4-21-2010

Kennedy v. Schneider Appellant's Reply Brief Dckt. 36853

IN THE SUPREME COURT OF THE STATE OF IDAHO

VERNON KENNEDY and DOROTHY KENNEDY, Plaintiff/Respondent, vs. SAMUEL SCHNEIDER, JR and LAURIE SCHNEIDER et. al., Defendant/Appellants.	)	Supreme Court No. 36853-2009 **APPELLANTS REPLY BRIEF**

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Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Idaho

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Honorable John Bradbury, Presiding

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1. THE KENNEDYS MISREPRESENT CAROLYNN PARK'S TESTIMONY.

As noted in Schneider's opening Brief, the Trial Court's decision as to the adverse possession claim and award of attorney fees was rooted in a mistaken understanding as to the testimony of Carolyn Parks, an employee of the Idaho County Assessor's office. More particularly, in issuing its *Memorandum Decision and Order*, the trial court stated:

> Carolynn Park works in the mapping department for the Idaho County Assessor. She testified that tax payers pay by the tax number assigned to property by assessor. She stated that the disputed property was included in both tax numbers. She testified that the number of acres for which the Kennedys were taxed, that the disputed property had to have been included in their tax parcel.

(R. P. 20-21). Within its *Decision Memorandum*, in which the trial court explained the basis of its decision regarding the adverse possession claim and its award of attorney fees, the Court reiterated the vital role the perceived testimony of Ms. Park had in the Court's decision making process and ultimate conclusions. The trial court stated:

> Also uncontested and irrefutable was the Idaho County Assessor's Mapper, Carolynn Park, who testified that both the Kennedys and Mr. Schneider had been assessed and taxed for the disputed property.

(R. 61).

The reporters transcript proves that Ms. Park actually testified to the exact opposite of what the Court believed she asserted at trial. The trial court's mistaken understanding of the testimony appears based in part in the misleading arguments from the Kennedys.

Despite having the benefit of the trial transcript, the Kennedys continue to misrepresent the content of Ms. Park's testimony by claiming that she testified that both the Schneiders and Kennedys paid taxes upon the same property. As noted in Respondents' Brief,

> In her [Carolynn Park's] testimony, as the District judge found, she unequivocally states at (Tr. 108 Ln. 105) as follows:
>
> Q... Did it appear to you that while the acreage for Mr. Kennedy was bigger and the acreage for Mr. Schneider was bigger than what you had, that they both, perhaps, paid tax on the same piece?
>
> A... Yes.

(Respondents' Brief, Page 9.) This Kennedy's excerpt disregards Ms. Park's subsequent testimony in which she expressly denied stating that both the Kennedys and Schneiders paid taxes on the same property or that the Kennedys paid taxes on the disputed property. Ms. Park's testimony at trial was as follows:

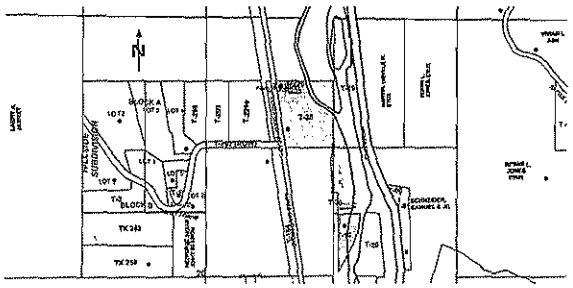
> Q. So, when you testified earlier that from your perspective Kennedy was paying taxes on the property– ...
>
> A. I don't believe I said he [Kennedy] was paying taxes on that area. He was paying taxes on Tax 16 and his other tax numbers.
>
> Q. Okay. Which would be Tax 28?
>
> A. Yes.
>
> Q. But–
>
> A. And 30.
>
> Q. ....So, when you're saying he's [Kennedy's] paying taxes on–all you know is he's paying taxes on Tax Lot 16, Tax Lot 28, and the other tax parcels that are identified on the -

A. On the tax bill, yes, yes.

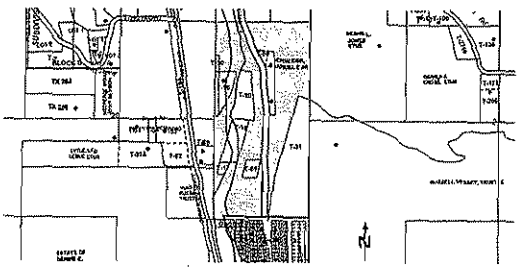
Q. Tax bill, okay. And the same would go for the Schneiders, the taxes that you were aware that were paid, all you know is if they're paid...as identified on the tax bill?

A. Yes

(Tr. P. 121, Ls. 2-18) Further evidencing the Court's and the Kennedys' erroneous understanding of Mr. Park's testimony are the maps Ms. Park prepared which visually establish that the Kennedys did not pay taxes on the disputed property and prove that the Kennedys and Schneiders did not pay taxes on the same property. The maps highlighting the property assessed and which taxes were paid were as follows:



Kennedy Property (Pg. 5, Def. Ex. C)



Schneider Property (Pg. 5, Def. Ex. B)

Given that the trial court's ruling on the adverse possession claim was grounded in an erroneous belief as to the facts presented at trial, the trial court's ruling is clearly erroneous and should be reversed.

2. CONTRARY TO THE KENNEDYS' ASSERTIONS, THE AMOUNT OF LAND THEY OCCUPIED AND WHICH THEY WERE ASSESSED TAXES WAS NOT THE SAME.

There is no dispute that under both theories of adverse possession pursued by the Kennedys, they were required to prove that they paid taxes on the disputed property. The crux of the Kennedys' argument, and the trial court's finding, is that the Kennedys satisfied the tax payment element by proving that the area of land they occupied was the same as the area of land for which they were assessed taxes.

Within their briefing on appeal, the Kennedys argue that in 1999 they acquired a 50- strip of old railroad right of way along the west end of tax lot 28, their home property. (Respondents' Brief, page 2). As a result of this increase in land, the Kennedys, on appeal, present separate acreage analysis for the time periods before and after the 1999 land purchase. Notably, the Kennedys rely upon Exhibit 23 for depicting the pre-1999 acreage assessment and upon Exhibit 20 for the post-1999 acreage assessment. Both analysis; however, are fatally defective as they each utilize inaccurate information.

A. Kennedys' Pre 1999 Area Calculation.

At page 2 of Respondent's Brief, the Kennedys claim they were assessed taxes on 14.588 acres and that they occupied 14.71 acres. According to the Kennedys, since the acreage assessed taxes and the area occupied are "almost identical", they satisfied the tax payment element of their adverse possession claim. The basis for the Kennedys' calculations, however, are inaccurate.

As noted above, the Kennedys relied upon Exhibit 23 to depict the pre-1999 area of land they were assessed taxes since it identifies the land owned by the Kennedys prior to their 1999 purchase of the 50 foot wide land strip. In calculating the area of the land occupied pre-1999, however, the Kennedys rely upon a post-1999 property description. More particularly, the Kennedys utilize the calculations of Ms. Pearsons, who determined that the acreage occupied by the Kennedys pre-1999 was 14.71 acres. This opinion, in turn was based upon her calculation that tax lot 28, less the excepted properties, contained 8.1 acres; that tax lot 16 contained 2.01 acres; that the relevant portion of tax lot 19 contained either .56 or .59 acres; and, that the disputed property (which she included the acreage for tax lot 30) contained 4.04 acres.

The inherent problem is that Ms Pearson's calculations relating to tax lot 28 utilizes the post-1999 property description which excludes more lots from tax lot 28 than what existed in the pre-1999 property description[1]. With regard to tax lot 28, the pre-1999 property description listed the Kennedy ownership as being Tax # 28 Less Tax #'s 113, 220, 236. (Pl.Exhibit 23) The post-1999 property description; however, lists the Kennedy property as including Tax 28 Less Tax #'s 113, 220, 236, **268 & 269.** By using the post-1999 property description, the Kennedys' pre-1999 acreage analysis is incorrect.

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[1]The timing of Ms. Pearsons work is found in her testimony that she started work on the Kennedy property analysis a couple of years prior to the 2009 trial. (Tr. P. 13, Ls. 3 -9) Moreover, Plaintiff's Exhibit 55, which is a hand drawing depicting Ms. Pearsons' calculations for the area of tax lot 28, lists a date of 5/7/2007.

B. Kennedys' Post 1999 Acreage Calculations.

At page 6 of Respondent's brief, the Kennedys' change their calculations somewhat to take into consideration the changes in the Kennedys' land ownership after they purchased the 50 foot strip of land. They argue that post 1999, the Kennedys actually occupied 15.118 acres and were being assessed and billed for 15.066 acres. Once again, the calculations used by the Kennedys are incorrect.

The Kennedys' claim that the purchase of the 50' strip of land added .478 acres to the post 1999 tax assessment and land occupied by the Kennedys. (Respondents' Brief, page 6) The Kennedys' calculate the area of the 50 foot strip of land by simply subtracting the pre-1999 tax assessment acreage of 14.588 acres (Exhibit 23) from the post-1999 tax assessment acreage of 15.066 (Exhibit 20). (Respondent's Brief, page 6). Employing this methodology results in an area of .478 acres (15.066 - 14.588 = .478 acres.). This methodology, however, is fatally flawed.

The problem with the Kennedys' methodology is that the property description within the 15.066 tax assessment (Exhibit 20) differs from the pre-1999 tax assessment. The differences in the pre-1999 and post-1999 descriptions are as follows:

PRE 1999 Exhibit 23 Total Acreage 14.588	POST 1999 Exhibit 20 Total Acreage 15.066
T32 N R4E SEC 20 Tax #'s 16 & 30 Tax #28 Less Tax #'s 113, 220, 236	T32 N R4E SEC 20 Tax #'s 16, 28 & 30 **along with a 50' wide strip of RR ROW along W Side of Tax #28** Less Tax #'s 113, 220, 236, **268 & 269.**

Since the two property descriptions vary by more than the purchase of the 50 foot stip of land, a simple comparison of the two exhibits cannot be used to calculate the acreage of that 50 foot strip of land.

The actual value of the 50 foot land strip, however, is easily calculated by one of two methods. First, the actual acreage for the land strip can be determined by comparing the acreage contained within Exhibit 23 with the acreage contained in the Kennedys' 2000 quitclaim deed (Plaintiff's Exhibit 5). This method will produce an accurate result since the only difference in the land descriptions used in these two records is the purchase of the 50 foot strip of land.

The Quitclaim Deed identifies a total acreage owned of 15.368 acres. (Plaintiff's Exhibit 5) Subtracting the acreage listed in Exhibit 23 from the acreage listed in the quitclaim deed results in a finding that the strip of land occupies 78 acres. (15.368 acres -14.588acres =.78 acres)

The accuracy of the .78 acreage assessment is confirmed by using Ms. Pearsons' measurement of the west side of Tax lot 28 and multiplying it by 50 feet. As noted by the Respondents, Exhibit 55 was prepared by Ms. Pearsons to show the area of tax lot 28 less the excepted parcels. The West boundary of tax 28 is identified in that exhibit as being 674.03 feet. Thus, the area of fifty foot strip of land is 33,701.5 sq. feet (50' x 674.03' = 33,701.5 sq. ft.) This area, in turn, equates to .774 acres (1 acre = 43,560 sq. ft. 33,701.5/43,560 = .77367 sq. ft.).

Substituting the correct acreage for the 50 foot strip of land, results in an increase of .302 acres to the total acreage alleged to be occupied by the Kennedys. Thus, by using the proper figures,

the total acreage allegedly occupied by the Kennedys is 15.42 acres rather than the 15.118 acres claimed in Respondents' Brief. Clearly, the occupied acreage of 15.42 is not the same as the 15.06 acres assessed in taxes.

3. The Kennedy's Reliance upon the Holdings of *White v. Boydstun*, *Wilson v. Gladish*, and *Flynn v. Allison* Are Misplaced as the Facts in Those Cases Are Readily Distinguishable from the Facts in the Case at Bar.

The Kennedys argue that the facts of this case are so similar to the facts in *White v. Boydstun*, 91 Idaho 615, 428 P.2d 747 (1967) that it is "spooky". (Respondents' Brief, page 6) A review of the facts, however, finds the case so dissimilar that the holding in *White* is rendered inapplicable to the case at bar. *White v. Boydstun*, involved a quite title action to a 1.01 acre parcel of land located in McCall Idaho. The disputed property was located adjacent to a .98 acre parcel which was deeded to White. A fence enclosed the two parcels as one tract. White was assessed taxes for a two acre parcel even though the disputed parcel was only 1.01 acres. Furthermore, it was undisputed that the tax assessor's office attributed to White the entire property tax assessment and that White paid all the taxes assessed. It was further established that Boydstun, while claiming under a right of title, had not paid taxes on the disputed property. *White,* 91 Idaho at 618 -619, 428 P.2d 750-751.

Boydstun claimed ownership of the 1.01 acre parcel under claim of title. The trial court quieted tittle in favor of White. On appeal, Boydstun argued that White had failed to prove that he paid taxes on the disputed property. This Court affirmed the lower court, finding that "[w]hen taxes to land adversely claimed are in fact paid, an erroneous or uncertain assessment will not affect the

efficacy of the actual payments." *White*, 91 Idaho at 622, 428 P.2d at 754.

Unlike in White, the case at bar does not involve erroneous or uncertain tax assessments. Moreover, unlike in White, the Kennedys were not billed for the taxes assessed on disputed property. Instead, the taxes assessed on the disputed property were included only in the Schneider's tax bill.

Thoroughly evidencing the Kennedys' misunderstanding of and reliance upon *White* is the excerpt from *White v. Boydstun*, the Kennedys incorporate within their Respondents' Brief ,which states:

> It should be noted that in the analogous situation concerning adverse occupation of land next to a boundary line between the property of the adverse claimant and his opponent, continuous adverse occupation will extend a true boundary line beyond the occupiers deed limits, so that the payment of taxes assessed on the property deeded is deemed the payment of taxes on lands in the claimants possession.

(Respondents' Brief, page 7). This quoted language, relied upon by the Kennedys, was expressly rejected by this Court in *Trappet v. Davis,* 102 Idaho 527, 533, 633 P.2d 592, 598 (1981). In *Trappett*, this Court stated that [s]ince application of the *White* dicta would eliminate the tax requirement in virtually every adverse possession case, it is hereby disapproved." *Trappet*, 102 Idaho at 533, 633 P.2d at 598.

The next case relied upon by Kennedy, as well as the trial court, is *Wilson v. Gladish*, 140 Idaho 861, 103 P.3d 474 (Ct. App. 2004). In *Wilson*, the adverse possessor claimed .66 acres of property and was assessed on .66 acres of property. The tax assessment failed to particularly describe the land being taxed such that it could not be identified. *Wilson,* 140 Idaho at 866, 103 P.3d

at 478. As noted by the Court in Wilson,

> On the facts of this case, the assessment against Wilson was made following a viewing of the disputed property, and the assessment describes the property being taxed by a generic description which indicated the quantity of property being taxed, but not the specific property itself. Wilson paid taxes according to that assessment....Wilson claimed 0.66 acres of property and was assessed on 0.66 acres of property, and the assessment failed to particularly describe the land being taxed such that it could be identified. We therefore conclude that Wilson met the tax payment requirement..

Wilson, 140 Idaho at 867, 103 P.3d at 480.

Without question, the pertinent facts in Wilson do not exist in the case at bar. Here, the tax assessments identify the specific land being taxed with particularity instead of by using generic descriptions. Moreover, as established above, the acreage assessed to the Kennedys does not equal the land claimed by the Kennedys.

Finally, the Kennedys cite to *Flynn v. Allison*, 97 Idaho 618, 549 P.2d 1065 (1976). In *Flynn v. Allison*, the property owner, Flynn, purchased two contiguous 100-foot parcels. At the time of the purchase the property was unsurveyed and unimproved. Later, Boise Cascade commissioned a survey of the area for a possible purchase which fell through. The survey stakes were left in place. Based upon a misunderstanding of the survey markers, Flynn erected a fence; cleared the land; planted a lawn trees; and, located his septic tank in that area. A later survey revealed that Flynn had encroached about sixty feet north onto the adjoining landowners property.

In *Flynn*, taxes were assessed based upon the amount of river frontage property owned. The tax assessments did not precisely describe the property taxed. 97 Idaho at 621, 549 P.2d at 1068.

The uncontroverted evidence established that Flynn was assessed taxes for 200 feet of river front property, that Flynn only claimed ownership of 200ft river front land, and that Flynn paid the taxes assessed. The trial court found in favor of Flynn.

On appeal, the tax payment requirement was addressed. In analyzing the issue, this Court held that,

> Boundary disputes are not uncommon in this state, as witnessed by the relative frequency with which this Court has wrestled with the problem, and we realize that the adverse possessor faces a almost impossible task in attempting to prove that he paid taxes on the land he claims when the facts show simply that he has mistakenly shifted his boundaries, as in this case, sixty feet into his neighbor's property. We hold that under these circumstances, in which the adverse claimant occupied the same amount of land as that which for which he was assessed, and, further, the county property tax assessment sheet did not particularly describe the land being taxed, the requirement of I.C. 5-210 that the adverse claimant has 'paid all the taxes, state, county or municipal, which have been levied and assessed upon such land according to law' has been satisfied.

The pertinent circumstances which existed in *Flynn* do not exist in the case at bar. Unlike in *Flynn*, the Kennedys did not occupy the very same amount of land that they were being assessed taxes. Moreover, the tax assessment records in the case at bar unambiguously describe the property being taxed with particularity. Therefore, the rationale for the result reached in *Flynn* is not present in the case at bar.

Based upon the above, the trial court's holding was clearly erroneous Accordingly, the Schneiders' respectfully request this court reverse the trial court's decision.

4. THE DISTRICT COURT AWARD OF FEES CONSTITUTED AN ABUSE OF DISCRETION.

Undoubtedly, the trial court's attorney fee award was based upon its mistaken belief as to the testimony presented by Carolynn Park. As discussed in detail above, the trial court believed that Ms. Park expressed the opinion that the taxes assessed against the Kennedys included the disputed property. Clearly, the trial judge's memory of what was presented could not have been more at odds with what was actually was presented at trial. Ms. Park expressly denied that the Kennedys having paid taxes on the disputed property or that both partys paid taxes on the disputed property. The trial courts mistaken understanding should, alone, result in the award for attorney fees being reversed.

Furthermore, as noted within Respondents' Brief, the trial court attached significance to Leah Meager's testimony. The trial court determined that Ms. Meager's review of the property and belief that the property at issue was included within the assessed property somehow rendered a defense to the adverse possession claim as frivolous. Contrary to the trial court's position, Ms. Meager's testimony was of little to no value. The only time that she reviewed the property was in 2003 which was after the time period at issue. Furthermore, Ms. Meager's belief that the disputed property was contained within the taxes assessed to the Kennedys was directly contradicted by the testimony of Carolynn Park.

Given the trial court's award of attorney fees is based upon a misunderstanding of the facts presented, the Courts basis for award of fees is improper and constitutes an abuse of the trial court's

discretion. Accordingly, the Schneiders respectfully request this Court vacate the award of attorney fees.

CONCLUSION

Based upon the foregoing, the Schneiders respectfully request that this Court reverse the lower court's decision granting the Kennedys title to the disputed property by way of adverse possession. Furthermore, the Schneiders request this Court vacate the award of attorney fees in the case below and reject the Kennedys' request for attorney fees on appeal.

RESPECTFULLY SUBMITTED this 16 day of April, 2010.

CLARK and FEENEY LLP

By: _____
Jonathan D. Hally, a Member of the firm
Attorneys for Appellants Schneider

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of April, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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☒ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Overnight Delivery
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By: _____
Jonathan D. Hally