10-16-2008

Bird v. Bidwell Appellant's Reply Brief Dckt. 35314

IN THE SUPREME COURT OF THE STATE OF IDAHO

MIKE AND VERLA BIRD, husband and wife,

Plaintiffs – Appellants.

v.

GARY AND LINDA BIDWELL, husband and wife,

Defendants – Respondents.

Supreme Court No. 35314

Case No. CV-2007-443

APPELLANTS' REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR FREMONT COUNTY.

HONORABLE BRENT J. MOSS, PRESIDING.

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes and other authorities

STATEMENT OF THE CASE

I. Nature of the Case

This case involves a dispute over a road and right-of-way in Fremont County, which road crosses both the plaintiffs/appellants' (hereafter "the Birds") and the defendants/respondents' (hereafter "the Bidwells") respective properties. The Birds assert that they have an implied easement from prior use over the road which crosses the Bidwells' property.

II. Course of Proceedings

The Birds filed a Verified Complaint For Declarative and Injunctive Relief on August 9, 2007, in Fremont County Case No. CV-2007-443, claiming an implied easement by prior use. Bidwells filed an Answer on August 16, 2007. Thereafter, discovery was conducted and trial was held on January 31, 2008. The trial court entered a Judgment, Memorandum Decision, Findings of Fact and Conclusions of Law on April 4, 2008 denying the Birds' requested relief. The Birds filed a Notice of Appeal on May 12, 2008.

III. Facts

Virgil Mickelson is the father of Appellant Verla Bird, respondent Linda Bidwell and Carol Murri (who is not a party to these proceedings).The Birds were granted a parcel of property[1] in Fremont County, Idaho on December 18, 1995, by Warranty Deed from Virgil Mickelson. (Tr. Vol. I, p.9, L.4-19; Trial Exhibit 8). On the same day, the Bidwells were granted by Warranty Deed a

[1]This parcel is referred to on the respective deeds as parcel "2".

parcel of property[2] immediately to the north of the Birds' parcel of property. (Tr. Vol I., p.1, L.19-20; Trial Exhibit 2). That same day, Virgil Mickelson also granted by Warranty Deed to Roger and Carol Murri the parcel of property[3] immediately to the south of the Birds' property. (Tr. Vol. I, Trial Exhibit 9). The Bidwells purchased that parcel from the Murris in the year 2000 and currently own it. (Tr. Vol. I, p.199, L. 16-23). The parties stipulated at the beginning of trial that all the parcels in controversy were owned, in unity of ownership, by Virgil Mickelsen, at the time of the grant of the dominant estate, which estate is owned by the Birds. (Tr. Vol. I, p. 2, L. 19-25; Tr. Vol I. p.3, L.1-4).

The Deed granting property to the Bidwells contained language that granted to them a "30 Ft. right of way into the property along the west side of property and through and around the existing buildings." (Tr. Vol. I, Trial Exhibit 2). The Deeds granting property to the Birds and Murris respectively granted the property and contained the following language: "Excepting thereon that part used for the 30 ft. right of way on west side of property & road and highway right of way." (Tr. Vol. I, Trial Exhibit 8, 9)(emphasis added). The Birds were also granted an additional 66-foot wide strip of land on the east side of the Mickelson properties, which strip abuts the county road. (Tr. Vol. I, Trial Exhibit 8).

Regarding this "right of way", (which is referred to in testimony and the record as "the road"

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[2]This parcel is referred to on the respective deeds as parcel "1".

[3]This parcel is referred to on the respective deeds as parcel "3".

or "the lane"),[4] the trial court made specific findings of fact, which include the following:

> Prior to 1954, the lane served as access to a family home located across the canal on what is now parcel #1 owned by the Bidwells. Since that time the lane has been fenced on both sides and used as a farm lane to haul hay, move cattle between the corrals and pasture, access the northern end of the farm, clean ditches, picnic, access a flume across the canal to facilitate repairs, move farm machinery, etc.

(R. Vol I, p. 20).

It is the Birds' position that they openly and continuously used this Road for access to the parcel of land that was deeded to them in 1995. Mike and Verla Bird testified that they had used the lane, and witnessed others using the lane numerous times before 1995. (Tr. Vol. I, p.11, L. 8-25; p.12, L.1-17; p.71, L.4-24). The Court made a finding of fact that "[p]rior to 1995, either Virgil Mickelson or Roger Murri operated the farm and used the lane, as necessary, for purposes related to farming. Other family members sporadically used the lane when visiting the family farm." (R. Vol. I, p.21). The Birds' son, Jeff Bird, testified that he had personally used the Road many times prior to 1995, especially during the time that he lived with his grandparents, the Mickelsons, on the properties that were later deeded to the Birds and Bidwells. (Tr. Vol. I, p.86, L.2-25; p.87, L.1-25; p.88, L.1-25).

Jeff Bird also testified that there was no other road for access to the parcel which became the Birds' property. (Tr. Vol I, p.89, L.2-9). Jeff testified that he once became stuck in the ground next to the 66-ft. strip of land that was deeded to his parents, because irrigation season had made the

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[4] Throughout this brief, the "right of way" at issue will be referred to as "the Road" or "the Lane".

ground wet. (Tr. Vol. I, p.100, L.9-25). Mike Bird also testified that they could not use the 66-foot-wide strip of land as an access to their property. (Tr. Vol I, p.22, L.2-16). The Birds had obtained a bid for the cost of building a road on that 66-foot-wide strip of land, but the bid was financially prohibitive at an estimated cost of approximately $30,000.00. (Tr. Vol I, p.121, L.8-11).

Although the parties received ownership of their respective parcels in December of 1995, there was no dispute over use of the Road until after Virgil Mickelson passed away in 2006. (R. Vol. I, p. 7-8). In the summer of 2007, the Bidwells informed Birds they would be "cut off" from use of the Road. (R. Vol. I, p. 7-8). The Birds filed a Verified Complaint for Declarative and Injunctive Relief on August 9, 2007 seeking a declaration that they had an implied easement by prior use for the Road. (R. Vol. I, p. 5-10).

ISSUES PRESENTED ON APPEAL

The Birds will not restate the representations made in their Appellants' Brief, but will instead rely on the representations made in this section of that brief.

ATTORNEY FEES

The Birds request their attorney's fees and costs on appeal pursuant to Idaho Code §§12-121, 12-123, Rule 54 of the Idaho Rules of Civil Procedure and Idaho Appellate Rules 40 and 41, or other applicable rule of civil procedure, or statute.

STANDARD OF REVIEW

When a case has been tried to a court, it is the province of the trial judge to weigh the

conflicting evidence and testimony and to assess the credibility of witnesses. I.R.C.P. 52(a); *Kootenai Elec. Co-op., Inc. v. Washington Water Power Co.,* 127 Idaho 432, 434-35, 901 P.2d 1333, 1335-36 (1995). On appellate review, the trial court's findings that are supported by substantial and competent evidence will not be set aside, *Id.*; *Margaret H. Wayne Trust v. Lipsky,* 123 Idaho 253, 256, 846 P.2d 904, 907 (1993), and those findings will be liberally construed in favor of the judgment entered. *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 547, 808 P.2d 1289, 1292 (1991). However, the appellate court is not bound by the trial court's legal conclusions, and is free to draw its own legal conclusions from the facts presented. *Kootenai Elec. Co-op., Inc.*, 127 Idaho at 435, 901 P.2d at 1336; *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992).

Further, the appellate court should freely review the question of whether the facts found, or stipulated to, are sufficient to satisfy the legal requirements for the existence of an implied easement. *Davis v. Peacock,* 133 Idaho 637, 640, 991 P.2d 362, 365 (1999), citing *Walker v. Hollinger,* 132 Idaho 172, 176, 968 P.2d 661, 665 (1998). The trial court's findings of fact will be upheld if supported by substantial and competent evidence, but the appellate court will freely review the trial court's conclusions of law. *Leavitt v. Leavitt,* 142 Idaho 664, 668, 132 P.3d 421, 425 (2006).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE LANGUAGE OF THE DEEDS TO THE RESPECTIVE PARCELS SPECIFICALLY EXCEPTED THE LANE FROM THE BIRDS' USE.

The Bidwells argue that "the court did not find there was apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent". (Respondents' Brief, p. 9.) The Bidwells even cite the trial court's specific finding that "...the evidence does not support a finding that the use of the lane was intended to be permanent at the time the property was deeded in parcels to family members. (R. Vol.1, p.25);(Respondents' Brief, p.9.) However, Bidwells failed to note that this finding was made specifically in the context of the trial court stating that "[o]n the other hand, the Bird deed to parcel # 2, and the Murri deed to parcel # 3 specifically except the lane from such use, and both parcels abut the county road under the conveyance. **Were it not for these facts**, the court would conclude that the doctrine of implied easement by prior use would support the Birds' claim to use the lane." (R. Vol. I, p.24) (emphasis added).

Thus, the trial court specifically found that the language of the Deeds, and the inferences drawn therefrom regarding the use of the lane, specifically overruled and superceded the doctrine of implied easement by prior use. Indeed, this trial court specifically notes that were it not for this language of the Deeds, the court would have found in the Birds' favor. This means that the trial court found the evidence regarding the use of the road sufficient to satisfy the second element of an

implied easement by prior use - - "apparent and continuous use of the road long enough to show that the use was intended to be permanent." See *Thomas v. Madsen*, 142 Idaho 635, 638 (2006); *Davis v. Peacock*, 133 Idaho 637 (1999).

Bidwells go on to argue in this portion of their Brief that there were other dirt tracks involved on the property, and that a written statement from Roger Murri somehow shows the grantor's "subjective intent" regarding the use of the road. However, none of these facts or assertions are found in the trial court's findings of fact and it is totally unclear what weight, if any, the trial court gave to Bidwells' presentation of those facts. In fact, to the contrary, in light of the above-referenced specific findings of the court, it seems clear the trial court did not subscribe at all to the Bidwells' view of these facts. This court should likewise give them no weight.

Finally, Bidwells argue that "Birds are attempting to show... that they were not prohibited from using the right of way granted to Bidwell over the Murri and Mickelsen parcels." (Respondents' Brief, p.12.) That is exactly what the Birds are arguing, but it is unclear what Bidwells mean by this argument. The facts are uncontroverted that the Birds were not prohibited from using the road and right of way until June of 2007, nearly 11 years after the severance of the parcels and approximately 6 months after the death of the grantor Virgil Mickelsen. (R. Vol I, p.7-8; Trial Exhibit 43, p.56, L.1-10). This is entirely consistent with the Birds' position that they had a legal right to use the road, pursuant to their implied easement by prior use, and is inconsistent with the Bidwells' position that the use of the road was not intended to be permanent.

II. BECAUSE IDAHO LAW CONCERNING IMPLIED EASEMENT FROM PRIOR USE DOES NOT SUPPORT AN INQUIRY INTO THE SUBJECTIVE INTENTIONS OF THE GRANTOR, THE TRIAL COURT'S FINDING REGARDING VIRGIL MICKELSEN'S SUBJECTIVE INTENT ARE ERRONEOUS.

The Bidwells argue that it was proper for the trial court to consider the subjective intent of the grantor Virgil Mickelson, because, the Bidwells assert, the subjective intent of the grantor was found to be relevant to the determination of whether a driveway was intended to be permanent in the case of *Thomas v. Madsen*. (Respondents' Brief, p.13.) The Bidwells state that "the Supreme Court's analysis opined that Thomas intended the driveway to be permanent because of the maintenance of the driveway for more than 70 years." (*Id.*) However, Bidwells are confused as to the court's holding. The Supreme Court utilized the use of the road to infer, pursuant to the standard for implied easement by prior use, that such use was intended to be permanent. That is exactly the standard proffered and urged by the Birds in this matter- -that the use of the road, particularly that use prior to the date of severance (but also the Birds' uninterrupted use of the road after the date of severance) does not support the trial court's inference that the grantor intended to deny the Birds the use of the road at issue. Such an inference by the trial court in this matter is completely without foundation, based upon several faulty assumptions, and contradicted by several salient facts as well as the Supreme Court's prior holdings. This is unlike the inference drawn by the court in *Thomas v. Madsen*, which inference conformed with the facts proffered at the time of trial.

Indeed, the Bidwells are essentially arguing that facts apart from the actual use of the road

support the inference that the grantor, Virgil Mickelsen, did not subjectively intend for the Birds to have an implied easement from prior use. However, if the court were to engage in this type of inquiry - - a walk through the mind of Virgil Mickelsen with Virgil as the guide - - in *Thomas v. Madsen*, the court would have cut short the trial process and simply asked the plaintiff, Mr. Thomas, whether he subjectively intended to retain an implied easement by prior use, to which he would surely have replied "Yes" and ended the case. But the case law flatly contradicts this type of inquiry. And the Birds note that it is instructive that such inferences and assumptions about Virgil Mickelsen's subject intent were not drawn nor enforced until after his death, when he was unavailable to testify. It is also instructive that the inference urged by the Bidwells requires the court to believe that the grantor intended to deny himself access to the road, as the "part used for the 30 ft. right of way" ran past his house for the 11 years between the severance and his death. (R. Vol I, p.7-8); (Tr. Vol. I, Trial Exhibit 8); (Tr. Vol. I Trial Exhibit 43, p.56, L.1-10). Such an inference is unsupportable. Although the Birds believe any supposition regarding the grantor's intentions and motives to be irrelevant, as suppositions go, it is far more likely that Virgil Mickelsen intended by the language of the respective deeds merely to prevent the Birds from denying access to the Bidwells, rather than denying use of the road to all persons except the Bidwells.

Notwithstanding the impropriety of such inferences as to the grantor's subjecting intent, Bidwells make the strange and puzzling argument that because the Bidwells were deeded a 30 foot easement on the west side of the property, this shows that neither the grantor nor the Bidwells

intended for that 30 foot easement to be a permanent access to the Bidwell property. (Respondents' Brief, p. 14.) This is nonsensical. The facts are uncontroverted that the Bidwells in fact have used that road since the date of severance to access their parcel. Evidence was also uncontroverted that the Birds used that road to access their parcel, until June of 2007.

Further, Bidwells urge the assumption, which was made by the trial court, that it is impossible and nonsensical for a man to have 2 roads to access a piece of property. (Respondents' Brief, p.14.) As stated in Appellants' Brief, any inferences drawn from the fact that the Birds were deeded additional land, which abutted a county road, fall outside the purview of the elements for an implied easement by prior use. Indeed, drawing the inference that additional land abutting a county road shows an intent for the use of the road-at-issue to not be permanent is an inference that is expressly contradicted by Idaho law. As noted in Appellants' Brief, in *Davis v. Peacock*, the plaintiffs in *Davis* had "access points" to their property at two locations and that, at the time of trial, the "access" which was not at issue was in fact a fully developed access road. This did not stop the court from finding an implied easement by prior use on the disputed road. An implied easement from prior use requires only reasonable necessity, not great present necessity[;] there is no requirement that the dominant estate be landlocked. *Thomas*, 142 Idaho at 639. By inferring that because the dominant estate was not landlocked, the grantor could not have subjectively intended that the use of the road-at-issue be permanent, the trial court contradicted the holding of *Thomas*. Further speculation by the Bidwells as to the grantor Mr. Mickelsen's "wishes" are likewise

irrelevant entirely to the determination in this action and were improperly considered by the trial court.

III. THE TRIAL COURT ERRED IN FINDING THAT THE COST OF PLACING A LANE ALONG THE 66 FOOT STRIP FROM THE ROAD TO PARCEL #2 WAS "A MATTER OF CONSIDERABLE DISPUTE."

The portion of the Respondents' Brief which addresses the trial court's finding that the cost of building a road over the 66 foot tract was "a matter of considerable dispute" contains numerous unsupported assertions regarding the "convenience" of building a road in 1995, and inclusion of a statement of Roger Murri which contains numerous statements of hearsay, and which was objected to by the Birds' counsel at the time of trial. (Tr. Vol.1, p.160, l.7– p.161, l.6.) As Birds noted in the Appellants' Brief, there was no evidence offered at the time of trial which controverted or contradicted in any way the testimony of the Birds' expert, Jack Zollinger, regarding the cost of building a useable road to access their property on the 66 foot wide tract of land. The simple fact that Bidwells make an unsupported assertion regarding the cost does not turn the matter into one "of considerable dispute." As noted, the Bidwells were well capable of providing an expert witness to contradict or qualify the testimony of Mr. Zollinger, and chose not to do so.

Further, the Bidwells' current contentions regarding the "inconvenience" of access are entirely irrelevant to the determination of this action because none of those assertions or contentions were made at the time of trial, supported by any evidence, let alone competent evidence, or were made any part of the trial court's determination, findings of fact or conclusions of law. Likewise

irrelevant is the Bidwells' assertion that the claim of implied easement by prior use is a theory "developed by Birds after the death of Mr. and Mrs. Mickelsen". (Respondents' Brief, p. 18.) Implied easement by prior use has been a doctrine in Idaho for many years, and has recently been upheld and clarified by the Idaho Supreme Court. Indeed, if anyone is entitled to claim that the other party developed a theory after the death of the Mickelsens, it is the Birds. As noted in Appellants' Brief, there is uncontroverted evidence that there was no need for the Birds to file an action asserting applied easement by prior use until June of 2007, when, for the first time ever, Birds were denied access to the road at issue. There were eleven (11) years after the severance of the parcels wherein the parties, including Virgil Mickelsen, continually used the road and the respective parcels of land, yet it was not until 2007, after Virgil's death, that the Bidwells put forth their interpretation of the situation and attempted to pretend it had been that way all along. Bidwells' unsupported assertions, contradictory arguments, and emotional appeals should be given no weight by this court in the determination of this action.

CONCLUSION

The trial court relied (as do the Bidwells in their Respondents' Brief) heavily on the granting of property by the respective deeds, and rely just as heavily on unsupportable inferences drawn from those grants. However, both the trial court's findings (and the Bidwells's brief) gloss over or ignore the plain language of the deeds, which do not exempt the lane from the use by the Birds, but simply from their ownership. (Tr. Vol. I, Trial Exhibit 8). As noted in Appellants' Brief, the paragraph in

which the "excepting" language is found describes the bounds of the property which granted **ownership** to the Birds and Murris. (Tr. Vol. I, Trial Exhibit 8). Further, the "excepting" language of the deed states that what is excepted is "**that part** used for the 30 ft. right of way..." not the use of the right of way. (Tr. Vol. I, Trial Exhibit 8)(emphasis added). Reading that language as expressly denying use would overrule the whole law of easements.

The trial court then used such unsupportable inferences, drawn from the fact of the Deed while ignoring the language of the Deed, to overrule the doctrine of implied easement by prior use. This is a clear error of law, supported by an inference which is without factual basis. Because there was not competent evidence to support the trial court's inferences, which inferences the trial court used to erroneously apply Idaho law, this court is duty-bound to overrule such findings and conclusions of law. However, because the trial court made some findings of fact which were supported by competent evidence - - the finding that apart from the deed-related inferences, the Birds had established their claim for implied easement by prior use - - this court is empowered to overrule the trial court's erroneous holdings, sustain the trial court's correct holdings, and order that the Birds have established an implied easement by prior use.

Based upon the foregoing, plaintiffs/appellants the Birds request that this Court issue its decision vacating the entry of judgment against plaintiffs and instead enter judgment for plaintiffs, and find that the Birds have satisfied the elements of an implied easement by prior use.

DATED this 14th day of October, 2008.

NALDER LAW OFFICE, P.C.

By: 

Benjamin K. Mason, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 14th day of October, 2008, I caused a true and correct copy of the foregoing **APPELLANTS' BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

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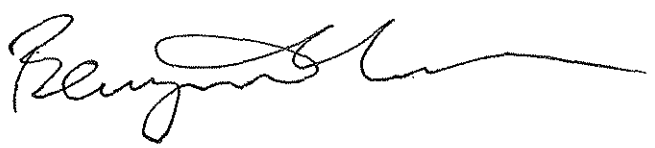
By: 

Benjamin K. Mason, Esq..

BKM/bkm
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