

1958

Max E. Birch and Fontella Birch v. Forrest W. Fuller and Judith Hyde Fuller et al : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Birch v. Fuller*, No. 8822 (Utah Supreme Court, 1958).
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In The Supreme Court

of the State of Utah

FILED

1958

MAX E. BIRCH and FONTELLA BIRCH,
his wife,

Clerk, Supreme Court, Utah

Plaintiffs and Respondents,

vs.

Case No.
8822

FORREST W. FULLER and JUDITH
HYDE FULLER, his wife; KENNETH
W. JUDD and RUBY F. JUDD, his wife,

Defendants and Appellants.

BRIEF OF APPELLANTS

8822 Appeal from the Fourth Judicial District Court
of the State of Utah
Honorable Maurice Harding

GORDON I. HYDE and
FORREST W. FULLER,

Attorneys for Appellants.

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In The Supreme Court of the State of Utah

MAX E. BIRCH and FONTELLA BIRCH,
his wife,

Plaintiffs and Respondents,

vs.

FORREST W. FULLER and JUDITH
HYDE FULLER, his wife; KENNETH
W. JUDD and RUBY F. JUDD, his wife,

Defendants and Appellants.

Case No.
8822

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This is an appeal from a judgment granted plaintiff-respondents by the District Court of Duchesne County, State of Utah, against the defendant-appellants for trespass and slander of title.

On or about January 31, 1957, the respondents entered into a Uniform Real Estate Contract with defendant Robert E. Sather (Plaintiffs' Exhibit "A") whereby the respondents agreed to sell and Sather agreed to buy the ranch of respondents. On or about March 31, 1957, Sather and the respondents executed a mortgage in favor of Security Loan and Finance Corporation (Plaintiffs'

Exhibit "C"). Concurrently therewith the respondents and Sather, Judd and Fuller entered into the following agreement:

"This is to acknowledge that Kenneth W. Judd and Forrest W. Fuller agree to make all payments upon the foregoing note and to save Robert R. Sather completely harmless therefrom. Max E. Birch and Fontella Birch agree to credit the principal and interest of said note upon their Uniform Real Estate Contract with Sather, and Sather agrees to assign all of his interest in and to said contract to Fuller and Judd at such time as the foregoing note to Security Loan and Finance is paid in full together with interest thereon." (Plaintiffs' Exhibit "I").

On or about the 23rd day of April, 1957, appellant Fuller paid the sum of \$290.00 to the finance company in accordance with said agreement and had the Sather-Birch real estate contract recorded. On or about May 1, 1957, Max E. Birch and Sather entered into an option agreement for the same land described in the prior Uniform Real Estate Contract (Plaintiffs' Exhibit "E") without notice to any of the other parties. Subsequent thereto, on or about May 4, 1957, defendant Sather executed a release of the Uniform Real Estate Contract (Plaintiffs' Exhibit "B").

Subsequent to the execution of the Sather-Birch option, appellant Kenneth W. Judd and defendant F. A. Hatch entered upon the property of respondents, built corrals and fences thereon and peacefully engaged in varied agricultural pursuits with the knowledge of respondents and without objection on the part of respondents. Respondents' admitted reason for their lack of objection was the Sather-Birch option agreement (Transcript, Birch D 7-9, and C 53-54).

At the close of Plaintiffs' case defendants moved for dismissal and when denied entered a stipulation into the record as

to what defendants' witnesses would testify to. The Court dismissed as to the defendants Sather upon motion of respondents (Record, 47); found that "no money judgment is to be entered against the defendant, F. A. Hatch."; and entered judgment against appellants for \$128.00 "actual damages" and \$500.00 attorney's fee for slander of title, and, \$877.00 less \$435.0 set-off for trespass. From this judgment and the order of the Court denying appellants' motion to dismiss appellants appeal.

STATEMENT OF POINTS

I. THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS RESPONDENTS' FIRST CAUSE OF ACTION AND IN GRANTING JUDGMENT THEREUNDER FOR SLANDER OF TITLE.

II. THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN GRANTING RESPONDENTS JUDGMENT UPON THE SECOND CAUSE OF ACTION FOR TRESPASS.

ARGUMENT

POINT I

THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS RESPONDENTS' FIRST CAUSE OF ACTION AND IN GRANTING JUDGMENT THEREUNDER FOR SLANDER OF TITLE.

"The elementary principle is well settled that malice, express or implied, is an essential element in actions for slander of title . . . It follows that no action will lie where a statement in slander of title or property, although false, was made in good faith with probable cause for believing it, . . . Again, one who has reasonable

ground to suppose himself possessed of the legal title to lands, or an equity therein which would enable him to maintain an action for a conveyance, is not liable in damages in an action for slander of title." 33 AMERICAN JURISPRUDENCE 313, 314, Section 348.

"Malice or want of good faith and want of probable cause are essential elements of the action of slander of title, and damages cannot be recovered where it appears that such element is absent. Where defendant acts in pursuance of a bona fide claim which he is asserting honestly, although without right . . . such defendant will not be penalized in damages for asserting such bona fide claim in good faith." WARD v. MID-WEST & GULF CO., 97 OKLA. 252, 223 P.170.

"Had plaintiff introduced evidence showing the tax deed to be patently void on its face, or had he established that defendant had conspired with (another) . . . or had he introduced any other evidence indicating the mortgage was recorded in bad faith to cloud plaintiffs' title he might have established his right to recover such damages as are recoverable under a theory of slander of title, but nothing of this kind appears in the record." DRAPER v. J. B. and R. E. WALKER, INC., (Utah Supreme Court) 204 P. 2d 826.

There is nothing in the record to indicate that plaintiffs' Exhibit "I", the agreement of Sather to assign to appellants, or the lis pendens based thereon is patently void, and no evidence in the record to indicate that the lis pendens was filed in bad faith. In fact it is manifestly apparent from the record that Sather and Birch, having full knowledge of the equitable interest of the appellants acquired by virtue of the agreement set forth in said Exhibit "I", and the subsequent payment made by Fuller, conspired to defeat such interest and that the lis pendens was filed in good faith to protect such equity. The record would not permit any contrary connotation even if the agreement were

declared to be null and void and such declaration was supported by some small shred of evidence in the record.

Absent any showing of bad faith on the part of the appellants and any knowledge on their part that the terms of such agreement had been *lawfully* abrogated there was no evidence to support respondents' contention that appellants slandered their title without cause and such cause of action should have been dismissed.

POINT II

THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN GRANTING RESPONDENTS JUDGMENT UPON THE SECOND CAUSE OF ACTION FOR TRESPASS.

"In an action of trespass the board rules of evidence in civil actions . . . are applicable; . . . The principle is fundamental that the burden of proof in any cause rests upon the party who asserts the affirmative of an issue . . . Where several persons are engaged together in a common purpose and a trespass is committed by one or more of them, assent thereto by the others is presumed only if the common design is unlawful. Where the object to be accomplished is a lawful one, assent is a matter of fact to be proved. 52 AMERICAN JURISPRUDENCE 889, Trespass, Sections 75, 76, 77.

The record is entirely barren of any evidence that the appellants, Judith Hyde Fuller, Ruby F. Judd, and Forrest W. Fuller, ever entered upon the land of the respondents and/or ever performed any acts resulting in the damage complained of. Likewise is the record barren of any shred of evidence that the co-defendants Kenneth W. Judd, F. A. Hatch and/or their employees were acting under the control, at the direction, for the

benefit, or with the assent of said three named appellants. Nor is there any evidence in the record that any of the parties were acting in concert one with the other. "While the plaintiff need not prove his case beyond a reasonable doubt, evidence affording only a basis for mere speculation and conjecture as to the cause of plaintiffs' injuries is wholly insufficient as a basis upon which to rest a verdict for damages." 52 AMERICAN JURISPRUDENCE 892, Trespass, Section 80.

In this connection it is significant to note that the trial Judge found with respect to F. A. Hatch, upon facts much stronger than exist against these respondents, that he was not liable for a money judgment in trespass. It is also significant to note that the case against the co-defendants Sather, named in all of the agreements with respondents, was dismissed upon the motion of respondents. If there is any basis for liability against respondents Judith Hyde Fuller, Ruby F. Judd, and Forrest W. Fuller, it must, if at all, exist outside of the record.

With respect to the appellant, Kenneth W. Judd, it must be admitted that he entered upon the land of respondents, but with the consent of respondents. (Transcript, Birch, D 7, 8, 9; C 53-54). In *BOBO v. YOUNG et al*, 61 So. 2d 814, it was stated, "... if an owner of land consents for another to go upon it and the other acts on that consent and incurs labor and expense in connection therewith, that consent cannot be later withdrawn, nor is the other party liable in damages for trespass."

The respondents made no attempt to distinguish between the damages caused by appellant Judd and the defendant Hatch, and further made no effort to distinguish between damage done prior to July 4, 1957, when respondents ordered Hatch off the property (Transcript, Birch, 4 14-15) and damages for subsequent entries. It may thus be observed that from the record

only pure conjecture as to what part of the damages Kenneth W. Judd was directly responsible for, if any, and as to what damages, if any, accrued after July 4, could determine any liability. Conjecture and speculation upon the part of the trier of the facts should not replace plaintiffs' burden of proof. Since the Court apparently found some excuse for the admitted and proved trespasses of Hatch it then becomes imperative to determine which, if any, of the damages were caused by Judd or his agents and which by Hatch, for "when two or more tort-feasors acting independently of each other inflict an injury . . . one cannot be held liable for the trespasses of the other . . . " 521 AMERICAN JURISPRUDENCE, Trespass, 861, Section 31. From the record it becomes manifestly apparent that no such determination is possible.

CONCLUSION

The facts in this case do not appear to be materially in conflict. The exhibits were introduced and identified by respondents and all testimony referred to herein was from witnesses called by respondents. The respondents have fallen fatally short of proving either the elements of slander of title or with any slight certainty facts necessary to hold appellants liable in trespass.

The denial by the District Court of appellants' motion to dismiss and the judgment granted were in error and should be reversed.

Respectfully submitted,

GORDON I. HYDE and FORREST
W. FULLER, Attorneys for

Defendant-Appellants.