquiescence in their prior brief. In this brief, plaintiffs will attempt to respond only to the allegations raised in defendants' briefs. Plaintiffs concede

that there is an ancient fence which has been in existence for more than 50 years and that none of the parties know the reason for its being built. Plaintiffs also acknowledge that defendants Cluff and Bigelow have on various occasions occupied property within the disputed P-N-M-O area on Appendix A. However, assertions made in defendants' briefs with respect to the other three requirements for establishing a presumption of boundary by acquiescence, are not correct.

Defendant Cluff bases her argument almost entirely on the proposition that the parties recognized the M-N fence as a boundary between their respective properties. Defendant Cluff makes many assertions which appear to be incorrect restatements of the testimony. At pages 5 and 6 of defendant Cluff's brief it is asserted that the fence line M-Y and the fence line M-N is a continuation of the fence line around the property formerly owned by Madge Cluff's father, Mr. Durnell, and was for the purpose of establishing the property line between the Halladays and the Durnells. However, what Mr. Elmo Halladay actually testified was as follows:

> Q. So those fence lines between points "M" and "N" and points "X" and "Y" on Exhibit 8 have been there at least 50 years?
>
> A. Easy. I would say around 50 years, yes.
>
> Q. And maybe before?
>
> A. Yes.
>
> Q. Now, what was the purpose of this old fence that runs between point "X" and point "Y" on plaintiffs' Exhibit 8?

A. That divided the property between our place and, I think, Brother Durnell, who owned it at that time. That was Madge's father.

Q. Did you ever speak with anybody about any kind of problem related to that fence line?

A. No, we never had no problems then. We was always very good friends all the time. We was very good friends.

(R. 162-263).

Clearly, Elmo Halladay was testifying with respect to the X-Y fence line and not the M-N fence line involved in this appeal. The X-Y fence line divided the property, not the M-N fence. Furthermore, it was the X-Y fence line that he was referring to when he said there was no dispute about the fence.

Defendant Cluff then cites a statement by plaintiff Mack Halladay that when he bought the Boardman piece, parcel 1 on Appendix A, he intended to occupy to the M-N fence line. (Respondent's Brief p. 9). However, defendant Cluff does not indicate to the court that when plaintiff Halladay purchased the Boardman piece, (1965) that plaintiff Halladay had already purchased the A-B-C-D property from Mayor Collard (1958) and therefore he owned the property up to the fence line. Defendant Cluff's quotation from the record is clearly not accurate and is intended to have the court believe that plaintiff Halladay purchased the Boardman piece with the intent of occupying to the fence line without actually receiving a deed to the property below the fenceline. However, plaintiff Halladay

already owned that property.

Both defendants Cluff and Bigelow further attempt to show that plaintiffs acquiesced in the M-N fence as a boundary by alleging that plaintiffs purchased the A-B-C-D property for the purpose of clearing title to the land already owned by plaintiffs. Plaintiffs' reason for purchasing the A-B-C-D parcel has absolutely nothing to do with acquiescence in the M-N fence as a boundary line. Plaintiff or his father already held record title up to the fence line prior to purchasing the P-M-N-O property from Mayor Collard. By purchasing that property, plaintiffs not only cleared up whatever record title problems they may have had, but also purchased additional ground. At the time plaintiffs purchased the A-B-C-D property, defendant Perry Bigelow testified that plaintiff Mack Halladay told him that he had purchased property in Mr. Bigelow's backyard. (R. 277). Plaintiff Halladay knew that he was purchasing property beyond the M-N fence line.

Defendants have cited no testimony or evidence in the record indicating any affirmative acquiescence by plaintiffs with respect to the M-N fence line, and plaintiffs have been unable to find any such evidence in the record. There is evidence that at the time plaintiffs purchased the property from Mayor Collard and that during the ten year period immediately preceding trial, plaintiff informed defendant Bigelow that he owned the property and that defendant Bigelow should not do anything with it. Furthermore, in 1978 plaintiff Halladay

prevented Perry Bigelow from building a potato cellar on the property. (R. 178, 277-278).

Although defendants cite Lane v. Walker, 29 Utah 2d 1199, 505 P. 2d 1199 (19730) for the proposition that acquiescence is more akin to indolence or inaction, essentially such indolence is found to form an implied agreement that the parties recognize a particular line as a boundary. To constitute a valid agreement which does not run afoul of the statute of frauds, there must be a dispute or uncertainty as to the correct boundary between the parties' respective properties. In the present case, there is neither dispute nor uncertainty as to the correct boundary, nor is there a basis to find an agreement between the parties. It is undisputed that the record titles of defendants Bigelow and Cluff do not include the P-M-N-O parcel. When he purchased the P-M-N-O property in 1958, plaintiff Mack Halladay knew that that boundary extended beyond the fence line and he so informed Perry Bigelow. The testimony appears to be undisputed that defendant Cluff and plaintiff Halladay have never had any discussion with respect to the M-N fence as a boundary between their properties prior to the initiation of this lawsuit. According to Madsen v. Clegg, supra, any implied agreement between defendant Cluff and plaintiffs that the M-N fence is a boundary runs afoul of the statute of frauds and is void.

Furthermore, for a presumption of boundary by acquiescence to arise, the alleged boundary must be between adjoining

landowners and there must be mutual acquiescence in the boundary for a long period of years, usually in excess of 20 years. Until 1958, plaintiffs were not adjoining landowners to defendants, at least as to the M-N property line. Until 1961, plaintiffs did not own any property north of defendant Cluff's property other than the disputed parcel. (Trial transcript of February 5, 1981, page 18). In 1975, defendant Cluff and defendants Bigelow were involved in litigation with each other as to the east-west boundary between their properties. At that time, defendant Cluff had prepared a plat of the property lines which indicated that her north boundary was approximately 50 feet short of the M-N fence line. (R. 232, February 25, 1981 Transcript, p. 18, Ex. 13). Thus, even if there was acquiescence by plaintiffs in the M-N fence as a boundary line, such acquiescence was not between adjoining landowners for a long period of years.

Plaintiffs further argue that the real purpose of the doctrine of boundary by acquiescence is to settle land titles. On the other hand, it is the established law of this jurisdiction that one cannot transfer property by parol agreement. "Land cannot be conveyed from one person to another by merely a change in possession, even though such change in possession continues for a long period of time." Tripp v. Bagley, supra, at 918. In their present case, plaintiffs knew that the M-N fence was not the boundary of their property and they so informed defendant Perry Bigelow when they purchased it. This

is not a case wherein the parties are in dispute as to the location of the true boundary and agree that a certain line shall become the boundary between the respective properties. In this case, plaintiffs owned to the M-N fenceline, they subsequently purchased ground south of the M-N fenceline, and now defendants are attempting to obtain title to the property subsequently purchased by plaintiffs. "When the true boundary is known, any parol agreement of the owners establishing the boundary elsewhere is void and unenforceable by virtue of the statute of frauds, which requires a conveyance of real property to be in writing." Madsen v. Clegg, supra, citing Tripp v. Bagley, supra. The doctrine of boundary by acquiescence therefore has no application to the present case and the judgment of the lower court should be reversed with respect to the P-M-N-O property.

CONCLUSION

The doctrine of boundary by acquiescence is clearly not applicable to the facts of this case. The evidence shows that plaintiffs have never affirmatively acquiesced in the M-N fence as a boundary line, and thus any showing of acquiescence must result from plaintiff's nonuse of the property. Any implied agreement that plaintiffs accepted the M-N fence as a boundary line is rebutted by the evidence which shows that as to defendant Cluff there was never any dispute or uncertainty as to the boundary and with respect to defendants Bigelow, plaintiff affirmatively told said defendants on many occasions that he

judgment with respect to the P-M-N-O property and quiet title to that property in plaintiffs.

Dated: July 12, 1982.

Brent D. Young

BRENT D. YOUNG
Attorney for Appellants

MAILING CERTIFICATE

Mailed two copies of the foregoing Reply Brief of Appellants postage prepaid, to S. Rex Lewis, Esq., Attorney for Defendants Bigelow, and to M. Dayle Jeffs, Esq., Attorney for Defendant Cluff, addressed follows this 13th day of July, 1982.

S. REX LEWIS
HOWARD, LEWIS & PETERSEN
Attorney at Law
120 East 300 North
Provo, Utah 84601

M. DAYLE JEFFS
JEFFS & JEFFS
Attorney at Law
90 North 100 East
Provo, Utah 84601

Brent D. Young
BRENT D. YOUNG