

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

11-21-2007

Summary of Horgan v. Felton, 123 Nev. Adv. Op. No. 53

Krystal Gallagher
Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Gallagher, Krystal, "Summary of Horgan v. Felton, 123 Nev. Adv. Op. No. 53" (2007). *Nevada Supreme Court Summaries*. 469.

<https://scholars.law.unlv.edu/nvscs/469>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

***Horgan v. Felton*, 123 Nev. Adv. Op. No. 53 (November 21, 2007)¹**

PROPERTY– ATTORNEY FEES

Summary

This opinion focuses on the district court’s judgment awarding attorney fees as damages in a suit to quiet title. The Court reexamines their decision in *Sandy Valley Associates v. Sky Ranch Estates*² and restates the rule set forth in that case.

Disposition/Outcome

Affirmed in part and reversed in part.

Factual and Procedural History

This case was brought forth by several homeowners in Glenbrook, Nevada (collectively referred to as the “Horgan group”), seeking declaratory relief and to quiet title on a recreational beach easement identified as Golf Links Road. This road provides access to the homeowners’ residences and to the beach. The defendants include Daiss, Jepsen Properties, and the Biggs, whose parcels are benefited by the recreational beach easement, and the Feltons, whose property does not benefit from the easement. Daiss owns the recreational easement.

The Horgan group sought a declaration that they were the owners of Golf Links Road. They also sought an order that Daiss and the Felton remove improvements and an order requiring that Daiss and the Feltons re-grade and repave the road. The district court held that the Horgan group, and their predecessors, have continuously used the recreational easement and their right to the recreational easement has not been extinguished. The court further held that the original grantor’s reservation runs with the land and set forth rules pertaining to the use of the easement. The court awarded attorney fees in favor of the Horgan group. The parties appealed and cross-appealed.

Discussion

The Court sets forth the following issues to be determined:

1. “Whether Jepsen Properties and the Biggs extinguished a portion of the recreational easement;
2. Whether the right to promulgate rules concerning the reasonable use of the recreational easement under the deed survived the grantor and vested in the servient tenants;
3. Whether the district court has rulemaking authority under the deed; and
4. Whether attorney fees are appropriate in this case.”³

¹ By Krystal Gallagher.

² 117 Nev. 948, 35 P.3d 964 (2001).

³ 123 Nev., Adv. Op. 53, p. 4-5 (November 21, 2007).

The Court finds Jepsen Properties and the Biggs did not extinguish a portion of the recreational easement by adverse use. The record does not show “Jepsen Properties and the Biggs adversely, continuously used any portion of the recreational easement over the required five-year prescription period.”⁴ Therefore, they failed to extinguish any part of the easement. The Court reasons that most of the properties are vacation homes and since they are not occupied on a year round basis, they could act to exclude Horgan group from using the easement. The Daiss group attempted to exclude the Horgan group by installing sprinkler systems, landscaping, and fences on or across the bluff the Horgan group used to get to the recreational easement. However, the Horgan group was still able to access, and make use of, the easement by climbing over or walking around the fences.

Jepsen and the Biggs argue the rulemaking authority of the servient landowner was reserved to only the “first part” based on the language of the grant. The Court disagrees and holds that the burden of an easement is appurtenant and the rights or obligations of servitude are tied to ownership or occupancy, not an individual. However, the deed did not provide the district court with rulemaking authority. Therefore, the Court holds the district court erred in promulgating specific rules for the use of the easement and reverses that portion of the district court’s decision. “The district court has no rulemaking authority under the deed in the first instance.”⁵

The issue the Court looks most closely at is whether attorney fees as special damages are appropriate. The Court states that attorney fees are generally not recoverable without a statute, rule, or contractual provisions that states otherwise. An exception is that district courts may award attorney fees as special damages in some circumstances. The Court takes the opportunity to clarify the language in *Sandy Valley Associates v. Sky Ranch Estates*,⁶ which the Horgan group uses as support for their award of attorney fees.

In *Sandy Valley*, the Court stated, “an award of attorney fees is permissible, but not mandatory, when a property owner litigates to remove a cloud on title.”⁷ This rationale partially relied on *Summa Corp. v. Greenspun* (Summa I),⁸ where the Court affirmed the award of attorney fees because the cause of action was brought to remove a cloud upon title. The Court clarifies that the actual holding of Summa I is that a “plaintiff may recover as damages the expense of legal proceedings necessary to remove a cloud on the plaintiff’s title.”⁹

The Court points to the Restatement (Second) of Torts § 633, which defines recoverable pecuniary loss as support for the majority rule that attorney fees qualify for special damages in action for slander of title to remove clouds from title. The Court reverses the district court’s award of attorney fees in this case because “no authority appears to support the proposition that attorney fees are available as special damages in a

⁴ 123 Nev., Adv. Op. 53, p. 4-5.

⁵ *Id.* at p. 5.

⁶ 117 Nev. 948, 35 P.3d 964 (2001).

⁷ 123 Nev., Adv. Op. 53, p. 9 (citing *Michelsen v. Harvey*, 110 Nev. 27, 30, 866 P.2d 1141, 1142 (1994)).

⁸ 96 Nev. 247, 607 P.2d 569 (1980).

⁹ 123 Nev., Adv. Op. 53, p. 11 (citing *Wright v. Rogers*, 342 P.2d 447 (Cal. Dist. Ct. App. 1959) and *Dowse v. Doris Trust Co.*, 208 P.2d 959 (Utah 1949)).

case to remove a cloud upon title when no claim for slander of title has been alleged.”¹⁰ The Court states the clarified rule as follows, “attorney fees are only available as special damages in slander of title actions and not simply when a litigant seeks to remove a cloud upon title.”¹¹ Accordingly, since the district court did not find the Daiss group slandered title to real property, no attorney fees were available. The Court reverses this portion of the district court’s order.

Concurring Opinion [Chief Justice Maupin]

Chief Justice Maupin stresses that the clarification of *Sandy Valley* does not preclude the prosecution of claims for attorney fees as special damages in other contexts.

Conclusion

The Court affirms the district court’s holdings that the Daiss group failed to show they acquired a portion of the recreational easement through adverse use and that Daiss (servient tenant) may promulgate rules for the reasonable use of the easement. The Court also holds that the district court did not have the authority to promulgate rules and reverses this portion of the opinion. The Court reverses the district court’s awarding of attorney fees as special damages, clarifying the rule as only applying for slander of title causes of action.

¹⁰ *Id.* at p. 12.

¹¹ *Id.* at p. 13.