2011

JimPurkey and Jan Purkey v. Kent Max Roberts and Jilene Roberts : Reply Brief

Utah Court of Appeals

Charles W. Hanna; Law Offices of Charles W. Hanna; Attorney for Appellee.
Michael E. Day; Nathan Whittaker; Day Shell & Liljenquist; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

JIM PURKEY AND JAN PURKEY, Plaintiffs, v. KENT MAX ROBERTS AND JILENE ROBERTS*, Defendants/Cross-Claimants/ Appellant, v. DR. ROGER RUSSELL,* Cross-Defendant/Appellee. * – *Parties on Appeal*	Case No.: 20110365-CA Dist. Ct. Case No.: 070600015

APPELLANT'S REPLY BRIEF

Appeal from a Final Judgment and an Order denying Motion
to Alter or Amend the Judgment of the
Sixth Judicial District Court in and for Sanpete County,
The Honorable Marvin D. Bagley Presiding

Charles W. Hanna (1326)
LAW OFFICES OF CHARLES W. HANNA
50 W. Canyon Crest Rd.
Alpine, UT 84004
Attorney for Appellee

Michael E. Day (7843)
Nathan Whittaker (11978)
DAY SHELL & LILJENQUIST, L.C.
45 E. Vine St.
Murray, UT 84107
Attorneys for Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/RULES

OTHER AUTHORITIES

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S RULING ON WAIVER AND REMAND WITH INSTRUCTIONS TO ENTER JUDGMENT IN FAVOR OF MRS. ROBERTS ON QUIET TITLE.

The trial court found that "the fence between the Roberts and Russell was not on the boundary line, but encroached upon the Roberts' property by up to 14.5 feet." (R. at 679.) This finding is sufficient to establish a *prima facie* case for quiet title. Dr. Russell did not assert any affirmative defenses against this claim at trial (R. at 683), and he does not attempt to do so now. Therefore, if this Court reverses the trial court's ruling on waiver, it would be appropriate to instruct the trial court to enter judgment quieting title of the disputed property in favor of Mrs. Roberts. *See United States v. 449 Cases*, 212 F.2d 567, 573 (2nd Cir. 1954) (holding that an appellate court can instruct the district court to enter judgment when it appears that the findings of fact support it); *John Wagner Assoc. v. Hercules, Inc.*, 797 P.2d 1123, 1133 (Utah App. 1990) ("Based on the uncontested facts, we remand and instruct the trial court to find for Wagner.").

A. The trial court erred in concluding that the Roberts had waived their claim for quiet title.

In her opening brief, Mrs. Roberts gives five separate grounds as to why the trial court erred when it concluded that Mr. Roberts waived the Roberts' claim for quiet title in his trial testimony: first, the statement did not evince a clear and unequivocal intent to waive a right; second, he had no authority to unilaterally waive the claim without Mrs. Roberts' consent; third, Mr. Roberts could not waive the claim by his trial testimony, as such an act could only be accomplished by a motion made by the Roberts' counsel;

fourth, that the trial court's finding of waiver was an impermissible amendment of the pleadings; and fifth, that there was no basis to support the application of waiver, as there was no consideration or detrimental reliance on Dr. Russell's part. Mrs. Roberts will not rehash these arguments, but will simply answer Dr. Russell's responses.

With respect to the question of whether Mr. Roberts' statement manifested an unequivocal intent to waive his claim, Dr. Russell merely states that Mr. Roberts stated that "his only concern in this lawsuit was from his house 'going east.'" (Br. Appellee 11.) He does not address the fact that Mr. Roberts' statement was made in the context of the road to the west of his house, not the fence, or that the subject of the question was the Roberts' claim against the Purkeys, not Dr. Russell, or any of the circumstances brought up in Mrs. Roberts' opening brief that suggested that there was no intentional waiver. The context of the statement simply does not support intentional and unequivocal waiver of the Roberts' claim against Dr. Russell.

With regard to the question of whether Mrs. Roberts' approval would be required to effectuate a waiver, Dr. Russell argues that Mrs. Roberts did not repudiate Mr. Roberts' supposed waiver. However, he fails to give any reason or cite to any authority that would indicate that Mrs. Roberts had "some duty or obligation to speak" that would form the basis for a waiver based on silence. *See Soter's, Inc. v. Deseret Federal Sav. & Loan Ass'n*, 857 P.2d 935, 940 (Utah 1993). Also, Dr. Russell does not dispute that Mr. Roberts had no authority to waive Mrs. Roberts' rights with respect to the claim for quiet

title. Because Mr. Roberts could not waive the claim for quiet title without the consent of Mrs. Roberts, any such waiver would be ineffective.[1]

With respect to Mrs. Roberts' argument that voluntary dismissal of a pending claim must come through a motion made by counsel and the order of the court "upon such terms and conditions as the court deems proper," *see* Utah R. Civ. P. 41(a), Dr. Russell does not dispute that a client represented by counsel cannot move to dismiss its action and that such a motion must come through counsel. Instead, Dr. Russell states that "a court may dismiss a claim *sua sponte*, without a motion by the defendant." (Br. Appellee 14.) This statement is non-responsive. First, Dr. Russell cites Rule 41(b), which deals with *involuntary* dismissals, while a dismissal under these facts would be voluntary. As a waiver is a voluntary relinquishment of a known right, looking to the rule for involuntary dismissals makes no sense. Second, Rule 41(b) provides specific grounds for dismissing the action *sua sponte*. None of these grounds were cited by the trial court. As the alleged waiver was not submitted through counsel, by motion, the trial court improperly dismissed the Roberts' cause of action for quiet title.

Finally, with respect to the question of whether the court's determination of waiver was an improper amendment, Dr. Russell argues that because "Mr. Roberts' waiver took place at the trial of this matter . . . , Dr. Russell could not have anticipated [it]

---

1. In his brief, Dr. Russell suggests that he and Mrs. Roberts are now co-tenants. This misunderstands both the nature of the right that the trial court concluded was waived, and the legal effect of the trial court's decision. First, the trial court did not claim that Mr. Roberts waived his rights to the property. Rather, the trial court concluded that he had waived his claims against Dr. Russell for quiet title. (R. at 679, 683; Tr.2 50:16-18.) Second, a waiver is not a conveyance, and cannot be the basis for severance of a joint tenancy. There was no severance and Dr. Russell has no present interest in the subject property under the trial court's ruling.

and therefore could not properly plead the affirmative defense of waiver prior to the trial of this matter." (Br. Appellee 14.) This statement supports Mrs. Roberts' argument that Dr. Russell took no action in reliance on the waiver and therefore the trial court erred in not allowing the Roberts to withdraw the waiver. This statement also contradicts his argument that the Roberts' failure to object to his "testimony regarding his understanding of the location of the property boundary line and Roberts' past conduct which implied the correct location of the fence in question" supports the conclusion that waiver was tried by implied consent. (Br. Appellee 15.) Dr. Russell does not explain what testimony about events prior to the trial would have to do with the alleged waiver, which happened at the trial. Moreover, Dr. Russell's argument that the issue of waiver was tried by implied consent misses the point. Even if the trial court believed that there was implied consent to try the issue, the trial court would still have to consider the issue of prejudice to the Roberts before amending the pleadings, and allow a continuance so that the Roberts could meet the new defense. *See* Utah R. Civ. P. 15(b). Because Dr. Russell did not rely upon the waiver and the trial court did not allow the Roberts to refute the waiver, the trial court erred in concluding that the claim against Dr. Russell was waived.

B. Whether Mr. Roberts' statement waived the Roberts' claim for quiet title against Dr. Russell is a question of law reviewed for correctness.

Dr. Russell also points out that Mrs. Roberts did not marshal all the evidence in support of the trial court's judgment. However, a party is only required to marshal the evidence in favor of a challenged factual finding, not a challenged conclusion of law. *See Peirce v. Peirce*, 2000 UT 7, ¶ 17 n.4, 994 P.2d 193. As Mrs. Roberts notes in her

opening brief, since the issues raised in this appeal are questions of law, the marshaling requirement does not apply. (*See* Br. Appellant 1-2).

This Court has previously noted the difficulty of articulating the standard of review with respect to mixed questions of law and fact such as waiver. *See State v. Vigil*, 815 P.2d 1296, 1298-1300 (Utah App. 1991) (determining the proper standard of review for whether consent to search was voluntary). This Court analyzed this question based on the core functions of trial and appellate courts, noting that "the trial judge is in the best position to sift witness credibility and the accuracy of conflicting evidence," and that "collegial appellate courts" are in the best position to resolve "legal conclusions and ultimate facts." *Id.* at 1299. Ultimately, this Court concluded that

> the determinant factor in selecting the proper standard of appellate review for mixed questions of law and fact is whether the first step—elucidation of historical facts—or the second step—correct application of the proper rule of law—is challenged on appeal. While we normally do not intrude on the trial court's resolution in the first step, we independently assess the legal conclusions generated in the second step for correctness.

Id. at 1300.

In this case, the facts upon which the waiver is based are not in dispute and plain from the record. There are no issues of credibility or conflicting evidence for the trial court to weigh. Therefore, the question presented in this matter is a pure question of law.[2]

---

2. *See In re Estate of Uzelac*, 2005 UT App 234, ¶ 10, 114 P.3d 1164 (when the facts constituting the waiver are not in dispute, waiver is a question of law); *B.R. Woodward Marketing, Inc. v. Collins Food Service, Inc.*, 754 P.2d 99, 101 (Utah App. 1988) ("In this case, the material facts concerning Woodward's conduct . . . are undisputed. However, Woodward claims that its conduct does not compel the conclusion, as a matter of law, that it waived its right to compensation under the agreement."); *Vessels Oil & Gas Co. v. Coastal Refining & Marketing, Inc.*, 764 P.2d 391, 392 (Colo. App. 1988) ("Where . . . the facts are uncontested and the evidence before the trial court is entirely

C. Mrs. Roberts fulfilled the marshaling requirement in her opening brief.

Furthermore, Mrs. Roberts has adequately marshaled the evidence supporting waiver in her opening brief. "In order to properly discharge the marshaling duty," an appellant must present all of the evidence that supports the findings that the appellant challenges, and then "ferret out a fatal flaw in the evidence" to show why that evidence does not support the conclusion. *Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1053 (Utah App. 1994). While Mrs. Roberts did not specifically identify her efforts as "marshaling the evidence," she has fulfilled the substance of both requirements and has adequately discharged her marshaling duty. *See id.* at 1053-54 (clarifying the purposes of the marshaling requirement).

Mrs. Roberts presented all of the relevant evidence in support of the trial court's finding of waiver. In its written rulings, the trial court is clear that the "evidence"[3] it relied upon to make its determination of waiver consisted of Mr. Roberts' response to the

---

documentary, the waiver issue becomes a matter of law, and we are not bound by the trial court's findings."); *see also Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1240-41 (Ariz. App. 1984) (whether a letter constituted a repudiation of a contract is a question of law); *Nuco Plastics, Inc. v. Universal Plastics, Inc.*, 601 N.E.2d 152, 154-55 (Ohio App. 1991) ("However, whether the actions of appellant, which are facts to be found by the trial court, constitute a repudiation of the contract is a question of law.").

3. Calling Mr. Roberts' answer to the trial court's question evidence of waiver is a misclassification. Evidence is "something that tends to prove or disprove the existence of an alleged fact." *Black's Law Dictionary* 595 (8th ed. 1999). Words that have a legal effect, such as entering into an oral contract, are not evidence; rather, they are verbal acts. *See John C. Cutler Ass'n v. De Jay Stores*, 279 P.2d 700, 706 (Utah 1955) (Wade, J., concurring). Just as a written, executed contract is not "evidence" of a contract, Mr. Roberts' statement either constituted a waiver or it did not, but it is not "evidence" of a waiver, and the issue of weighing credibility does not come into play. *See id.* (explaining that verbal acts are not testimonial evidence).

trial court's questioning. (*See* R. at 679 (¶ 15); 880 (¶ 3).) Dr. Russell concedes this in his brief (*see* Br. Appellee 7-8, 10-11) and does not identify any other evidence in support of waiver that Mrs. Roberts failed to marshal. When a party shows that certain facts were not relied upon by the trial court in making its decision, those facts are not relevant and do not need to be marshaled. *Taylor v. Taylor*, 2011 UT App 331, ¶ 8, __ P.3d __; *Harding v. Bell*, 2002 UT 108, ¶ 21, 57 P.3d 1093. Further, Mrs. Roberts has pointed out the fatal flaw in this evidence by showing that, in context, Mr. Roberts' statement was not meant to apply to the claim for quiet title against Dr. Russell.

However, if this Court determines that Mrs. Roberts was deficient in any duty she may have had to marshal the evidence, it does not follow that "this Court should decline the Appellant's request to overturn the District Court's rulings in this matter." (Br. Appellee 9.) While parties are obligated to marshal the evidence supporting a challenged finding, this Court "retains discretion to consider independently the whole record and determine if the decision below has adequate factual support." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 20, 164 P.3d 384. Because this case deals with a narrow issue, the relevant portion of the record is not voluminous, and there is adequate citations and references to all of the evidence in Mrs. Roberts' opening brief, the Court would not become "a depository in which the appealing party may dump the burden of argument and research." *See State v. Larsen*, 828 P.2d 487, 491 (Utah App. 1992). Mrs. Roberts therefore requests that the Court decide the issues presented by this appeal, and to excuse any non-compliance as non-substantial. Finally, even if the Court were to decline to review the question of whether Mr. Roberts

intended to waive the cause of action for quiet title against Dr. Russell, there is still the question of whether the waiver is legally effective. As shown *supra*, it is not. Therefore, this Court should reverse the trial court's conclusion of waiver and direct the trial court to enter an order quieting title of the disputed property to Mrs. Roberts.

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S RULING ON TRESPASS AND REMAND WITH INSTRUCTIONS TO ENTER JUDGMENT IN FAVOR OF MRS. ROBERTS.

Dr. Russell's brief on this point simply recites the trial court's conclusions and fails to respond to any of Mrs. Roberts' arguments against those conclusions. Therefore, Mrs. Roberts stands on the arguments made in her opening brief. The trial court' finding that Dr. Russell's fence is encroaching on the Roberts' property (R. at 679) is sufficient for this Court to reverse and instruct the trial court to enter a judgment ordering Dr. Russell to cease trespassing by removing his fence from the Roberts' property.

III. THE COURT SHOULD REMAND WITH INSTRUCTIONS TO AWARD MRS. ROBERTS HER REASONABLE ATTORNEY FEES AND COSTS AS PER THE OCTOBER 14, 2009 ORDER.

Because the Roberts proved their *prima facie* case for quiet title and trespass against Dr. Russell in this matter and Dr. Russell did not plead or prove any affirmative defense, Dr. Russell did not prevail in his defense and so Mrs. Roberts is entitled to her reasonable attorney fees from May 27, 2009 to the present. Dr. Russell makes two points, which are addressed below.

First, Dr. Russell states that "this matter does not fall under any previously recognized exception to the general rule against awarding attorney fees in tort cases. Moreover, [Appellant] has cited no statutory reference to guide this court in awarding

attorney fees." (Br. Appellee 17.) This is false. As stated in pages 5 and 25 of Mrs. Roberts' opening brief, the award of attorney fees is authorized by the lower court's order of October 14, 2009, which provided as a condition of setting aside the judgment that "if Cross-Defendant does not prevail in his defense, Cross-Claimants shall be entitled to their reasonable attorney's fees from . . . May 27, 2009." (R. at 395.) A trial court can set reasonable conditions for setting aside a judgment. Utah R. Civ. P. 60(b) (allowing the court to set aside judgments "upon such terms as are just"); *Powerserve Int'l v Lavi*, 239 F.3d 508, 515 (2nd Cir. 2001) ("In determining whether to exercise its discretion to set aside a default, a district court has inherent power to impose a reasonable condition on the vacatur in order to avoid undue prejudice to the opposing party."); *Thorpe v. Thorpe*, 364 F.2d 692, 694 (D.C. Cir. 1966) ("In granting a motion to vacate a default judgment the District Court may impose reasonable conditions."); 47 Am. Jur. 2d *Judgments* § 713 (2011); *see also Barnard v. Wassermann*, 855 P.2d 243, 249 (Utah 1993) (recognizing a district court's inherent authority to award attorney fees). Dr. Russell did not raise the issue of the reasonableness of the trial court's order below, nor does he attempt to argue this now.

Second, Dr. Russell states that the trial court "found that no party prevailed in this litigation . . . ." (Br. Appellee 17.) This is not exactly true—the trial court did not *find* that no party prevailed, rather the trial court made this is a conclusion of law. The Roberts' point in bringing up this issue is that the trial court's conclusion was in error. While it is true that "trial courts apply a flexible and reasoned approach to the determination of who prevailed at trial," *Gallegos v. Lloyd*, 2008 UT App 40, ¶ 13, 178 P.3d 922, this

discretion is not without bounds. Based on the language and purpose of the Court's previous order, the failure of Dr. Russell to provide any affirmative defense, and the Roberts successfully proving their *prima facie* case for quiet title and trespass, for the trial court to say that Dr. Russell had "prevailed in his defense" was an abuse of discretion.[4] This Court should reverse and instruct the trial court to determine an appropriate award of attorney fees in this matter, including attorney fees expended on appeal.

CONCLUSION

For the foregoing reasons, respectfully asks this Court to reverse the trial court's decision and remand for a new trial in this matter, and for an order of attorney fees and costs expended on appeal.

RESPECTFULLY SUBMITTED this 30th day of November, 2011.

/S/ Nathan Whittaker
Nathan Whittaker
DAY SHELL & LILJENQUIST, L.C.
Attorney for Defendant/Appellant

4. Again, Mrs. Roberts met whatever marshaling burden that she may have had in her opening brief. "Prevailing in the litigation" is either a conclusion of law or an ultimate fact; either one is subject to *de novo* review. *See Vigil*, 815 P.2d at 1299. Mrs. Roberts reviewed both findings of fact that could have led to this conclusion—the court's *sua sponte* finding of waiver and the fact that the boundary was not off by 32 feet as stated in the cross-complaint—and showed why they were not sufficient grounds for the trial court to conclude that Dr. Russell had prevailed in his defense. (*See* Br. Appellant 25-26; 25 n.8.)

PROOF OF SERVICE

I hereby certify that I caused two copies of the foregoing brief to be placed in the United States Mail, first class, postage prepaid, to the following:

Charles W. Hanna
LAW OFFICES OF CHARLES W. HANNA
50 W. Canyon Crest Rd.
Alpine, UT 84004

DATED this 30th day of November, 2011.

/S/ Nathan Whittaker