9-28-2017

# Nielson v. Talbot Appellant's Reply Brief Dckt. 44864

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

GLEN WAYNE NIELSON and CHERYL E. NIELSON, husband and wife,

Plaintiffs/Appellants,

v.

ROBERT TALBOT and MICHELE TALBOT, husband and wife,

and

PAUL PARKER AND SAUNDRA PARKER, husband and wife,

Defendants/Respondents.

**Supreme Court of Idaho**
**Case No. 44864**

# APPELLANTS' REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
FOR FRANKLIN COUNTY
THE HONORABLE JUDGE NAFTZ, PRESIDING

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## THE ANCIENT CAMPBELL CASE MUST BE READ IN LIGHT OF THE LATER DEVELOPMENT OF THE BOUNDARY BY ACQUIESENCE CAUSE OF ACTION

The Parker and Talbot brief demonstrates a fundamental lack of understanding of the common law and the way in which causes of action develop. As cases are decided, the elements of a cause of action begin to emerge. As later cases focus on different aspects of a particular type of dispute new elements required to establish the cause of action are developed. In our legal system, it is the duty of the courts and lawyers to coalesce those precedents in order to distill from them the elements that must be proved to establish the common law cause of action. In this case, Plaintiffs were deeded land by metes and bounds. That metes and bounds description in their deed created a prima facie case that the Plaintiffs were the owners of the property therein described. Defendants disputed that ownership. It was incumbent on them to identify the legal theory they were pursuing that would deprive Plaintiffs of ownership of a portion of the property they thought they owned. One such legal theory is the doctrine of boundary by agreement or acquiescence. Boundary by agreement or acquiescence has three elements: (1) there must be an uncertain or disputed boundary, (2) a subsequent agreement fixing the boundary, and (3) subsequent purchasers must be put on notice of the boundary that is different from their deed. *Luce v. Marble*, 142 Idaho 264, 127 P. 3d 167 (2005). The fact pattern presented to the court was a supposed agreement that the boundary would be different from that contained in the contract the parties drew up that contained a clear metes and bounds description. The problem for the Defendants was that there was never the element of an uncertain or disputed boundary. Without such uncertainty or dispute there is no consideration for the supposed agreement and one of the necessary elements of the cause of action for boundary by agreement or acquiescence cannot be met.

That an early Idaho case did not happen to discuss the element of uncertainty or dispute that provides the necessary support for ignoring the clear metes and bounds description, one of the later developed elements of the cause of action, is of no moment. All of the relevant precedent must be applied to arrive at a just and satisfying result in the later cases. In this case, the fact that the ancient *Campbell* [1]case did not explore the necessity for a dispute between the parties to provide the consideration for a boundary by agreement or acquiescence does not give license to the trial court to ignore later cases such as *Luce v. Marble*, 142 Idaho 264, 127 P. 3d 167 (2005) that synthesizes the agreement element of the cause of action with the dispute element of the cause of action for boundary by acquiescence. If this Court were to accept Defendants' argument, the *Luce* case with its holding that there are three elements to a cause of action for boundary by agreement or acquiescence would be written out of our common law.

Indeed, early on Defendants' recognized this case as a case of boundary by acquiescence. Only later, when it became apparent that the facts would not support a claim of boundary by agreement or acquiescence did the new argument begin. Only after the facts demonstrated that there had never been any uncertainty or dispute to be resolved by agreement between the parties was it argued that a case following this fact pattern could be decided without the essential element of a dispute or uncertainty as to the location of that boundary line. Such sloppy analysis is not worthy of the noble common law system we embrace in this state.

## UNDER OUR SYSTEM, A CASE CANNOT BE TRIED ON COMPETING AFFIDAVITS

As Defendants correctly point out, Plaintiffs did raise a genuine issue of material fact through submission of the affidavit of Vince Whitehead that refuted the so-called undisputed

[1] *Campbell v. Weisbrod*, 73 Idaho 82, 89, 245 P.2d 1052, 1057 (1952).

facts on which Defendants relied in their motion for summary judgment and their brief in this appeal.

Mr. Whitehead was the builder who built the home the Defendants now live in. In his affidavit he stated that when he came on the property twenty years ago there was no fence. At the time Vince Whitehead bought the property there was neither a fence nor lilac bushes. See Appendix, Exhibit D; Clerk's Record on Appeal at p.p. 250-251. When he bought the property the fence did not exist and he could not discern a boundary line on the ground. Appendix, Exhibit D; Clerk's Record on Appeal at p.p. 250-251. There were no sprinkler systems. There was no shed. There was no carport. In short, the fence was removed before any of the "landmarks" on which defendants now rely were later added. The person who built the shed had never seen the fence. The person who built the sprinkler system had never seen the fence. The person who planted the lilacs had never seen the fence. The person who built the carport had never seen the fence.

When that testimony is coupled with the testimony of Craig Shaffer that he and the Murdocks believed that the legal description they had prepared pinpointed the location of the fence, and he would not have signed the deed had he believed that the legal description did not accurately define the boundary of the property. Appendix, Exhibit E; Clerk's Record on Appeal at p.p. 152-154; See Appendix, Exhibit S; Clerk's Record on Appeal at p.p. 147-148. One is left with confidence that the fence was not actually located where the other markers now exist. At least there is a genuine issue of material fact whether the fence coincided with the markers to which the Defendants now point.

Nor is it of any moment in a summary judgment proceeding that the Defendants produced a second affidavit of Mr. Whitehead in which he states that he cannot be sure his memory of what happened 20 years ago is accurate. Such a later affidavit, while perhaps creating a genuine issue of material fact cannot be allowed to circumvent Plaintiffs' right to a jury trial. It is not difficult to perceive a line of questioning where Mr. Whitehead is on the stand and the Plaintiffs' lawyer pulls out his first affidavit and asks "When first asked about the fence, you testified that the fence was gone when you arrived on the scene? He answers, "that is correct." The lawyer asks, "and it was only after that testimony was called into question did you agree that your memory of what happened 20 years ago may not be accurate?" He responds, "that is correct." "But your first recollection was that the fence was gone when you first visited the property twenty years ago." He answers, "that is correct." Given that questioning, a jury very well might conclude that the fence was gone when Mr. Whitehead arrived on the scene to build Defendants' house, and therefore all the so-called markers of the fence line were installed after the fence was long gone, by people who had never seen the fence. Those are the kind of issues that trials are made of. It was inappropriate on this record for the trial court to grant summary judgment.

DATED this 28th day of September, 2017.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2017, a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF was served upon each of the following individuals by causing the same to be delivered by the method and to the address indicated below:

| | |
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Dated this 28th day of September, 2017.

Jennifer Mariscal