

2004

Michael Poppert and Lori Poppert v. Michael Woolsey and Heidi Woolsey and South Weber City : Brief of Appellant

Utah Court of Appeals

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Robert L. Froerer; Froerer & Miles; Attorney for Defendants/Appellees.

Kraig J. Powell; Tesch Law Offices, P.C.; Attorneys for Plaintiffs/Appellants.

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IN THE UTAH COURT OF APPEALS

MICHAEL POPPERT and	:	BRIEF OF APPELLANTS
LORI POPPERT,	:	MICHAEL AND LORI POPPERT
	:	
Plaintiffs/Appellants,	:	
v.	:	
	:	Case No. 20040294-CA
MICHAEL WOOLSEY and	:	
HEIDI WOOLSEY and	:	
SOUTH WEBER CITY,	:	
	:	
Defendants/Appellees.	:	

APPEAL FROM A DECISION OF THE
SECOND JUDICIAL DISTRICT COURT
JUDGE THOMAS L. KAY

Robert L. Froerer
FROERER & MILES, P.C.
707 24TH ST., SUITE A
Ogden, UT 84401
(801) 621-2690

Attorney for Defendants/Appellees

Kraig J. Powell, #8929
TESCH LAW OFFICES, P.C.
314 Main Street, Suite 201
P.O. Box 3390
Park City, Utah 84060-3390
Telephone: (435) 649-0077
Facsimile: (435) 649-2561

Attorneys for Plaintiffs/Appellants

FILED
UTAH APPELLATE COURTS
JUL 21 2004

MICHAEL POPPERT and	:	BRIEF OF APPELLANTS
LORI POPPERT,	:	MICHAEL AND LORI POPPERT
	:	
Plaintiffs/Appellants,	:	
v.	:	
	:	Case No. 20040294-CA
MICHAEL WOOLSEY and	:	
HEIDI WOOLSEY and	:	
SOUTH WEBER CITY,	:	
	:	
Defendants/Appellees.	:	

Robert L. Froerer
FROERER & MILES, P.C.
707 24TH ST., SUITE A
Ogden, UT 84401
(801) 621-2690

Attorney for Defendants/Appellees

Attorneys for Plaintiffs/Appellants

COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING

Michael Poppert and Lori Poppert, Plaintiffs-Appellants

Michael Woolsey and Heidi Woolsey, Defendants-Appellees

South Weber City, Defendant (not involved in appeal)

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STATEMENT OF APPELLATE JURISDICTION

The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. 78-2a-3(2)(j) as a transfer from the Utah Supreme Court. The judgment being appealed has been certified as a final judgment by the trial court pursuant to Rule 54(b), Utah Rules of Civil Procedure. Order Dismissing Case as to Defendants Woolsey, Record at 188, 191.

ISSUE PRESENTED FOR REVIEW

Did the trial court err in holding that a defendant private property owner is not subject to suit for equitable relief or private nuisance damages for construction of a home in a manner allegedly constituting a nuisance to plaintiffs on the basis that the city in which Plaintiffs' and Defendants' properties are located had approved the construction of the home by issuing a building permit?

The order dismissing the case as to the Defendant private property owners (Woolseys) cites both Rule 12(b)(6) (failure to state a claim) and Rule 56(c) (summary judgment) of the Utah Rules of Civil Procedure. The standard of review for both an order of dismissal under Rule 12(b)(6) and summary judgment under Rule 56(c) is one of correctness, with the appellate court granting no deference to the trial court. *Stokes v. Van Wagoner*, 987 P.2d 602, 603 (Utah 1999); *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989). Furthermore, in considering an appeal from a grant of summary judgment, the reviewing court views the facts in a light most favorable to the losing party below. *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989).

These issues were preserved in the trial court by Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss. Record at 98.

STATUTES AND RULES DETERMINATIVE OF THE APPEAL

Rule 12(b), Utah Rules of Civil Procedure (set forth in Addendum to Brief)

Rule 56(c), Utah Rules of Civil Procedure (set forth in Addendum to Brief)

South Weber City Zoning Code, Section 10-5A-5:

“All buildings and structures shall be located as provided in Chapter 11 of this Title and as follows: Structure – Dwellings: Front Setback – 30 feet from all front lot lines. Side setback – 10 feet minimum on each side, except 20 feet minimum for side fronting on a street. Rear setback – 30 feet.”

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition Below

Plaintiffs filed suit in Second District Court against Defendants for nuisance and injunctive relief. Complaint, Record at 1. Defendants moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Motion to Dismiss, Record at 89. The Court granted Defendants' motion in an Order entered on March 29, 2004. Order, Record at 188.

Statement of Facts

Plaintiffs (Popperts) and Defendants (Woolseys) own neighboring (adjoining) properties in South Weber City. Complaint, Record at 1-2. Defendants Woolseys applied to South Weber City to construct a home on their property based on construction drawings they submitted to the City. Affidavit of Mark Larsen, Record at 67-70. The City approved the construction and issued a building permit, finding, *inter alia*, that the boundary between Plaintiffs' and Defendants' properties could qualify as a side lot line rather than a rear lot line for purposes of zoning setback requirements under South Weber City Zoning Code, Section 10-5A-5. Affidavit of Mark Larsen, Record at 67-70.

Plaintiffs filed suit against the Woolseys and South Weber City to halt construction and recover nuisance damages based on the placement of the home. Complaint, Record at 1. Plaintiffs argued that their lot's boundary with the Woolseys' lot does not and cannot constitute a side lot line, and therefore the rear-

lot setback requirements must instead be enforced against the Woolseys with respect to Plaintiffs' boundary. Memorandum in Support of Preliminary Injunction, Record at 75, 79; Memorandum in Opposition to Motion to Dismiss, Record at 98, 100; Affidavit of Kerwin L. Jensen, Record at 180. The trial court granted the Woolseys' Rule 12(b)(6) motion to dismiss on the grounds that the Woolseys cannot be sued on the alleged facts because there is no dispute that the Woolseys applied for and were issued a building permit by South Weber City for the proposed location of the home. Order, Record at 188, 190. The trial court also ruled, and the parties stipulated, that the dismissal could be treated as an entry of summary judgment on the trial court record for purposes of appeal. Order, Record at 188, 190-91.

Defendant South Weber City has not moved for, and the trial court has taken no action with respect to, any dismissal as to the City. Plaintiffs' claims against the City therefore remain pending in the trial court.

SUMMARY OF ARGUMENTS

The trial court was incorrect in ruling that a private landowner cannot be sued for nuisance and injunctive relief arising from a structure if the landowner has complied with the City's instructions in building the structure. Defendants are subject to suit and may be held liable for their actions despite their compliance with the City's instructions.

The trial court erred in alternatively granting summary judgment for Defendants. Because genuine disputes exist as to whether the home complies with the applicable zoning requirements and/or constitutes a nuisance, the entry of summary judgment for Defendants was improper.

ARGUMENT

- I. THE TRIAL COURT ERRED IN RULING THAT A COMPLAINT FOR NUISANCE AND INJUNCTION AGAINST A PRIVATE PROPERTY OWNER FAILS TO STATE A COGNIZABLE LEGAL CLAIM IF THE OWNER HAS COMPLIED WITH EVERYTHING THE CITY ASKED THE OWNER TO DO IN THE PERMITTING AND BUILDING PROCESS.

The trial court ruled, as a matter of law, that a private property owner who is building a house cannot be sued for zoning violation and/or nuisance if the owner has simply followed the instructions of the building department in the City in which the house is being built. Order, Record at 189-90. This legal conclusion is patently incorrect.

A motion to dismiss under Rule 12(b)(6) admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995). In adjudicating a motion to dismiss under Rule 12(b)(6), the court must accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff. *Colman v. Utah State Land Board*, 795 P.2d 622, 624 (Utah 1990).

Applying these legal standards, the trial court should have denied Defendants' motion to dismiss under Rule 12(b)(6). Plaintiffs' Complaint alleges that Plaintiffs have sustained private nuisance damages by Defendants' act of constructing their home too close to Plaintiffs' property and at too great a height. Second Amended Complaint, Record at 156, 156-59. Private nuisance is a cause of action for the invasion of a person's interests in the private use and enjoyment of land. *Sanford v.*

University of Utah, 488 P.2d 741, 744-45 (Utah 1971). In order to establish a prima facie claim for private nuisance, Plaintiffs must first allege that the invasion of their property by the acts of Defendants is substantial. *Turnbaugh v. Anderson*, 793 P.2d 939, 942 (Utah App. 1990). Next, if the nuisance liability is based on an intentional or negligent act of Defendants, Plaintiffs must allege that the interference with Plaintiffs' land caused by the acts of Defendants is unreasonable. *Turnbaugh*, 793 P.2d at 942; *Sanford*, 488 P.2d at 744. If, however, the nuisance liability is based not on an intentional or negligent act, but instead on strict liability, such as a claim for nuisance per se, no allegation of unreasonableness is necessary. *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982). When the conditions giving rise to a nuisance are also a violation of a statutory prohibition, those conditions constitute a nuisance per se. *Branch*, 657 P.2d at 276.

Plaintiffs' Complaint fully satisfies the above standards for pleading a prima facie case of private nuisance. Plaintiffs have alleged that Defendants' acts of constructing their home in its current location and height have caused a substantial invasion of Plaintiffs' property rights, in that the home is in close proximity and view of Plaintiffs' property, thereby causing a substantial loss of privacy and diminution of property value to Plaintiffs in an amount greater than \$100,000.00. Second Amended Complaint, Record at 156, 156-59. Furthermore, as required under negligence or intentional conduct theories, Plaintiffs' Complaint alleges that Defendants' conduct in constructing the home in its current location and height was unreasonable. Second Amended Complaint, Record at 158. Finally, Plaintiff's Complaint also alleges that

Defendants are strictly liable for Defendants' damages under the doctrine of nuisance per se. Second Amended Complaint, Record at 158. If proven at trial, these allegations would require that judgment be entered for Plaintiffs. Because the court in considering a motion to dismiss under Rule 12(b)(6) must accept all allegations as true, Defendants were not entitled to dismissal of the Complaint.

The trial court's apparent belief that a landowner cannot be held liable or responsible if the City incorrectly interprets and applies its own ordinances is not a correct statement of Utah law. In *Harper v. Summit County*, 26 P.3d 193 (Utah 2001), both the municipality and the landowner were named as defendants in a nuisance action, even though the landowner had simply relied on the actions of the municipality in approving the contested use of the land. What the trial court in the instant case may be intending is that the Defendant landowners would have the right to maintain a cross-claim or an action for contribution against the City for its role in approving the building plans if the landowners are ultimately found liable. But instead the court incorrectly held that the landowners cannot be sued at all because they did what the City told them to do. On the contrary, the landowners are the most appropriate party defendant under Rule 17 and Rule 20, Utah Rules of Civil Procedure, because they are the ones who physically caused the allegedly offending structure to be built and they are the owners of the structure. A nuisance claim, of course, must name as a defendant the party who is alleged to have caused the nuisance. Because the complaint as framed in this action fully incriminates the landowners

under the governing law of nuisance and equitable relief, it is not subject to dismissal under Rule 12(b)(6).

The trial court's holding that the Defendant landowners cannot be sued should be reversed.

II. THERE ARE DISPUTED ISSUES OF MATERIAL FACT ON PLAINTIFFS' CLAIM THAT DEFENDANTS' HOME VIOLATES THE ZONING ORDINANCE, CONSTITUTES A NUISANCE AND CONSTITUTES A NUISANCE PER SE.

The trial court ruled in the alternative that the Defendant landowners were entitled to summary judgment. Order, Record at 188, 190-91. This ruling was also in error.

Summary judgment may be granted if the pleadings and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Utah Rules of Civil Procedure. In considering an appeal from a grant of summary judgment, the reviewing court views the facts in a light most favorable to the losing party below. *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989).

In an affidavit submitted by Defendants, the City Building Inspector stated that he believes that the approval he granted for the home was justified because the boundary of Plaintiffs' lot can be considered a side lot line of Defendants' lot and therefore requires only a 10-foot setback. Affidavit of Mark Larsen, Record at 67-70. Plaintiffs, however, submitted an affidavit from an experienced building and zoning expert stating that the boundary of Plaintiffs' lot cannot qualify as a side lot line of

Defendants' lot but rather is a rear lot line. Affidavit of Kerwin L. Jensen, Record at 180, 182. The map attached to Mr. Jensen's affidavit shows that the two homes on either side of the allegedly offending structure face the same direction, and face the same street, as the offending structure. Record at 183. For this reason, Mr. Jensen stated in his affidavit that the boundary of those homes cannot qualify as a rear line as the City Building Inspector apparently concluded in issuing his approval of the building plans. Affidavit of Kerwin L. Jensen, Record at 180, 182. Instead, the boundary with Plaintiffs' lot is the only legal rear lot line of the offending lot.

Defendants cited no statute, ordinance or other provision in the trial court that would allow the de facto variance the City appears to have granted in this case. Contrary to the attempted after-the-fact assertions in Mr. Larsen's affidavit, the offending lot is not, and is not similar to, "a corner lot on a radius corner." Affidavit of Mark Larsen, Record at 68. Mr. Larsen's assertion that "the city ordinances allow for some leeway" in this instance is totally unsupported by any citation to applicable authority. Affidavit of Mark Larsen, Record at 68. The trial court's order of dismissal is similarly devoid of any such citation of authority.

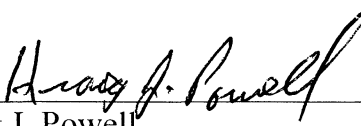
Because the above information presented to the trial court creates, at a minimum, genuine issues of dispute as to material facts, and because the summary judgment evidence must be viewed in the light most favorable to Plaintiffs, the trial court should not have granted summary judgment for Defendants.

CONCLUSION

Plaintiffs request that the order of dismissal and/or summary judgment entered in favor of Defendants be reversed and that this case be remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 21st day of July, 2004.

TESCH LAW OFFICES, P.C.



Kraig J. Powell
Attorneys for Plaintiffs/Appellants

ADDENDUM

Rule 12. Defenses and objections.

(a) When presented Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims.

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action,

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Robert L. Froerer (#4574)
FROERER & MILES, P.C.
Attorney for Defendants
707 - 24th Street, Suite A
Ogden, UT 84401
Telephone: (801) 621-2690

FILED
MAR 23 2004
Layton District Court

IN THE SECOND JUDICIAL DISTRICT COURT
COUNTY OF DAVIS, STATE OF UTAH

MICHAEL POPPERT and LORI POPPERT,)	
)	
Plaintiffs,)	
)	ORDER DISMISSING CASE
vs.)	AS TO DEFENDANTS WOOLSEY
)	
MICHAEL WOOLSEY and HEIDI WOOLSEY, individuals; and)	Civil No. 030602897
SOUTH WEBER CITY, a Utah body politic,)	
)	
Defendants.)	Judge Thomas L. Kay

This matter came on for hearing on a Motion to Dismiss pursuant to U.R.C.P. Rule 12(b)(6) filed by Defendants MICHAEL WOOLSEY and HEIDI WOOLSEY (hereinafter "WOOLSEYS"). Plaintiffs, though not present, were represented by counsel, Kraig J. Powell. Defendant MICHAEL WOOLSEY was present and represented by counsel, Robert L. Froerer. Defendant SOUTH WEBER CITY did not make an appearance, in that this Motion did not pertain to said Defendant's position in this lawsuit.

The Court having reviewed the Motion filed by WOOLSEYS and the supporting Memoranda filed by WOOLSEYS and Plaintiffs, and having heard the arguments of the parties at this hearing, hereby orders this case dismissed as to WOOLSEYS, based on the Court's conclusions as follows:

1. This matter was initially filed by Plaintiffs

Order Dismissing Case As To Defendants Woolsey



alleging three separate causes of action; i.e., First Cause of Action alleging Nuisance; Second Cause of Action alleging Injunction; and Third Cause of Action alleging Fraud.

2. Subsequent to the filing of the initial Complaint, Plaintiffs were granted leave to file an Amended Complaint, adding a Fourth Cause of Action alleging Zoning Enforcement.

3. At this hearing, Plaintiffs moved to dismiss without prejudice their Third Cause of Action alleging Fraud, which Motion was granted.

4. The Court determined that Plaintiffs' Fourth Cause of Action alleging Zoning Enforcement, was an action pertaining to Defendant SOUTH WEBER CITY only and did not pertain to WOOLSEYS.

5. The Court finds that the issue herein pertaining to the remaining two causes of action; i.e., Nuisance and Injunction, is whether or not a cause of action for damages or injunction can be maintained against a private homeowner who complies with city zoning ordinances dealing with placement of their home on a subdivision lot in accordance with prescribed setback requirements.

6. As pertaining to the remaining two causes of action; i.e., Nuisance and Injunction, the Court further finds that such causes of action are legally intertwined and concludes that both causes of action should be dismissed.

7. The Court concludes that, as a matter of law, an individual property owner should have no liability to a neighboring property owner for actions taken in compliance with zoning setback regulations required by the governmental entity, in this case, SOUTH WEBER CITY, pertaining to the real property in question. Therefore, there can be no successful claim against WOOLSEYS herein for either Nuisance or for a permanent Injunction to remove the WOOLSEYS' home from the property.

8. This Court concludes that for Plaintiffs to be successful as to their First and Second Causes of Action, WOOLSEYS would have to have done something wrong; i.e., contrary to law, beyond simply complying with the regulations imposed by the governmental entity, SOUTH WEBER CITY. Based on the information provided to the Court through this hearing and on file herein, this Court concludes that there is nothing in the pleadings or in the information presented by Plaintiffs to indicate that WOOLSEYS did anything wrong or improper.

9. There apparently is no Utah case law that either disposes of the issues herein or even assists in addressing the issues herein. This Court relies heavily on U.R.C.P. Rule 1, which requires the Rules of Civil Procedure to "...be liberally construed to secure the just, speedy, and inexpensive determination of every action."

10. In order to expedite resolution of this matter in

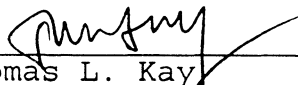
the trial court and on appeal, Plaintiffs and the WOOLSEYS have stipulated before the Court that, in the alternative, this Motion may also be treated as a Motion for Summary Judgment by the WOOLSEYS on the grounds set forth in this Order, and on the entire factual record of the trial court. Therefore, by joint stipulation of the parties, the Court hereby alternatively grants Summary Judgment in favor of WOOLSEYS on said grounds and factual record.

WHEREFORE, based on the findings and conclusions of the Court as stated above, this Court hereby dismisses Plaintiffs' Third Cause of Action, alleging Fraud, without prejudice.

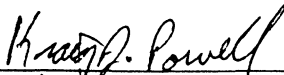
This Court further hereby dismisses, as to the WOOLSEYS, Plaintiffs' First Cause of Action, alleging Nuisance, and Plaintiffs' Second Cause of Action, alleging a Request for Injunction. This Order shall operate and is hereby entered as a final Judgment as to WOOLSEYS, the Court finding that there is no just reason for delay pursuant to Rule 54(b), Utah Rules of Civil Procedure.

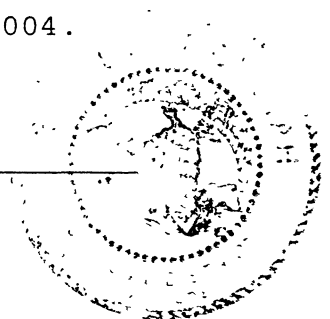
SO ORDERED this 29 day of March, 2004.

BY THE COURT:


Thomas L. Kay
District Court Judge

APPROVED AS TO FORM:

 3-23-04
Kraig J. Powell
Attorney for Plaintiffs



CERTIFICATE OF SERVICE

I, Kraig J. Powell, hereby certify that on July 21, 2004, I mailed by first-class mail, postage-prepaid, the foregoing Brief to:

Clerk
Utah Court of Appeals
P.O. Box 140230
Salt Lake City, Utah 84114

Robert L. Froerer
Froerer & Miles, P.C.
707 24th St., Suite A
Ogden, UT 84401

David L. Church
Blaisdell and Church
5995 South Redwood Rd.
Salt Lake City, UT 84123

