

1994

# Max Greenhalgh v. Virginia Beach Federal Savings & Loan Association : Reply Brief

Utah Court of Appeals

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Appellants.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 940016

IN THE UTAH COURT OF APPEALS

MAX GREENHALGH, et al.,  Plaintiffs/Appellees,  vs.  VIRGINIA BEACH FEDERAL SAVINGS & LOAN ASSOCIATION, et al.,  Defendants/Appellants.	Case No. 940016-CA  Priority No. 15
---	---

REPLY BRIEF OF APPELLANTS  
VIRGINIA BEACH FEDERAL SAVINGS AND LOAN  
AND  
JEREMY SERVICE CORPORATION

APPEAL FROM ORDER OF PARTIAL SUMMARY JUDGMENT  
ENTERED IN THE THIRD JUDICIAL DISTRICT COURT  
FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE FRANK G. NOEL, PRESIDING

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Utah Court

JUL 15 1994

representing the view that there are  
determinative Constitutional Provisions or statutes  
quired in my brief.

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### RESPONSE TO APPELLEE'S STATEMENT OF FACTS

While most facts recited by Warburton are true to the record, one "fact" appears to be fashioned from whole cloth. Because this supposed "fact" is pivotal to the notice issue, it warrants a rebuttal.

Warburton's Fact #14 (Warburton Brief, p. 6) twice identifies a mortgage broker, Richards Woodbury, as "VBF's agent." Warburton presents no citation to the record to establish that agency relation. The record is devoid of such a fact or finding. Richards Woodbury brokered the loan between the developer and a coalition of lenders. Nowhere in the Partial Summary Judgment or ultimate Findings of Fact is there a finding that Richards Woodbury acted as an agent for one party or the other. Indeed, Finding of Fact #5 entered by the trial court identifies Richards Woodbury as a "mortgage broker," and not as an agent of either party. (R. 3405.)

The assertion as "fact" that Richards Woodbury was VBF's agent should be disregarded.

### ARGUMENT

VBF submits the following points in reply to Warburton's brief. As required by Rule 24(c), Utah Rules of Appellate Procedure, this reply brief is limited to answering new matters set forth in Warburton's brief.

I. THE PARTIAL SUMMARY JUDGMENT WAS BASED  
ON THE SAMPLE LRA, NOT WARBURTON'S LRA.

Warburton attempts to distance himself from the sample LRA, arguing that his own LRA has "significant and determinative" differences from the sample LRA (Warburton Brief p. 10). Any such differences are unavailing to Warburton, as the August 22, 1991 Partial Summary Judgment clearly turned on the sample LRA. Individual LRA's were not before the Court:

The Court's ruling in August of 1991 granting partial summary judgment was based on a sample LRA submitted to the Court with the argument that the language in the sample LRA constituted an easement. The Court reviewed that language, agreed that it did establish an easement and so ruled. The Court did not at that time apply its ruling to any specific plaintiffs.

June 5, 1992 Order of District Court, p. 2 (Exhibit "A" hereto).

Those plaintiffs who could produce a signed LRA later moved to have the Summary Judgment applied specifically to them. Their motion was initially denied due to affirmative defenses raised by VBF:

The Court is of the opinion that there are three (3) issues of fact which are common to all of the plaintiffs and which therefore require a trial and the presentation of evidence to the trier of fact before the Court can apply it's ruling granting partial summary judgment to any specific plaintiffs. Those questions of fact are whether



consideration has been paid by the plaintiffs, whether any of the agreements have been resold by any of the plaintiffs and whether any of the plaintiffs have received any refunds for their LRA's.

June 5, 1992 Order, p. 2 (Exhibit "A").

Based on the Court's identification of these fact issues, some plaintiffs renewed their motion for specific application of the 1991 Partial Summary Judgment by furnishing individual proof of consideration, no re-sale, and no refund. Faced with that proof, VBF stipulated that certain plaintiffs (including Warburton) "qualified" for the Partial Summary Judgment. (January 15, 1993 Minute Entry, Exhibit 3 to Warburton Brief). Contrary to Warburton's assertion, the record shows that the application of the Partial Summary Judgment to specific plaintiffs did not turn on the language of individual LRA's.

It would have been illogical for the District Court to consider individual LRA's at the summary judgment level, because it was disputed whether VBF had any individual LRA's before making its loan in 1982. The only uncontested facts were that VBF had the sample LRA and list of LRA holders before the 1982 loan<sup>1</sup>. The application of

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<sup>1</sup> The list of LRA holders contained the developer's warranty that all those listed had LRA's in the form of the sample LRA. (VBF brief, Exhibit E, ¶ 2(d)).

summary judgment to individual plaintiffs was premised on those uncontested facts, not any "variations" which might appear in their LRA's.

Whether the focus is on the sample LRA or Warburton's LRA, the ultimate issue remains the same: Does a document conveying a "membership in a club" grant an interest in real property as a matter of Utah law?

II. WARBURTON HAS NOT DEMONSTRATED THAT THE LRA MEETS THE TEST OF WASATCH MINES.

In Rocky Mountain Energy v. Tax Commission, 852 P.2d 284 (Utah 1993), this Court reiterated the standard set out in Wasatch Mines Co. v. Hopkinson, 465 P.2d 1007 (Utah 1970), for determining whether a document could be construed as a conveyance of an interest in land (in the absence of a deed). In arguing that his LRA conveyed an easement (Section I of Warburton Brief), Warburton does not address the Wasatch Mine standard. Indeed, Warburton cites one Utah precedent, Maw v. Weber Basin Water Conservancy Dist., 436 P.2d 230 (Utah 1968).

Maw did not present the issue of whether a document conveyed an interest in real property. The issue was whether a right which had admittedly been created was inheritable. Maw is tenuous authority for Warburton's position that his LRA conveyed an interest in real property.

In Maw, Annie Maw granted a right of way over her

property to a neighboring duck club. In exchange, the agreement provided that Maw's named sons were entitled to free shooting privileges at the duck club. The agreement further provided that the shooting privileges of the named sons could be transferred to a designated grandson for a given year. After the Maw property changed hands, shooting privileges were denied. The plaintiffs in Maw were Annie Maw's grandsons, who claimed to have succeeded to their fathers' shooting privileges. The trial court held that the agreement created shooting privileges for the named sons, and no others. On appeal, the Utah Supreme Court affirmed, holding that the agreement granted rights which were personal to designated individuals, and not inheritable. In the course of that holding, the Court characterized the right created as "in the nature" of an easement in gross. However, a fair reading of Maw shows that the issue was not whether a document created a real property interest. The issue was whether an interest admittedly created was inheritable.

Similarly, High v. Davis, 584 P.2d 725 (Ore. 1978), did not squarely present the issue of whether an agreement conveyed an interest in real property. While the High Court held that a form agreement created an interest which could be classified as a profit a prendre, it is

unclear whether the parties even contested that issue. The holding turned on a narrower issue:

The parties both recognize that the central issue in these cases is the adequacy of the property description in the membership agreements to satisfy the statute of frauds . . .

Id. at 730.

Warburton's reliance on Maw and cases from other jurisdictions does not address the argument made by VBF: The Utah Supreme Court has defined a standard for determining whether a document conveys an interest in land, and the LRA does not measure up. The LRA did not identify boundaries to any real property interest.<sup>2</sup> Similarly, the LRA fails to define the nature or scope of a real property interest, instead referring generally to a "club membership." The LRA fails the test of Wasatch Mines.

III. WARBURTON'S CLAIM TO AN EQUITABLE EASEMENT IS RAISED FOR THE FIRST TIME ON APPEAL, AND IS WITHOUT MERIT.

In the five years between the filing of this action and the entry of judgment, none of the 180 plaintiffs claimed an "equitable easement". To the contrary, the plaintiffs claimed their easements arose from written agreements. Specifically, plaintiffs claimed their

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<sup>2</sup> The LRA could not identify any boundaries because the golf course was "to be constructed" (§ 1 of the LRA) and no golf course plat had been recorded. (R. 631, ¶ 16).

easements in the Jeremy Ranch Golf Course "were . . . created and granted by a written document . . . a Lot Reservation Agreement." (R. 416, ¶ 6). Because this theory is raised for the first time on appeal, it should be disregarded. James v. Preston, 746 P.2d 799, 801 (Utah App. 1987).

In any event, Warburton's theory of equitable easement is based on Wells v. Marcus, 480 P.2d 129 (Utah 1971). In Wells, this Court recognized that part performance could take "a verbal agreement for an easement" out of the statute of frauds. The record is devoid of any finding of a verbal agreement. As in Wells, the absence of a verbal agreement renders this theory inapplicable.

#### IV. WARBURTON HAS MISCHARACTERIZED VBF'S POSITION ON EXTRINSIC EVIDENCE.

VBF argued that the District Court erred in considering extrinsic evidence, because the LRA was facially inadequate under Wasatch Mines and the Restatement of Property, §450 (VBF Brief, p. 16, et seq.). Warburton claims that argument "contradicts the position" previously taken by VBF (Warburton Brief, p. 18). That claim is both unfair and unfounded in the record.

To support his claim that VBF contradicted itself, Warburton selectively cites from VBF's 1991 Memorandum in Support of VBF's Cross-Motion for Partial Summary Judgment.

Warburton cites a string of questions listed by VBF in its Memorandum (e.g., Can the course be modified? Can it be closed?). Even a casual reading of VBF's Memorandum reveals that these questions were raised in VBF's argument that the LRA was too indefinite to be construed as a conveyance of land. The passage appears in a memorandum section entitled "The Claimed Easement Is Too Indefinite", arguing that a document cannot convey an interest in land unless it sufficiently defines the nature and scope of that interest. The listed questions are examples of the indefinite nature of the LRA which render it unenforceable as a real property conveyance.

Similarly, in its brief on appeal, VBF argued that Wasatch Mines and the Restatement of Property, §450, require an adequate definition of the nature and scope of an interest in land. Without that definition, the document is facially inadequate to convey an interest in land. (VBF Brief p. 13, et seq).

The LRA raises a host of unanswered questions regarding the nature and scope of the interest granted. VBF has consistently argued that those uncertainties render the LRA too indefinite on its face to convey a real property interest. VBF has never argued that such unanswered questions open the door to extrinsic evidence.

V. THE RECORD BELOW DID NOT ESTABLISH  
NOTICE AS A MATTER OF LAW.

Warburton's argument on the notice issue is two-fold. First, Warburton argues that VBF had notice because VBF's "agent" Richard Woodbury was allegedly in possession of the individual LRA's. As addressed earlier, the record established no agency relation between Richards Woodbury and VBF. What the record does reflect is that Richards Woodbury acted as a mortgage broker between parties to a loan. (Finding of Fact No. 5, R. 3405). Second, Warburton argues that even if notice to VBF's supposed "agent" is insufficient, VBF itself is deemed to have notice as a matter of law. Again, Warburton's argument fails because the record shows genuine issues of fact regarding notice.

Warburton concurs with VBF's recitation of the notice standard. Constructive or inquiry notice will be imputed if a party dealing with the land had sufficient information to put a reasonably prudent man upon inquiry respecting a conflicting interest, and that inquiry, if pursued, would lead to discovery of the truth. See Johnson v. Bell, 666 P.2d 308 (Utah 1983), Salt Lake v. Garfield & Western Railway Co., 291 P.2d 883 (Utah 1955). The first part of this test creates factual issues on this record. There is a fact issue as to whether a prudent man

would have been on inquiry solely by possession of the sample LRA and LRA list. Again, these are the only two uncontested facts on notice, interpreting the facts in a light most favorable to VBF. D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989).

VBF presented below the Affidavit of an experienced title and real estate professional who stated that nothing in the LRA's would have caused him to make further inquiry. This Affidavit created a fact issue as to whether VBF had sufficient information to be on inquiry.

The authority cited at length by Warburton, Salt Lake v. Garfield, supra, does not help Warburton circumvent this factual issue regarding notice. In Salt Lake v. Garfield, the undisputed facts were that the defendant acquired land on which the neighboring railroad had openly erected polls, guywires and trolley wires. Moreover, a deed in the defendant's chain of title reserved a right-of-way for the railroad. On these undisputed facts, the Utah Supreme Court held that the defendant had constructive or inquiry notice as a matter of law. While that is the holding defendant Warburton seeks, the facts are dissimilar. Here, there was neither open, notorious possession nor a recorded interest by the claimant. There was only an unrecorded document referencing a "membership in a club."



That document would not have put a title professional on inquiry.

The record below showed a genuine factual dispute over whether VBF had sufficient information to be on inquiry notice. Partial Summary Judgment was inappropriate on the notice issue.

CONCLUSION

The Partial Summary Judgment should be reversed because the LRA did not create an easement as a matter of law. Alternatively, fact issues regarding notice preclude summary judgment for Warburton.

DATED this 15<sup>th</sup> day of July, 1994.

PRINCE, YEATES & GELDZAHLER

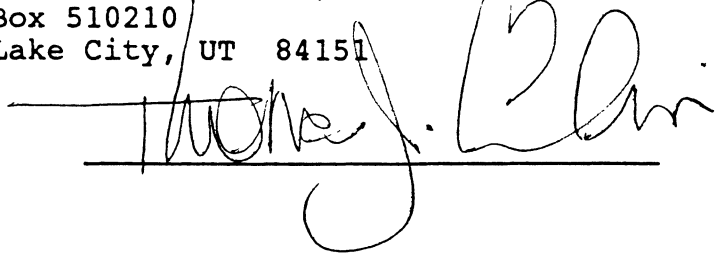
By 

Thomas J. Erbin  
Attorneys for Defendants/Appellants  
Virginia Beach Federal Savings and  
Loan and Jeremy Service Corporation

MAILING CERTIFICATE

I hereby certify that, on the 15<sup>th</sup> day of July, 1994, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS to the following:

Anthony L. Rampton, Esq.  
FABIAN & CLENDENIN  
215 South State Street, 12th Floor  
P.O. Box 510210  
Salt Lake City, UT 84151

A handwritten signature in cursive script, appearing to read "Anthony L. Rampton", is written over a horizontal line.

VBEACH.RBR

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SUMMIT COUNTY, STATE OF UTAH

-----

MAX GREENHALGH, et al.,	:	ORDER
Plaintiff,	:	Civil No. 10005
vs.	:	JUDGE FRANK G. NOEL
VIRGINIA BEACH FEDERAL SAVINGS	:	
& LOAN ASSOCIATION, a foreign	:	
corporation; ATLANTIC PERMANENT	:	
FEDERAL, a foreign corporation;	:	
JEFFERSON SAVINGS & LOAN, a	:	
foreign corporation; THE JEREMY,	:	
LTD, a Utah limited partnership;	:	
JEREMY SERVICE CORPORATION, a	:	
Utah Corporation; ASSOCIATED	:	
TITLE COMPANY, INC., a Utah	:	
corporation,	:	
Defendants.	:	

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Now before the Court is plaintiffs' Objection to the Proposed Order Regarding the Scope of Partial Summary Judgment and plaintiffs' Motion for Application of 8-22-29 Order of Partial Summary Judgment to Specific Plaintiffs. The Court has reviewed the memos and other documents filed in connection with these matters, has heard oral argument thereon and now rules as follows:

The Court's ruling in August of 1991 granting partial summary judgment was based on a sample LRA submitted to the Court with the argument that the language in the sample LRA constituted an easement. The Court reviewed that language, agreed that it did establish an easement and so ruled. The Court did not at that time apply it's ruling to any specific plaintiffs. Since that time defendants have raised what they argue to be numerous issues of fact as to specific plaintiffs.

The Court has reviewed each of the claimed issues of fact together with the response thereto by plaintiffs. The Court is of the opinion that there are three (3) issues of fact which are common to all of the plaintiffs and which therefore require a trial and the presentation of evidence to the trier of fact before the Court can apply it's ruling granting partial summary judgment to any specific plaintiffs. Those questions of fact are whether consideration has been paid by the plaintiffs, whether any of the agreements have been resold by any of the plaintiffs and whether any of the plaintiffs have received any refunds for their LRA's.

There are other issues that apply to specific plaintiffs and while this Minute Entry does not attempt an exhaustive list of all of those issues it will simply point out that there appears to be issues that have not been resolved by the Court with regard to those LRAs which do not contain language essentially


identical to the sample LRA used as a basis for the Court's ruling. For example, those whose LRA's are "non transferable" must be examined in as much as the Court has not ruled on whether or not an easment exists if the membership is not transferable. The fact that the memberships were transferable, it will be remembered, was one of the factors that the Court looked at in it's previousl ruling and, as stated, the Court has not considered whether an easment exists if the membership is not transferable.

There are three agreements, namely those signed by plaintiffs numbered 4, 86 and 88 that are substantially different from the sample LRA, and the Court has not ruled whether said agreements do constitute an easement.

The Court notes that this is a rather old case, that the parties have had a substantial amount of time within which to conduct discovery, and the Court is aware that the parties are anxious to get this matter resolved. The Court instructs the parties to contact the clerk of the court in Summit County to obtain a date for a scheduling conference at which time the Court can consider the scope of discovery, a discovery cutoff date, a date for the trial of this matter and other related matters.

This will serve as the order of the Court.

DATED this 5 day of June, 1992.

  
\_\_\_\_\_  
FRANK G. NOEL  
DISTRICT COURT JUDGE