

1960

Lawrence H. Stratford and Ella L. Stratford v. George G. Wood and Leah C. Wood : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

APR 1 1960

LAWRENCE H. STRATFORD and
ELLA L. STRATFORD,

Plaintiffs and Respondents,

—vs.—

GEORGE G. WOOD and LEAH C.
WOOD, his wife,

Defendants and Appellants.

Supreme Court, Utah

BRIEF OF RESPONDENTS

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Defendants and Appellants.

Case No. 9198

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

As stated in appellant's brief, this case involves an action to quiet title to real property and for damages arising out of the use of respondents' property by appellants. Appellants' answer claimed a prescriptive right to the use of respondents' property. By the pre-trial order, the issues of the case were designated as being three in number, as follows: (1) Whether or not there was a

prescriptive use as claimed by appellants; (2) The location of the survey line between the property of appellants and that of respondents, i.e., whether the correct survey line is that established by Robert A. Wilkins, or that fixed by Bush & Gudgell; (3) The damages to respondents (R. 6).

Rather than approaching the facts of the case by way of an abstract of the trial transcript, as was done in appellants' brief, respondents believe a chronological approach will prove more helpful to the Court in understanding the case. At the time of the trial and for some years prior, respondents were the owners of Lots 11 to 13, inclusive, and appellants were the owners of Lot 10 and part of Lot 9 of Block 5 of the Groves Subdivision in Emigration Canyon. These properties adjoin one another. There is no fence or other physical dividing line between the two properties.

From 1928 until 1939, Lots 11 to 13 were owned by Emeline L. Whitney. In 1939 this land was conveyed to respondents (Exh. P-2, pages 19, 24). During the period from about 1927 until 1941, Lot No. 10 was owned by Mrs. Whitney's daughter-in-law, Mrs. Edwin Whitney (R. 117; Exh. P-10; R. 121). In 1941, Lot No. 10 was conveyed to James A. Stevenson (Exh. P-10), who conveyed it to appellants in 1943 (Exh. P-12).

At the time the Edwin Whitneys acquired Lot 10, there were stakes on all four corners of the property, and these stakes were recognized as the boundary line between Lots 10 and 11 (R. 117). Mr. Whitney testified that the

location of the boundary line between Lots 10 and 11 as the property was recognized by his mother and himself during the time they owned the property was within a foot to a foot and a half of the location of the corner as established by the survey of Bush and Gudgell (R. 117-8). On motion of appellants' counsel, the evidence of where the Whitneys recognized the property line to be was excluded by the Court. Counsel contended, in obtaining the exclusion of this evidence, that there was no showing that the stakes which the Whitneys recognized as the boundary line were survey stakes (R. 121).

Prior to 1943, when appellants acquired Lot No. 10, they had never been on the property (R. 91). At the time appellants purchased the property there were two patio areas to the north of their cabin, in much the same location as they are presently located on the land (R. 85). Appellant testified that they use [present tense] these patio areas when they have guests come to their cabin (R. 86). There was no evidence as to how early appellant started this use, nor how frequent the use was.

In June of 1954, appellants built a cabin on Lot No. 11, owned by respondents (R. 45; 51), and also constructed a large concrete picnic table on one of the patio areas. At the time the cabin was being completed, respondents had a conversation with appellant and requested that he remove the cabin from respondents' property (R. 47, 52). Respondents repeatedly requested appellants to remove the cabin, but appellant would only respond by asking how they knew it was on respondents' land (R. 47).

As a result of these conversations, respondents had surveys made of the property, in an effort to get appellants to remove the cabin from respondents' property, which he never did (R. 48-9).

The first survey was made by Robert A. Wilkins, a man 72 years of age. He testified he had not located the section corner to which the subdivision was tied (R. 72). He stated that in 1937 he had surveyed some land in the vicinity, and at that time he had seen a sandstone monument at what he determined was the corner of Lot 13 of Block 17. In making his survey in 1956, the sandstone monument was not to be found (R. 71), so he commenced his survey of the property from a place which his recollection told him the monument had been 19 years before (R. 70-3). Starting from this beginning point, he ran his survey by means of traverse lines (R. 73), the angles on which he turned by the use of the compass of his transit (R. 78). He testified that he did not check the accuracy of his traverse line by running the traverse line back to his beginning point, but rather had only run his traverse line to the property (R. 83).

The official plat of the Groves Subdivision contains no reference to any sandstone monument, such as Mr. Wilkins testified he had tied his survey in 1937 (Exh. P-4).

The second survey made of the property by respondents was conducted by George Gudgell of Bush & Gudgell. In making his survey, the section corner to which the subdivision is tied was located (R-14), and the survey

run from there by the use of the vernier scale on the transit to turn angles. A traverse line was run up to the property and a return traverse line was run to check the original, which closed accurately to approximately one and a half inches (R. 107). In addition to tying the survey to the section corner, Mr. Gudgell checked his survey line against two county monuments placed in the road up the canyon, which are in turn tied into the section corner by the Salt Lake County surveyor. Here again there was a very close check to his survey line (Exh. P-3; R. 15-16). In running up the canyon to respondents' property, Mr. Gudgell also tied in several fence lines which checked out quite close to his survey (R. 16). Among the natural monuments which Mr. Gudgell checked to on his survey was a rock wall and fence corner dividing appellants' property from that of his neighbor to the south and this checked very close, indicating appellants under the Gudgell survey has the entire eighty feet of land which they purchased, independent of the patio area which was in conflict at the trial (Exh. P-5; R. 21).

Mr. Wilkins located the property line 17.2 feet northerly from Mr. Gudgell's location. The cabin built by appellants was ten feet north of Mr. Wilkins line on respondents' property. The importance of the testimony of Mr. Wilkins as to how he ran his survey line was demonstrated to the jury by Mr. Gudgell who showed them the difference between turning angles with a compass versus turning them with the vernier scale of the transit. The transit compass is only divided into 360

degrees. The vernier scale on the transit accurately divides each of the 360 degrees of a circle into 60 parts so that the chance of error in turning the angle is greatly minimized (R. 106). Further, by the use of a compass, the presence of any metallic substance in the near vicinity can pull the compass needle off. Mr. Gudgell testified that a metallic pencil in the surveyor's pocket could pull the compass off as much as three or four degrees if the pencil were within three or four inches of the compass (R. 107).

A third survey line was made by Mr. Arnold Coon for appellants. He located the division between the properties three-eighth of an inch from where Mr. Gudgell did (R. 114).

Appellants had the use of Lot No. 11 for a period of five and one-half years from June 1954 to the time of trial. Respondents did not have any use of the property during that period while they were attempting to get appellants off (R. 54). Respondents therefore claimed damages for the loss of use of the premises during that period. Further respondents claimed damages for the cost of removing the cabin from their property. Mr. Ketchum testified as an expert that if the cabin were to be removed without substantial damage to the trees and foliage on the lot, it would cost \$100.00 (R. 30-1).

Mr. Holt testified as an expert witness that the value of Lot 11 was \$2500.00 (R. 35), and that the rental value of the land would be \$250.00 per year (R. 36). On examination by the Court, the witness testified that the

land was of value to the public only for cabins.

At the conclusion of appellants' case, a motion for a directed verdict was granted on the issue of whether or not appellants had established a prescriptive use on respondents' property. No question of the correctness of the court's granting of this motion is made on this appeal.

At the time counsel for appellants was making his arguments to the jury, he made the statement that the property in dispute between the two surveys had been used by appellants' predecessors for 35 years. Respondents objected to this argument and the court sustained respondents' objection. After counsel had completed his argument and the jury had retired, the court stated the matter into the record, and the parties thereupon stated their positions with respect to the excluded argument (R. 138-40).

STATEMENT OF POINTS

POINT ONE

THE ARGUMENT OF COUNSEL AS TO USE OF THE PROPERTY BETWEEN THE TWO SURVEY LINES WAS IMPROPER, AND THE TRIAL COURT PROPERLY EXCLUDED SUCH ARGUMENT.

POINT TWO

THE COURT COMMITTED NO ERROR IN CONNECTION WITH THE TESTIMONY OF WITNESS COON.

POINT THREE

THE COURT'S INSTRUCTIONS RESPECTING DAMAGES IS A CORRECT STATEMENT OF THE LAW WITH RESPECT THERETO.

ARGUMENT

POINT ONE

THE ARGUMENT OF COUNSEL AS TO USE OF THE PROPERTY BETWEEN THE TWO SURVEY LINES WAS IMPROPER, AND THE TRIAL COURT PROPERLY EXCLUDED SUCH ARGUMENT.

At the conclusion of appellants' case, the trial court granted a motion for a directed verdict on the issue of whether or not appellants had any prescriptive right to the use of the respondents lands. No error is assigned to this ruling on appeal, and therefore, it must be deemed to have been proper.

There were therefore only two issues for the jury to determine: (1) whether the Gudgell survey was correct, or whether the Wilkins survey was correct; and (2) the amount of damages to which respondents were entitled. There was no contention made for a boundary line by acquiescence.

Prior to the time that the court had made its ruling on the question of prescriptive rights, there was certain evidence which could properly come into the case for its probative value on the question of prescriptive use, which would have been improper were that issue not involved in the case. A brief examination of this evidence is therefore appropriate to determine first of all, whether counsel's remarks were supported by the evidence, and secondly whether this evidence could properly be considered as bearing upon the two issues which were submitted to the jury.

On the question of how the property was used, there were only two witnesses whose testimony touched upon this point: Appellant and Edwin Whitney.

Appellant first moved onto the property in 1943. He was asked to describe the condition in 1943 of the area between his main cabin and the sleeping cabin which he built. He described two patio areas and a generator house as being in the area (R. 85). In addition, he volunteered two additional pieces of information: (1) that the concrete on the patio had been built by Ed Whitney in 1924 and contained Mr. Whitney's son's initials "T. W.", and (2) that Mr. Whitney generated the electricity for his house from the generator shed (R. 85). He next testified that the patio areas are the same size now as they were in 1943, that he built a concrete table to seat 17 persons on on patio, and that his wife uses the other one for a crowd of people she gets up there. Important in this connection is that Mr. Wood was testifying in the present tense in connection with the use of the patio areas by him and his wife (R. 86).

Upon cross examination Mr. Wood testified that he had never been on the property until 1943 when he purchased it (R. 91). He testified that he did not know of the way the property was used by his immediate predecessor, Mr. Stevenson, except that Mr. Stevenson didn't use any of the property very much based upon the condition of the main cabin when they bought the property (R. 91). He testified that he could not say one way or the

other as to whether Mr. Stevenson used the patio areas (R. 92).

The other witness who offered any testimony as to the use of the property was Mr. Edwin Whitney. His testimony was offered after respondents' motion for directed verdict was granted by the court. His testimony offers an interesting comparison with the matters which counsel attempted to argue at the trial, and which he states as being a fact in the brief. First, he testified that he acquired his property in 1927 (R. 114), three years after he is supposed to have built the patios according to appellant's testimony. He and his mother, who owned the Stratford lot at this time, recognized a boundary line very close to that established by Mr. Gudgell, according to some stakes which were located at the corners of the property when he acquired it (R. 117-8).

To Mr. Whitney's testimony, appellants' counsel objected on the basis that the stake to which Mr. Whitney referred as being the boundary line recognized by him and his mother was not shown to be a surveyor's stake (R. 121). The court then ordered the jury to disregard Mr. Whitney's testimony as to the stakes on the property as not being shown to be a correct survey line (R. 123).

From the foregoing, it becomes apparent that there was no competent evidence which was admitted as to any past use of the area between the two survey lines. Taking appellants' testimony at full value, even though it is obvious that he had no personal knowledge whatsoever

of the true facts prior to 1943, we have only that Mr. Whitney built two patios and a generator shed on his mother's property. It should be rather obvious that a son can build structures on his mother's land without his acts meaning the son claims ownership of the land or even of the structures. There is no evidence whatsoever as to how the property was utilized prior to June of 1954 when Mr. Wood built the picnic table and cabin. Gauging counsel's arguments in the light of the evidence manifests that it was improper for him to argue to the jury that the land between the Wilkins and Gudgeall survey had been occupied for 35 years by the owners of the Wood cabin, when the evidence does not support the statement, and the court had ruled out any question of adverse user.

If, as appellants contend, the parties owning appellants' property had used the area between the two surveys for a period of 35 years, it is apparent that appellants would have been entitled as a matter of law to a prescriptive right to use the property. Yet appellants do not argue that the court committed error in directing a verdict that appellants had no prescriptive right by 20 years user.

The law is very clear that counsel must keep his argument confined to the questions in issue and the evidence relating to these issues.

In 53 Am. Jur. 385, Trials, Section 480, it is said:

"It is fundamental that the argument of counsel should at all times be confined to the questions

in issue and the evidence relating thereto adduced at the trial, and such inferences, deductions, and analogies as can reasonably and properly be drawn therefrom. There is no rule of trial practice more universally accepted and applied than the rule that counsel may not introduce into his argument to the jury statements unsupported by evidence produced on the trial and made not as expressions of belief or opinion, but as assertions of fact. Judicial censure of misstatements of the evidence by counsel in arguing their case or statements of facts not in evidence or not warranted as a deduction from the evidence has been equally emphatic in both civil and criminal cases."

See also 88 CJS, p. 354, Trials, Section 181 (a).

In his argument Counsel was attempting first to bring in matters which were not in evidence as to the use to which the land lying between the survey lines had been put; and secondly to argue a matter which was no longer an issue in the case, since the court had determined as a matter of law that appellants and their predecessors in interest had failed to prove a prescriptive use of respondents' property.

The sole issue for the jury in this connection was whether the Bush & Gudgell survey or the Wilkins survey was correct. Absent a showing of a boundary by acquiescence, adverse user, or a prescriptive right the question of how the property was used is completely immaterial. This was pointed out by appellants' counsel in obtaining the exclusion of Mr. Whitney's testimony of the recognized property line prior to Mr. Wood's acquisition.

The jury had before it the testimony of three expert witnesses, each of whom had measured to location of the division line between the properties. An examination of the beginning point technique used by Mr. Wilkins and the methods used to run his survey line makes it clear as to why the jury chose to believe the correctness of the line as found by both Mr. Gudgell and Mr. Coon. Appellants under the survey of Bush & Gudgell have the full 80 feet which they purchased, and have no right whatsoever to any of respondents' land.

POINT TWO

THE COURT COMMITTED NO ERROR IN CONNECTION WITH THE TESTIMONY OF WITNESS COON.

Arnold W. Coon, a licensed engineer and land surveyor, was called as a rebuttal witness by plaintiffs. He had been retained by the appellants to check the location of the division between appellants and respondents property (R. 110). He had previously checked Mr. Gudgell's calculations and procedures in order to determine their accuracy (R. 110). Thereafter he ran an independent check of the location of the Wilkins survey and of the Bush & Gudgell survey and tied in both surveys at that time (R. 111). The Coon survey located the property boundary line about three-eighths of an inch in a North-South direction and two and five-eighths inches in an East-West direction from the Bush and Gudgell survey location (R. 114). He had found the location of the Wilkins boundary line to be 17.2 feet distant from that of

Mr. Gudgell in a line which would be approximately parallel to the front lot line of Lot No. 11 (R. 112-13).

The witness was asked, based upon his own calculations of the line, whether in his opinion the Wilkins location of the line was correct or incorrect. The court, prior to the witness answering the question, asked him whether or not he had a professional knowledge that he was calling upon and was not making a guess as to whether or not the Wilkins survey was correct (R. 113). When the witness stated that he did, the court permitted him to answer question, and the witness testified that his survey would indicate that the Wilkins survey was incorrect (R. 114).

Counsel for appellants objected that the question was leading, suggestive and calling for a conclusion which was not the province of the jury. The objection was overruled (R. 113). This ruling of the Court is argued on appeal as being reversible error.

The opinion expressed by witness Coon was based upon his own investigation and expert knowledge. He was testifying as an expert in a field as to which the jury as laymen would need assistance in determining the question which was before them. It is submitted that this form of expert opinion would not be objectionable as being "within the province of the jury" even in those jurisdictions still adhering to this illogical rule of evidence.

However, without delving into the academics of whether or not this form of expert opinion goes to the

ultimate issue of fact or not, it is submitted that the rules of evidence enunciated by this Court render this form of opinion evidence unobjectionable. In the recent cases decided by this court bearing upon the point raised in appellants' brief, this court had adopted the position expressed in *Wigmore on Evidence*, Third Edition, Sections 1920 and 1921.

The most recent Utah case found bearing upon this point is the case of *Joseph v. W. H. Groves Latter-day Saints Hospital*, 7 Utah 2d 39, 318 P (2nd) 330. In disposing of certain points assigned as error, the court says:

"The first is plaintiffs contention that a nurse who cared for deceased could not express an opinion that she was given good nursing care. The objection was on the ground that this was the very issue to be decided by the jury, and the witness thus invaded its province. This objection is untenable. Whether the testimony of an expert is as 'to the very issue before the jury' is not a proper test as to its admissability. Where the subject of inquiry is in a field beyond the knowledge generally possessed by laymen, one properly qualified therein may be permitted to testify to his opinion as an expert. If the opinion evidence is such that it will aid the jury in understanding their problems and lead them to the truth as to disputed issues of fact, it is competent and admissable, irrespective of whether it bears directly on the ultimate fact the jury is to determine. And the trial judge is allowed a wide discretion in regard to the allowance of such testimony."

The dissent in this case by Justices McDonough and Henriod goes to other points involved in the case. On the

point above cited, the dissenting opinion says: "Since I agree with the court's disposition of the other errors assigned, I would affirm the judgment below."

Noteworthy in connection with the point here under consideration is that the Committee on Uniform Rules of Evidence, appointed by the Utah Supreme Court, in its Final Draft of the Rules of Evidence submitted to this Court on March 2, 1959, at page 31, in Rule 56 (4) recommends the adoption of the rule as stated in the Joseph case above cited, as follows:

"(4) Testimony in the form of opinions or inferences otherwise admissible under these rules, is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact."

POINT THREE

THE COURT'S INSTRUCTIONS RESPECTING DAMAGES IS A CORRECT STATEMENT OF THE LAW WITH RESPECT THERETO.

Although, as appellants' brief states, the main issue of the case involves the question of entitlement to the property as discussed above, appellants also contend the court erred in giving Instruction No. 13 which dealt with damages which the jury might award to respondents.

Upon the instructions given, the jury awarded plaintiffs the sum of \$295.00.

Before discussing the legal questions involved, comment should be made on the conversations of court and counsel relative to a settlement of the damage ques-

tion after the jury retired to deliberate and as counsel were taking exceptions to instructions. Appellants' brief conveys the impression the court was intending to change its complete instruction with respect to damages. This is not the case. After the jury retired to deliberate, the court suggested to the parties that they might resolve their differences with regard to damages by a stipulation that regardless of the jury's verdict, defendants would pay plaintiffs one-half the cost of the survey which the jury found was correct (R. 143). The court was only expressing a personal impression of a satisfactory settlement of the damage question (which would have amounted to \$240.00 as the case turned out). Apart from the possibility that the parties might stipulate to such a settlement, these comments were not intended to have any effect in the case.

Turning then to the instruction given, each part will be discussed in the order given by the court. Part (a) of the instruction was a correct statement of the law that for wrongful detention and use of property the measure of damages is the reasonable rental value of the premises during the period for which the damages are claimed. See *Van Wagoner v. Whitmore*, 58 Utah 518, 199 Pac. 670 at 677-8; 15 Am. Jur., p. 540, Damages, Section 131.

Mr. Holt, a real estate appraiser, was the only witness with respect to the value of the premises. He testified that the fair market value of the lot used by defendants was \$2500.00 (R. 35), and that the reasonable rental value for such a lot would be \$250.00 per year (R. 36).

In appellants' brief it is contended there is no evidence of any rental value, based on the witness's statement in response to a question from the Court that property was of value to the public only for cabins.

The net effect of this testimony is that of creating a factual question for the jury as to what was the reasonable rental value of the property, and the Court so instructed the jury. Appellants used respondents' property for five and one-half years as a cabin site. This was the precise use for which the land had its value.

Part (b) of the instruction dealt with cost of removal of structures put on land by appellants and restoration of premises by plaintiff. The costs of removing structures from premises wrongfully placed thereon and restoring the premises to their former condition is recoverable as damage against the wrongdoer. *Blood vs. Cohen*, 330 Mass. 385, 113 N. E. 2d 448. The court instructed the jury that they could take into account that respondents might not incur any expense for this item unless respondents desired to remove the structures. Mr. Ketchum, an expert witness with respect to demolition and moving of structures, testified that in order to remove the structure without substantial damage to trees and foliage, it would cost respondents \$100.00 (R. 31).

In part (c) of the instruction, the court instructed that the jury could award to respondents *as damages* one-half of the survey costs which they might find respondents were required to expend as a result of de-

endants acts in putting structures on respondents land and refusing to remove them. The evidence is clear that in the conversations between appellants and respondents, appellants indicated that if respondents could demonstrate where the correct property line was, appellants would remove the structures (R. 47, 87). Respondents advised appellants that if they would not remove the cabin otherwise, respondents would be forced to have the survey made to show where the correct line was (R. 47-8). The survey costs in this case are not contended for as a matter of taxable costs, such as the authorities cited in appellants' brief consider, but rather as damages directly and proximately resulting from appellants' tortious conduct in erecting a cabin on respondents' land and refusing to remove it.

It is submitted that in such a case the entire amount of the survey expenses should be recoverable. However, the trial court followed the ruling of this court in the case of *Davis vs. Davis*, 111 Utah 324, 178 Pac. (2nd) 394, wherein this court approved the assessment of costs of surveys of land evenly between the landowners in an action between adjoining landowners involving the location of the true boundary line.

Here we have a situation where respondents would not have incurred the survey costs but for appellants building the cabin on respondents' land. In such a situation, these survey expenses are properly awarded as damages.

In considering the damages as a whole, it cannot be contended that the appellants have received unjust treatment in the verdict of \$295.00 for five and one-half years use of respondents' land. By comparison, respondents paid out \$685.34 in survey expenses alone in order to get the survey line correctly established so appellants would get off their land. Manifestly, the establishment of a correct boundary line is of equal benefit to both adjoining landowners. It is therefore submitted that there was no prejudicial error committed in connection with the damages awarded by the jury in this case.

CONCLUSION

It is respectfully urged that there was no error committed prejudicing appellants and the judgment should be affirmed.

Respectfully submitted,

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