8-9-2012

Armand v. Opportunity Management Co., Inc. Cross Appellant's Reply Brief Dckt. 39445

IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT SIEGWARTH and SHARRI SIEGWARTH, Supreme Court No. 39445-2011
Plaintiffs/Appellants/Cross-Respondents

and

GUIDO ARMAND and SANDRA ARMAND,
Plaintiffs/Cross-Respondents

v.

EDWARD FELSING and LINDA FELSING, EDWARD BLANCHETTE and DEBRA BLANCHETTE, and MICHAEL SCHADEL and ROSEMARY SCHADEL,
Defendants/Respondents/Cross-Appellants

and

OPPORTUNITY MANAGEMENT CO., INC.
Defendant/Respondent

CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County, Honorable Charles W. Hosack and Lansing L. Haynes, District Judges, Presiding.

James McMillan
Residing at Wallace, Idaho, Attorney for Appellants/Cross-Respondents, Siegwarth

Douglas Marfice
Residing at Coeur d'Alene, Idaho, Attorneys for Cross-Respondents, Armands

R. Wayne Sweney
Residing at Coeur d'Alene, Idaho, Attorneys for Respondents/Cross-Appellants, Blanchettes and Schadels

Michael K. Branstetter
Residing at Wallace, Idaho, Attorney for Respondents/Cross-Appellants, Felsings

John R. Zeimantz
Residing at Spokane, Washington, Attorneys for Respondents, Opportunity Mgmt. Co., Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. ARGUMENT

A. The Nature and Scope of the Access Easement Granted to Siegwarths and Armands was Not Based Upon Substantial and Competent Evidence.

1. The District Judge Erred in Granting an Easement to Siegwarths and Armands over Lot 10.

In opposition, Siegwarths renew their specious argument that Lot 10, BBT I, "*in its entirety*, was intended for broad recreational use incident to the Lake." Appellants' Reply Brief, pp. 12, 16. As pointed out in Respondents' Brief, Michael Smith's parol and impeached testimony upon which Siegwarths so heavily rely, is contradicted by the unambiguous instruments he signed. Respondents' Brief, p. 22.

An express easement, being an interest in real property, may only be created by a written instrument. *Shultz v. Atkins,* 97 Idaho 770, 773, 554 P.2d 948, 951 (1976), citing Idaho Code § 9–503. The BBT I plat did not designate the location of any easement on Lot 10, designate Lot 10 as a recreational or common area, or dedicate Lot 10 for common use. (Ex. 79.2). Likewise, the Schafhausen deed did not grant an easement *over* Lot 10, BBT I "for access to the Lake." Ex. 79.3. As such, any use of Lot 10, BBT I, for "for access to the Lake" was expressly limited to the "Lake Frontage contained in Lot 10."

Even if the John Schafhausen deed created an easement through the "Lake Frontage" of Lot 10, BBT, the use of an easement claimed under a grant must be confined strictly to the purposes for which it was granted or reserved, and in compliance with any restrictions imposed by the terms of the instrument. *McCoy v. McCoy*, 125 Idaho 199, 868 P.2d 527 (Ct. App., 1994); citing 25 Am.Jur.2d Easements and Licenses § 74, pp. 479-80 (1966). The general rule

concerning easements is that the right of an easement holder may not be enlarged and may not encompass more than is necessary to fulfill the easement. *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991). In *Aztec Ltd., Inc. v. Creekside Investment Co.*, this Court stated:

> "An increase in width does more than merely increase the burden upon the servient estate; it has the effect of enveloping additional land." Thus, the Argosy Trust ... could not increase the width of the easement in order to develop its land into a subdivision.

100 Idaho 566, 569, 602 P.2d 64, 67 (1979). Any **widening** of an alleged easement on Lot 10, BBT I beyond the "Lake Frontage" line would impermissibly increase the burden on the servient estate.

No part of Lot 10, aside from the "Lake Frontage," was or can be encumbered with an easement appurtenant to the Siegwarths' and Armands' properties for access to the lake. The language of the agreement granting use of the "Lake Frontage" in the John Schafhausen deed to the "other owners of lots" in BBT **without reference to their** successors and assigns has consequences. In *King v. Lang*, 136 Idaho 905, 42 P.3d 698 (2002), this Court addressed the argument whether such language created an easement appurtenant or an easement in gross:

> The primary distinction between an easement in gross and an easement appurtenant is that in the latter there is, and in the former there is not, a dominant estate to which the easement is attached. *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973). An easement in gross is merely a personal interest in land of another, *id.*, whereas an easement appurtenant is an interest which is annexed to the possession of the dominant tenement and passes with it. [citation omitted.] An appurtenant easement must bear some relation to the use of the dominant estate and is incapable of existence separate from it; any attempted severance from the dominant estate must fail. [citation omitted.]

...

> The section of the easement agreement that is in dispute states the following:
>
> As partial consideration for the aforesaid easement, ***the grantees grant the grantors and their immediate families the right to use the road across the grantees' property described above***, to reach the Spokane River for the purpose of fishing on the banks thereof. [***Emphasis in original***].
>
> The district court held that this language unambiguously created an easement in gross that was not transferred to French.
>
> The opinion of the district court is correct. The first easement, which was granted to the Langs, clearly identified a dominant estate and a servient estate and identified the location of the easement. Further, the Lang easement was granted to the Langs and their "heirs and assigns," rather than specifically to the Lang family. In contrast, the easement granted to the Waggoners identified no dominant or servient estate, and gave a right of access to the river to people who may have no interest in the land itself, such as members of the Waggoners' immediate family.
>
> *King,* 136 Idaho at 909, 42 P.3d at 702 (Emphasis added [underlined]).

Much like that in *King*, the John Schafhausen deed only granted "all other owners of lots in proposed Berven Bay Terrace Subdivision" the right to use "Lake Frontage" on the proposed Lot 10 for "access to the lake." Of import, this conveyance language does not identify any dominant estate benefitted by the "access to the Lake," nor did it create an easement appurtenant to the Siegwarths' properties.

More recently, this Court confirmed the rule that if the language of a deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible. *Machado v. Ryan*, 2012 WL 2481622, 3 (June 29, 2012). As in *Machado*, the John Schafhausen deed is unambiguous as it does not allow for conflicting

interpretations. It simply granted "access to the Lake" at the "Lake Frontage contained in Lot 10" and not over Lot 10. There is no language in the John Schafhausen deed that clearly establishes any intention to burden Lot 10, BBT I or Lot 8, BBT II, with an easement traversing Lot 10 to the "Lake Frontage" appurtenant to the Siegwarths' properties. For these reasons, the trial court's judgment establishing an easement across Lot 10, BBT I for lake access should be reversed.

2. A 4' Wide Access Easement Was Not Intended by the Parties, nor is it Necessary for Reasonable "Lake Access."

In the event that this Court affirms the judgment granting an express easement to Siegwarths and Armand, it must then address the Cross-Appeal of the trial courts' determination of the width and scope of the easement. The judgment described the location and scope of the lake access easements as follows:

Lake Frontage Easement for Purposes of Lake Access

> An easement over said Lot 8, Berven Bay Terrace II as recorded in Book "F" of Plats at page 138, Kootenai County, State of Idaho, Records, along the lake frontage for lake access purposes, as described in the Supplemental Memorandum Decision, appurtenant to Lots 1-3 and 5, Berven Bay Terrace, over a strip of land two (2) feet in width on each side of the centerline of the existing main path and extending from said centerline to the waterline of Hayden Lake with the description of the centerline of the main path defining the length of the easement described as follows:
>
> . . .
>
> **Lots 1, 2, 3 and 5, BERVEN BAY TERRACE, Easement to Lake Frontage Easement for Purposes of Lake Access**
>
> Together with an easement appurtenant to said Lots 1 and 2, Berven Bay Terrace, *for pedestrian ingress and egress* for the owners of said lots to the Lake Frontage

> Easement, four (4) feet in width, with two (2) feet on each side for trail maintenance along the centerline of the existing path from Lots 1 and 2, BERVEN BAY TERRACE, onto Lot 8, BERVEN BAY TERRACE II described as follows:
>
> . . .
>
> Together with an easement appurtenant to said Lots 3 and 5, BERVEN BAY TERRACE, *for pedestrian ingress and egress* for the owners of said dominant lots to the above-described Lake Frontage Easement, four (4) feet in width, with two (2) feet on each side for trail maintenance, the center line of which is to be determined by the Court in accordance with its Supplemental Memorandum Decision because the plaintiffs objected to defendants' designation of its location.

(39445-2011 R. at 107-47).

Siegwarths concede that a four foot wide easement granted by the trial court was not intended by the parties. Appellants' Reply Brief, p. 17. Rather, they contend that the granted easement should be at least ten feet wide because that was the width of the designated corridor on the Berven Bay Terrace I plat. Appellants' Reply Brief, p. 17. Siegwarths also cite to testimony of their surveyor, Scott Rasor, and Respondents' surveyor, Earl Sanders, regarding the trail width. However, the cited testimony of Mr. Rasor regarded his concerns about trail construction even though he acknowledged that he was not an expert in trail construction. (Tr. pp. 1296-1297, 1301). The Respondents' surveyor, Mr. Saunders, was merely testifying to the width he designated for Respondents' *proposed* easement that was ordered by Judge Hosack. (Tr. p. 1325).

Siegwarths seek to invert the rule in *Conley v. Whittlesey*, 133 Idaho 265, 270, 985 P.2d 1127, 1132 (1999) that "a grant indefinite as to width and location must impose no greater burden than is necessary," and argue for the most cumbersome access easement; that which

subsumes all of Lot 10, BBT I [Lot 8, BBT II]. Appellants' Reply Brief, pp. 16-17. As pointed out in Respondents' Brief, p. 41, an easement is to be defined according to the intention of the parties and circumstances in existence at the time the easement was given and carried out. *Argosy Trust v. Wininger*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005). The evidence at trial showed that there were no four foot wide trails established or in use on Lot 10, BBT I, when the property was platted. (Tr. p. 353, ls. 10-11; Tr. p. 370, L. 20 – p. 371, L. 11). Due to the Siegwarths' failure to properly meet their burden at trial, the trial court's judgment creating a four foot wide easement for lake access must be reversed.

3. An Express Reservation for a "Secondary Easement" Was Unnecessary and Unreasonably Increased the Burden on Servient Estate.

In summary fashion, Siegwarths assert that the evidence shows the parties intended for a expansive use of Lot 10, BBT I and contend the trial court's award of a four foot secondary easement was justified. At no point do they address the additional burden created by enveloping an additional two feet of land on each side of the easement.

Most recently this Court reaffirmed the long standing rule that "secondary easements cannot enlarge the burden on the servient estate." *Machado*, 2012 WL 2481622 at 7; citing *Conley*, 133 Idaho at 271. Again, the evidence in the record regarding the history of trails to Lot 10, BBT I [Lot 8, BBT II] does not show that there was any contemplation of a secondary easement when the John Schafhausen deed was executed, and it certainly was not mentioned in that document. In *Coulsen v. Aberdeen-Springfield Canal Co.*, this Court stated:

> The use to which a right of way is devoted, or for which it is created, determines the character of title with which the holder is invested. The character of the use or

> the necessity of complete dominion determines the extent to which he is entitled to possession. No greater title or right to possession passes under a general grant than reasonably necessary to enable the grantee to adequately and conveniently make the intended use of his way.

47 Idaho 619, 626, 277 P. 542, 544 (1929). Further, "because the determination of width and length of an easement must be based upon the 'circumstances in existence at the time the easement was given,' it follows that the width of a secondary easement must also be determined on that basis." *Machado*, 2012 WL 2481622 at 7. In *Northwest Pipeline Corp. v. Luna*, this Court expressly rejected the approach taken by the trial court in specifying the dimensions of the declared easement without evidence of the parties' intent at the time of creation:

> While Northwest Pipeline presented evidence that a twenty-foot easement may be necessary for pipeline safety and maintenance under today's standards, it failed to present substantial evidence of the parties' intent concerning the intended width of the easement at the time it was granted. As plaintiff in this matter, Northwest Pipeline had the burden of demonstrating the intention of the parties to create a twenty-foot easement or that the twenty-foot easement was necessitated by conditions existing at the time of the grant.

149 Idaho 772, 775, 241 P.3d 945, 948 (2010).

Again, Siegwarths ignore that it was incumbent upon them to demonstrate that the parties intended to create a four foot secondary easement at the time the easement was created. Due to the complete want of evidence on this front, the court's determination of location and scope of the secondary easement cannot be sustained based upon the evidence introduced. Therefore, that portion of the judgment granting a specifying the width of the primary easement and a secondary easement must be reversed.

B. Siegwarths Should be Judicially Estopped from Asserting Continued Claims to the "Common Areas" of BBT I Within BBT II.

Siegwarths simply respond to Respondents' judicial estoppel argument by asserting that there is no inconsistency between their arbitration award compensating them for their claim on their title policy for their "loss" of the common areas in Berven Bay Terrace, and their argument on appeal that they still have an interest in the same property. Appellants' Reply Brief, pp. 18-19. The basis for their assertion of inconsistency is their misunderstanding of the collateral source rule. Because they received an arbitration award on their title policy claim for their "loss," they assert that this recovery from insurance proceeds is not inconsistent with continuing to assert a claim to the property that was compensated by the award. The collateral source rule is codified in Idaho Code § 6-1606 and bars double recoveries against a defendant where an injured plaintiff has received compensation from insurance or some other collateral source:

> In any action for **personal injury or property damage**, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory. For the purposes of this section, collateral sources shall not include benefits paid under federal programs which by law must seek subrogation, death benefits paid under life insurance contracts, benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code, and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract. Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages which have been compensated independently from collateral sources.
>
> (Emphasis added).

There is no damage award in this case for the Siegwarths so the collateral source rule is inapplicable.

Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position," *Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008), which is exactly what the Siegwarths are doing here. They literally want to retain their compensation award for their property "loss" and continue to assert that they retain an interest in the "loss" property. These are incompatible positions – loss and with compensation in one and retained property rights in the other. Siegwarths' actions are similar to the judicially estopped plaintiff in *McKay v. Owens*, 130 Idaho 148, 154, 937 P.2d 1222, 1228 (1997) where this Court noted:

> McKay obtained an advantage (the settlement) from one party (the medical malpractice defendant). She cannot now repudiate that statement made in open court in front of a judge, and by means of her inconsistent positions, obtain a recovery against another party, arising out of the same transaction.

McKay, 130 Idaho at 154, 937 P.2d at 1228.

Siegwarths are likewise seeking a second recovery against Respondents Schadel, Blanchette, and Felsing in the form of an interest in properties, the loss of which they were compensated for by their title insurer. As this Court stated in *McKay*:

> The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings . . . Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts . . . Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

McKay, 130 Idaho at 152, 937 P.2d at 1226 (1997); citing *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996).

Due to the unavoidable fact that they were previously compensated for the loss of property rights, the Siegwarths should be judicially estopped from asserting a claim to the same property, the common areas of Berven Bay Terrace I included in Berven Bay Terrace II, in this case.

II. CONCLUSION

For the reasons outlined above, Respondents submit that the trial court's judgment granting Siegwarths an access easement over Lot 10, BBT I [Lot 8, BBT II] should be reversed with a remand to the District Judge directing entry of judgment that Siegwarths and Armands have no right, title, interest or easement to that property. In the alternative, the Respondents submit that the trial court's determination as to the scope of the primary and secondary was contrary to the evidence and law so that part of the judgment should be reversed and remanded

for further proceedings.

Respectfully Submitted,

Dated: August 8, 2012.

LUKINS & ANNIS, P.S.

By: _____
R. WAYNE SWENEY
JONATHON D. HALLIN
Attorneys for Cross-Appellants
Schadels and Blanchettes

Dated: August 7th, 2012

_____
MICHAEL BRANSTETTER
Attorney for Cross-Appellants Felsings

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6 day of August 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Douglas Marfice
Ramsden & Lyons, LLP
P.O. Box 1336
Coeur d'Alene, Idaho 83816
Fax: (208) 664-5884
dmarfice@ramsdenlyons.com
Attorneys for Cross-Respondents, Armand

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)
- ☐ Electronic Mail

James McMillan
415 Seventh Street, Ste. 7
Wallace, Idaho 83873
Fax: (208) 752-1900
mcmillanlaw@suddenlinkmail.com
Attorney for Appellants, Siegwarth

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)
- ☐ Electronic Mail

John R. Zeimantz, Isb# 7239
J. Patrick Diener, Isb# 8734
Feltman, Gebhardt, Greer & Zeimantz
421 W. Riverside Ave., Ste. 1400
Spokane, Washington 99201
Fax: (509) 744-3436
jrzeimantz@fggzlaw.com
Attorneys for Opportunity Management Co., Inc.

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)
- ☐ Electronic Mail

R. WAYNE SWENEY