

1995

Marden R. Kohler and Joy J. Kohler v. Stephen C. Martin : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Kohler v. Martin*, No. 950345 (Utah Court of Appeals, 1995).

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DOCKET NO. 950345-CA IN THE UTAH COURT OF APPEALS

MARDEN R. KOHLER and :
JOY J. KOHLER, :
 :
 Plaintiffs/Respondents :
 and Cross-Appellants, :
 :
 vs. : CASE NO. 950345-CA
 : priority no. 15
 : oral argument requested
STEPHEN C. MARTIN, :
 :
 Defendant/Appellant :
 and Cross-Appellee. :

REPLY BRIEF OF APPELLANT

Appeal From the Fourth Judicial District Court
of Wasatch County, State of Utah, The
Honorable Guy Burningham, District Judge
Presiding

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TABLE OF CONTENTS

Table of Contents.....i
Table of Authorities.....i
Argument.....1
Conclusion.....3

TABLE OF AUTHORITIES

CASES

PAGE

Copper State Thrift and Loan v. Bruno, 735 P.2d 387
(Ut. App.1987).....1

ARGUMENT

Because Steve Martin is requesting this Court to reverse the trial court's application of law to the facts, Copper State Thrift and Loan v. Bruno, 735 P.2d 387, 387 (Ut. App., 1987) it is important that he demonstrate that Plaintiffs' Brief (1) does not dispute Mr. Martin's presentation of the specific uses which occurred on the parcel of property in question and (2) except for the fact that the driveway was visible, totally fails to address the issue that the Defendant is a bona fide purchaser who acquired his home without knowledge of any of the information relied upon by the Kohlers to support their arguments.

The Kohlers' factual statement, commencing on page 3 of their brief, confuses rather than clarifies the evidence. It relates the evidence in terms of generalization and conversations between people that occurred years before Mr. Martin acquired his home. This Reply is targeted to demonstrating these inadequacies.

Contrary to the Kohlers' assertion, the diagram on page 5 of Steve Martin's Brief properly demonstrates the "relative" position of all of the properties and was reproduced from trial Exhibit 10.

Page 5 of the Kohler Brief suggests, for the first time on appeal, that the small wall in front of their house would impede alternative access to that residence. This issue was not raised in the trial court and the photograph on page 19 of the Kohlers' Addendum demonstrates that alternative access would require very little modification and fill material.

The Kohlers' recitation of facts regarding the historical use of the property attempts to improperly generalize the testimony rather than examine the evidence as to who used this property; why did they use it; when did they use it and for what period of time?

The trial court allowed the Plaintiffs to present general reputation evidence pursuant to Rule 803 U.R.E. (T. p.96). On pages 7 to 13 of their Brief, they relate the general testimony of the witnesses in terms of "public use" (p.10); "the public went up the roadway" (p.11); "publicly used and the townspeople" (p.12); "many people" (p.15); "people" (p.18); "neighbors" and "everybody" (p.20), etc.. On cross examination Defendant's counsel elicited the specifics of who the witnesses were actually referring to when they used these general descriptions. That testimony is properly compiled for this Court's review on pages 10 through 16 of Mr. Martin's Brief and further condensed by removing uses attendant to the Buhler Hot Pots and summarized again on pages 28 and 29 of the Brief.

The Plaintiffs devote an inordinate portion of their brief to the relationship between Reed/Elda Kohler and the Whittakers. Except for the mention that the driveway was visible on page 29 of their brief there is not a single suggestion of a legal basis whereby the conversations or "agreements" which occurred between the Plaintiffs' parents and the Whittakers are legally enforceable against a subsequent purchaser who acquired his property without knowledge of any claim; had no means to discover this information and after his inquiry of Elda Kohler was met with silence.

The last issue which requires response is the assertion the Defendant failed to allege a "taking" in the trial court pleadings. This claim was to be asserted against the public entity acquiring the property, which was Midway City. Mr. Martin was prevented from asserting this claim because of the trial court's refusal to allow joinder of Midway City as a party.

CONCLUSION

The Kohlers' argument mirrors the mistake of the trial court in ignoring the legal principles applicable to taking or encumbering the property of another. The trial court and the Kohlers' Brief failed to apply the law to the facts; failed to exclude uses of the property by neighbors and failed to explain the legal basis which holds Steve Martin to an oral, unrecorded agreement between third parties.

Steve Martin requests the judgment of the trial court be reversed.

RESPECTFULLY submitted this 1 day of Dec, 1995.




ROBERT FELTON
Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

MARDEN R. KOHLER and
JOY J. KOHLER,

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Plaintiffs/Respondents
and Cross/Appellants,

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CERTIFICATE OF SERVICE

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vs.

:

Case No. 950345-CA

STEPHEN C. MARTIN,

:

Defendant/Appellant
and Cross/Appellee.

I hereby certify that on the 1st day of December, 1995, I mailed two copies of Appellant's Reply Brief to counsel for Plaintiffs, A. Dean Jeffs, 900 North 100 East, P.O. Box 888, Provo, Utah 84603.



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