

2004

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL POPPERT and	:	REPLY 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

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PLAINTIFF'S REPLY TO DEFENDANTS' ARGUMENT

I. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO FILING SUIT AGAINST THESE PRIVATE DEFENDANTS.

Defendants Michael and Heidi Woolsey first argue that the trial court's dismissal was proper because Plaintiffs Michael and Lori Poppert failed to exhaust administrative remedies pursuant to Utah Code Section 10-9-1001 prior to filing suit in Second District Court against the Woolseys. Appellees' Brief at 11-14. This argument is incorrect.

Plaintiffs' Second Amended Complaint alleges that the placement of Defendants' home on Defendants' lot constitutes a private nuisance which causes damage to Plaintiffs' neighboring lot. Second Amended Complaint, Record at 156-59. The nuisance count seeks damages from the Woolseys for actions by the Woolseys – specifically, the construction of their home in a design and location that constitutes a nuisance to the Popperts. Utah Code Section 10-9-1001 cited by the Woolseys in their brief requires a plaintiff to exhaust administrative remedies within a municipality prior to challenging the municipality in district court. See *Patterson v. American Fork City*, 67 P.3d 466, 471 (Utah 2003). The section therefore has no relevance to this private claim for nuisance between two private parties. There is no requirement that a

plaintiff exhaust administrative remedies prior to filing a nuisance claim against a private party.

Additionally, Plaintiffs' second cause of action for injunction is specifically authorized by Utah Code Section 10-9-1002, which authorizes "any owner of real estate" within a municipality to institute actions to "enjoin" violations of zoning ordinances or "remove" unlawful buildings. UCA 10-9-1002(1)(a). The remedies contained in Section 10-9-1002 are explicitly described as "in addition to other remedies provided by law." UCA 10-9-1002(1)(a). Therefore, an injunctive claim for zoning enforcement is not predicated on exhaustion of administrative remedies. Based on the allegations of the Complaint, which for purposes of this appeal must be accepted as true, Plaintiffs have a facially valid claim under section 10-9-1002 for injunctive relief based on a zoning violation, in addition to any standard common law injunctive relief based on the nuisance aspect of the Complaint.

II. PLAINTIFFS' COMPLAINT ADEQUATELY ALLEGES A NUISANCE.

Defendants argue that the type of damage alleged by Plaintiffs in the Complaint is not a cognizable nuisance because a "physical invasion" has not occurred. Appellees' Brief at 17-18. Defendants are incorrect.

As acknowledged by Defendants' own brief, a private nuisance is defined in Utah as "a substantial and unreasonable nontrespassory interference with the private use and enjoyment of another's land." Appellees' Brief at 18, quoting *Turnbaugh v. Anderson*, 793 P.2d 939, 942 (Utah App. 1990). By this very definition, a nuisance is not required to be "trespassory." Similarly, the only required "invasion" is an invasion to a plaintiff's *interest* in land, not necessarily to the land itself. *Sanford v. University of Utah*, 488 P.2d 741, 744-45 (Utah 1971) ("private nuisance is an action for invasion of a person's interest in the private use and enjoyment of land").

The facts of every individual nuisance case, such as those cited in Plaintiffs' opening brief, will understandably differ. In this case, the nuisance to Plaintiffs' property arises due to the illegal and unreasonable design and location of Defendants' home. The Complaint adequately alleges that this conduct by Defendants has interfered with the use and enjoyment of Plaintiffs' land by illegally and unreasonably invading Plaintiffs' privacy and causing monetary damage to Plaintiffs' property. Second Amended Complaint, Record at 157-59. Under Utah private nuisance law, these allegations are more than sufficient to withstand a motion to dismiss for failure to state a claim. The trial court's order of dismissal should therefore be reversed.

III. THE RECORD SHOWS THAT THERE ARE GENUINE ISSUES OF DISPUTE AS TO FACTS MATERIAL TO PLAINTIFFS' CLAIMS.

Defendants assert that no material facts are in dispute because the affidavit opinion of Plaintiffs' expert is "irrelevant." Appellees' Brief at 19-20. On the contrary, the affidavit testimony of Kerwin Jensen is directly material to the issue of whether the construction of Defendants' home was illegal and unreasonable.

Mr. Jensen stated that the boundary between Plaintiffs' lot and Defendants' lot is not a side lot line as asserted by Defendants' expert, but is instead a rear lot line, which requires a 30-foot setback. Affidavit of Kerwin L. Jensen, Record at 182. This directly contradicts the affidavit of Defendants' expert, Mark Larsen, who stated that the lot line between Plaintiffs' lot and Defendants' lot validly constitutes a side lot line. Affidavit of Mark Larsen, Record at 68. Mr. Jensen also stated that Defendants' lot is not a corner lot, Record at 182, contrary to the assertion of Mr. Larsen. Record at 68.

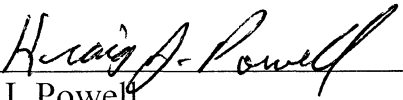
The above facts are precisely the facts that will need to be proved or disproved at trial of this case. Because they are now genuinely in dispute, the order of dismissal and summary judgment must be reversed.

CONCLUSION

The District Court prematurely terminated the progress of this case by granting a dismissal and summary judgment for Defendants when Plaintiffs had satisfied all requirements for pleading a prima facie case and establishing genuine disputes as to material facts. Therefore, the case should be remanded for further proceedings.

RESPECTFULLY SUBMITTED this 20th day of September, 2004.

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CERTIFICATE OF SERVICE

I, Kraig J. Powell, hereby certify that on September 20, 2004, I mailed by first-class mail, postage-prepaid, the foregoing Reply Brief to:

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