

2005

Hal Mckee v. Renn Smith : Brief of Appellee

Utah Court of Appeals

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Cindy Barton-Coombs; Attorney for Appellee.

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HAL MCKEE,)	
)	
Plaintiff/Appellant,))	
)	
vs.)	Case No. 20050598
)	
RENN SMITH,)	Priority: Civil
)	
Defendant/Appellee.)	

APPEAL FROM JUDGMENT ENTERED
BY THE EIGHTH DISTRICT COURT, UTAH COUNTY
HONORABLE A.LYNN PAYNE, PRESIDING.

Daniel S. Sam
Attorney for Defendant - Appellee
319 West 100 South, Suite A.
Vernal, Utah, 84078

UTAH APPELLATE COURTS
DEC 05 2005

HAL MCKEE,)	
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ORAL ARGUMENT AT THE DISCRETION OF THE COURT

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HAL MCKEE,
Plaintiff/Appellant,

vs.

RENN SMITH,
Defendant/Appellee.

)
)
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Case No. 20050598

JURISDICTION AND NATURE OF PROCEEDING

STANDARD OF REVIEW

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logically from, and is supported by, the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” Armed Forces, Ins. Exch. V. Harrison, 70 P.3d 35, 37 (Utah 2003). However, the “[Appeals Court] will not reverse the findings of fact of a trial court sitting without a jury unless the are... clearly erroneous...[Appeals Courts] review trial courts conclusions of law on this issue for correctness, according the trial court no particular deference.” Orton v. Carter, 970 P.2d 1256, 1256 (Utah 1998).

STATEMENT OF THE CASE

Appellant, Mr. McKee and Appellee, Mr. Smith own adjoining real property in Tridell, Utah. During the several years before the suit, Mr. Smith changed the location of the fences. Mr. McKee filed suit to require that the fences be returned to their previous location. At trial of the matter, the Court ruled that Appellant had inadequately plead the doctrine of boundary of acquiescence. The Court ruled that the official boundary lines did not follow the ancient fence lines and that Mr. Smith did not have to move his new fence. This appeal followed.

STATEMENT OF THE FACTS

Appellant, hereinafter Mr. McKee and Appellee, hereinafter, Mr. Smith own adjoining property located in Tridell, Uintah County, Utah legally described

as Township 1 North, Range 2 East Uintah Special Meridian in Sections 30 and 25. A road meanders with the topography in a manner that is roughly along the division of the two sections. The testimony at trial of prior landowners and Mr. McKee was that there had been a fence that was on the east side of the road since probably as early as 1912. Around six years before this action commenced, Mr. Smith bought the land in Section 30. During the next several years, he began building new fence that ignored the old lines and went up to the meandering road.

Mr. McKee felt that this was a direct taking of his land and filed suit to protect his interest in the real property now within the fences built by Mr. Smith.

In the Complaint filed in this matter, Mr. McKee alleged:

“(5) That the county road in that area is not straight on section lines, but runs with the topography of the land. That means that the road bisects portion of Plaintiff’s land. A fence has run between the land that Plaintiff owns and that Defendant now owns for many years, probably since 1912.

(6) That during the last six years since Defendant has been on the property, he has continued to systematically move the fences from the original boundary line to the county road. This results in conversion of the Plaintiff’s land preventing him from using and enjoying the benefit of his own land.” (Plaintiff’s Complaint P.2)

During opening statement's the Court interjected that Plaintiff had not sufficiently plead boundary by acquiescence to give the Defendant notice of the argument. (See transcript pgs. 7-10) The Defendant stated that he did not have any notice that the suit would proceed upon the theory of boundary by acquiescence, and the Court thenceforth precluded argument and findings that would support the theory. However, the witnesses testified that the old fence that Mr. Smith had moved had been in existence for 82 years or more and had been considered the boundary between the properties. (See testimony of Sarah Simmons, Transcript pg. 24-30)(See testimony of Farrell Simmons pg. 38 & 40). The testimony of the surveyors placed the boundary some 10-15 feet west of the pre-existing fence.

ARGUMENT

I. Plaintiff's claim for boundary by acquiescence was not specifically plead, but under the liberal pleading rules of the Utah Rules of Civil Procedure the theory was sufficiently plead to give notice to the Defendant of the intention of Plaintiff to prove to theory.

"A plaintiff is required, under our liberal standard of notice pleading to submit a short and plain statement... showing that the pleader is entitled to relief and a demand for judgment for relief. The plaintiff must only give defendant fair notice of the nature and basis or grounds of the claim and a general indication of

the type of litigation involved.” Canfield v. Layton City, 122 P.3d 622 (Utah 2005) citing Williams v. State Farm Ins. Co., 656 P.2d 966, 971 (Utah 1982)

Williams (Id.) contains a lengthy discussion of the liberal pleading rules.

“Rule 8(a)(1) of the Utah Rules of Civil Procedure adopted in 1950, requires that a pleading set forth a short and plain statement of the claim showing that the pleader is entitled to relief...

Under the prior federal practice, the pretrial functions of notice-giving, issue formulation and fact revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict pleading to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.” (Id. at 972)

The Court in Williams went on to hold “It is evident... that the fundamental purpose of our liberalized pleading rules is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to the dispute, (Cheney v. Rusher ,381 P.2 86, 91 (Utah 1963) subject only to the requirement that their adversary have fair notice of the nature and basis or grounds of the claim and a general numeration of the type of litigation involved. (Blackman v. Snelgrove, 280 P.2d 454, 455 (Utah 1955). The rules allow examination into and settlement

of all issues bearing upon the controversy, with latitude for proof that extends beyond the pleadings, where appropriate. It also appears from the cited decisions that these principals are applied with great liberality, sustaining the sufficiency of allegations stating a cause of action or an affirmative defense.” Williams , supra at 973.

It is Mr. McKee’s position that paragraphs 5 and 6 of his complaint give notice to Mr. Smith that he contends that the fence that had been in existence for a long period of time was the agreed boundary between the properties and that Mr. Smith was encroaching on the property. Counsel for Mr. Smith stated at the hearing that he did not have notice of the theory, but this cannot be so. In the discovery process, served upon Defendant January 14, 2004, Plaintiff interrogatory No. 4 asked: “Please state the legal theory relied upon by Defendant in support of his denial of the encroachment upon property and the removal of established fences referred to in Plaintiff’s Complaint, which confers upon Defendant any justifiable grounds or legal standing.” (See Interrogatories attached herein as Addendum 1)

In Plaintiff’s Initial Disclosures submitted to Defendant May 4, 2004, Plaintiff listed witnesses:

“Helen Simmons, testimony: That Defendant, Renn Smith moved the fence

on at Section Corner on North side, and that there was no stone there. The old fence was recognized as the Boundary line.

Bobby Simmons, testimony: That Defendant, Renn Smith moved the fence on North side, and that he still claims the old fence line as the Boundary Line because it has been in existence for as long as he can remember.

Clark McKee. Testimony: ...That the old fence was recognized and noted by residents as the Boundary line.

Vida McKee: Testimony ... that the old fence was recognized for over 50 years by neighbors as the Boundary Line. That when the property was first purchased the old fence was designated as the Boundary line in the purchase.

Hal McKee: Testimony: That Defendant, Renn Smith moved the fence on North side, and that the old fence was recognized as the Boundary line. That the boundary has been established for over 50 years, and is acknowledged as the Boundary line by the Boundary of Acquiescence.” (See Initial Disclosures attached as Addendum 2)

Although it must be admitted that Plaintiff did not use the words “boundary by acquiescence” in his pleading, there could be no doubt from the language used or in the discovery process as to his legal contention. It was error on the part of the Court to disallow the presentation of the theory.

II. In spite of the trial court's ruling against the presentation of the theory of boundary by acquiescence, the witnesses presented sufficient evidence for the advancement of the finding in favor of such a boundary.

Mrs. Helen Simmons did testify that the old fence had been the boundary between the properties before she was a child, and she was 82. (Trans. pgs.22-29)

Mr. Farrell Bobby Simmons testified that the old fence was considered the boundary. (Trans. pgs/31-34)

Mr. Hal McKee testified that the fence line had been the boundary when he was a child and his father owned the land. (Trans. pgs. 54-55)

At the close of testimony, attorney for Plaintiff moved to amend the pleadings to conform to proof. (Trans. Pgs. 138-141) The trial court denied the motion based upon the prior ruling that the pleading was insufficient. This is clearly in direct opposition to the liberal pleading rules and is clearly an error.

III. Mr. McKee's witnesses established the elements of boundary by acquiescence in spite of the rulings of the court.

"The elements of boundary by acquiescence are 1) occupation up to a visible line marked by monuments, fences or buildings, (2) mutual acquiescence in the line as a boundary, (3) for a period of time (4) by adjoining landowners." Jacobs v. Hafen, 917 P.2d 1078, 1080 (Utah 1996). Mrs. Simmons and Mrs. McKee were

the adjoining landowners for many years before they transferred to their respective sons. They testified as to the old existing fence was considered the boundary between the properties for all those years. The transfer of the property to Mr. Smith after the period of time had been established would not extinguish the line that had been in place for at least 82 years. The photos introduced at trial clearly show considerable amount of land between the old fence and the new fence. Mr. McKee should have succeeded on the merits of his case.

CONCLUSION

Mr. McKee was wrongfully denied his remedy in his case for boundary by acquiescence. The decision of the trial court should be overturned.

Dated this 1st day of November, 2005.


Cindy Barton-Coombs,
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that on the 5th day of December, 2005, I placed a true and correct copy of the foregoing document postage prepaid to the U.S. Mail to:

Daniel S. Sam
Attorney for Defendant - Appellee
319 West 100 South, Suite A.
Vernal, Utah, 84078

A handwritten signature in cursive script that reads "Cindy Barton-Cornish". The signature is written in black ink and is positioned to the right of the printed name.

CINDY BARTON-COOMBS
193 No. State Street
Roosevelt, Utah 84066
Utah Bar No. 5842
Telephone: (435) 722-0200
Fax: (435) 722-0218
Client: 200-125

IN THE EIGHTH JUDICIAL DISTRICT COURT, VERNAL DEPARTMENT
COUNTY OF UINTAH, STATE OF UTAH

HAL MCKEE,)	PLAINTIFF'S FIRST SET OF
Plaintiff,)	INTERROGATORIES AND REQUEST
)	FOR PRODUCTION OF DOCUMENTS
vs.)	
)	Civil No.: 030800509
RENN SMITH,)	
Defendant,)	Judge: A. LYNN PAYNE

COMES NOW Plaintiff, Hal McKee, by and through his counsel of record, Cindy Barton-Coombs and pursuant to Rule 33 and Rule 34 of the Utah Rules of Civil Procedure, hereby requests that the Defendant answer in writing and under oath within thirty (30) days from receipt hereof the following Interrogatories and produce the documents specified below for inspection and copying.

INTERROGATORIES

INTERROGATORY NO. 1: With respect to all witnesses you intend or expect to call at the trial of this case, please provide the name of the witness, the address and telephone

number of the witness, the current occupation of the witness and a summary of the expected testimony from each witness.

INTERROGATORY NO. 2: If any of the witnesses listed above in Interrogatory No. 1 are to be called as expert witnesses, please state as to such witness the education, training, experience and other qualifications which would enable him to testify as an expert in this case.

INTERROGATORY NO. 3: With respect to paragraphs 5, 6, 7, and 8 of Plaintiff's Complaint, please state in detail all facts and circumstances relied upon by Defendant in support of each individual denial of the allegations contained therein.

INTERROGATORY NO. 4: Please state the legal theory relied upon by Defendant in support of his denial of the encroachment upon property and the removal and relocation of established fences referred to in Plaintiff's Complaint, which confers upon Defendant any justifiable grounds or legal standing.

REQUEST TO PRODUCE

REQUEST NO. 1: All documents which you intend to introduce as exhibits at the trial of this matter.

REQUEST NO. 2: All documents relied upon or used by you in preparing answers to Interrogatories served by Plaintiff.


REQUEST NO. 3: All documents in your possession or known to you that disprove any alleged statements regarding the property that has been encroached upon and the removal of established fences and placement of those fences in another area referred to in Plaintiff's

Complaint, any cause of alleged defects in the survey of said property, and any other document relating to the Complaint and Answer filed in this matter.

REQUEST NO. 4: All documents relied upon which would have authorized Defendant to encroach on Plaintiff's property and for the removal of established fences which have been there for a period over twenty (20) years. Such as an Order from a Court granting him the authority, or an signed agreement entered into by Plaintiff which would convey to him the power to do so.

REQUEST NO. 5: All documents in your possession or known to you that would describe and define the exact property description where the fences were moved.

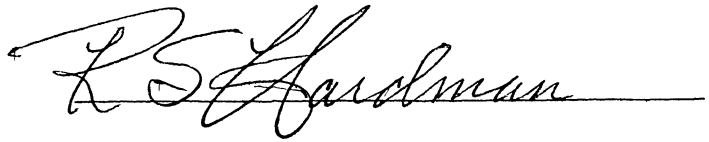
DATED this 14 day of January, 2004.


Cindy Barton-Coombs
Attorney for Plaintiff

CERTIFICATE OF MAILING

I, do hereby certify that on this 14th day of January, 2004, I mailed a true and correct copy of the foregoing PLAINTIFF'S FIRST SET OF INTERROGATORIES AND PRODUCTION OF DOCUMENTS, by first class postage prepaid, by depositing the same in the United States Post Office at Roosevelt, Utah to:

Daniel S. Sam
Attorney for Defendant
319 West 100 South, Suite A
Vernal, Utah 84078

A handwritten signature in cursive script, reading "R. S. Hardman", written over a horizontal line.

CINDY BARTON-COOMBS USB# 5842
193 No. State Street (73-13)
Roosevelt, Utah 84066
Telephone: (435) 722-0200
Fax: (435) 722-0218
Client: 200-125

IN THE EIGHTH JUDICIAL DISTRICT COURT, VERNAL DEPARTMENT
COUNTY OF UINTAH, STATE OF UTAH

HAL MCKEE,)	
Plaintiff,)	PLAINTIFF'S
)	INITIAL DISCLOSURES
vs.)	
)	Civil No.: 030800509
RENN SMITH,)	
Defendant,)	Judge: A. LYNN PAYNE

COMES NOW Plaintiff, Hal McKee, by and through his attorney of record, Cindy Barton-Coombs and submits the following Initial Disclosures pursuant to Rule 26 (a)(1) of the Utah Rules of Civil Procedures.

Initial Disclosures

A. The name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information.

EXPERT WITNESS:

Lanny Kay
Registered Land Surveyor
85 South 200 East
Vernal, Utah 84078
Phone: (435) 789-1017

WITNESSES:

1. John T. Kay
Registered Land Surveyor
646 East Main Street
P.O. Box 266
Vernal, Utah 84078
Phone: (435) 789-6723
2. Helen Simmons
Phone: (435) 247-2520
Testimony: That Defendant, Renn Smith moved the fence at Section Corner on North side, and that there was no stone there. The old fence was recognized as the Boundary Line.
3. Bobby Simmons
Phone: (435) 247-2565
Testimony: That Defendant, Renn Smith moved the fence on North side, and that he still claims the old fence line as the Boundary Line because it has been in existence for as long as he can remember.
4. Clark McKee
Phone: (435) 247-2431
Testimony: That Defendant, Renn Smith moved the fence on North side, and that it was not to be permanent only temporary because Plaintiff was in the process of getting the property. That the old fence was recognized and noted by residents as the Boundary Line.
5. Vida McKee
Phone: (435) 247-2434
Testimony: That Defendant, Renn Smith moved the fence on North side, and the old fence was recognized for over 50 years by neighbors as the Boundary Line. That when the property was first purchased the old fence was designated as the Boundary Line in the purchase.
6. Hal McKee
Phone (435) 247-2434
Testimony: That Defendant, Renn Smith moved the fence on North side, and that the old fence was recognized as the Boundary Line. That the boundary has been established for over 50 years, and is acknowledged as the Boundary Line by the Boundary of Acquiescence

B. A copy of, or a description by category and location of, all discoverable documents, data compilations, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment.

1. Copy of Survey that was done by John T. Kay.
2. Copies of pictures taken at the site showing the location of the old fence, and where Defendant built the new fence.
3. Copy of a picture showing the survey marker next to the corner post of the old fence.
4. Copies of pictures showing where Defendant placed the new fence next to the existing roadway.

DATED this 4 day of May, 2004.


Cindy Barton-Coombs
Attorney for Plaintiff

CERTIFICATE OF MAILING

I, do hereby certify that on this 4th day of May, 2004, I mailed a true and correct copy of the foregoing PLAINTIFF'S INITIAL DISCLOSURES, by first class postage prepaid, by depositing the same in the United States Post Office at Roosevelt, Utah to:

Daniel S. Sam
Attorney for Defendant
319 West 100 South, Suite A
Vernal, Utah 84078

A handwritten signature in cursive script, reading "L. B. Hardman", written over a horizontal line.