

2005

Hal McKee v. Renn Smith : Brief of Appellee

Utah Court of Appeals

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Cindy Barton-Coombs.

Daniel S. Sam.

Recommended Citation

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HAL MCKEE,

VS.

Defendant/Appellee.

Attorney for Defendant/Appellee

IN THE UTAH COURT OF APPEALS

HAL MCKEE,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	Case No. 20050598-CA
)	
RENN SMITH,)	
)	
Defendant/Appellee.)	

BRIEF OF APPELLEE

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

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PARTIES TO THIS ACTION

All parties to this action are listed in the caption

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-2(j); to wit, appeal from a final order of the Eighth District Court, Uintah County, Utah, Judge A. Lynn Payne presiding, dated June 3, 2005, and transferred to this Court by order of the Utah Supreme Court, dated July 8, 2005.

STATEMENT OF ISSUES, STANDARD OF APPELLATE REVIEW, AND SUPPORTING AUTHORITY

Since the Plaintiff did not comply with Rule 24(a)(5) of the Utah Rules of Appellate Procedure, in that the Plaintiff's statement of issues does not state the issues of the case, Defendant/Appellee submits that the following are the issues of this case:

- I DID THE TRIAL COURT ERR IN FAILING TO GRANT PLAINTIFF'S MOTION TO CONTINUE ON THE DAY OF TRIAL, WHERE SAID MOTION WAS BASED ON THE FACT THAT THE PLAINTIFF WANTED ADDITIONAL TIME TO AMEND HIS PLEADING TO INCLUDE A CLAIM BASED ON BOUNDARY BY ACQUIESCENCE AND TO CONDUCT DISCOVERY ON THAT ISSUED.

Trial courts have substantial discretion in deciding whether to grant continuances. The standard of review on this issue is abuse of discretion. *Christenson v. Jewkes*, 761 P.2d 1375 (Utah 1988).

- II DID THE COURT ERR IN NOT GRANTING PLAINTIFF'S MOTION TO AMEND HIS PLEADING TO CONFORM TO THE EVIDENCE WHERE THE THE DEFENDANT OBJECTED TO THE AMENDMENT.

Trial courts have limited discretion in determining whether the presentation of the merits of the case would be subserved by the amendment and whether the admission of such evidence would prejudice the opposing party. Thereafter, the trial court has full discretion

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STATEMENT OF ISSUES, STANDARD OF APPELLATE REVIEW, AND SUPPORTING AUTHORITY

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the trial shall not be postponed upon that ground.

Rule 15(b) of the Utah Rules of Civil Procedure states:

(b) **Amendments to Conform to the Evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

STATEMENT OF THE CASE

This an appeal by the Plaintiff, Hal McKee, to the judgment issued by the Honorable A. Lynn Payne in the Eighth Judicial District Court, Uintah County, Utah, dated June 3, 2005, against the Plaintiff for no cause of action, wherein the Plaintiff sued the Defendant, Renn Smith, an adjoining landowner, to remove fencing constructed by the Defendant near the boundary between the parties' parcels of land. Defendant disagrees with the Plaintiff's statement of the case where it states that "the Court ruled that Appellant (Plaintiff) had inadequately plead the doctrine of boundary of acquiescence." The Court simply denied Plaintiff's motion to continue which Plaintiff requested so that Plaintiff could amend his

pleading and conduct additional discovery on the boundary by acquiescence issue and denied Plaintiff's subsequent motion to amend his pleading to conform to the evidence. Indeed, Plaintiff conceded that the Complaint did not include a boundary by acquiescence claim by making his motions to continue and to amend. The Court thus was led by the Plaintiff's motions to conclude that the Complaint did not contain a claim for boundary by acquiescence.

STATEMENT OF MATERIAL FACTS

1. The first paragraph of Plaintiff's Statement of Facts should be stricken for lack of citation to the record. The following should be inserted in its place:

- a. This matter in general involves the boundary line running between the Parties' respective plots of land said boundary line also being the section and township line (hereinafter, the "Section Line" and/or "Boundary Line") running between Section 25, T1N, R1E, Uintah Special Meridian ("USM"), and Section 30, T1N, R2E, USM, all located in Uintah County, Utah. Specifically, this dispute is over the location of a new fence constructed by the Defendant – whether it is on the Plaintiff's property or the Defendant's property.

(Findings of Fact, paragraph 1, T. at 45).

- b. Plaintiff owns land in Section 25 bordering the Section Line. Defendant owns land in Section 30 also bordering the Section Line. The Section Line is the Parties' Boundary Line.

(Findings of Fact, paragraph 2, T. at 45).

- c. No one disputes the Section Line as it begins in the southwest portion of Section 30 and the southeast portion of Section 25. What is in dispute is the northeast corner of Section 30 which is also the northwest corner of Section 30.

(Findings of Fact, paragraph 3, T. at 45).

- d. Local history shows that there was a fence (hereinafter, the “Old Fence”) that was more or less straight running north/south between sections 25 and 30. Everyone believed that the fence was the Section Line.

(Findings of Fact, paragraph 4, T. at 45).

- e. There were six surveys of the Section Line. The original of Section 25 and the original of Section 30, both completed in 1875, and 3 or 4 other surveys. All of these surveys agreed upon the location of the Section Line. None of the surveys showed the Section Line being where the Old Fence ran.

(Findings of Fact, paragraph 5, T. at 45).

- f. There is a Uintah County road, running north/south, roughly between the Parties’ properties along the Section Line.

(Findings of Fact, paragraph 7, T. at 46).

- g. There is a marker located 33 feet east of the Section Line which is

consistent with a right of way marker marking the eastern boundary of the 66 foot right of way for the County road which runs down the center of the Section Line.

(Findings of Fact, paragraph 8, T. at 46).

- h. Both the Old Fence and the new fence constructed by the Defendant are located on the eastern side of the County Road in Section 30.

(Findings of Fact, paragraph 9, T. at 46).

- i. There is no evidence that any portion of the new fence constructed by the Defendant is on the Plaintiff's property and there is no evidence that the Old Fence was on the Section Line.

(Findings of Fact, paragraph 10, T. at 46).

- 2. The Uintah County road runs down the Section Line between the parties' properties. There are fences on both sides of the road separating the parties' properties from the road. The land between the road and the fences are all within Uintah County's 66 foot right of way and is thus not only useless for development by either of the parties but development is not allowed.

(Answer, paragraphs 4 and 5, T. at 9-10; Findings of Fact, paragraph 8, T. at 46).

SUMMARY OF ARGUMENT

Two issues are presented for review. Both issues are related. The first issue is whether the Court erred in not granting Plaintiff's motion to continue made on the day of trial because Plaintiff wanted to amend his Complaint to include a claim for boundary by acquiescence and

wanted to conduct additional discovery related to that claim. The second issue is whether the Court erred in not granted the Plaintiff's motion to amend his Complaint to conform to the evidence, also made the day of trial after the Court denied the motion to continue. The Court thus was led by the Plaintiff's motions to conclude that the Complaint did not contain a claim for boundary by acquiescence. Thus, the issue is not whether the Court erred in not treating the Complaint as a claim for boundary by acquiescence since the Plaintiff has conceded that the Complaint does not contain such a claim.

As to the Court's ruling on the Motion to Continue, such ruling was purely within the Court's discretionary power to make under Rule 40(b) and did not constitute an abuse of discretion under the circumstances of this case.

As to the Court's ruling on the Motion to Amend to Conform to the Evidence, although the Findings of Fact did not state that the presentation of the merits of the case would not be subverted by the allowance of the motion to amend the complaint or that the Defendant would be prejudiced by allowing the motion to amend as required by Rule 40(b), this may be considered harmless error under Rule 61 of the Utah Rules of Civil Procedure since such is immaterial to the outcome of the case because the fences on both sides of the Uintah County road, including both the old fence and the new fence which are at issue in this case, are within the road right of way, and because the land on each side of the road between the fences and the road, including the land at issue in this case, are only slivers of land, and cannot be used for development by either party. Thus, it is clear from the record that the presentation of the merits of the case, on a boundary by acquiescence claim, would not have been subverted by the

allowance of the motion to amend, but would have only caused a waste of additional time and expense to both parties.

Since boundary by acquiescence was not an issue to determine at trial, the Court merely found that the new fence did not encroach upon the Plaintiff's land and thus dismissed the Complaint. This finding was proper and supported by the evidence at trial and is not a basis for review by the Court of Appeals.

ARGUMENT

I THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT PLAINTIFF'S MOTION TO CONTINUE ON THE DAY OF TRIAL, WHERE SAID MOTION WAS BASED ON THE FACT THAT THE PLAINTIFF WANTED ADDITIONAL TIME TO AMEND HIS PLEADING TO INCLUDE A CLAIM BASED ON BOUNDARY BY ACQUIESCENCE AND TO CONDUCT DISCOVERY ON THAT ISSUED.

Rule 40(b) of the Utah Rules of Civil Procedure states as follows:

(b) **Postponement of the Trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

Trial courts have substantial discretion in deciding whether to grant continuances.

Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988). In the case at hand, the Plaintiff made the

motion to continue on the day of trial. (T. at 44). At the trial were at least four witnesses subpoenaed by the parties. (T. at 22-24, and 31-36) . The case had already been pending for nearly a year. The Court had already filed two motions to dismiss for failure to prosecute which were later withdrawn. (T. at 38-43). The Plaintiff had plenty of time to move to amend his pleading. Under these circumstances, the denial of the motion to continue by the trial court did not constitute an abuse of the Court's substantial discretion.

II THE COURT DID NOT ERR IN NOT GRANTING PLAINTIFF'S MOTION TO AMEND HIS PLEADING TO CONFORM TO THE EVIDENCE WHERE THE THE DEFENDANT OBJECTED TO THE AMENDMENT.

Rule 15(b) of the Utah Rules of Civil Procedure states:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

In the case at hand, the Court denied the Plaintiff's motion to amend his pleading to conform to the evidence in order to include a claim for boundary by acquiescence. Based on that motion, the Plaintiff concedes that the Complaint is insufficient to make such a claim.

Indeed, from the plain language of the Complaint, it is clear that the Plaintiff is asking the Court to order the Defendant to cease encroaching upon Plaintiff's land. (Complaint, paragraph 7; T. at 4). Thus, the issue to be determined at trial was whether the new fence was on the Plaintiff's land. The Court correctly determined that the new fence was not on Plaintiff's land. (Findings of Fact, paragraph 10; Conclusions of Law, paragraph 2; T. at 46-47).

In the case of *England v. Horbach*, 944 P.2d 340 (Utah App. 1997), this Court stated:

The decision to permit amendment under rule 15(b) of the Utah Rules of Civil Procedure is subject to what we have called conditional discretionary review. The trial court's discretion to grant amendment of the pleadings is conditioned on the satisfaction of two preliminary requirements: a finding that the presentation of the merits of the action will be subserved by amendment and a finding that the admission of such evidence would not prejudice the adverse party in maintaining his action or defense on the merits. The trial court has only limited discretion in making these preliminary findings, but once these prerequisites are met, the trial court has full discretion to allow an amendment of the pleadings; that is, it may grant or deny a party's motion for amendment upon any reasonable basis, and the court's decision can be reversed only if abuse of discretion appears.

Id., 944 P.2d at 345. (Citations omitted).

In the case at hand, as stated, the Court did not state in its findings of fact that the presentation of the merits of the case would not be subserved by the allowance of the motion to amend the complaint or that the Defendant would be prejudiced by allowing the motion to amend as required by Rule 40(b). However, this court can either assume that the trial court made such a finding or it may consider the trial court's omission a harmless error under Rule 61 of the Utah Rules of Civil Procedure since such is immaterial to the outcome of the case.

In this case, the fences on both sides of the Uintah County road, including both the old fence and the new fence which are at issue in this case, are within the road right of way, and the land on each side of the road between the fences and the road, including the land at issue in this case, are only slivers of land that cannot be used for development by either party. Thus, it is clear from the record that the presentation of the merits of the case, on a boundary by acquiescence claim, would not have been subverted by the allowance of the motion to amend, but would have only caused a waste of additional time and expense to both parties. Indeed, neither was there any prejudice to either party in the Court's denial of the motion since the Court had all of the evidence regarding the history of the fences, the surveys, and the road, as clearly stated in the findings of fact. Finding of Fact, paragraphs 4-11, T. at 45-46.

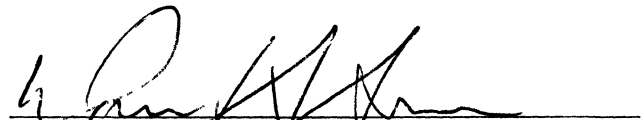
Finally, Plaintiff argues in his brief that the Court should have concluded that the Complaint sufficiently plead the boundary by acquiescence issue under the liberal rules of notice pleading. However, the Court was clearly led by the Plaintiff's motions to conclude that the Plaintiff had conceded that the Complaint did not plead that issue. Had Plaintiff not made the motion to amend, the Plaintiff could have presented the evidence as if the Complaint plead boundary by acquiescence and then ask for a finding of such in closing arguments. This would have allowed the Defendant to argue the issue and would have allowed the Court to rule on this issue. However, this did not happen. There was no argument in the trial court that the Complaint plead the boundary by acquiescence issue and thus the issue was not preserved for appeal.

CONCLUSION

The trial court properly denied the motion to continue since there was no abuse of discretion. The trial court also properly denied the motion to amend, even though the appropriate language of Rule 15(b) was not used in the findings of fact, since, under the facts of this case, a trial on the issue of boundary by acquiescence would have like led to the same result, based on the fact that the property in question is within the road right of way, is only a sliver of land, and cannot be put to use by the Plaintiff. The issue of whether the Complaint included a claim for boundary by acquiescence was not argued in the trial court, was not ruled on by the trial court, and was thus not preserved for appeal.

Wherefore, the Defendant respectfully requests this court to deny Plaintiff's request to overturn the trial court's Final Order, dated June 3, 2005.


Respectfully submitted this 6th day of February, 2005.


DANIEL S. SAM
Attorney for Appellee

CERTIFICATE OF SERVICE

I, Heather Eskelson, do hereby certify that on February ____, 2006, I mailed first class, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLEE to:

CINDY BARTON-COOMBS
193 North State Street (73-13)
Roosevelt, Utah 84066



Heather Eskelson, Legal Secretary

Z:\Daniel S. Sam & Associates P.C\Clients\Active\Renn Smith\Appellee brf.wpd

ADDENDUM

TRIAL COURT'S FINAL ORDER

STATE OF UTAH

HIAL MCKEE,)	
)	
Plaintiff,)	FINAL ORDER
)	
vs.)	
)	
RENN SMITH,)	Case No. 030800509
)	
Defendant.)	Judge: A. Lynn Payne

This matter came before the Court on July 7, 2004, for a bench trial. Plaintiff, Hal M. Kee, was present and represented by counsel, Cindy Barton-Coombs. Defendant, Renn Smith, was present and represented by counsel, Daniel S. Sam. At the outset, the Plaintiff made a motion to continue the trial in order to investigate the issue concerning the location of the section line. Plaintiff also made a motion to amend his pleading to conform to the evidence under Section 15, U.R.C.P. The Defendant objected to both motions. The Court, having entered its Findings of Fact and Conclusions of Law herein, it is hereby Ordered, Adjudged, and Decreed as follows:

1. Plaintiff's motion to continue is denied for lack of a showing of good cause, and Plaintiff's motion to amend his pleading to conform to the evidence is denied for a lack of showing of consent of the Defendant.

2. Plaintiff's complaint is dismissed with prejudice on the basis of no cause of action since Defendants new fence does not encroach upon Plaintiff's property and there is no need for the Court to quiet title.

3. Each party is ordered to pay their own costs and attorney fees in this matter.

DATED this ____ day of May, 2005.

BY THE COURT

A. LYNN PAYNE
District Court Judge

APPROVED AS TO FORM:

CINDY BARTON-COOMBS
Attorney for Plaintiff

FD Smith.fof.wpd

1. Plaintiff's motion to continue is denied for lack of a showing of good cause, and Plaintiff's motion to amend his pleading to conform to the evidence is denied for a lack of showing of consent of the Defendant.

2. Plaintiff's complaint is dismissed with prejudice on the basis of no cause of action since Defendants new fence does not encroach upon Plaintiff's property and there is no need for the Court to quiet title.

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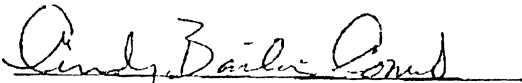
DATED this 27th day of May, 2005.

BY THE COURT



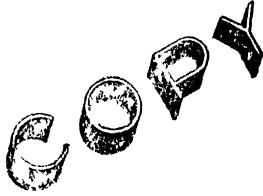
Conformed copy
A. LYNN PAYNE
District Court Judge

APPROVED AS TO FORM:


CINDY BARTON-COOMBS
Attorney for Plaintiff

FD Smith,rof,wpd

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW



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IN THE EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

HAL MCKEE,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
vs.)	
)	
RENN SMITH,)	Case No. 030800509
)	
Defendant.)	Judge: A. Lynn Payne

This matter came before the Court on July 7, 2004, for a bench trial. Plaintiff, Hal McKee, was present and represented by counsel, Cindy Barton-Coombs. Defendant, Renn Smith, was present and represented by counsel, Daniel S. Sam. At the outset, the Plaintiff made a motion to continue the trial in order to investigate the issue concerning the location of the section line. Plaintiff also made a motion to amend his pleading to conform to the evidence under Section 15, U.R.C.P. The Defendant objected to both motions. The Court, after having heard testimony from the parties, having received and reviewed the trial exhibits, and hearing the arguments and representations of counsel for the respective parties, having reviewed the pleadings and other papers on file, and being fully advised in the premises, does now make and enter the following Findings of Fact:

FINDINGS OF FACT

1. This matter in general involves the boundary line running between the Parties' respective plots of land, said boundary line also being the section and township line (hereinafter, the "Section Line" and/or "Boundary Line") running between Section 25, T1N, R1E, USM, and Section 30, T1N, R2E, USM, all located in Uintah County, Utah. Specifically, this dispute is over the location of a new fence constructed by the Defendant – whether it is on the Plaintiff's property or the Defendant's property.

2. Plaintiff owns land in Section 25 bordering the Section Line. Defendant owns land in Section 30 also bordering the Section Line. The Section Line is the Parties' Boundary Line.

3. No one disputes the Section Line as it begins in the southwest portion of Section 30 and the southeast portion of Section 25. What is in dispute is the northeast corner of Section 30 which is also the northwest corner of Section 30.

4. Local history shows that there was a fence (hereinafter, the "Old Fence") that was more or less straight running north/south between sections 25 and 30. Everyone believed that the fence was the Section Line.

5. There were six surveys of the Section Line. The original of Section 25 and the original of Section 30, both completed in 1875, and 3 or 4 other surveys. All of these surveys agreed upon the location of the Section Line. None of the surveys showed the Section Line being where the Old Fence ran.

6. Any disagreement between surveys dealt with the length of the Section Line. Such disagreements as to the length of the Section Line did not change the location of the Section Line.

7. There is a Uintah County road, running north/south, roughly between the Parties' properties along the Section Line.

8. There is a marker located 33 feet east of the Section Line which is consistent with a right of way marker marking the eastern boundary of the 66 foot right of way for the County road which runs down the center of the Section Line.

9. Both the old fence and the new fence constructed by the Defendant are located on the eastern side of the County Road in Section 30.

10. There is no evidence that any portion of the new fence constructed by the Defendant is on the Plaintiff's property and there is no evidence that the old fence was on the Section Line.

11. There is no evidence showing that the Plaintiff brought this action in bad faith since all of the old timers thought the old fence was the Section Line.

12. Good cause does not exist to support the granting of Plaintiff's motion to continue.

13. Plaintiff's motion to amend his pleading would have raised a new issue which was not consented to by the Defendant.

CONCLUSIONS OF LAW

1. Plaintiff's motion to continue should be denied for lack of a showing of good cause, and Plaintiff's motion to amend his pleading to conform to the evidence should be denied for a lack of showing of consent of the Defendant.

2. Plaintiff's complaint should be dismissed with prejudice on the basis of no cause of action since Defendants new fence does not encroach upon Plaintiff's property and there is no need for the Court to quiet title.

3. Each party should be ordered to pay their own costs and attorney fees in this matter.

DATED this 29th day of ^{May}~~May~~, 2005.

BY THE COURT


A. LYNN PAYNE
District Court Judge

APPROVED AS TO FORM:

CINDY BARTON-COOMBS
Attorney for Plaintiff

FD Smith.fof.wpd

2. Plaintiff's complaint should be dismissed with prejudice on the basis of no cause of action since Defendants new fence does not encroach upon Plaintiff's property and there is no need for the Court to quiet title

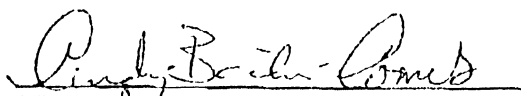
3 Each party should be ordered to pay their own costs and attorney fees in this matter.

DATED this ____ day of May, 2005

BY THE COURT

A. LYNN PAYNE
District Court Judge

APPROVED AS TO FORM


CINDY BARTON-COOMBS
Attorney for Plaintiff

FD Smith for wpd