2004

Roger Argyle v. Sterling D. Jones, Dorothy P. Jones, John Does : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROGER ARGYLE	:	BRIEF OF THE APPELLEE
Plaintiff/Appellee,	:	Appellate Case No. 20040254-CA
v.	:	
STERLING D. JONES, DOROTHY P. JONES and JOHN DOES 1-5,	:	
Defendants/Appellants.	:	

Appeal from Amended Findings of Fact, Conclusions of Law, and Order entered by the Honorable Claudia Laycock of the Fourth Judicial District Court, Utah County, State of Utah on January 2, 2004 and the Ruling on Defendants' Rule 52(b) Motion to Amend Findings of Fact and Judgment entered on March 8, 2004.

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STATEMENT OF THE CASE

Appellee notes at the outset that there are four elements of a claim of boundary by acquiescence. The parties stipulated that the third and fourth elements of boundary by acquiescence were met, on the record, at the beginning of the trial. The appellants have not appealed the trial court's order finding that the first element was satisfied. All of the appellants' arguments regarding the boundary by acquiescence are focused on the second element, namely "mutual acquiescence in the line as a boundary." Mutual acquiescence is described as

> Under the doctrine of boundary by acquiescence, the party attempting to establish a particular line as the boundary between properties must establish that the parties mutually acquiesced in the line as separating the properties. To do so, the party must show that *both* parties recognized and acknowledged a visible line, such as a fence or building, as the boundary of the adjacent parcels. . . .

Ault v. Holden, 2002 UT 33 ¶ 18, 44 P.3d 781, 788(emphasis in original). Once these elements were established, a boundary by acquiescence was presumed and it was the appellants' burden to provide evidence rebutting the acquiescence.

Appellee disagrees with the characterization of some of the facts set forth in Appellants' brief as Appellants have omitted words from quotes, mischaracterized testimony as being something other than that which was actually testified, and even misstated the actual testimony. The specific instances of mis-characterization will be addressed briefly here as well as in the body of Appellee's arguments.

Appellants' brief constantly refers to the boundary fence at issue as being a fence for a horse corral but does not cite to the record for supporting testimony. Appellant Sterling D. Jones testified at trial that he wanted to put up a fence and that he did so [T. 190:20-24](citations to the transcript of the trial will be cited as T. then the page number:line number, citation to the Record will be cited as R. plus the record page numbers). Sterling Jones further testified that he put up the fence while he believed the property at issue belonged to Appellee's predecessor and prior to purchasing the property at a tax sale [T. 186:15-187:16, 191:16-192:6, 207:14-19]. In other words, he believed that this was the boundary line between his property and Appellee's predecessor's property. Sterling D. Jones' daughter testified that the horses only came in after the fence was put up [T. 253:11-12]. The Court's Findings of Fact, Conclusions of Law, and Order did not find that the fence was erected as a horse corral. R. at 435, ¶ 11.

Appellants' brief further misstates the facts found by the trial court by declaring the trial court found that "As a result of this argument, Sterling Jones and Charles Argyle agreed that they would check their property descriptions in order to ascertain their true property lines." Appellants' Brief at p. 8. What the trial court actually found was that "Due to the relocation of the canal, a dispute arose between Charles Argyle and defendant Sterling Jones as to the appropriate location of the boundary line between the disputed property and defendants' southern boundary. Defendant Sterling Jones *testified* that the parties decided to check the property descriptions and then resolve the dispute." R. at 373 (July 25, 2003, Memorandum

Decision, p. 4, ¶ 12 (emphasis added)). The Court specifically refused to agree with this "testimony." See R. at 367-366.

The appellants' brief also indicates that nobody who supported their cause ever stated that the land belonged to appellee or his predecessor. Yet the trial court found that "[o]n April 8, 2000, a fire broke out on the Sorensens' property, which located east of the disputed property. The fire jumped the river and ignited certain portions of the disputed property. At the time of the fire Daniel Poulsen, who is a neighbor to the parties, witnessed a conversation between Sterling Argyle, defendant's son in law, and a fireman. The fireman asked who owned the disputed property. Sterling Argyle replied that plaintiff [Appellee] owned it." R. at 434, ¶ 23. Essentially, the Court is pointing out in this finding, that the Appellant's own son in law, as late as April 2000, believed the property in question to be the apellee's as delineated by the current fence line boundary.

The appellants have not challenged the trial court's finding that "[t]he testimony of [appellants] and their witnesses was unconvincing and sometimes contradictory." R. at 432 (Amended Findings of Fact, Conclusions of Law, and Order p. 6, ¶ 33). Only the finding regarding Sterling Jones' credibility has been challenged.

Although not brought out in the appellants' brief, the trial transcript shows that at trial, Sterling D. Jones attempted to coach his wife's testimony by supplying answers to her while she was testifying [T. 218:16-24]. This is yet another basis for sustaining the trial court's findings regarding Mr. Sterling Jones' credibility.

The appellants' brief indicates that the appellants consulted with attorneys prior to the initial complaint in this action being filed and that a Notice to Quit was prepared based on that consultation. See Appellants' Brief p. 44-45. The trial court's findings cited by the appellants make no mention of the Appellants consulting with an attorney prior to the initial complaint being filed nor does the testimony at trial support such a statement.

The actual testimony of Sterling Argyle, appellants' son-in-law, was that they consulted with an attorney after Appellant was served with the complaint and that the Notice to Quit was the result of that consultation [T. 280:12-23]. The complaint in this matter was filed on February 28, 2001 (R. at 1) and appellants were served on March 3, 2001 (R. at 5, 8). The Notice to Quit Premises was dated March 20, 2001. R. at 125, seventeen days after service of the complaint.

ARGUMENT

Arguments 1 through 5 of appellants' brief involve the second element of boundary by acquiescence, or the mutual acquiescence in a boundary line. However, each of these arguments assumes a credibility of appellant Sterling Jones testimony, which the trial court specifically refused to adopt. See R. at 433, 432 (Amended Findings of Fact, Conclusions of Law, and Order ¶¶ 29, 33), R. at 405 (Ruling on Defendants' Objections to Findings of Fact, Conclusions of Law, and Order and on Defendants' Objection to Decree Quieting Title p. 5), R. at 418-17 (Amended Memorandum Decision), and R. at 367-66 (Memorandum Decision).

Appellee will first address the issue of Sterling Jones' credibility, raised as argument 6 in appellants' brief, as it pertains to all other issues presented by Appellants.

1. The trial court properly found within its discretion that appellant Sterling Jones never gave Charles Argyle actual permission to use the disputed property and therefore acquiescence arose.

The issue of credibility of witnesses is clearly committed to the discretion of the trial court. See, e.g., Glauser Storage, L.L.C. v. Smedley, 27 P.3d 565, 569 (Utah App. 2001)(quoting Coalville City v. Lundgren, 930 P.2d 1206, 1209-10 (Utah Ct.App.), cert. denied, 939 P.2d 683 (Utah 1997)) ("'Findings of fact will not be set aside unless they are against the clear weight of the evidence and clearly erroneous[,] with due consideration given to the trial court to judge the credibility of witnesses.'").

The issue of credibility as it arose in this matter is similar to the credibility issue in the case of Homer v. Smith. In the Homer case, the issue was also that of boundary by acquiescence or prescriptive easement. The Smiths attempted to rebut the arguments that either of these had been established by testifying that they had given permission to the other people to use their property. As in the present matter, the people to whom the Smiths allegedly gave permission were dead. The Homer Court noted that "[The testimony regarding permission] was uncontroverted because the Deweys were no longer alive at the time of trial. In its written findings,

however, the trial court stated that the Smiths' testimony was "self-serving and not believable in view of [the Smiths'] conduct, demeanor and substantive testimony during trial." Homer v. Smith, 866 P.2d 622, 627 (Utah App. 1993). In evaluating this finding, the court went on to say that

> Clearly, the fact-finder is in the best position to judge the credibility of witnesses and is free to disbelieve their testimony. [citations omitted] The trial court did just that here, and we give due regard to the court's opportunity to judge the credibility of the witnesses. [citation omitted]. Moreover, the record reveals that the Smiths' testimony at trial concerning both the Deweys' and Homer's use was contradictory and inconsistent. We therefore uphold the trial court's finding as to the credibility of the Smiths' testimony.

Id.

In this matter, the trial court had ample opportunity to observe the witnesses, their demeanor, and their behavior at trial. It is important to note that the appellants have not challenged the Court's finding that "[T]he testimony of [appellants] and their witnesses was unconvincing and sometimes contradictory." R. at 432 (Amended Findings of Fact, Conclusions of Law, and Order ¶33). The Court found the testimony of all of the other appellants and their witnesses to be of no value in determining the truth of this matter.

The trial court observed the testimony of Appellant Sterling Jones (hereafter "Appellant" in this section) and compared it with and weighed it against the testimony of the other witnesses at trial. Appellant testified to at least two alleged conversations where the only other person in the conversation, Charles Argyle, is

dead. As with the testimony that permission was given to persons then deceased in the Homer case, Appellant's testimony in this case that he gave permission to use the land to a deceased individual was "contrived and unconvincing." R. at 433; see Homer v. Smith, 866 P.2d 622, 627 (Utah App. 1993)(making a similar finding regarding testimony that permission was given to deceased persons).

Appellant's reliance on the testimony of others to bolster his credibility is unavailing. As noted above, the trial court not only found Sterling Jones to lack credibility but found the testimony of the other appellants, including appellant Dorothy Jones, to be unconvincing. R. at 433, ¶33; 432, ¶29. Appellant's testimony was contradictory to the testimony of other witnesses for Appellant who were excluded during the trial. Dorothy Jones, Appellant's wife, testified that she could not remember the specifics of what occurred when her husband allegedly told her that he gave permission to Charles Argyle to use the land. During questioning about this alleged conversation, Dorothy's answers included the phrase "I don't know" on five occasions and "I guess" once. [T. 223:22-225:24]. Even more telling is the fact that Appellant went so far as to attempt to coach his wife while she was testifying and had to be cautioned by the trial court. [T. 218:16-24, 219:2-3].

After a full opportunity for hearing and argument on the outstanding issues, the trial court made its first Memorandum Decision where it found that Appellant

Sterling Jones's testimony was "contrived and unconvincing" and pointed out that the testimony was inconsistent with the testimony of other witnesses. R. at 367-66.

The trial court then revisited its assessment of Sterling Jones' testimony when it ruled on the appellants' objections to the findings of fact, conclusions of law, and order. In particular, the trial court found that Sterling Jones' testimony was "contrived and unconvincing" on at least one issue and, while making some adjustment to the wording of the findings of fact, did not alter its ultimate conclusions that the testimony of Sterling Jones, and the other appellants and their witnesses, was "unconvincing and sometimes contradictory." R. at 405 (Ruling on Defendant's Objection to Findings of Fact, Conclusions of Law, and Order); R. at 433, 432 (Amended Findings of Fact, Conclusions of Law, and Order).

The trial court properly found Appellant's testimony to be unconvincing and supported its decision with specific findings that are not clearly erroneous.

Appellants cite as support for reconsideration their claim that the trial court overlooked an important fact in that appellants allegedly contacted their attorneys prior to being served. Appellants have continued their record of inconsistency and contrary conduct as found by the court in this matter, by misstating the evidence in their marshalling section and again here. Appellant testified that this communication took place after the appellants were served in this matter [R. 280:12-23] and the Notice to Quit was not dated until 17 days after service of the

complaint and summons on the appellants. The trial court properly did not consider the alleged contact with the attorneys as evidence of Appellant's truthfulness because Appellant only began to take action after being served with the complaint that sought to establish the boundary by acquiescence that had existed for over forty-three years. Appellant's actions after being served, like his testimony, were merely an attempt to bolster his defense against a just claim by Appellee.

Also contrary to appellants' brief (page 39), Appellant did not testify that he thought it was appellee's predecessor's property until 1957. Appellant told a long story at trial which began in 1957 and ended with testimony that he discovered the true boundary of and purchased the property in question in 1961 [T. 186:1-191:20-21]. Thus, by his own admission, Appellant did not know the true boundary until 1961.

The Homer decision is directly on point. The trial court was in the best position to evaluate the testimony and credibility of the witnesses. This trial court, like the trial court in Homer, found the Appellant's testimony about a conversation with a dead person who could not rebut the testimony to be untrustworthy, contrived, and self-serving. As previously noted, Appellants' entire brief is based on the credibility of Appellant. If Appellant is found to lack credibility and to be untrustworthy, as the trial court properly found, then appellants' other arguments must fail.

2. The trial court properly found that Charles Argyle did not agree to check any actual boundary that he was unaware of and mutual acquiescence arose when a fence line was established and the parties treated it as the boundary for 43 years.

The trial court never found that Charles Argyle and Sterling Jones agreed to check the plats and ascertain the true boundary; it only found that appellant testified that such a conversation occurred. The trial court found that the testimony of Sterling Jones was contrived and unconvincing and that there was no permission given to Charles Argyle to use the land. R. at 433, ¶33; 432, ¶29. There are no additional findings that any contemporaneous or subsequent conversations occurred that prevented acquiescence from being established nor is there any finding that the parties disagreed on the boundary line. The appellants' entire first argument is based on a finding of fact that the trial court never made. This Court should not disturb the trial court's findings on credibility. None of the case law cited or arguments made in support of appellants' first contention are applicable because the factual basis for the argument is non-existent in the findings of the trial court.

Since the Court found that there was no agreement in 1957 to check where the actual boundary was located, acquiescence arose when the fence line was established. Appellant Sterling Jones testified that he put up the fence line at a time when he believed that the property at issue belonged to Appellee's predecessor

prior to 1961 when he discovered the actual boundary. [R. 186:15-187:16, 191:16-192:6, 207:14-19].

The parties treated the fence line as the boundary between the properties for the next several decades. This acquiescence included the building of additional fences by both parties along the original fence line and Sterling Argyle's statement to firefighters in April 2000 that the property belonged to plaintiff. Mutual acquiescence was established when the fence was built in 1958.

The Ault case as cited by Appellant, does not apply to the situation in this matter. The Ault decision focused on a situation where one party was unwilling to accept the boundary line and manifested that disagreement through several conversations that the court in that matter found actually occurred. See Ault v. Holden, 2002 UT 33, 44 P.3d 781.

Unlike the parties in Ault, and as the findings in this matter show, there was neither an agreement nor anything else when the fence was established or thereafter to indicate that Appellant did not acquiesce in the boundary. The court held that Sterling Jones' knowledge of the true boundary in 1961 did not destroy the acquiescence and that there was no credible evidence that Charles Argyle, Appellee's predecessor, was ever informed of the true boundary or the purchase of the property by Appellant at a tax sale. See R. 417-414 (Amended Memorandum Decision of October 30, 2003). In fact, the Appellants admit that Sterling Jones

never told "Plaintiff or Richard Argyle . . . that Defendants claimed the disputed land." R. 442 (Defendants' Memorandum of Points and Authorities in Support of Rule 52(b) Motion, p. 11).

The citation from Stratford v. Morgan on page 17 of appellants' brief is from the dissenting opinion in the Stratford case. See Stratford v. Morgan, 689 P.2d 360, 365-66 (Utah 1984)(setting forth Justice Howe's dissenting opinion).

The case of Hales v. Frakes, 600 P.2d 556, 559 (Utah 1979), unlike this case, rested on specific, credible testimony that established that the fence in Frakes was built to serve as a corral and was placed so as not to interfere with an expected road. In this matter, the trial court found Sterling Jones testimony not to be credible and there was no testimony that the boundary fence was built as a horse corral.

3. "Mutual acquiescence" was proved and there was no testimony that the fence line was erected as a horse corral or anything other than a boundary.

Once appellee had established the four elements of a boundary by acquiescence without an express agreement, a presumption arose that the boundary by acquiescence was established. The appellants then had the burden to rebut that presumption. See Ringwood v. Bradford, 269 P.2d 1053, 1055-56 (Utah 1954)(holding that one factor in rebutting the presumption is that the line was not intended as a boundary). Thus, the appellants had the burden at trial to establish the fact that the fence was established as a horse corral.

Sterling Jones testified at trial that he erected the fence at a time when he believed the disputed land belonged to appellee's predecessor. [T. 190:20-24, 186:15-187:16, 191:16-192:6, 207:14-19]. There is nothing in the trial testimony or the trial court's actual findings and rulings to indicate that the fence was erected in order to corral horses. In fact, the trial court specifically noted in its Ruling on Defendants' Objections that Sterling Jones had testified that he put the fence up "in a location [Sterling Jones] described as 'where I knew he [Charles Argyle] wouldn't complain." R. at 404; see also T. at 192:7-9.

The evidence presented was that there was uncertainty as to the boundary and Appellant Sterling Jones put the fence up where he believed the boundary to be. The parties then occupied the land up to the fence on their respective sides for over forty years. Since Sterling Jones' self-serving testimony itself, which has already been found to be untrustworthy, does not support a finding to rebut acquiescence, the cases cited by appellants are inapplicable and this argument must necessarily fail.

4. "Mutual acquiescence" had already been established prior to the appellants discovering the true boundary in 1961.

Acquiescence once established is not destroyed by subsequent knowledge of the true boundary. In the case of Nunley v. Walker, the Utah Supreme Court held that "[I]f the parties do not know where the actual boundary line is, even though

they could have readily ascertained that fact by a survey, a boundary line by acquiescence may be established." Nunley v. Walker, 369 P.2d 117, 122 (1962). This analysis focuses on whether there was knowledge of the true boundary at the time of acquiescence. It does not permit the consideration of whether a party had subsequent knowledge of the true boundary.

Appellants' entire third point turns on whether there was acquiescence in 1958. As set forth above, the trial court properly found acquiescence occurred in 1958 when the fence was erected at a time when there was a dispute as to the boundary at issue. Under Nunley, Sterling Jones' did not destroy the acquiescence established in 1958 when he ascertained the true boundary in 1961. See id. The Nunley decision would make no sense if subsequent knowledge were permitted to negate acquiescence because the Nunley court specifically held that the ability to ascertain the boundary is not relevant.

In addition, the Ault decision also supports the finding that subsequent knowledge by one party did not destroy acquiescence. The Ault court dealt with a situation where there were numerous conversations about the disputed boundary, including an offer to buy the property from the title owners. The Ault court noted that "mere conversations between the parties evidencing either an ongoing dispute as to the property line or an unwillingness to accept the line as the boundary refute

any allegation that the parties have mutually acquiesced in the line as the property demarcation." Ault v. Holden, 2002 UT 33 ¶ 21, 44 P. 32 781, 789 (Utah 2002).

In this matter, the appellants admitted that they never told anyone that they purchased the land at a tax sale. R. 442 (Defendants' Memorandum of Points and Authorities in Support of Rule 52(b) Motion, p. 11). However, appellants still contend that they did give permission to use the land. Why would Sterling Jones give permission to Charles Argyle to use land Charles believed was his, and the entire community he lived in believed was his, including Appellant's own son in law, when by his own admission he never told any one that the land was purchased out from under Charles at a tax sale? See R. 434, ¶ 22 (finding that others understood the property was owned and occupied by appellee and his predecessors in interest). This contradiction in testimony is typical of what the trial court must have considered when finding that appellant Sterling Jones' testimony in particular, and the testimony of all of the appellants and their witnesses in general, was contrived and unconvincing. Since the trial court found there was no conversation after the appellants' determined the true boundary, the acquiescence was not disturbed.

5. The trial court properly granted appellee title to the parcel of land under boundary by acquiescence.

The Appellants' fourth argument is essentially that there was no mutual acquiescence and that the court awarded appellee title on the sole basis of appellee's belief. This plays as an assertion rather than a legal argument. Of course both parties came to trial with a belief that they were right, Appellee came away from the trial justified in his belief after a fair appraisal by the trial court of the relevant evidence presented.

Appellants here site Ringwood v. Bradford, 269 P.2d 1053 (Utah 1954), which declared that a boundary by acquiescence can be established by an implied agreement. The Ringwood court in discussing the case of Brown v. Milliner stated

> "in the absence of evidence that the owners of adjoining property or their predecessors ever made an express parol agreement as to the location of the boundary between them if they occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buildings for a long period of time and mutually recognized it as the dividing line between them, the law will *imply* an agreement fixing the boundary as located, if it can do so consistently with the facts appearing, and will not permit the parties nor their grantees to depart from such line."

Id. at 1055 (emphasis in original). The Court went on to state "the court in such cases indulges in the fiction that at some time in the past the adjoining owners were in dispute or uncertain as to the location of the true boundary and that they settled their differences by agreeing upon the fence or other monument as the dividing line between their properties." Id.

The present case is consistent with the approach described above. This is not a case about the mere belief of a party establishing a new boundary. There was a genuine dispute as to the boundary. The trial court specifically found that the fence was erected during the time of the dispute while the true boundary was unknown. See R. at 435, ¶¶10-11. Appellee and a host of community members familiar with the land and parties, as well as adjacent landowners, believed the fence to be the boundary between the properties. See R. at 434, ¶ 22. Only appellant Sterling Jones' self-serving, inconsistent and unbelievable testimony said otherwise.

The court made the only finding that it could consistent with its determination that the appellants and their witnesses lacked credibility, i.e. that there was acquiescence and a boundary by acquiescence was established between the parties.

6. Appellants' use of the property was not such as to defeat a boundary by acquiescence claim.

In this matter, the parties had acquiesced to a boundary in 1958. The appellee and his predecessors believed the land to be theirs. The trial court found that appellee and his predecessors made extensive use of the property at issue over the last forty plus years, including as a shooting range, pasture, and recreation area, filling in a washed out portion of the land in order to "reclaim" that land, and have "rented the disputed property to non-parties for pasturing" for a period of at least ten years from 1991-2001. R. at 434, ¶¶20-21.

In the case of Brown v. Milliner, the Supreme Court of Utah held that "[t]he fact that a landowner allows other to share with him the use of his land does not necessarily signify a disclaimer of ownership." Brown v. Milliner, 232 P.2d 202, 208 (Utah 1951). The appellants' occasional maintenance of an artesian well on appellee's land is not inconsistent with the trial court's ruling. The appellants had an easement that allowed them access to the well.

Likewise, the appellants' maintenance of the southern fence, the boundary fence in question, is activity consistent with the appellee's ownership of the property and a boundary by acquiescence. As a property owner on the other side of the fence, the appellants would be interested in, and even expected to help in, maintaining that fence. These activities do not negate the acquiescence that occurred in 1958.

7. The trial court properly granted appellee his attorney's fees and costs for responding to the appellants' motion to amend and should grant appellee his fees for defending this appeal.

The trial court properly awarded the appellee his attorney's fees and costs for having to respond to the appellants' motion to amend. The motion to amend was the second time since trial that the appellants had raised the exact same issues. The Court already denied many of the contentions made in the appellants' motion to amend and the appellants had also improperly sought to have the trial court review its ruling on a summary judgment motion when it is well established that there is no jurisdiction under the Utah Rules of Civil Procedure for such a review at

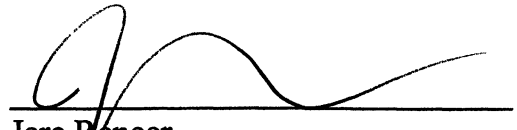
that stage of the litigation. The motion was brought without a basis in law and the trial court found that an award of attorney's fees was appropriate.

Now appellee has been burdened with responding to the same arguments yet again, on appeal. Consequently, appellee submits that the appeal brought by appellants meets the requirements of Utah Rule of Appellate Procedure 33entitling appellee to an award of attorney's fees and costs for having to defend against this appeal.

CONCLUSION

The trial court's decision should be affirmed in all particulars. The trial court properly found that Sterling Jones' testimony was contrived and unconvincing and that the testimony of the other appellants and their witnesses was also unconvincing and sometimes contradictory. There was acquiescence in the boundary in 1958. The appellee proved the existence of the two disputed elements of boundary by acquiescence at trial. The trial court properly awarded the appellee his attorney's fees and costs for responding to the appellants' motion in the trial court. Appellee should be awarded his attorney's fees and costs for having to respond to this appeal.

RESPECTFULLY SUBMITTED this 29 day of December 2004.



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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, or hand delivered to the following on the 29th day of December 2004:

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