

2005

Linda Martin v. Jamie Fries : Reply Brief

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

REPLY 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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**FILED
UTAH APPELLATE COURT**

JUN 21 2006

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ARGUMENT

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

Ms. Fries argues that Ms. Myers could not have acquired the Disputed Tract through adverse possession, based on the ancient doctrine of *nullum tempus occurrit regi*, or “time does not run against the king.” *See Devins v. Borough of Bogata*, 592 A.2d 199, 201-02 (N.J. 1991) (explaining basis and history of doctrine of *nullum tempus*). What Ms. Fries fails to note, however, is that a hard-and-fast rule of *nullum tempus* is not and has never been the law of the State of Utah. In fact, under Utah law, publicly owned property that is not held for public use is subject to adverse possession. *See Utah Code Ann.* § 78-12-13; *see also 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); *Pioneer Investment & Trust Co. v. Board of Education 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). Thus, the real question in this case is not whether publicly owned property not held for public use is subject to adverse possession, it is whether any exceptions to the general rule apply to the facts of this case.

Moreover, Ms. Fries’ attempt to rely on the doctrine of *nullum tempus* is flawed in light of the disfavored status of the doctrine in modern courts. *See Rutgers, State University of New Jersey v. Grad Partnership*, 634 A.2d 1053, 1054 (N.J. Super.Ct. 1993) (discussing “the ancient, and now almost dead, doctrine of ‘*nullum tempus occurrit regi*.’”); *Devins*, 592 A.2d at 203 (“[F]or municipally-owned real estate not dedicated to

or used for a public purpose, *nullum tempus* is an anachronism.”) (emphasis added).

When property owned by a municipality is not in public use, courts have generally permitted its acquisition through adverse possession. *See Siejack v. City of Baltimore*, 313 A.2d 843, 846 (Md. 1974) (noting the “well established . . . notion that municipal property not devoted to a public use can be” acquired by adverse possession); *Goldman v. Quadrato*, 114 A.2d 687, 690 (Conn. 1955) (“Adverse possession will run against a municipality, however, as to land which is not held for a public use.”).¹

Here, there is no question that the Disputed Tract has not been in public use for a minimum of fifty years. Moreover, it is unclear whether the Disputed Tract ever entered into public use in the first place. More importantly, 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.

¹ Moreover, *nullum tempus* is based on antiquated assumptions that are even less applicable today than they were when Utah case law adopted its general rule that municipal property not held for public use is subject to adverse possession. With the level of resources available to modern local government bodies, it is not unreasonable to expect that such bodies maintain responsibility for the property they hold in the same manner as a private landowner.

Also, Ms. Fries' reliance on *Henderson v. Osguthorpe*, 756 P.2d 1268 (Utah 1982), and *Ecanbrack v. Judd*, 524 P.2d 595 (Utah 1974), is misplaced. Neither of those cases dealt with the specific question of whether an alleyway originally dedicated but never placed into public use could be abandoned without official action. Utah courts have recognized the possibility of abandonment by a municipality of property dedicated for public use without official action when that property ceases to serve such a public use. *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. . . ."). Therefore, because the property dedicated as an alley was either abandoned or because the County's interest was defeated by its failure to put the alley into public use, Ms. Meyers properly acquired title to the property through adverse possession. *See Utah Code Ann.* § 78-12-13.

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.

Even if the alley was not vacated until the County's enactment of the Ordinance, the district court erred in holding that Ms. Fries became the sole owner of the entire Disputed Tract. 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 within 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.

Ms. Fries relies on *State v. Mobile River Telephone Company*, 898 So. 2d 763 (Ala. Ct. App. 2004), to support her view that upon vacation of the alley, the entire

Disputed Tract would “revert” to her ownership. Her reliance on that case is misplaced, however, because it is based on a fundamentally different view of dedication. Under Utah law, upon dedication of a public road, the public obtains *fee* ownership, rather than a mere *easement*, in the dedicated property. *Utah Code Ann.* § 10-9a-607(1) (formerly § 10-9-807) (emphasis added). In some other states, including Alabama, dedication results only in an *easement* held by the public. *See Mobile River Terminal Co., Inc.*, 898 So. 2d at 774; *Terwelp v. Sass*, 443 N.E.2d 804, 806 (Ill. Ct. App. 1982) (“[U]nder a common law plat the fee of the tract purported to be conveyed remains in the dedicator, burdened only with an easement over the way in question and subject to the acceptance of the easement by the public.”). Thus, under the common law in several states, the original dedicator maintains an interest in the subject property, which is burdened only by an easement held by the public.

However, Utah views dedication differently than does Alabama or the common law cited above. Under Utah law, upon dedication, the alley was owned by the public *in fee* until it was abandoned or otherwise vacated. *Utah Code Ann.* § 10-9a-607(1) Thus, the original dedicator (and his successors in interest) held no greater claim to the property than did Ms. Myers and her predecessors. Under the plain language of the Ordinance:

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.

(Ordinance, R. at 15; emphasis added.) Because it is undisputed that Ms. Meyers is an “abutting property owner,” Ms. Meyers was entitled, at the very least, to half of the disputed tract. As such, and in the alternative, 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.

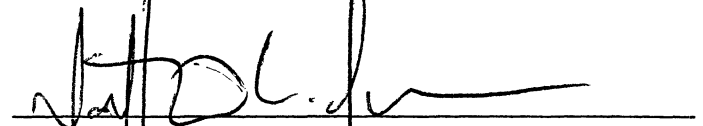
The district court erred in ruling that there were no disputed issues of fact and that summary judgment was therefore appropriate. No discovery has taken place in this case, and Ms. Myers has had no opportunity to explore the history of the Disputed Tract or otherwise establish her right to ownership. 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.) Substantial questions remain, however, about whether the alley ever entered into public use in the first place. 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 21st day of June 2006.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

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

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were served on the following this 21st day of June 2006, in the manner set forth below:

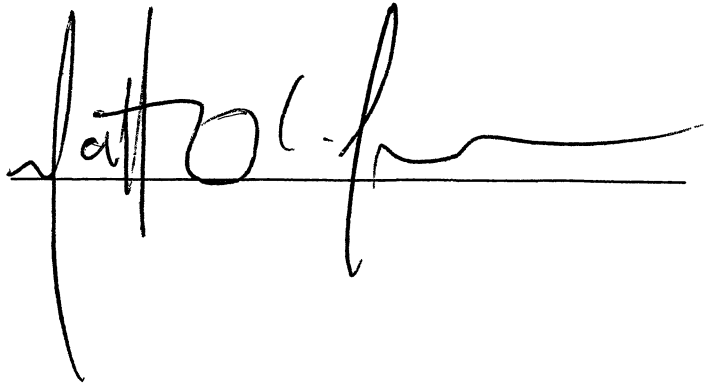
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