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Gene Wheadon and Deane Wheadon v. George B. Pearson and Sarah K. Pearson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
JUL 30 1962
Sup Court, Utah
Case
No. 9696
GENE WHEADON and
DEANE WHEADON, his wife,
Plaintiffs and Appellants,
— vs. —

GEORGE B. PEARSON and
SARAH K. PEARSON, his wife,
Defendants and Respondents.

BRIEF OF APPELLANT

Appeal From a Judgment of the Third District Court
for Salt Lake County
HONORABLE MARCELLUS K. SNOW, Judge

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No. 9696

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action by which plaintiffs seek to establish the existence of a permanent easement or right-of-way across defendants' land.

DISPOSITION IN LOWER COURT

The lower court dismissed plaintiffs' complaint, on motion of defendants, on the ground of *res judicata*.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the lower court's order of dismissal.

STATEMENT OF FACTS

There are two suits involved in this appeal, both of which were filed in the District Court for Salt Lake County. In the first suit, No. 129450, plaintiffs, through other counsel, sued defendants for the purpose of establishing the existence of a permanent easement, appurtenant to plaintiffs' land, across defendants' land. The complaint in the first suit (the record in the first suit was not serially numbered by the lower court) sets forth plaintiffs' cause of action for establishment of the said right-of-way on the theory of adverse user over a period in excess of twenty years (paragraph 3). At the pre-trial hearing, the lower court found that plaintiff Gene Wheadon was the owner of both plaintiffs' and defendants' parcels for a five-year period within the period of claimed adverse use, and concluded that there was not a sufficient period of adverse use aside from the said five-year period to establish plaintiffs' claim. Upon motion of defendants' counsel, it therefore granted summary judgment against plaintiffs (see pre-trial order).

Present counsel then filed in plaintiffs' behalf a motion for new trial with affidavits in support thereof, and the matter was argued by respective counsel to the trial court. The trial court denied the motion, and the present suit was commenced shortly thereafter.

In this second suit, No. 136131, plaintiffs again seek to establish a permanent easement appurtenant to their land across defendants' land, but on an entirely different cause of action. The present complaint (R. 1) sets forth a cause of action based on an implied easement

brought into being at the division of a parcel of land into two contiguous parcels, one of which was burdened during the single ownership by a right-of-way for the benefit of the other. Defendants' counsel moved to dismiss the present complaint on the ground that the issues involved were res judicata by reason of the summary judgment in the first suit. The trial court granted that motion.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT ON THE GROUND OF RES JUDICATA.

The general rule is stated in 30-A American Jurisprudence *Judgments*, section 363, to the effect that a final judgment on the merits is a bar to a later action by the same parties involving the same claim, demand, and cause of action. That text then continues (p. 403):

If, however, the two suits do not involve the same claim, demand, and cause of action, such effect will not be ordinarily given to the prior judgment. In this respect, it is worthy of notice that there must be not only identity of subject matter, but also of the cause of action, so that a judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, although each action relates to the same subject matter. . . .

Further statement of the rule is set forth in section 373 of the same work:

The rule granting conclusiveness to a judgment in regard to issues of fact which could properly

have been determined in the action is generally limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the points or questions actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein. Accordingly, the view is generally taken that before the doctrine of *res judicata* is applied in such cases, it should appear that the precise question involved in the subsequent action was determined in the former action. These rules prevail whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*.

The author at 50 *Corpus Juris Secundum*, *Judgments*, section 648, p. 82, states the rule similarly:

Although a judgment may be conclusive evidence on any point formerly litigated and decided between the same parties, . . . yet it is not pleadable in bar of a second action unless it is founded on the same identical or substantially identical cause of action, notwithstanding the parties are the same, the circumstances comparable, and the defense similar, or the same property is involved. In applying this rule, numerous particular cases have adjudicated the lack of identity of causes of action as against the claim of *res judicata*. On the other hand, where the requisite identity of causes of action is shown to exist, the former judgment may be interposed to prevent a second recovery by plaintiff on the same cause, or to bar the maintenance of a second action on a cause against which defendant has already successfully defended himself, and a party cannot evade the rule by changing

the form of his complaint. It must clearly appear or be demonstrated on what cause of action the former judgment was rendered and that it is the same as the cause of action brought forward in the second suit; and no estoppel arises if this matter can be made only inference or conjecture. Any doubt as to the identity of the causes of action in the two suits must be resolved in favor of the party against whom the plea of *res judicata* is asserted.

And again, from section 652 of the same work at p. 97:

... However, identity of the subject matter is not alone a sufficient test; the true requirement is that the causes of action in the two suits shall be the same. Undoubtedly the subject matter involved in the two actions must be the same, for otherwise there could not be an identity of the causes of action; but the same transaction or state of facts may give rise to distinct or successive causes of action, and the judgment on one will not bar a suit on another, . . . Therefore, a judgment in a former suit, although between the same parties and relating to the same subject matter, is not a bar to a subsequent action, when the cause of action is not the same. . . .

Under the comment to section 63 of the Restatement, Judgments, the same rule is explained in the rationale:

Where the plaintiff has brought an action and judgment has been rendered against him on the merits, and thereafter he brings a new action against the defendant, it is important to determine whether the new action is based on the same or a different cause of action. If the action is based on the same cause of action, the plaintiff is barred by the prior judgment, regardless of the issues which were litigated on the prior action. On the other

hand, if the new action is based on a different cause of action, the judgment is conclusive only as to questions actually litigated and determined in the prior action.

This court has previously announced the same rule. In *Glen Allen Mining Co. v. Park Galena Mining Co.*, 77 U. 362, 296 P. 231 (1931), this court approved the rule from 15 R. C. L. 977 set forth in respondent's brief in that case, that "a judgment concludes the parties only as to the facts actually decided, or which were necessarily involved in it and without the existence of which such judgment could not have been rendered, and is not conclusive as to matters not litigated or material to recovery in the former suit." More recently, in *East Mill Creek Water Co. v. Salt Lake City*, 108 U. 315, 159 P. 2d 863 (1945), this court rejected the defendant's claim of res judicata and stated, ". . . On the other hand, where the claim, demand, or cause of action is different in the two cases then the former is res judicata of the latter only to the extent that the former actually raised and decided the same points and issues which are raised in the latter." The court then cited a number of decisions in support of the rule, including the *Glen Allen* case, quoted from above. The decision in *Voyles, et al. v. Straka*, 77 U. 171, 292 P. 913 (1930) is to the same effect, the court there quoting from 34 C. J. 874 with approval.

The question then becomes one of determining whether the causes of action involved in the two suits are identical or whether they are separate or distinct. Amer-

ican Jurisprudence, *Judgments*, Vol. 30-A, section 365, states the test as follows :

In the application of the doctrine of *res judicata*, if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has even been designated as infallible. On the other hand, it has been declared that the mere fact that the same evidence may be admissible under the pleadings in each action is not necessarily controlling. It has also been held that the maintenance of the second action may be precluded even though different grounds for relief are interposed. It is clear that the identity of causes of action may not be determined by the test whether the claims might have been joined in a single action.

The same rule is stated in 50 *Corpus Juris Secundum*, *Judgments*, section 648, at p. 88 :

A "cause of action" for the purpose of applying the doctrine of *res judicata* is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. The number and variety of the facts

alleged do not constitute more than one cause of action as long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. In determining whether causes of action are identical so as to warrant application of the rule of res judicata, the test most commonly stated is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so the prior judgment is a bar; otherwise it is not. If, however, the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of plaintiff in the first suit is no bar to his recovery in the other suit, although it is for the same cause of action. It has been held that a proper test on an issue of identity of causes of action is to inquire whether the judgment sought will be inconsistent with the prior judgment; if such inconsistency is not shown, the prior judgment is not a bar. . . .

The Restatement, Judgments, at section 61, states the same rule: "Where a judgment is rendered in favor of the plaintiff or where a judgment on the merits is rendered in favor of the defendant the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action."

To summarize the foregoing authorities, the rule is that if the evidence necessary to sustain the second action would not have sustained the first, then res judicata is not a bar.

If the rule were otherwise, a plaintiff who proceeded on the wrong theory and thereby lost would be forever foreclosed from recovery, no matter how just his cause. That he is not so precluded is shown in the following statements of the correct rule, first from 50 Corpus Juris Secundum *Judgments*, section 649, at p. 90: "Where plaintiff is defeated in an action based on a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his view of the case, this will not as a rule preclude him from renewing the litigation . . . on a new and more correct theory. . . ." And again, from the Restatement, *Judgments*, section 65, comment on sub-section (2)h.:

Where, as at common law, the plaintiff in an action at law has to select a particular form of action, and judgment is given for the defendant on the ground that the plaintiff has brought the wrong form of action, the judgment is not on the merits, and the plaintiff is not precluded from subsequently maintaining an action in the proper form of action. Thus, if the plaintiff brought an action of covenant alleging that the defendant made a promise under seal but it was shown at the trial that the promise was not under seal and verdict and judgment were for this reason given for the defendant, the plaintiff is not precluded by the judgment from maintaining an action of assumpsit. Conversely, where the plaintiff brought an action of assumpsit and it was shown that the promise sued upon was under seal, and judgment was accordingly given for the defendant, the plaintiff is not precluded from maintaining an action in covenant. So also, where judgment was given for the

defendant in an action of trespass on the ground that case was the proper form of action, the plaintiff is not precluded from maintaining an action on the case.

Where the forms of action have been abolished, a similar question may arise. Where the plaintiff in his complaint bases his right of action on one theory, it is held in some States that he is not entitled to recover on a different theory, even though he has alleged facts in his complaint sufficient to entitle him to recover on another theory and those facts are admitted or proved at the trial. If judgment is given for the defendant on this ground, the plaintiff is not precluded from subsequently maintaining an action on the other theory.

The complaints involved in the two suits in question here might now be examined against the background of the legal principles discussed above. In the first suit, the gist of the cause of action is contained in paragraph 3 of the complaint. It states:

Along the East Jordan Canal bank, there has been a lane or road about fifteen or twenty feet in width which is now, and for more than thirty years has been, used by the plaintiffs, their grantors and predecessors in interest and by divers other persons as a vehicular and pedestrian road to gain ingress and egress to and from the above described real property of plaintiff and to other real property located by plaintiffs' land, under claim of right of user, and plaintiffs and others have notoriously and openly used said lane and road under said right for more than thirty years, which lane and road extends from a country road, 13800 South, along the canal to the plaintiff's property.

If the plaintiffs have there set forth any ground upon which the court could grant them an easement over defendants' land, it is on the theory of adverse use in excess of twenty years, or in other words, on a prescriptive right cause of action (2 American Law of Property, sections 8.44-8.63, 2 Thompson, Real Property [1961 replacement], sections 335-350).

The pertinent portions of the complaint in the second suit are contained in paragraphs 4 through 9 (R. 2-3) and are of such length that to quote them verbatim would unduly extend this brief. In summary, they allege that the parties' respective parcels were previously held in single ownership, that while so held defendants' parcel was used for the benefit of plaintiffs' parcel, that such use continued for a long period and was of a visible, apparent, continuous and permanent nature, that the single parcel was severed into the two contiguous parcels now owned by the parties, and that the continued use of defendants' parcel by plaintiffs is necessary to the beneficial enjoyment of plaintiffs' land.

The latter complaint thus sets forth plaintiffs' right to an easement over defendants' land on an implied easement theory (2 American Law of Property, sections 8.31-8.43, 2 Thompson, Real Property [1961 replacement], sections 351-361). This cause of action — implied easement — is entirely different from and wholly unrelated to the prescriptive right cause of action set forth in the first complaint. In fact, neither cause of action has a main element in common with the other, though some of

the supporting elements are the same. A side by side comparison will illustrate the difference:

<i>Prescriptive Right</i>	<i>Implied Easement</i>
(1) open, notorious adverse use	(1) single ownership
(2) in excess of twenty years	(2) severance
(3) of a continuous and uninterrupted nature	(3) apparent, visible prior use over long period
	(4) reasonable necessity to beneficial enjoyment of dominant estate

The test as to whether a second suit is barred is whether it asserts the same cause of action as that on which a judgment has been previously entered. And whether a cause of action is the same as a prior one turns on whether the evidence necessary to prove it would have proved the first one. In this case the causes of action have very little in common; in fact, proof of the second precludes proof of the first. They are incompatible. Thus, plaintiffs' second suit and the cause of the action therein alleged come squarely within the rules hereinabove set forth.

It is noteworthy that at the time the trial court denied plaintiffs' motion for a new trial in the first suit, plaintiffs were out of court on a summary judgment against them. The motion for new trial was an attempt to get back in court so that the pleadings could be amended and the implied easement cause of action be presented to the court. The court denied the motion, for reasons not known. All that is known is that the court refused to

pass on the question of implied easement, on the merits. This court has heretofore stated that a judgment is not res judicata as to matters which a court expressly refuses to determine, *Todaro v. Gardner*, 3 U. 2d 404, 285 P. 2d 839, at 841 (1955).

CONCLUSION

The trial court erred in dismissing plaintiffs' complaint in the second suit, since it states an entirely new and independent cause of action against defendants. No court has yet passed on plaintiffs' claim there asserted, and they are entitled to their day in court.

The judgment of the lower court should be reversed.

Respectfully submitted,

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