9-22-2008

Bird v. Bidwell Respondent's Brief Dckt. 35314

IN THE SUPREME COURT OF THE STATE OF IDAHO

MIKE AND VERLA BIRD, husband and wife,

Plaintiffs - Appellants.

GARY AND LINDA BIDWELL, husband and wife,

Defendants - Respondents.

Supreme Court No. 35314

Case No. CV-2007-443

RESPONDENTS' BRIEF

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

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STATEMENT OF THE CASE

I. Nature of the Case

This case involves the legal issue of an implied easement by prior use. The parties stipulated at the start of trial that the trial did not involve any legal theory other than an easement implied by prior use. (Tr. I, p. 7, L 5-17). The dispute is over a road and right of way in Fremont County, Idaho which arose as a result of the division of 80 acres of farmland in December of 1995, by Virgil and Lillis Mickelsen to Appellant, Bird, Respondent, Bidwell, Roger and Carol Murri, and the heirs of Wayne Mickelsen. (Tr. Vol. I, Trial Exhibit 1,2, 13).

At the time of the division, the Murri and Wayne Mickelsen parcels each fronted a Fremont County road. Virgil Mickelsen granted a 30-foot easement to the Bidwell property along the west side of the farm, through the Virgil Mickelsen yard and farm buildings and through the Murri property. (Tr. Vol. I, Trial Exhibit 2). Mr. Mickelsen granted Birds 66 feet along the east side of the farm to access their property. (Tr. Vol. I, Trial Exhibit 1).

The Birds/appellants assert that they have an implied easement by prior use over the 30-foot lane or track which was granted to the Bidwells which crosses the former Virgil Mickeslen and Murri property, which is presently owned by the Bidwells. They claim a road or track was in existence in December of 1995 which entitled them to access their property over the Virgil Mickelsen and Murri property when they received a deed to their parcel of property and that the access was theirs through an Implied Easement. (Tr. Vol. I, p. 10, L 6-24).

The parties stipulated at the beginning of trial that all of 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).

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 denying an implied easement by prior use. 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 and Lillis Mickelsen, the parents of Verla Bird, Appellant, and Linda Bidwell, Respondent, owned approximately 80 acres of farmland in Fremont County, Idaho. On April 8, 1986, Roger and Carol Murri, (Carol Murri being Virgil and Lillis Mickelsen's daughter) purchased the Mickelsen's approximately 80 acres excepting the Mickelsen residence and surrounding yard located in the southwest corner of the farm. (Tr. Vol. I, p.130, L. 15-18). At the time the property was purchased by the Murris, the road in question exited the Fremont County road on the south of the property and traveled north within approximately 10 feet of the front of the Mickelsen house and ended at a feed lot approximately 100 yards north of the county road. (Tr. Vol. I, p.131, L. 1-25; Tr.Vol. I, Exhibit 32). Hay and straw were piled in the road or track, which is in contention, between June and November each year the Murris owned the property. (Tr. Vol. I, Exhibits 40 & 41) Any travel beyond the feed yard was on foot during the Murri ownership. (Tr. Vol. I, p.131, L. 19-25; Tr. Vol. I, p.132, L. 20-25; Tr. Vol. I, p.133, L. 1-25; Tr. Vol. I, p.134, L. 1-8). On May 19, 1995, the Murris were unable to make the payments on the farm and deeded the property back to Virgil Mickelsen. (Tr. Vol. I, p.143, L. 1-6; Trial Exhibit 4).

On December 18, 1995, the Mickelsens deeded 17.44 acres on the southeast side of the 80 acres to the children of their deceased son, Wayne Mickelsen, who are not parties to this suit. On December 18, 1995, the Birds were deeded 20.34 acres, by Warranty Deed from Virgil Mickelsen. (Tr. Vol. I, p.9, L.4-19; Trial Exhibit 8). On the same day, the Bidwells were granted 24.56 acres by Warranty Deed, north of the canal immediately to the north of the Birds' parcel of property. (Tr. Vol. I, p.9, L.19-20; Trial Exhibit 2). That same day, Virgil Mickelsen also granted to Roger and Carol Murri by Warranty Deed, 16.89 acres north and east of the farmstead, which included the hay shed and barn. (Tr. Vol. I, Trial Exhibit 8). Virgil and Lillis Mickelsen retained a parcel 195 feet by 171 feet in the southwest corner of the farm which included the house and yard. (Tr. Vol. I, Trial Exhibit 9). The Murri parcel lies immediately to the south of the Birds' property. (Tr. Vol. I, Trial Exhibit 13).

The Deed granting property to the Bidwells contained language that granted 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 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). The Birds were granted an additional 66-foot wide strip of land on the east side of the Mickelsen property, which strip abuts the county road. (Tr. Vol. I, Trial Exhibit 8).

Upon the death of Virgil and Lillis Mickelsen, Gary and Linda Bidwell received the home and yard of Virgil and Lillis Mickelsen on November 30, 2006. (Tr. Vol. I, p. 200, L 19-25, Tr. Vol. I, p. 201, L 1-25).

The Birds claim in their appellant brief that they openly and continuously used the lane or cow track, as it was characterized at trial, on the west side of the farm for access to the parcel of

land that was deeded to them in 1995. (Birds' Appellant Brief in their Statement of Facts, paragraph 7). There was no testimony at trial of the Birds open and continuous use of the road. Gary Bidwell testified that the Birds did not continuously travel over the road in contention prior to 1995. (TR. Vol. I, p. 212, L12-25) The question is not whether the Birds used the road openly and continuously, it is whether there was apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent. *Thomas v. Madsen*, 142 Idaho 635, 638 (2006); *Davis v. Peacock*, 133 Idaho 637. The court found there was not an implied easement because, clearly, it was not intended to be permanent.

APPELLANTS' ISSUES PRESENTED ON APPEAL

A. Did the trial court err in finding that the language of the deeds to parcels #1, #2 and #3 specifically excepted the lane from the Birds' use?

B. Did the trial court err in finding that it must be inferred from the Mickelsens' exception of the lane from the deed transcriptions of deeds #2 and #3 that the Mickelsens intended to provide access only to parcel #1 across their homestead and along the existing lane?

C. Did the trial court err in finding that "there [was] no other explanation for [the Mickelsens'] decision to convey the extra 66 feet to the Birds, while exempting the lane, if it was intended that the Birds continue to use the lane to access that parcel"?

D. Did the trial court err in considering and applying the language of the deeds to its determination of whether the Birds had an implied easement from prior use?

E. Did the trial court err in making findings of fact regarding Virgil Mickelsens' subjective intent with regard to the use of the lane?

F. Did the trial court err 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?"

G. Did the trial court err in examining and considering facts other than the use of the easement to determine whether there was apparent continuous use long enough before separation of the dominant Estate to show that the use was intended to be permanent?

H. Did the trial court err in finding that "when the Mickelsens, at the Birds' request, deeded the strip abutting the county road and specifically excluded the lane in the same deed they extinguished any basis for the Birds to rely on what may otherwise have been an implied easement to use the lane?"

I. Did the trial court err in finding that "the specific reference to a right of way in the Deed conveying parcel #1 to the Bidwells, coupled with the specific exceptions to the lane found in the language of the Deeds conveying parcel #2 and parcel #3, clearly establishes that the Mickelsen did not convey nor did they intend to grant an easement across their homestead or on the lane along the western portion of parcel #3 for the benefit of the Murris or the Birds."?

J. Did the trial court err in determining that "the Birds have failed to meet their burden to establish that use of the lane was ever intended to continue for any parcel other than parcel #1 when the Mickelsens divided their farm among the family"?

ATTORNEY FEES

The Bidwells 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

A trial court's findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact. *Lindgren v. Martin,* 130 Idaho 854, 857, 949 P.2d 1061, 1064 (1997); *Sun Valley Shamrock Resources, Inc.*

v. Travelers Leasing Corp., 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990). It is the province of the district judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Abbott v. Nampa School Dist. No.* 131, 119 Idaho 544, 808 P.2d 1289 (1991); **I.R.C.P.** 52(a). Findings of fact that are based on **substantial** evidence, even if the evidence is conflicting, will not be overturned on appeal. *Hunter v. Shields,* 131 Idaho 148, 953 P.2d 588 (1998). However, we exercise free review over the lower court's conclusions of law to determine whether the trial court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. *Conley v. Whittlesey,* 133 Idaho 265, 985 P2d 1127.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE LANGUAGE OF THE DEEDS TO THE BIDWELL, MURRI AND BIRD PARCELS SPECIFICALLY EXCEPTED THE LANE FROM THE BIRDS' USE

The trial court made a finding that:

"The Bidwell deed specifically grants a 'right of way' through the homestead and along the lane to access parcel #1. On 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).

The Court made a finding of fact that "to 1995, either Virgil Mickelsen 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 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 nor did it find that the lane was reasonably necessary for the enjoyment of the dominant estate. *Thomas v. Madsen,* 142 Idaho 635, 638 (2006); *Davis v. Peacock,* 133 Idaho 637 (1999). The trial court found specifically 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. I, p. 25).

Mr. Murri testified, and the trial court so found, that when he started working on the farm in 1979 that there were three tracks or paths which traveled north from the County road to the property which was deeded to Bird. There was a path, or a dirt track, that left the county roadway near the center of the 80 acres east of the Wayne Mickelsen home and proceeded in a northeasterly direction around the east side of the Wayne Mickelsen home, across the property which was to be deeded to Wayne Mickelsen, that accessed the Bird property. (Tr. Vol. I, p. 154, L.4). There was also an access that left the north side of the county road on the east side of the Mickelsen home and proceeded by a path or dirt track around the south end of the milking barn and thence northeasterly across the property which was deeded to Roger and Carol Murri. It ended at the Bird property. (Tr. Vol. I, p.154, L.4); (Tr. Vol. I, p.136, L.6-25; R Vol. I, p. 25).

Roger Murri also testified that there was a track which was used for the cows to get to pasture from May through August which left the feed area behind the Virgil Mickelsen home and proceeded north along the western edge of the Mickelsen farm. (Tr. Vol. I, p.172, L1-7). The lane was never used by people to camp on the back of the property during the ownership of Roger Murri. (Tr. Vol. I, p. 172, L 7-13. The Birds never took a vehicle on the road while Murri owned the farm. (Tr. Vol. I, p. 172 L. 16-25). According to Mr. Murri, the lane was not necessary for access to the Bird property. (Tr. Vol. I, p 173, L7-25). It was Murri's understanding that Virgil Mickelsen intended for everyone to have access to his property and that is why Mr. Mickelsen did what he did. (Tr. Vol., I, p. 174, L 1-14). The lane was not traveled by a vehicle in the 10 years Murri owned the farm. Mr. Murri drove a tractor down the lane maybe two times a year. (Tr. Vol. I, p 176, L 1-25; Tr. Vol. I, p. 177 L1-23).

The first unrecorded deed from Mickelsen to Bidwell had no road provision. (Tr. Vol. I, Exhibit 35). Also, the first unrecorded deed from Mickelsen to Birds had no provision for access. (Tr. Vol. I, Exhibit 36). Upon receipt of the draft deeds, both Bidwell and Bird recognized they had no access and that they were landlocked. They each requested a specific declaration in their deed giving them access to the Fremont County road. (Tr. Vol. I, p 139, L1-25; Tr. Vol. I, p. 140, L1-25; Tr. Vol. I, Ex. 15). Each party received access in writing in their respective deeds by Bidwell receiving a 30-foot right of way on the west and Bird receiving a 66-foot strip of land on the east, which adjoined the County road. (Tr. Vol. I, Exhibit 1 & 2; Tr. Vol. I, p. 149, L1-25; Tr. Vol. I, p.150, L1-25).

Roger Murri, brother-in-law to both Bidwell and Bird, testified regarding the property each party received and the circumstances surrounding the granting of the deeds, the access and how each description was determined. The most telling evidence which shows that the use in 1995 over the west track was not intended to be permanent access for either Bidwell or Bird is Trial Exhibit 15 which is a statement given by Roger Murri on September 5, 2007, which states in part:

> ". . . We then took the measurements of the draft and staked out the suggested corners of the boundary between the Mickelsen's and the Murri's on the south side of the Bird's proposed property. Then the Bidwells realized that they needed a way to get to their piece of ground. It was then decided that they would get a thirty-foot right of way on the West Side of Virgil's farm to get to their proposed piece of ground. Mike decided that he didn't want their piece of ground to be land locked either so he wanted a way to get to their property also. He said that they would need more than 30 feet though and that they would need at least 66 feet. Virgil then asked my opinion of what I thought would be a good way to accommodate his desire to have his property more accessible. I told him that in my opinion it would be good to give him the extra footage he needed on the East Side of the farm. This would make it a part of the property that he intended to give Mike and Verla already. Virgil thought this should be satisfactory with the Birds and I was not aware of any disagreement to the proposed plan."

It is clear from Trial Exhibit 15 that neither of the three parties that is Virgil Mickelsen, Gary Bidwell nor Mike Bird, believed that any of the three roads or tracks over the parcels which

were to be deeded were roads intended to be permanent under the theory of "implied easement by use" which were meant to be access, for either Gary Bidwell or Mike Bird to their respective properties.

The Birds are attempting to show through some interpretation of the term "right of way" that they were not prohibited from using the right of way granted to Bidwell over the Murri and Mickelsen parcels. The Birds disregard the fact that they were not granted a right of way over the Bidwell easement nor over the other two tracks, one of which went around the barn on the Virgil Mickelsen homestead, (Tr. Vol. I, p. 135, L 2-25; Exhibits 23,24 & 25), and the other which left the county road and proceeded northerly across the Wayne Mickelsen property to the Bird property. (Tr. Vol. I, p. 136 L. 1-25; Exhibit 31). If the Birds had no implied easement at the time of division, then they certainly had no right to trespass on the Mickelsen or Murri property by traveling over those two properties on any right of way granted to the Bidwells.

II. THE TRIAL COURT WAS CORRECT IN CONSIDERING THE EXTRA 66 FEET GRANTED TO THE BIRDS

Appellants rely upon the legal theory of implied easement from prior use. In an action to establish an "Implied Easement From Prior Use," the party seeking to establish the easement must show (1) unity of title or ownership and a subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Thomas v. Madsen*, 142 Idaho 635, 638 (2006); *Davis v. Peacock*, 133 Idaho 637 (1999).

As was held by the court in interpreting an implied easement from prior use in *Eisenbarth v. Delp*, 70 Idaho 266, (1950), it is for the court ". . . to balance the respective convenience, inconvenience, costs and other pertinent facts in determining an implied easement from prior

use." Birds have met their burden of unity of title. However, the element of continuous use of a roadway long before separation of the dominant estate has not been met. The Birds, are seeking a private road across the property originally deeded to the Murris which is a burden to the Murri property.

A "Private road" is defined in I.C. 49-117 - P. - (16) as follows: "Private road" means every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not other persons. It was stipulated at the start of trial that there was no claim by Birds of an easement by adverse use. (Tr. Vol. I, p. 7, L. 4-16).

Defendant, Gary Bidwell, and Roger Murri testified that at the time the dominant estate was severed in December of 1995 that there was no roadway as defined by the Idaho Code on the western edge, or any portion, of the property deeded to the Birds which had been in continuous use long enough before separation to show that the use was intended to be permanent. (Tr. Vol. I, p. 212, L 14-25; Tr. Vol. I, p. 213, L. 1-25).

In this case, the parties stipulated that the first element was satisfied. (Tr. Vol. I, p.2, L. 19-25; Tr. Vol. I, p.3, L.1-4). 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*, 142 Idaho 635 at page 638, contrary to Birds' argument in their Appellant brief. Idaho law does contemplate an inquiry into the mind of the grantor of his subjective intentions. For example, in the case of *Thomas v. Madsen*, Id., at 637, in which the plaintiff himself was the grantor 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. The trial court in this case, in examining the grantor's intent, concluded that grantor, Virgil Mickelsen, intended to give each

Grantee private access to each party's respective parcel. T Vol. I, p. 17-26). It is evident that Mr. Mickelsen did not intend for either of the three dirt tracks to be permanent access to either the Bird or Bidwell property.

The evidence showed that the Bidwells were deeded a 30-foot easement to their property and the Birds were deeded a 66-foot tract of land for access to their property from the county road. This is further proof that Mr. Mickelsen and the recipients of the various tracts did not regard the so-called roadway on the western edge of the Mickelsen property to have been continuously used and that it was intended or reasonably necessary to be a permanent access to either the Bidwell or Bird property. If Birds' theory of the case is correct, there would have been no need to deed a 66-foot strip of land to the Birds on the east side of the Mickelsen property for a road, nor would have a deeded easement to the Bidwells for access to the Bidwell property have been necessary. If there was no need for a deeded easement, under the theory of the Birds, the 66 feet should have been added to the south side of the Bird property so it could have been farmed and the Birds could simply appropriate one of three accesses, i.e., the cow lane over which an easement was granted to the Bidwells, the road in front of the barn and northeast across the Murri property or the access on the east side of the Wayne Mickelsen house to the Bird property. All three of these accesses were equal in 1995 and all three of them were not intended to be treated as continuous, necessary or permanent to give Birds access to their property. (Tr. Vol. I, Exhibits 21,26, 30 & 31). The need for a 30-foot easement to Bidwells and a strip of land 66-feet in width to the Birds is evident from the actions of Virgil Mickelsen and the recipients of the four tracts of property. (Tr. Vol., I, Exhibit 15). Can the court imagine the chaos if Bird and Bidwell claimed access to their property over one or all of the three paths or tracks that had been used over the years? Mr. Mickelsen obviously was not interested in a family feud over access so

he made sure each property holder had access to his or her property.

The trial court was correct in finding that "there is no other explanation for the decision to convey the extra sixty-six feet to the Birds, while exempting the lane, if it was intended that the Birds continue to use the lane to access that parcel." (R Vol. I, p.24)

III. THE TRIAL COURT WAS CORRECT 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 Bird's cause of action must also fail because of the third element, being: "(3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Thomas v. Madsen*, 142 Idaho 635, (2006). In the present case, there were three accesses to the Bird property at the time of severance which were all dirt tracks across the property to be deeded to the Murris and the Wayne Mickelsen family. None of the three were graveled definable roadways. (Tr. Vol. I, p.154, L.4); (Tr. Vol. I, p.136, L.6-25). (Tr. Vol. I, p.154, L.4).

The evidence is clear that Mr. Mickelsen and the three grantees discussed access to the various tracts. (Tr. Vo. I, Exhibit 15). Mr. Bird and Mr. Bidwell brought to the attention of Mr. Mickelsen that they both desired a written access to their property because they were both landlocked. (Tr. Vol. I, Exhibit 15). It is evident that Mr. Mickelsen and Mr. Bird did not believe the trail along the west side of the 80-acre tract was necessary to access the Bird property because Mr. Mickelsen did not grant the Birds an interest in the 30-foot easement which he granted to the Bidwells, nor did the Birds request that they be added to the easement.

When Virgil and Lillis Mickelsen made a gift of the property to Birds, they excepted that part "used for a 30-foot right of way on west side." Tr. Vol. I, p. 42, L 11-16; Exhibit 1). The evidence is clear that Mr. Bird requested a 66-foot strip of land on the east side of the Mickelsen property because he was landlocked. He received the 66-foot parcel because the Bidwell

easement and the other two tracks across the Mickelsen property were not necessary for the Bird access.

Mr. Murri testified that the access Mr. Bird requested along the eastern side of the Mickelsen property, 66 feet in width, was to access his property in the area where it was testified he intended to build a home or establish a camp site. (Tr. Vol. I, p. 160, L. 8). In fact, the evidence was clear that in the year 2000, Mr. Bird applied for and obtained a permit from Fremont County, Idaho to build an access off of the county road onto his 66-foot tract for a road. (Tr. Vol. I, Exhibit 42).

As was held in the *Eisenbarth v. Delp*, supra, when the court balances the respective convenience, inconvenience, costs and other pertinent facts, Appellants have failed. Bidwells and Birds were each given an access to their property over dirt tracks which required improvement for either to use his track as a road. Mr. Bidwell testified he contacted Parker Sand and Gravel of St. Anthony, Idaho, who built his road. (Tr. Vol. I, p. 205 L 1-25; Tr. Vol. I, p. 206 L.1-25; Tr. Vol . I, p. 207 L 1-23). Mr. Bidwell obtained a bid for $6,800.00 from Parker Sand and Gravel to build a road over the Bird access which was of the same quality as that which Parker Sand and Gravel built for him. (Tr. Vol. I, Exhibit 31 and 39).

The access over the Bidwell easement was not convenient for the Birds in 1995. Mr. Murri testified the Birds were going to build a home or camp site at the north end of their 66-foot strip on the east side of their property. (Tr. Vol. I, p. 149, L. 14-25. It would have been inconvenient for the Birds to have been granted an access on the west side of the farm because when they reached the southwest corner of their property it would have been necessary for them to build a road east one-quarter of a mile to their proposed home site or camp site. (Tr. Vol. I,

Exhibit 4).

Access for the Birds over the Bidwell easement, which was within 10 feet of the front of the Mickelsen home and through the barnyard, was inconvenient for the Mickelsens. Because the Bidwells were going to inherit the Mickelsen homestead, it was logical and convenient for the Bidwells to be given an access in front of the house and through the farm yard to the property they were given.

The 66-foot right of way given to Birds was far more convenient and better access than that which was available over the unimproved 30-foot right of way deeded to Bidwells or the other two tracks over the Roger Murri or Wayne Mickelsen family property. Mr. Bidwell has improved his access with the help of Parker Sand and Gravel. (Tr. Vol. I, p. 202, L 12-25; Tr. Vol. I, p. 205, L 2-25) Mr. Bird has not. It would have cost each the same in 1996. (Tr. Vol. I, Exhibit 39). It is doubtful if this case would be in court had the Bidwells left the hay and straw in the middle of their deeded access, left the road unimproved with water leaking onto it in the summer and no winter access. The Bidwells could have waited for the Birds to improve their access and then they could claim that through implied easement through prior use the Bird easement was also for them to gain access to their property.

In balancing the respective convenience, inconvenience, costs and other pertinent facts, as indicated in the *Eisenbarth v. Delp*, (supra) and the continuous use element long before separation which was intended to be permanent and the reasonable necessity for the proper enjoyment of the dominant estate as indicated in the *Thomas* case (supra) it seems to that the intention of the grantor and the action of the parties must be taken into account. The facts of the case seem to indicate that none of the parties, including Mr. Mickelsen, knew of or intended an

easement to any of the parcels through a claim of implied easement from prior use. That theory has been developed by Birds after the death or Mr. and Mrs. Mickelsen, and after the Bidwells improved their right of way.

On December 18, 1995, all accesses were equal. They all required improvement so there would be a roadway as the term is commonly used for vehicular and year around use. The Birds and Bidwells were each given tracts of land with access. The other properties fronted the county road. Apparently the gift to the Birds was not enough. They now want the Bidwells to give them a finished roadway. This gift to the Birds has gone awry. It has pitted family members against family members all because the Bird family is attempting to take something they were not given.

In *Thomas*, Id., the trial court analyzed the reasonable necessity of the road at issue by weighing the expense and time of constructing a road of the same quality on Thomas's land. In this matter, the trial court found that the cost of placing a lane along the Bird's 66-foot strip of land "a matter of considerable dispute." (R, Vol. I, p. 25). The bid of Parker Sand and Gravel, which was for a road comparable to that of the Bidwells, was $6,800.00. (Tr. Vol. I, Exhibit 39). The Zollinger bid of $30,000.00 was for a far superior road, which would have been in a condition to be paved. (Tr. Vol. I, p 121, L. 12-24). The trial court was right in finding there was considerable dispute in the type of road to be built and its cost. A road, such as the road to the Bidwell property suffices for the Bidwell use which is similar to the Bird use. The Birds could have obtained a bid for a freeway or paved road, and submitted it so there would be an even larger dispute.

IV. THE TRIAL COURT DID NOT FIND THAT WHEN "THE MICKELSENS, AT THE BIRD'S REQUEST, DEEDED THE STRIP ABUTTING THE COUNTY ROAD AND SPECIFICALLY EXCLUDED THE LANE IN THE SAME DEED THEY EXTINGUISHED ANY BASIS FOR THE BIRDS TO RELY ON WHAT MAY OTHERWISE HAVE BEEN AN IMPLIED EASEMENT TO USE THE LANE"

The Birds claim the trial court essentially concluded that the Birds knew at the time of severance that they had no right to use the Lane because of the language in the Deed and because they were granted land on the east side of the property which abuts a county road. The trial court did not conclude that this knowledge "extinguished" their implied easement by prior use. The law of Idaho is that parties are presumed to know the implied easement law. It was stated clearly in *Wilson v. State of Idaho*, 133 Idaho 874, (App. 2000) that "it is axiomatic that citizens are presumptively charged with knowledge of the law once such laws are passed. *Atkins v. Parker*, 472U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). Ignorance of the law is not a defense. *Smith v. Zero Defects, Inc.*, 132 Idaho 881, 887, 980 P.2d 545, 551 (1999); *State v. Fox*, 124 Idaho 924, 926, 866 P.2d 181, 183 (1993). "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny." *Atkins*, 472 U.S. at 131. The law presumed that in 1995, the Mickelsens, Birds, Murris and Bidwells knew the three elements of an implied easement. Based upon their knowledge, all three participants concluded that the three unimproved tracks across the respective parcels did not rise to an implied easement for a road to any of the parcels. Both parties knew their particular parcel was landlocked. With that in mind, Bidwell and Bird requested a specific deeded access to their respective parcels of property. Mr. Mickelsen decided to not deed the parcels to Bidwell and Bird without granting each a specific roadway. (Tr. Vol. I, Exhibit 15).

V. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE BIRDS FAILED TO MEET THEIR BURDEN TO ESTABLISH THAT USE OF THE LANE WAS EVER INTENDED TO CONTINUE FOR ANY PARCEL OTHER THAN PARCEL #1 WHEN THE MICKELSENS DIVIDED THEIR FARM AMONG THE FAMILY.

In order to establish an implied easement by prior use, the party asserting the easement must prove three elements: (1) unity of title or ownership and a subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Thomas v. Madsen*, 142 Idaho at 638.

As noted above, the first element was stipulated to by the parties. As to the second element, the trial court made a factual finding that, since 1954, "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, picnics, access a flume across the canal to facilitate repairs, move farm machinery, etc." (R. Vol. I, p.20). The trial court also made a finding that "to 1995, either Virgil Mickelsen 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.22). Applying these facts to the second element of the standard ("apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent"), the trial court concluded that it was the intent of the grantor to grant an exclusive easement to each piece of property and that there as not any implied easement over any of the three tracks.

Both Bird and Bidwell recognized there was not an implied easement when they each

requested a specific easement. (Tr. Vol. I, Exhibit 15). The grantors elected to not deed the property to Bird and Bidwell without granting them a specific ability to access their own property without intruding upon the other grantees' fee simple interest in their land. (Tr. Vol. I, Exhibit 15).

This court exercises free review over questions of law. This court can find, based upon all of the evidence adduced at trial, that the trial court was correct in concluding that the Birds did not establish all three of the elements required by Idaho law for establishing an implied easement by prior use.

CONCLUSION

Based upon the foregoing, Defendants/respondents request that this Court issue its decision upholding the entry of judgment against plaintiffs/Appellants and enter judgment for defendants/Respondents for their attorney fees and costs.

Dated this 16th day of September 2008.

Lynn Hossner
Attorney for Respondents, Bidwell

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 St. Anthony, Idaho; that on the 16th day of September, 2008, I caused a true and correct copy of the foregoing Respondents' Brief to be served upon the following person(s) at the address listed below their name by depositing said document in the U.S. mail with the correct postage thereon.

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