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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GENE WHEADON and DEANE
WHEADON, his wife,

Plaintiffs and Appellants

vs.

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

Defendants and Respondents

Case
No. 9696

17 1962

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS

Appeal From a Judgment of the Third District Court
for Salt Lake County

HONORABLE MARCELLUS K. SNOW, Judge

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

Because of the frequent reference in matters quoted in this brief to the parties as they appeared in the trial court, the parties will be referred to as they appeared in the trial court, as follows:

Gene Wheadon and Deane Wheadon, as Plaintiffs and Appellants, are herein called "Plaintiffs"

George M. Pearson and Sarah K. Pearson, as Defendants and Respondents, are herein called "Defendants."

STATEMENT OF FACTS

Defendants agree, in general, with the facts as stated in the brief of the plaintiffs, but not the conclusions reached by plaintiffs in their brief. Defendants point out to the Court that there were two separate suits filed by these same plaintiffs against these same defendants, only one of which is involved in this appeal. For the purpose of this brief, hereafter the first suit, filed on February 14, 1961 as Case No. 129450 in the District Court shall be referred to as the "first suit," and the second suit, having been filed on April 19, 1962 as Case No. 136131, shall be referred to as the "second suit." (R 5)

The first suit was placed in issue between the parties and the case came on for pretrial on January 12, 1962. At pretrial this suit was dismissed upon a motion for summary judgment. On January 23, 1962, a motion for new trial was filed by the plaintiffs and was supported by several affidavits. This motion for new trial was argued and submitted to the Court on March 1, 1962, and plaintiffs' motion was denied by the Honorable Ray Van Cott, Jr. On April 19, 1962, plaintiffs filed the second suit against the same defendants. On May 4, 1962, the defendants filed a motion to dismiss as to the second suit. (R 8) This motion of the defendants was granted by the Honorable Marcellus K. Snow on May 4, 1962. (R 11)

Plaintiffs have only appealed from the order dismissing the second suit because the time for appeal has elapsed in the first suit. The time for appeal in the

first suit had elapsed before the second suit was filed by the plaintiffs. The statement of facts included in the brief of the plaintiffs (appellants) shows that the plaintiffs in the first suit "sued defendants for the purpose of establishing the existence of a permanent easement, appurtenant to plaintiffs' land, across defendants' land." (page 2 of appellants' brief) In the second suit "... Plaintiffs again seek to establish a permanent easement appurtenant to their land across the defendants' land, but on an entirely different cause of action." Although the plaintiffs claim is an "entirely different cause of action," the defendants say it is the same cause of action. (page 2 of appellants' brief) It is important, therefore, to point out some of the material issues which were pleaded and argued in both of the cases.

In the first suit, which was filed by Mr. Ray S. McCarty, as the attorney for the plaintiffs, it is alleged that the plaintiffs were owners of a certain tract of land situated in Salt Lake County and the defendants were owners of other land adjacent to the plaintiffs, and

"... there has been a lane or road of 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 land and road under a right for more than thirty years, which lane and road extends from a county

road, 13800 South, along the canal to the plaintiffs' property." (paragraph 3 of page 2 of plaintiffs' complaint in Case No. 129450)

It was also further alleged:

"There is no other way that the plaintiffs can get to and from their land, and they are unable to irrigate or tend said property." (paragraph 5 of page 2 of plaintiffs' complaint in case number 129450)

As a matter of relief in the first case the plaintiffs prayed for judgment as follows:

"1. For an order and decree restraining defendants, and all other persons claiming by them or under them, from interfering with plaintiffs' right-of-way in and out of said land for that purpose, or asserting any claim or interest in said property inconsistent with such use and right of plaintiffs." (Prayer of plaintiffs' complaint, page 2 of Case No. 129450)

To this pleading the defendants denied that the plaintiffs had any right-of-way or easement across the property, and counterclaimed for damages caused to the property of the defendants, and the matter was put at issue. Demand was then made for trial of the issues. Pursuant to the Rules of the Third District Court of Salt Lake County in effect at that time, the parties submitted a Statement of Facts in connection with the demand for trial in the subject case. In the Statement of Facts the following statement was submitted to the Court and signed by the respective attorneys for both of the parties:

"This case involves the claim by the plain-

tiffs to a right-of-way across the property of the defendants. The defendants claim that the plaintiffs do not have a right-of-way. Each of the respective parties claim damages for interference with the right-of-way, and the defendants claiming the damages because of the use of the property without having a right-of-way. The issue in this case is clear and concise:

ISSUE

1. Whether or not the plaintiffs have a right-of-way of (sic) (over) the property described in the complaint.

2. Whether or not the plaintiffs are entitled to damages or whether or not the defendants are entitled to any damages." (See file on Case No. 129450)

The matter came on for pretrial on January 12, 1962, before the Honorable Ray Van Cott, Jr.; and at that time Mr. Ray S. McCarty, appearing as attorney for the plaintiffs, said that his claim for an easement was based upon a prescribed right of long use. Discussion was had and documentary evidence was submitted to the pretrial judge. Upon a motion for summary judgment made by defendants' attorney the Court granted the motion based upon the record showing that the property had been in single ownership of both tracts within the twenty-year prescriptive period. The order of dismissal was entered by the Court.

Within the time prescribed by the Utah Rules of Civil Procedure, a motion for a new trial was made, together with the entrance of appearance of the attorney Mr. Roger K. Bean of Bean & Bean for and on behalf

of the plaintiffs. The motion for a new trial was based upon the grounds set forth in the motion, and provided under Rule 59, URCP, as follows:

“Insufficiency of the evidence to justify the verdict of other decision, or that it is against law,” and

“Error in law”

In connection with the motion for a new trial, several affidavits were submitted to the Court by the plaintiffs. These affidavits can be summarized as saying that the property was at one time in single ownership and that each had used the property of the defendants as a right-of-way for a long period of time.

The motion for a new trial, together with the affidavits, was called up for hearing before the Honorable Ray Van Cott on February 27, 1962, at which time the attorney Roger Bean appeared for and on behalf of the plaintiffs and the attorney Dean E. Conder appeared for and on behalf of the defendants. The matter was argued before The Honorable Ray Van Cott, Jr.; and Mr. Bean argued the information contained in the affidavits, and in particular the affidavit of Gene Wheadon, in which he says:

“... the use of said road is *necessary* for ingress and egress between the public highway (13800 South) and that part of affiant's land which lies southeast of the East Jordan Company Canal; that all of the products raised on said parcel must be removed therefrom by means of said road; that affiant always used the said road for transportation to the highway of crops raised on said land, and for the ingress and egress to

administer to the needs of the poultry ranged thereon." (emphasis added)

In the oral argument before the Court the plaintiffs pointed out the common ownership of the property, the severance, the use of the right-of-way and the need for it.

The cause of action which the plaintiffs plead in the second suit is identical with that pleaded in the first suit in that they seek to establish an easement over exactly the same property of the defendants. The allegation which they now plead in the second suit is as an easement by necessity or by implication. This is exactly what was claimed in the affidavits filed with the Motion for New Trial in the first suit.

The defendants in pleading to the complaint of the plaintiffs' second suit filed a motion to dismiss upon the grounds of res judicata, since the matter had been fully disposed of in the first cause of action. This motion was then heard before the Honorable Marcellus K. Snow, and a judgment was entered dismissing the plaintiffs' second cause of action. It is the judgment dismissing plaintiffs' second cause of action which they are seeking to reverse by this appeal.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' SECOND COMPLAINT ON THE GROUNDS OF RES JUDICATA.

We respectfully submit that the plaintiffs are seeking a second bite at the pie on the matter that was

submitted to the trial court in the first suit. They seek the same thing in both actions, namely, "an easement." The matter of an easement by necessity or an implied easement was submitted to the court in the first suit by reason of the affidavits and arguments in support of the plaintiffs' motion for a new trial.

Even if we assume for the purpose of this argument that the matter of an easement by necessity or an implied easement was not submitted to the court in the first suit, it nevertheless was included in the "cause of action" of the first suit wherein the plaintiffs sought an easement over the property of the defendants.

In the discussion of whether or not a cause of action is res judicata as to a subsequent action, Professor Moore states the following:

"Here the problem is essentially one of fairness, and one of administrative policy designed to end litigation: Have the parties litigated or had a reasonable opportunity to litigate the same or similar type of issues now raised." (*Moore's Federal Practice*, Volume II, Page 378)

The Supreme Court of the United States in two important decisions has discussed this matter of the plea in judgment. The first case was the case of *United States vs. California and O. Land Company* (1904) 192 U.S. 355, 24 S.Ct. 266, 48 L.Ed. 476. In this case an action was brought to have certain patents for lands declared void, on the grounds that the lands were within an Indian reservation. The land company pleaded the matter of res judicata, saying that there had already

been a prior suit and a final decree in which this matter was determined. The trial court dismissed the bill. The Supreme Court of the United States said that the only thing they could find distinguishing the two cases was that in the latter case the United States had put forward a new ground for its prayer, but in both cases it sought to establish its own title to the fee, and the plea of *res judicata* was sustained. Mr. Justice Holmes wrote the decision for the Supreme Court, and in this case he stated:

“The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means,—that is to say, by evidence that the lands originally were excepted from the grant. But in this as in the former suit, it seeks to establish its own title to the fee.

It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi*. *Phosphate Sewage Co. v. Molleson*, 5 Ct. Sess. Cas. 4th Series, 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. *S. C. L. R.* 4 App. Cas. 801, 820. *But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim* (*Fetter v. Beale*, 1 Salk. 11; *Trask v. Hartford & N. H. R. Co.* 2 Allen, 331; Freeman, Judgm. 4th ed. §§ 238, 241); and, *a fortiori*, he cannot divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar foot-

ing, the *United States* was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was discussed, was barred as to all by the decree. (Citing Cases) (Emphasis added)

In a subsequent case before the United States Supreme Court, the case of *Baltimore S. S. Co. et al v. Phillips* (1927), 274 U.S. 316, 47 S. Ct. 600, 71 L. Ed. 1069, the Court had before it a case in which the plaintiff had brought an action in admiralty for injuries sustained, and a decision was rendered in the admiralty court. This sum was paid and the decree satisfied. Subsequently, this action was brought, and the complaint alleged that there was negligence on the part of the petitioners and that the individual sustained serious injuries as a result of said negligence. The petitioners answered and set up *res judicata* based upon the decree in admiralty. Mr. Justice Sutherland in writing the opinion for the Court states:

“Here the court below concluded that the cause of action set up in the second case was not the same as that alleged in the first, because the grounds of negligence pleaded were distinct and different in character; the ground alleged in the first case being the use of defective appliances, and in the second, the negligent operation of the appliances by the officers and co-employees. *Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong, and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence, or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of*

a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

“A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. ‘The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. “The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.”’ Chobanian v. Washburn Wire Company, 33 R.I. 289, 302, 80 A. 394, 400 (Ann. Cas. 1913D, 730).

“The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury.” (Citing cases) (Emphasis added)

Our own Utah Supreme Court has considered this matter of res judicata on a cause of action, and Mr. Justice Wade in writing for the Court in the case of *East Mill Creek Water Company vs. Salt Lake City*

(1945) 180 Utah 315, 159 P.2d 863, stated as follows:

“This contention overlooks the fact that there are two kinds of cases where the doctrine of res judicata is applied: In the one the former action is an absolute bar to the maintenance of the second; it usually bars the successful party as well as the loser; it must be between the same parties or their privies; *it applies not only to points and issues which are actually raised and decided therein but also to such as could have been therein adjudicated, but it only applies where the claim, demand or cause of action is the same in both cases.* In such case the courts hold that the parties should litigate their entire claim, demand and cause of action, and every part, issue and ground thereof, *and if one of the parties fails to raise any point or issue or to litigate any part of his claim, demand or cause of action and the matter goes to final judgment, such party may not again litigate that claim, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action.* 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.” (Citing cases) (Emphasis added)

The primary issue in this case, therefore, seems to be whether or not a new cause of action is stated by the second suit filed by the plaintiffs herein. The Utah Supreme Court has defined a “cause of action” in the case of *State vs. California Packing Corporation* (1943) 105 U. 182, 1414 P.2d 386, at page 387, as follows:

“Do such allegations state a cause of action? As so often said, to state a cause of action a complaint must show:

“A primary right existing in the plaintiff; a primary duty with regard thereto imposed by law on the defendant; a delict by the defendant with respect to plaintiff’s right.”

This same definition is recognized by numerous other courts. See cases cited in *Words and Phrases*, Permanent Edition, Volume 6, “Cause of Action,” subparagraph “Primary Right and Infringement Thereof” in the 1962 Pocket Supplement, Page 135.

The right which the plaintiffs seek in both the first and second case is the right to cross the land of the defendants, by way of an easement. The duty which it is claimed the defendants owe in each case is exactly the same, and that is the right to allow the plaintiffs to cross the land of the defendants and that the defendants have been delict by prohibiting and restraining the plaintiffs from using defendants’ land. Where these issues have been determined by the court they become res judicata as to any subsequent action. This is clearly set forth in Volume 30A, *Am. Jur.* “Judgments” Sections 371 and 372, as follows:

“§371. *Generally.*—It is a fundamental principle of jurisprudence that material *facts or questions* which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or

their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief. . . .

§372. *Matters Not Previously Adjudicated—Identical Causes of Action.*—The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense which could have been presented by the exercise of due diligence.” (Emphasis added)

To assume the position claimed by the appellant in this case could only lead to continuous and endless re-litigations of matters. The respondent has searched for a case involving an identical fact situation of an easement, but has not found such a case. However, numerous cases are cited by the authorities to the effect that a claim arising out of negligence is res judicata to a subsequent case based upon negligence even though upon a different theory. (See *Baltimore S. S. Co. et al v. Phillips* (supra))

The analogy to the negligence cases and the claim made by the appellant herein may be used by saying: If the plaintiff sought to recover for a personal injury arising out of an automobile accident in which the plaintiff said there was negligence on the part of the defendant, and tried to show negligence by acts of commission but lost the lawsuit, the plaintiff could then come back in and sue the defendant again on the basis of negligence, but this time claim acts of omission. It is true the facts which may constitute negligent omission and negligent commission may not be identical, but they constitute but one cause of action.

CONCLUSION

We respectfully submit, therefore, that the issue sought to be determined by the plaintiffs in the first cause of action was whether or not the plaintiffs had the right-of-way or an easement upon the property of the defendants, and this issue was determined by the court in the first instance. The second action involves exactly the same cause of action and is precluded from being raised a second time by the doctrine of res judicata.

Respectfully submitted,

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