

2005

Linda Martin v. Jamie Fries : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA MARTIN, an individual,

Appellant,

vs.

JAMIE FRIES, an individual,

Appellee.

Case No. 20050026-CA

BRIEF OF APPELLANT

**APPEAL FROM AN ORDER OF SUMMARY JUDGMENT
ENTERED IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH, HONORABLE ANTHONY B. QUINN**

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

I. Whether the district court erred in ruling that Appellant/Defendant, Linda Martin (now known as Linda Meyers) (“Ms. Myers”), could not have obtained ownership of the property at issue through adverse possession. The district court’s ruling is reviewed for correctness, with no deference given to the decision of the district court. *Territorial Sav. & Loan Ass’n v. Baird*, 781 P.2d 452, 456 (Utah Ct. App. 1989). This issue was preserved in the district court. (R. at 61-63, 248-83.)

II. Whether the district court erred in ruling that Plaintiff/Appellee, Jamie Fries (“Ms. Fries”), is the sole owner of the portion of Ms. Myers’ yard that was part of an alley allegedly dedicated to public use. The district court’s ruling is reviewed for correctness, with no deference given to the decision of the district court. *Id.* This issue was preserved in the district court. (R. at 118-32, 248-83.)

III. Whether the district court erred in ruling that there were no genuine issues of material fact regarding, among other things, the circumstances relating to the original dedication of the property as an alley for public use, Ms. Myers’ adverse possession of the property, and Salt Lake County’s entry of Ordinance No. 1467, which purported to vacate the County’s rights in the alley. A district court’s ruling that there are no genuine issues of material fact and that a party is entitled to judgment as a matter of law is

reviewed for correctness, with no deference given to the decision of the district court. *Id.* This issue was preserved in the district court. (R. at 61-63, 248-83.)

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. §10-9a-607(1) (formerly § 10-9-807); *Utah Code Ann.* §72-5-105(2); and *Utah Code Ann.* § 78-12-13. Copies of these provisions are contained in the Addendum at Exhibits “A,” “B,” and “C,” respectively.

STATEMENT OF THE CASE

A. The Nature of the Case.

Since 1988, Ms. Myers has owned a home with a fenced yard located at 3031 South 9100 West, Magna, Utah. Ms. Fries owns a home located at 3036 South 9050 West, Magna, Utah (the “Fries Property”). The rear twelve feet of Ms. Myers’ backyard (the “Disputed Tract”), which abuts the western boundary of the Fries Property, was allegedly part of an “alley” approximately twelve feet in width and 725 feet long running from approximately 3000 South to 3100 South at 9075 West. The alleged alley had been divided among Ms. Myers’ neighbors and their predecessors for at least 40 years and has been out of public use since the 1950s, at the latest. This case arises from a dispute over the ownership of the Disputed Tract.

B. Course of Proceedings and Disposition Below.

On March 26, 2004, Ms. Fries filed her Complaint, seeking an order quieting title in her name to the Disputed Tract. Ms. Myers disputed the allegations of the Complaint and asserted that she is the rightful owner of the Disputed Tract on various legal grounds. On January 4, 2005, Judge Anthony B. Quinn of the Third Judicial District Court entered

summary judgment in favor of Ms. Fries. Ms. Myers filed her notice of appeal on January 5, 2005.

C. Statement of Facts.

1. Ms. Myers owns a home with a fenced yard located at 3031 South 9100 West, Magna, Utah, and more fully described as: Beg S 0-25' E 978 FT FR SE Cor Chambers Townsite Add #1; S 0-52' E 50 FT; N 88-53' E 133 FT; N 0-52' W 50 FT; S 88-52' W 133 FT to Beg. Less Street (the "Myers Property"). (R. at 4, 58.)

2. Ms. Myers has lived on and owned the Myers Property since 1988. (R. at 58; a copy of the Affidavit of Linda Meyers submitted in opposition to Ms. Fries' Motion for Summary Judgment is attached as Exhibit "D.")

3. The Disputed Tract was the subject of a dedication included on the Highland Subdivision Plat Map, recorded in 1916. (Highland Subdivision Plat Map, R. at 89; a copy of a portion of the Dedication is attached as Exhibit "E.") The Dedication reads, in relevant part, as follows:

Know all men by these presents that Manuel PaPanikolas and Georgia PaPanikolas, his wife, owners of the above described tract of land, having caused the same to be subdivided into blocks, lots, lanes, and alleys to be hereafter known as the Highland Subdivision of Magna, **do hereby dedicate for the perpetual use of the public all parcels of land designated in the Surveyors' Certificate and shown on this map as intended for public use.**

(*Id.*; emphasis added.) The Surveyor's Certificate for the Highland subdivision specifies that all alleys shown on the plat map are intended for public use. (*Id.*)

4. At all times during Ms. Myers' ownership of the Myers Property, the property has been enclosed by fencing that encompasses the Disputed Tract. (R. at 58.)

5. The value of the Disputed Tract was included in the price paid by Ms. Myers when she purchased the Myers Property. (R. at 59.)

6. The fence surrounding the Myers Property, including the Disputed Tract, has been in place for more than 40 years. (R. at 59.)

7. Ms. Myers has been in exclusive possession and control of the Myers Property, including the Disputed Tract, for about seventeen years. Ms. Myers has used the Disputed Tract for structures designed for storage and as kennels for her dogs. (R. at 59.)

8. Ms. Myers has paid property taxes on the Myers Property, including the Disputed Tract, for about seventeen years. Salt Lake County has accepted the taxes paid by Ms. Myers. (R. at 59.)

9. The alleged “alley” involved in this case is approximately twelve feet in width and 725 feet long running from approximately 3000 South to 3100 South at 9075 West. If the “alley” ever existed, it has not existed for more than 40 years. (R. at 59.)

10. Any property that was formerly part of the “alley” alleged by Ms. Fries was long ago divided among the owners of the Myers Property and neighboring properties. Fence lines of the Myers Property and neighboring properties have been in place for at least 40 years. (R. at 58-59.)

11. Fences maintained by the owners of the Myers Property and adjacent properties began crossing, fractionalizing, and dividing any “alley” that may have been platted at least 40 years ago. Also, any “alley” ceased to be dedicated to public use well

prior to the 1950s. (R. at 59; a copy of the Affidavit of Randy Parker submitted in opposition to Ms. Fries' Motion for Summary Judgment is attached as Exhibit "F.")

12. On or about September 18, 2000, Salt Lake County enacted Ordinance No. 1467, which stated, in part, as follows: "A 12 foot wide by 725 foot long alley, located approximately between 3000 South and 3100 South at 9075 West, and which is more fully described in *Exhibit A* attached hereto and incorporated by reference herein, is hereby vacated" (the "Ordinance"). (A copy of the Ordinance is attached as Exhibit "G.")

13. Ms. Fries filed her Complaint on March 26, 2004. (R. at 3-7.)

14. On January 4, 2005, Judge Anthony B. Quinn entered an order granting Ms. Fries' Motion for Summary Judgment and quieting title to the Disputed Tract in Ms. Fries' favor. (R. at 216-17.)

15. On January 5, 2005, Ms. Myers filed her Notice of Appeal. (R. at 219-21.)

SUMMARY OF ARGUMENTS

The district court erred in ruling, on summary judgment, that Ms. Myers could not have acquired the Disputed Tract through adverse possession. The evidence shows that Ms. Meyers' predecessors have been in open, notorious, and adverse possession of the Disputed Tract for more than forty years. Also, Ms. Meyers and her predecessors properly acquired the Disputed Tract through adverse possession, despite the purported ownership of the alley by Salt Lake County, because the Disputed Tract, although dedicated to the County over eighty years ago, had been abandoned by the County and had not been held for "public use," if ever, for more than fifty years.

Alternatively, the district court erred in ruling that Ms. Fries became the sole owner of the Disputed Tract as a result of the Ordinance, which purported to vacate the alley. Under Utah law, title to vacated property vests in the adjoining owners, with one half of the property assessed to each of the adjoining owners. Thus, at the very least, the order of summary judgment should be reversed and the case remanded with instructions to the district court to enter an order dividing the Disputed Tract equally between Ms. Meyers and Ms. Fries.

Finally, the district court erred in granting summary judgment because there were factual issues about the history of the alley and, particularly, whether the alley was ever used by the public. These facts are material to Ms. Meyers' defenses that she acquired title to the Disputed Tract through adverse possession. The district court should have denied the motion for summary judgment to allow a fact finder to assess and weigh the evidence regarding the history of the alley.

ARGUMENT

I. The District Court Erred In Ruling That Ms. Myers Could Not Have Acquired Ownership of the Disputed Tract Through Adverse Possession.

The district court erred in ruling, on summary judgment, that Ms. Myers could not have acquired the Disputed Tract through adverse possession. Under Rule 56 of the Utah Rules of Civil Procedure, summary judgment is appropriate only when the evidence shows "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." In Utah, a party may acquire title to property through adverse possession if their "possession was open, notorious, and hostile and . . .

taxes were paid for the entire statutory period.” *Marchant v. Park City*, 788 P.2d 520, 523-24 (Utah 1990). The district court granted Ms. Fries’ motion for summary judgment despite accepting as true the fact that Ms. Myers and her predecessors have been in open, notorious, and adverse possession of the Disputed Tract for more than forty years. (R. 248, at 33-34.) It is also undisputed that the fence line marking the boundary between the Myers Property and the Fries Property has been in its present location for over forty years.

Before the district court, Ms. Fries argued that Ms. Meyers could not adversely possess the Disputed Tract because it was owned by the County. Although Utah law does not permit the adverse possession of roads or alleys held by the government for public use, those restrictions do not apply here because the Disputed Tract, although dedicated to the County over eighty years ago, had been abandoned by the County and had not been held for “public use,” if ever, for more than fifty years.

A. At the Time Ms. Myers or Her Predecessors Obtained the Disputed Tract Through Adverse Possession, It Had Been Abandoned.

Ms. Myers’ predecessors began obtaining ownership of the Disputed Tract through adverse possession by the 1950s, because by that time the former alley had been abandoned and was no longer owned by Salt Lake County.¹ The former alley, including the Disputed Tract, was the subject of a dedication included on the Highland Subdivision

¹ Indeed, the affidavits filed by Ms. Myers raised the issue of whether the former alley ever entered into public use, creating factual issues that should have precluded summary judgment.

Plat Map, recorded in 1916. (Highland Subdivision Plat Map, a portion of which is contained at Exhibit “D.”) That dedication reads, in relevant part, as follows:

Know all men by these presents that Manuel PaPanikolas and Georgia PaPanikolas, his wife, owners of the above described tract of land, having caused the same to be subdivided into blocks, lots, lanes, and alleys to be hereafter known as the Highland Subdivision of Magna, **do hereby dedicate for the perpetual use of the public all parcels of land designated in the Surveyors’ Certificate and shown on this map as intended for public use.**

(“Dedication”; R. at 88-115 emphasis added.) The Surveyor’s Certificate for the Highland subdivision specifies that all alleys shown on the plat map are intended for public use. (R. at 88-115.)

The Dedication gave Salt Lake County only a defeasible fee interest in the former alley. A defeasible fee is “an estate in fee that is liable to be defeated by some future contingency.” *Falula Farms, Inc. v. Ludlow*, 866 P.2d 569, 573 n.6 (Utah Ct. App. 1993) (citation omitted). In *Falula Farms*, this Court considered the ownership of a reversionary interest in a county road that had been dedicated “for perpetual public use” after it was moved and no longer used by the public. *Id.* at 569-573. This Court recognized that if a public way or road “should cease to serve any public interest, it may be abandoned and, in that case, the right to the use and control of the roadway would revert to the abutting owner.” *Id.* at 572 (citation omitted). Based on this principle, this Court held that by dedication “for perpetual public use,” the county “acquired a defeasible fee simple title, rather than an absolute fee.” *Id.* at 573.

The Dedication is virtually identical to the dedication in *Falula Farms* that granted only a defeasible fee interest. The Dedication clearly expressed an intention that the

alleys of Highland Subdivision be held by Salt Lake County only so long as they were maintained “for perpetual public use.” (*See* Dedication, Exhibit “D.”) Therefore, the Dedication gave Salt Lake County a defeasible fee interest in the former alley.

Because Salt Lake County held only a defeasible fee interest in the former alley, when the alley was removed from public use in the 1950s (if not earlier), the County lost its interest in the alley. As this Court stated:

[T]he language in the recorded plat regarding dedication of the road to the public . . . arguably **created a condition subsequent, the occurrence of which would divest the County of its fee title**, by stating: “I [Alden Siddoway] hereby . . . relinquish all rights to the new location of Public Rights of Ways and hereby grant and convey them for perpetual public use.” **Thus, the County’s fee title to the country road was valid so long as the strip of land was used by the public as a county road.** The action by the County to vacate part of that road violated the Condition subsequent and worked to divest the County of its fee title to the vacated strip of land.

Id. at 573 n.6 (emphasis added).

In this case, the former alley has not been put to “public use” since the 1950s, at the very latest. Indeed, the affidavits submitted by Ms. Meyers created an issue of fact about whether the alley was *ever* used by the public. This is a critical issue that must be explored and weighed by the finder of fact because the Dedication, by its plain language, created a condition subsequent requiring that the alley be put into perpetual public use. Utah courts have recognized that “the failure of the grantee of a deed to comply with a condition subsequent . . . within a reasonable time” is “sufficient to forfeit the estate.” *Salt Lake City v. State*, 101 Utah 543, 125 P.2d 790, 792 (1942). Thus, if Salt Lake

County failed to put the former alley into public use within a reasonable time, it forfeited its ownership of the alley.

Upon the County's loss of its defeasible fee interest in the alley, ownership of the property reverted by operation of law to the abutting landowners. *Falula Farms*, 866 P.2d at 573. Accordingly, when the alley became vacant and was removed from public use, the owners of the property abutting the alley each took ownership of their respective portions of the alley. *See Nelson v. Provo City*, 2000 UT App 204, ¶ 12, 6 P.3d 567, 570 (The "center-of-the-highway" rule has been applied in Utah when a local government entity has "but a determinable fee and does not own the underlying fee simple."); *Utah Code Ann.* § 72-5-105(2) (stating that title to "vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with 1/2 of the width of the highway, street, or road assessed to each of the adjoining owners"). As a result, in the 1950s or earlier, the abutting property owners (including the owners of the Myers Property and of the Fries Property) became the owners of their respective one-half portions of the alley. Because Ms. Myers and her predecessors then openly and notoriously possessed and controlled the Disputed Tract for nearly fifty years, Ms. Myers now owns the entire Disputed Tract through adverse possession.² *Marchant*, 788 P.2d at 523-24. Accordingly, the district court erred in granting summary judgment to Ms. Fries.

² At least twenty years has passed since the County was divested of its defeasible fee interest in the alley. Because Ms. Myers' predecessors and Ms. Fries' predecessors each took ownership of one half of the relevant portion of the alley at that time, Ms. Myers would also be the owner of the entire alley through boundary by acquiescence. *See Jacobs v. Hafen*, 917 P.2d 1078, 1080 (Utah 1996) ("The elements of
(continued...)

B. Alternatively, Ms. Myers Obtained Title Through Adverse Possession Because The Former Alley Was Never Held for Public Use.

Even if the County's interest in the former alley was not terminated when it ceased being used by the public sometime prior to the 1950s, Ms. Myers could still acquire the Disputed Tract through adverse possession. Contrary to Ms. Fries' position, Utah law permits the adverse possession of property held by state and governmental bodies, with certain limitations. *See Utah Code Ann.* § 78-12-2 (seven-year statute of limitations applies to actions brought by the state respecting title to and possession of real property); *see also Pioneer Invest. & Trust Co. v. Board of Educ. of Salt Lake City*, 35 Utah 1, 99 P. 150, 152-53 (1909) (Utah law permits application of adverse possession against state-owned property except as specifically limited by statute).

This Court should reverse the district court's order because Ms. Myers (or her predecessors) could have obtained title to the Disputed Tract through adverse possession against Salt Lake County. *Utah Code Ann.* § 78-12-13 states:

No person shall be allowed to acquire any right or title in or to any lands **held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose**, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years

(...continued)

boundary by acquiescence are (i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a long period of time, (iv) by adjoining landowners." *Jacobs v. Hafen*, 917 P.2d 1078, 1080 (Utah 1996).

subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate; in which case an adverse title may be acquired.

Utah Code Ann. § 78-12-13 (emphasis added). Pursuant to this statute, only property *held for public use* by government bodies is exempt from adverse possession. *See Averett v. Utah County Drainage District No. 1*, 763 P.2d 428, 429-30 (Utah Ct. App. 1988) (“Property held by municipalities or other statutorily defined governmental entities cannot be acquired by adverse possession, at least insofar as the property is held for public use.”); *Pioneer Invest. and Trust Co.*, 99 P. at 153 (pursuant to previous version of § 78-12-13, “[e]ven as to the cities and towns therefore the exception only applies to property which is devoted to a special public use”). In this case, the former alley was not held by the County for public use since at least the 1950s, and it may never have been used by the public at all. Therefore, the former alley was not subject to the exemption in *Utah Code Ann.* § 78-12-13, and the district court erred in determining, as a matter of law, that Ms. Myers could not have acquired the Disputed Tract through adverse possession.

The district court granted Ms. Fries’ Motion for Summary Judgment based primarily on its conclusion that the County could have divested its ownership of the alley only by official action. This was error. Utah courts have recognized that counties are responsible to perform certain duties to maintain property rights. In *Averett*, this Court addressed a case in which landowners sought to quiet title to two acres of land, held by Utah County Drainage District. No. 1, by virtue of adverse possession. *Averett*, 763 P.2d

at 428-429. In *Averett*, this Court concluded that the property at issue was held for a public use and therefore was not subject to adverse possession based on *Utah Code Ann.* § 78-12-13. This Court, however, based this conclusion on its determination that “the Drainage District **continuously used and maintained the drainage ditch since its construction**, sometime in 1920.” *Id.* at 430 (emphasis added). Unlike in *Averett*, there is no evidence in this case that Salt Lake County **ever** maintained or otherwise used the former alley for public purposes. Therefore, the Disputed Tract was subject to adverse possession. *See id.* at 429-30; *see also Devins v. Borough of Bogata*, 592 A.2d 199, 203 (N.J. 1991) (stating that “municipal land not used for a public purpose is subject to adverse possession”).

Likewise, there is no Utah case law prohibiting the application of adverse possession to the facts of this case. First, *Ecanbrack v. Judd*, 524 P.2d 595, 595-96 (Utah 1974), which held that a public road continues as a public road until abandoned by official action, is distinguishable from the case at hand. *Ecanbrack* involved a public road that had been established by use, rather than dedication. *Id.* By contrast, the former alley has not been in public use for at least fifty years and may never have been in public use at all. Moreover, unlike the public road in *Ecanbrack*, the alley has been divided in several places among several neighbors for at least four decades.³

³ Because of the lack of discovery, the district court did not have the benefit of the evidence reflecting how the alley had been used and is presently being used. The property owners surrounding the alley have created a checkerboard by fencing off portions of the alley for their own private use.

In addition, *Henderson v. Osguthorpe*, 657 P.2d 1268 (Utah 1982), does not compel the conclusion that the former alley could not have been vacated or abandoned without formal action by the County.⁴ That case states that “even where a substantial period of nonuse of a public roadway has elapsed, no vacation occurs unless the specific statutory requirements of U.C.A., 1953, §§ 27-12-102.1 to 102.4 are met.” *Henderson*, however, relied on *Ecanbrack*, which is distinguishable, and was decided under prior law. Moreover, *Henderson* did not address the question of whether a county’s *abandonment of the public use of property* would subject that property to adverse possession. *Henderson*, 657 P.2d at 1270.

In short, the evidence reflects that the alley was either never put into public use or was removed from public use at least fifty years ago. When, as here, there is evidence that a government body has fully abandoned its public use of property, such property is subject to adverse possession. *See Averett*, 763 P.2d at 430-31; *see also White v. Salt Lake City*, 121 Utah 124, 239 P.2d 210, 213 (1952) (“If the street should cease to serve any *public* interest, it may be abandoned. . . .”); *Wanha v. Long*, 587 N.W.2d 531, 541-42 (Neb. 1998) (“[W]hen streets are laid out on a plat but are not so used by the public, they are nothing more than private ways and may be adversely possessed.”) At the very least,

⁴ Because no discovery has taken place, there is no evidence about whether formal action was taken by the County prior to passing the Ordinance in 2000. Moreover, it is unclear whether the former alley was in some manner, “sold, or otherwise disposed of, and conveyed . . . to a purchaser for valuable consideration,” which would also permit the alley to have been adversely possessed by Ms. Myers. *Utah Code Ann.* § 78-12-13.

the Affidavit of Linda Meyers and the Affidavit of Randy Parker, among other evidence submitted in opposition to the Motion for Summary Judgment, created issues of fact about whether the alley was ever used by the public. (Exhibits “D” and “F.”) Therefore, the district court’s order should be reversed.

II. The District Court Erred in Ruling that Ms. Fries is the Sole Owner of the Disputed Tract Because Ms. Myers Is Entitled To, At a Minimum, Half of the Disputed Tract.

The district court erred in ruling that Ms. Fries was the sole owner of the Disputed Tract as a result of the Ordinance, which purported to vacate the alley. The Ordinance states only that “[a]ll right, title and interest in” the vacated former alley reverts to **“abutting property owner or owners.”** (Emphasis added; Exhibit “G.”) Both the Myers Property and the Fries Property abut the former alley. Utah Code Ann. § 72-5-105(2) states, in relevant part:

For purposes of assessment, upon the recordation of an order executed by the proper authority with the county recorder's office, **title to the vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with 1/2 of the width of the highway, street, or road assessed to each of the adjoining owners.** Provided, however, that should a description of an owner of record extend into the vacated or abandoned highway, street, or road that portion of the vacated or abandoned highway, street, or road shall vest in the record owner, with the remainder of the highway, street, or road vested as otherwise provided in this Subsection (2).

Utah Code Ann. § 72-5-105(2) (emphasis added). The plain language of the statute dictates that upon the County’s vacating ownership through the Ordinance, ownership of the Disputed Tract should have been divided between Ms. Fries and Ms. Myers.

There is no Utah case law holding that only property owners within a platted subdivision are entitled to ownership of a vacated public way that was platted with that subdivision. Also, no Utah court has held that the vacating of a public way dedicated from a certain subdivision results in reversion solely to owners located within that subdivision. Courts in other jurisdictions have sometimes viewed a conveyance of a parcel abutting a street or road “laid out along the margin of a subdivision and wholly therein” as including “title to the farther edge of the highway.” *See, e.g., State v. Mobile River Telephone Company*, 2004 WL 1753418 (Ala. Ct. App. 2004) (citing various cases). The courts have done so, however, based on reasoning that the property owner whose property abuts the public way as originally platted contributed all of the property in the dedication. *See id.* That is not the case here. Ms. Fries’ property interests were not affected by the Dedication of the former alley to public use.⁵ The Dedication occurred in 1916 when the subdivision was created. In other words, neither Ms. Fries nor her predecessors going back to the 1950s had any ownership expectations regarding the alley. Hence, none of the owners of the property abutting the former alley could reasonably have expected to acquire any rights affected by the dedication of the former alley.

In any event, the district court erred in ruling that Ms. Fries was the fee owner of the entire Disputed Tract because Ms. Fries has no greater claim as an “abutting land

⁵ In contrast, the Myers Property has encompassed and included the Disputed Tract for many years. Ms. Myers has made extensive use of the Disputed Tract and has structures housed thereon.

owner” to the former alley than does Ms. Myers. Under Utah law, upon dedication of a public road, the public obtains fee ownership, rather than a mere easement, in the dedicated property:

Plats, when made, acknowledged, and recorded according to the procedures specified in this part, **operate as a dedication of all streets and other public places, and vest the fee of those parcels of land in the municipality for the public for the uses named or intended in those plats.**

Utah Code Ann. § 10-9a-607(1) (formerly § 10-9-807) (emphasis added). Based on the statute, upon dedication, the alley was owned by the public in fee until abandonment. Then, when the alley was abandoned by the County, it was divided between the abutting land owners. *Utah Code Ann.* § 72-5-105(2). Thus, at the very least, the order of summary judgment should be reversed and the case remanded with instructions to the district court to enter an order dividing the Disputed Tract equally between Ms. Meyers and Ms. Fries.

III. The District Court Erred In Ruling That There Were No Disputed Issues of Material Fact.

Finally, the district court erred in ruling that there were no disputed issues of fact and that summary judgment was therefore appropriate in this case. No discovery has taken place in this case, and Ms. Fries did not initially produce any affidavits in support of her Motion for Summary Judgment. Instead, Ms. Fries supported her original Motion using nothing more than unauthenticated copies of pages from the public record and a request that the district court take judicial notice of the facts based on those public records. (R. at 32-47.) The district court ruled that there were no disputed issues of fact

based on its conclusion that the only means by which the former alley “could cease to be the property of the county is by formal vacation by the county,” which the court ruled did not take place until the Ordinance was passed. (R. at 282.)

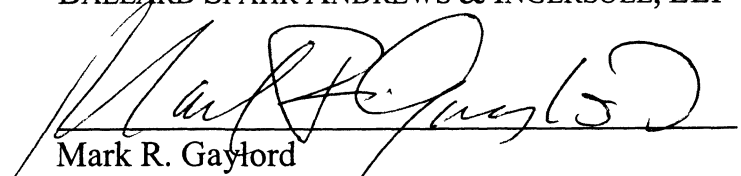
The district court, however, ignored that Ms. Myers raised questions of fact about whether the alley was ever used by the public. (*See* R. at 66, 123-26; *see also* Affidavits of Linda Meyers and Randy Parker, Exhibits “D” and “F,” respectively.) The Dedication itself required that the alley be put into public use. (R. at 123.) As such, if the alley was never put into public use, it could never have been owned, let alone abandoned, by the County, and Ms. Myers would be entitled to ownership. Thus, in light of the disputed issues of fact, the district court’s order should be reversed.

CONCLUSION

For the foregoing reasons, Ms. Myers respectfully requests that the Court reverse the order granting Ms. Fries’ Motion for Summary Judgment and remand this case for further proceedings.

DATED this 20th day of April 2006.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

A handwritten signature in black ink, appearing to read "Mark R. Gaylord", is written over a horizontal line.

Mark R. Gaylord

Matthew L. Moncur

Attorneys for Appellant, Linda Martin

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLANT** were served on the following this 20th day of April 2006, in the manner set forth below:

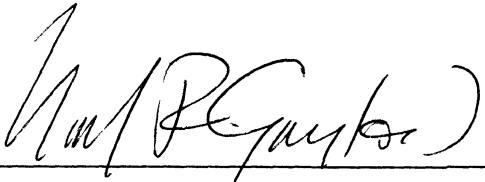
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☒ U.S. Mail, postage prepaid

☐ Federal Express

☐ Certified Mail, Receipt No. _____, return receipt requested

Jeffrey L. Kitchen, Esq.
DAY SHELL & LILJENQUIST, L.C.
45 East Vine Street
Murray, UT 84107



Tab A

10-9a-607. Dedication of streets and other public places.

(1) Plats, when made, acknowledged, and recorded according to the procedures specified in this part, operate as a dedication of all streets and other public places, and vest the fee of those parcels of land in the municipality for the public for the uses named or intended in those plats.

(2) The dedication established by this section does not impose liability upon the municipality for streets and other public places that are dedicated in this manner but are unimproved.

History: C. 1953, 10-9-807, enacted by L. 1991, ch. 235, § 47; 2000, ch. 209, § 6; renumbered by L. 2005, ch. 254, § 56.

Amendment Notes. - The 2000 amendment, effective May 1, 2000, in Subsection (1) deleted "maps or" before "plats" twice and deleted "filed" after "acknowledged."

The 2005 amendment, effective May 2, 2005, renumbered this section, which formerly appeared as § 10-9-807, and made a minor stylistic change.

NOTES TO DECISIONS

Analysis

Duty to complete improvements.

Effect of dedication.

- Fee title.

Location of streets.

- Present use.

Rights of owners of abutting land.

- Boundary by acquiescence.

- Damages.

Duty to complete improvements.

Former § 57-5-4 created a duty on the part of a city to bring about the completion of subdivision improvements where a subdivision developer has contracted with the city to install the improvements at his own expense, and the city has received commitments from banks or mortgage companies to deposit

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Tab B

72-5-105. Highways, streets, or roads once established continue until abandoned.

(1) All public highways, streets, or roads once established shall continue to be highways, streets, or roads until abandoned or vacated by order of the highway authorities having jurisdiction or by other competent authority.

(2) For purposes of assessment, upon the recordation of an order executed by the proper authority with the county recorder's office, title to the vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with 1/2 of the width of the highway, street, or road assessed to each of the adjoining owners. Provided, however, that should a description of an owner of record extend into the vacated or abandoned highway, street, or road that portion of the vacated or abandoned highway, street, or road shall vest in the record owner, with the remainder of the highway, street, or road vested as otherwise provided in this Subsection (2).

History: L. 1963, ch. 39, § 90; C. 1953, 27-12-90; renumbered by L. 1998, ch. 270, § 133; 2002, ch. 291, § 13.

Amendment Notes. - The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-90, and made a stylistic change.

The 2002 amendment, effective May 6, 2002, in Subsection (1), added "streets, or roads" twice, and deleted "over any highway" after "jurisdiction," added Subsection (2), and made related changes.

NOTES TO DECISIONS

Analysis

Abutting owners' rights.

Bridges.

Notice of abandonment required.

Platted but unused streets.

Power of city to abandon.

Requisites for abandonment.

Cited.

Tab C

78-12-13. Adverse possession of public streets or ways.

No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate; in which case an adverse title may be acquired.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-13.

Cross-References. - Dedication of streets, § 10-9-807.

Disposal of unused rights of way, § 75-5-111.

Highways continue until abandoned, § 72-5-105.

NOTES TO DECISIONS

Analysis

Establishment of a holding by city.

- Insufficient.

Establishment of a holding by drainage district.

Estoppel.

- Affirmative acts.

- Denied.

Public purpose.

Establishment of a holding by city.

- Insufficient.

Tab D

FILED
DISTRICT COURT
04 OCT 20 PM 4:25
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY 18
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Attorneys for Defendant Linda Martin

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JAMIE FRIES, an individual,

Plaintiff,

vs.

**LINDA MARTIN, an individual, and
DOES 1 through 5,**

Defendants.

AFFIDAVIT OF LINDA MYERS

Civil No. 040907279

Honorable Anthony B. Quinn

I, Linda K. Myers, being duly sworn, deposes and states as follows:

1. I am over eighteen, have personal knowledge of the matters set forth below and am competent to testify as to the matters set forth herein.

2. I am the defendant in this action, in which I am named as Linda Martin.

My married name is Linda Myers.

3. I am the owner of a home with a fenced yard located at 3031 South 9100 West, Magna, Utah, and more fully described in county and tax records as: Beg S 0-25' E 978 FT FR SE Cor Chambers Townsite Add #1; S 0-52' E 50 FT; N 88-53' E 133 FT; N 0-52' W 50 FT; S 88-52' W 133 FT to Beg. Less Street (the "Property").

4. I have lived on and owned the Property since 1988.

5. At all times during my ownership of the Property, the Property has been enclosed by fencing that includes and encompasses the approximately twelve-foot wide tract of the Property that is the subject of this lawsuit (the "**Disputed Tract**").

6. The value of the Disputed Tract was included in the price I paid when I purchased the Property.

7. It is my understanding that the fence surrounding the Property, including the Disputed Tract, has been in place for more than 40 years.

8. I have been in exclusive possession and control of the Property, including the Disputed Tract, for sixteen years. I use the Disputed Tract to house structures for storage and kennels for my dogs.

9. I have paid property taxes on the Property, including the Disputed Tract, for sixteen years, and Salt Lake County has accepted my payment of those taxes.

10. There is currently no "alley" approximately twelve feet in width and 725 feet long running from approximately 3000 South to 3100 South at 9075 West, Magna, Utah.

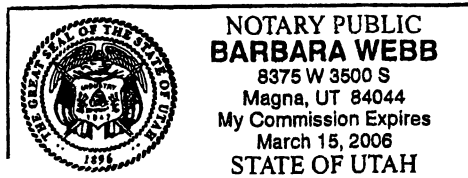
11. If any such "alley" ever existed, it was divided and fenced across by owners of the Property who preceded me long ago, and it has also been divided and fenced

across by fences owned and maintained by my neighbors. It is my understanding that any such
“alley” ceased to be dedicated to public use well prior to the 1950s.

DATED this 19 day of October 2004.


Linda Myers

SUBSCRIBED AND SWORN to before me this 19th day of October 2004.




Notary Public

My Commission Expires: 3-15-06

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **AFFIDAVIT OF LINDA MYERS** was served to the following this 20th day of October 2004, in the manner set forth below:

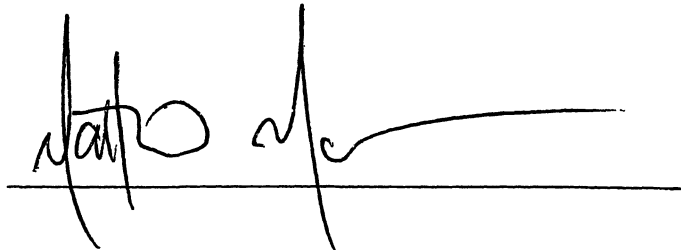
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☐ Certified Mail, Receipt No. _____, return receipt requested

Jeffrey L. Kitchen, Esq.
DAY SHELL & LILJENQUIST, L.C.
45 East Vine Street
Murray, UT 84107

A handwritten signature in black ink, appearing to read "Jeffrey L. Kitchen", is written over a horizontal line.

Tab E

Deputy

D-13

195-22

SURVEYOR'S CERTIFICATE

I hereby certify that the tract of land shown on this map and owned by Manuel Papanikolas and Georgia Papanikolas, his wife, is described as follows: Beginning at a point S. 17° 59' E. 2070.0 ft. from the 1/4 Sec. Cor. between Secs 19 and 30, T. 1 S., R. 2 W., S. L. B. & M., (Ferron survey), and running thence N. 89° 00' E. 559.5 ft., thence S. 0° 55' E. 725.0 ft., thence S. 89° 00' W. 559.5 ft., and thence N. 0° 55' W. 725.0 ft. to the place of beginning, containing 9.31 Acs.; that I have by the authority of the said owners thereof, subdivided the same into blocks, lots, lanes and alleys to be known as Highland Subdivision of Magna; that the same has been correctly surveyed and established on the ground by the placing of 5"x5"x16" concrete monuments at the block corners and that the steel tape used in making the survey was correct.

All lots are as shown on this map, drawn to a scale of 50 ft. to 1 inch.

NAMES AND DIMENSIONS OF PARCELS OF LAND DESIGNATED FOR PUBLIC USE
First East Lane, 50 ft. wide, is 725.0 ft. long. Second East Lane, 50 ft. wide, is 725.0 ft. long.
All alleys are as shown on this map.

Harry A. Rager
Surveyor

OWNER'S DEDICATION

Know all men by these presents that Manuel Papanikolas and Georgia Papanikolas, wife, owners of the above described tract of land, having caused the same to be subdivided into blocks, lots, lanes, and alleys to be hereafter known as Highland Subdivision of Magna, hereby dedicate for the perpetual use of the public all parcels of land designated in Surveyor's Certificate and shown on this map as intended for public uses.

In witness whereof we have hereunto set our hands and seals this 22nd day of

July, A.D. 1966

Manuel Papanikolas

Georgia Papanikolas

Tab F

FILED
DISTRICT COURT
04 OCT 26 PM 4:19
THIRD
SALT LAKE COUNTY
BY DEPUTY CLERK

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Attorneys for Defendant Linda Martin

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JAMIE FRIES, an individual,)	
)	
Plaintiff,)	AFFIDAVIT OF RANDY PARKER
)	
vs.)	Civil No. 040907279
)	
LINDA MARTIN, an individual, and)	Honorable Anthony B. Quinn
DOES 1 through 5,)	
)	
Defendants.)	
)	

I, Randy Parker, being duly sworn, depose and state as follows:

1. I am over eighteen, have personal knowledge of the matters set forth below and am competent to testify as to the matters set forth herein.

2. I was the owner of certain real property located at 3037 South 9100 West, Magna, Utah (the "Property"), from the end of 1993 until July of 2004.

3. Before I became the owner of the Property, it was owned by my grandmother, Louise Kinder, who obtained the Property in the early 1950s.

4. I have an intimate knowledge of the Property.

5. The current fence line at the eastern boundary of the Property, which is the same fence and fence line found at the eastern boundary of Linda Myers' property, has not moved since the Property was built over 40 years ago and is a correct representation of the property line between our properties and the property owned by Jamie Fries.

6. There is currently not an "alley" approximately twelve feet in width and 725 feet long running from approximately 3000 South to 3100 South at 9075 West, Magna, Utah.

7. If there were ever such an "alley," it was long ago separated and divided among property owners, including the current owners of what was my Property and the property now owned by Linda Myers. In any case, any such "alley" was fenced across by fences in several locations by the late 1950s, and it has been impassible and out of public use for at least forty years.

DATED this 22 day of October 2004.

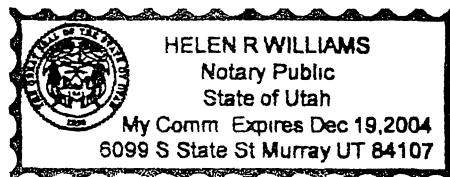

Randy Parker

SUBSCRIBED AND SWORN to before me this 22nd day of October 2004.



Notary Public

My Commission Expires:



CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **AFFIDAVIT OF RANDY PARKER** was served to the following this 26th day of October 2004, in the manner set forth below:

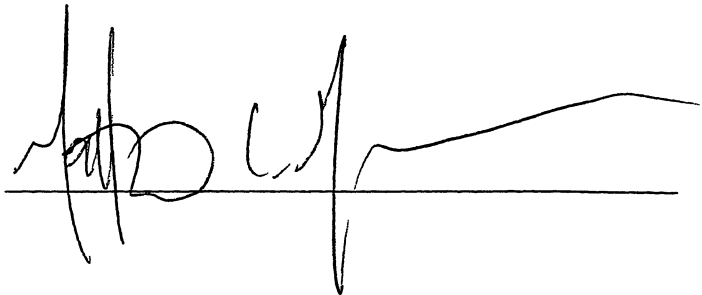
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Jeffrey L. Kitchen, Esq.
DAY SHELL & LILJENQUIST, L.C.
45 East Vine Street
Murray, UT 84107

A handwritten signature in black ink, appearing to read 'Jeffrey L. Kitchen', is written over a horizontal line.

Tab G

ORDINANCE NO. 1467

DATE SEPT. 13th, 2000

AN ORDINANCE VACATING AN ALLEY BETWEEN 3000 SOUTH AND 3100 SOUTH AT 9075 WEST IN SALT LAKE COUNTY, UTAH.

The Board of County Commissioners of Salt Lake County ordains as follows:

SECTION I. (1) A 12 foot wide by 725 foot long alley, located approximately between 3000 South and 3100 South at 9075 West, and which is more fully described in *Exhibit A* attached hereto and incorporated by reference herein, is hereby vacated.

(2) This ordinance is based upon a finding by the Board of County Commissioners following a hearing on June 7, 2000, that due and proper notice of the hearing to vacate said alley was duly given according to law and that no objection was made to said proposed vacation. The Board further finds that the County has no present or future need for the alley vacated herein, and that vacation of the alley relieves the County from present or future obligations to maintain such alley. Therefore, no appraisal nor compensation to the County is required.

(3) All right, title and interest in and to the portion of said alley being vacated is to revert by operation of law to the abutting property owner or owners. This ordinance shall have no force or effect to impair any easement or right-of-way for public utilities, holders of existing public franchises, water drainage easements, or other such easements, as presently exist under, over, or upon the vacated portion of said alley, or as are or may be shown on the official plats and records of the County.

(4) The Salt Lake County Recorder is hereby directed to record this ordinance and make the necessary changes on the official plats and records of the County to reflect said ordinance.

SECTION II. This ordinance shall become effective 15 days after the date of its enactment and upon one publication in a newspaper in and having general circulation in Salt Lake County.

APPROVED and PASSED this 18th day of SEPTEMBER, 2000.

BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY

ATTEST:

Salt Lake County Clerk -- CHIEF DEPUTY
n wp2 wp hns vacatnord.jht

By

MARY CALLAGHAN
ACTING CHAIR, BOARD OF COUNTY COMMISSIONERS

APPROVED AS TO FORM
Salt Lake County District Attorney's Office
By
Deputy District Attorney
Date 8 Sept 2000

Commissioner Callaghan voting " AYE "
Commissioner Overson voting " AYE "
Commissioner Shurtleff voting ABSENT

EXHIBIT "A"

Said parcel of land situated in the Southwest quarter, of the Northeast Quarter of Section 30, Township 1 S, Range 2 W, Salt Lake Base & Meridian, described as follows:

Beginning at the Northwest Corner of HIGHLAND SUBDIVISION OF MAGNA as recorded as entry #360562 in Book G of plats Page 67 and running thence N 89°00'E 12.0 feet to the Northwest Corner of Lot 1, Block 4 of said Subdivision; thence S 0°55'E 725.0 along the East Line of the Alley to the Southwest Corner of Lot 29, Block 4 of said Subdivision; thence S 89d 00'W 12.0 feet to the Southwest Corner of said Subdivision; thence N 0°55'W 725 feet to the point of beginning.

Area equals 8700 sq. ft. or 0.1997 acres.

SCALE: 1" = 100'

4-30-21

14-30-41

SALT LAKE CO.

W. 1/2 N.E. 1/4 SEC. 30 T.1S. R.2W.

100

