2-26-2010

Coward v. Hadley Appellant's Brief Dckt. 36981

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES COWARD and ANNE COWARD, husband and wife, Plaintiff/Appellant, vs. CRYSTAL HADLEY, an individual, Defendant/Respondent.	DOCKET NO.: 36981 BONNER DC DOCKET #CV-07-1997

Appeal from the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Bonner

Honorable Steve Verby, Presiding

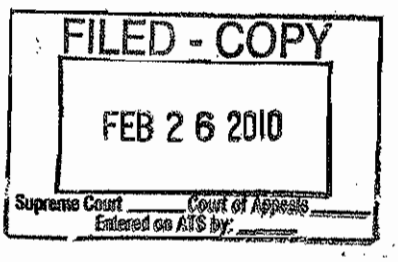
APPELLANTS' BRIEF ON APPEAL

Gary Finney
Finney, Finney & Finney, P.A.
20 East Lake, Street, Suite 317
Sandpoint, ID 83864

ATTORNEYS FOR RESPONDENT

Arthur M. Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

ATTORNEYS FOR APPELLANTS



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CASES

STATEMENT OF THE CASE

A. Nature of the case

Plaintiff/Appellants Charles and Anne Coward (Coward) claimed a right to use a portion of Defendant/Respondent Crystal Hadley's property to access a garage on Coward's property.

B. Course of Proceedings

The Trial Court concluded that there was no express easement that was appurtenant to Coward's lot that would allow Coward access across Hadley's lot. After a motion to reconsider, the Trial Court ruled that a prior agreement of the parties extinguished any access rights Coward had.

C. Statement of Facts

Defendant/Respondent Crystal Hadley (Hadley) owns lot 1 Block JJ of Laws edition to the City of Sandpoint, (R pp. 99-100) which is located on the corner of Superior and Boyer Street in Sandpoint, Idaho, (Tr p. 18, L. 4 - 6) Plaintiffs Charles and Anne Coward ("Coward") lived on the first lot south of Hadley – Lot 2 Block JJ Laws edition. (R pp. 99-100). When Coward purchased the home on lot 2, there was a garage at the rear of lot 2 that had been accessed from Superior Street by way of the rear of Hadley's lot 1. (Tr p. 37, L. 14)

In the summer of 2007, (Tr p. 44, L. 21-22), Coward began constructing a new garage at the rear of their lot 2 that had living quarters in it as well as car storage space. (Tr p. 43, L. 2-4). During construction, Hadley informed Coward that Hadley did not think that Coward had an easement across the rear of her lot 1 to access the garage. (Tr p. 49, L. 6-10).

Crystal Hadley moved into her residence in June of 1950 (Tr p. 18, L. 17). At the time she moved in, Coward's predecessor used the access off Superior Street to access the garage at the

rear of the Coward's lot (Tr. p. 20, L. 14-16) – the same garage that Coward demolished to construct the new garage/living quarters. (Tr. p. 19, L. 19 – 25) The garage that presently sits on the rear of the Hadley property is located on the same spot as the garage that was already constructed at the time Hadley moved in (Tr. p. 19, L. 1 – 11), more than fifty years earlier and that garage had been constructed in such a way as to not interfere with the access in question. (Tr. p. 38, L. 16-25)

In 1922, Freeman Daughters owned Hadley's lot 1 and Coward's lot 2 and also the lot immediately to the South of Coward's, lot 11. (R. p. 100). Daughters then deeded lots 1 and 2 to an Ole Sletegar with the following language in the deed:

> Lots One (1) and Two (2) in Block "JJ" of Law's Second Addition to Sandpoint, Idaho; provided, however, the party of the first part herein, [Daughters] his heirs and assigns shall have a permanent right of way over and across twelve feet on the east side or end of each of said lots for the purpose of an alley.
>
> (R. p. 100).

At the time of this grant, all the other lots in the block had alley access except one. (R. p. 100). Three years later, Freeman Daughters transferred Lot 11 to Jack Blake and the deed contained the following: "Also, a permanent right of way over and across twelve feet on the east side or end of Lots one (1) and Two (2), Block "JJ" Laws Second Addition to Sandpoint, Idaho, for the purpose of an alley." (R. p. 100).

At trial, Coward argued that the language in the grant created an express easement in favor of lot 2 by reservation of the easement to the assigns of Daughters, one of which was Coward, and, alternatively, that the use of the word "alley" in the grant created a right to use the alley by the owners adjacent to it. (R. pp. 68 – 74).

The Trial Court initially held that the access in question was appurtenant only to lot 11 and did not benefit lot 2 – Coward's lot. (R. pp. 84-85). On a motion to alter or amend the judgment, Coward pointed out to the Trial Court that the 1922 deed from Daughters to Sletegar did not expressly state it was appurtenant to lot 11 *only*, and the reasoning of the Trial Court in concluding it was appurtenant to only lot 11 was not present in the record. (R. p. 102).

Upon hearing argument on the matter, the Trial Court withdrew its finding that the access was only appurtenant to lot 11 and held that a prior agreement – reached almost nine years earlier between Hadley and Coward (hereinafter referred to as the "fence line agreement"), (Tr. p. 47, L. 11 to Tr. p. 48, L. 5) – had extinguished any right Coward may have had in the disputed access. (R. pp. 109-111).

ISSUES PRESENTED ON APPEAL

1. Whether the Trial Court committed error when it determined that the fence line agreement extinguished any easement rights that Coward may have had over Hadley's property?
2. Whether the language in the 1922 deed from Freeman Daughters to O.E. Sletegar created an express easement appurtenant to Coward's lot which would allow Coward access to their lot across the back of Hadley's lot?
3. Whether the language in the 1922 deed from Freeman Daughters to O.E. Sletegar created an implied easement appurtenant to Coward's lot which would allow Coward access to their lot across the back of Hadley's lot?

ARGUMENT

I. The Trial Court committed error when it determined that the fence line agreement operated to extinguish coward's right to use the alley. Nothing in the agreement indicates it pertains to easements or access and no party testified that it had anything to do with the present dispute.

The Trial Court determined that at the time of entering into the fence line agreement, the intent of the parties was to extinguish the disputed access through Hadley's lot. Hadley did not advance any argument that the parties intended the agreement to pertain to this access and the agreement unambiguously deals with ownership rights, not access rights. The Trial Court's determination is in error because nothing in the record supports such a conclusion.

When interpreting a deed or contract, the Court's "primary goal is to seek and give effect to the real intention of the parties." *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). The determination of whether a written instrument is ambiguous is a question of law. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 243-44, 16 P.3d 915, 919-20 (2000). Where the deed or contract is unambiguous, its interpretation "can be settled as a matter of law using the plain language of the instrument." *Porter v. Basset*, 146 Idaho 399, 404, 195 P.3d 1212, 1217 (2008). Questions that are of a matter of law are reviewed de novo by the Appellate Court. *City of Kellogg,* 135 Idaho at 244, 16 P.3d at 920.

The fence line agreement unambiguously pertains only to the ownership of the parties' respective properties and does not pertain to easements. That agreement sets forth:

> **This agreement concerns the boundary lines** of the parties real property and is made so that the **boundary lines on the ground** remain as legally described in each parties separate deed to their respective ownership, and is further made pursuant to Idaho Code §5-208 (3) to provide that by permitting possession or occupation

> of the real property, the doctrine of adverse possession, boundary by agreement/acquiescence, and any other legal, equitable, or statutory doctrine does not apply to alter the legal descriptions, ownership, boundary, or title to the real estate of either party.
>
> A survey by True North, Inc., recorded on **May** 30, **2000** as Instrument No. 564398 of Bonner County Records, depicts the Hadley Real Estate and the Coward Real Estate, and also depicts the common boundary line which is the southern boundary line of the Hadley Real Estate and is the northern boundary line of the Coward Real Estate. **This survey drawing depicts the common property line and it depicts a "wood fence" that is located so as to intersect the common property line and is partially located on the Hadley Real Estate and is partially located on the Coward Real Estate.**
>
> The true "Common Property Line" according to the actual legal description of each parties' real estate shall remain and be the true surveyed common boundary line, without regard to the "Wood Fence" encroachment, enclosure, possession, or occupancy of the real estate; and also, without regard to doctrines of adverse possession, boundary by agreement/acquiescence, or any other doctrine or law. The Wood Fence is located permissively by both parties.
>
> (Aug. R. p. 2-5). (Emphasis supplied)

The fence line agreement unambiguously sets forth that it concerns the boundary lines of the parties' real property and is made so that the boundary lines on the ground remain as legally described. The balance of the Agreement is consistent in that it is pertaining to only the legal descriptions of each party's real property, not to any other legal rights involved.

The Trial Court focused on the portion of the agreement that provided that neither party could utilize "...any other legal, equitable or statutory doctrine...to alter the legal descriptions,

ownership, boundary, or title to the real estate of either party," and determined that it meant that Coward released their easement. (R. pp. 109 – 111). This determination is in error because an easement does not alter the legal description, ownership, boundary or title of real property. "'An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner.'" *Backman v. Lawrence,* 147 Idaho 390, __, 210 P.3d 75, 80 (2009), citing *Akers v. D.L. White Const., Inc.,* 142 Idaho 293, 301, 127 P.3d 196, 204 (2005) (emphasis added). This right to use "does not divest the servient estate owner of title," nor "the right to transfer title." *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 143 Idaho 407, 410, 146 P.3d 673, 676 (2006) (emphasis added). This determination is also in error because it is unsupported by any of the testimony regarding the fence line agreement.

Every party who provided any testimony regarding the fence line agreement testified that the agreement resolved a fence line dispute and that it had occurred almost nine years earlier, (Tr. p. 47, L. 11 to Tr. p. 48, L. 5), and had just recently been memorialized in writing. Anne Coward testified that the agreement was the product of a dispute pertaining to a fence between the parties' property. (Tr. p. 45, L. 13 – Tr. p. 46, L. 13). The fence line agreement is consistent with this testimony, as it specifically references the wood fence. Cole Thompson, the grandson of Hadley, also testified regarding the fence line dispute. (Tr. p. 82, L. 15 to Tr. p. 83, L. 12).

No witness for Hadley testified that the fence line agreement was intended to extinguish any easement that may have existed at the time of the agreement, and all witnesses testified that the agreement only pertained to an unrelated fence line dispute. That agreement unambiguously sets forth that it only pertains to boundary lines and ownership of property. It was error for the

trial Court to conclude that the fence line agreement extinguished any easement that Coward may have had to access Coward's garage.

This Court should hold that the fence line agreement did not extinguish any access Coward had across the Hadley lot and should further hold that the intent of Freeman Daughter's in his 1922 deed to Ole Sletegar was to create an alley for use by lots 2 (Coward's lot) and 11.

II. THE 1922 DEED FROM DAUGHTERS TO SLETEGAR GRANTED THE RIGHT TO USE THE ALLEY TO THE OWNERS OF LOT 11 AS WELL AS THE OWNER OF COWARD'S LOT.

A. The deed from Daughters to Sletegar is ambiguous and the extrinsic evidence indicates the intent of Daughters to create an alley for the use of the owners of lots 1, 2 and 11.

The goal in interpreting any deed is to give effect to the intention of the parties. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). If the deed is plain and unambiguous, then the intention must be determined from the deed itself. *Id.* "Uncertainties should be treated as ambiguities; such ambiguities are subject to be cleared up by resort to the intention of the parties as gathered from the deed, from the circumstances attending and leading up to its execution, from the subject matter, and from the situation of the parties at the time." *Id.*, citing *City of Kellogg,* 35 Idaho 239, 16 P.3d 915 (emphasis added).

In this case, the deed contains uncertainty regarding whether the reservation created an *appurtenant* easement because it does not identify a dominant parcel. Both the extrinsic evidence and the language of the deed indicate that it created an easement appurtenant to both lot 11 and lot 2 (Coward's lot).

1. Notwithstanding the ambiguity in the 1922 deed from Daughters to Sletegar, this Court can determine the intent of the parties to that deed because there is no conflicting parol evidence.

Generally, where an ambiguity exists in a deed, it is a question of fact to be determined by the trier of fact from the surrounding circumstances and extrinsic evidence. *Porter,* 146 Idaho at 404, 195 P.3d at 1217. "However, when no parol evidence is introduced (requiring construction of the instrument solely based on its own language) or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing. [Citation.]" *Winet v. Price*, 4 Cal.App.4th 1159, 1166, 6 Cal.Rptr.2d 554, 557 (Cal.App. 4 Dist. 1992) (emphasis added).

In this case, there is no conflicting parol evidence and this Court can and should determine the effect of the 1922 deed from Daughters to Sletegar.

2. The 1922 Deed is Ambiguous because it does not identify the dominant estates.

The deed here is not clear as to the benefitting parcel of the appurtenant easement. An appurtenant easement attaches to some parcel or, as in this case, parcels, of property and the right to use passes to the successors in interest to those parcels. *Beckstead v. Price,* 190 P.3d 876, 884 (2008). The failure of this grant to identify which of the parcels is the dominant parcel creates an ambiguity as it creates a factual question of its existence and/or location. *Christensen v. City of Pocatello*, 142 Idaho 132, 136-137, 124 P.3d 1008, 1012 - 1013 (2005); *Sells v. Robinson*, 141 Idaho 767, 773, 118 P.3d 99, 105 (2005).

The alley here was created by Instrument number 53126 – the Daughters to Sletegar transaction – which contained the following language:

> Lots One (1) and two (2) in Block "JJ" of Law's Second Addition to Sandpoint, Idaho; provided, however, the party of the first part herein, [Daughters] his heirs and assigns shall have a permanent right of way over and across twelve feet on the east side or end of each of said lots for the purpose of an alley.
>
> (R. p. 100).

Since the deed is silent regarding the identity of the dominant parcel, it is ambiguous; therefore, extrinsic evidence is admissible to determine the intent of the parties. *Sells v. Robinson*, 141 Idaho 767, 773, 118 P.3d 99, 105 (2005).

3. The deed was intended to be appurtenant.

When considering whether an ambiguous deed creates an appurtenant or in gross easement, there is a presumption that the easement was meant to be appurtenant. *Nelson v. Johnson*, 106 Idaho 385, 388, 679 P.2d 662, 665 (1984). Besides the presumption, the deed itself indicates it was meant to be appurtenant to some parcel of land. It was granted to Daughters and his heirs and assigns, and a grant to "heirs and assigns" indicates that the easement was appurtenant. *King v. Lang,* 136 Idaho 905, 909, 42 P.3d 698, 702 (2002); *Boydstun Beach Ass'n v. Allen*, 111 Idaho 370, 375, 723 P.2d 914, 919 (Ct. App.1986). The alley created was permanent, which also indicates it was meant to be appurtenant. *Stig K-A v. Goodkin*, 98 Wash. App. 1064 (2000 WL 44112, 3); *Pokorny v. Salas,* 81 P.3d 171, 178 (Wyoming, 2003).

The deed is presumed to be appurtenant, indicates it is appurtenant, and the surrounding circumstances remove all doubt as to that question. At the time of the conveyance, lots 1, 2, and 11 in the subdivision did not have alley access. However, all the other lots in the subdivision, save one, did. (R. p. 100). At the time Daughters drafted the deed, he owned lot 11 located on

the south end of the alley he created. (R. p. 100). Three years later, when Daughters transferred lot 11 to one Jack Blake, it contained the following:

> Also, a permanent right of way over and across twelve feet on the east side or end of Lots one (1) and Two (2), Block "JJ" Laws Second Addition to Sandpoint, Idaho, for the purpose of an alley.
>
> (R. p. 100)

Clearly, Daughters did not intend the alley to be a personal right to himself, as he passed it on to Blake three years later. Furthermore, for the second time in three years when referring to this access, Daughters referred to it as an alley, and did not restrict its use to any particular parcel of land.

The permanent alley created in Instrument 53126 was intended to be appurtenant, and nothing about the grant indicates that it was intended to solely be appurtenant to lot 11.

4. Daughters granted the right to use this alley to his heirs and assigns. Coward is an assign of Daughters and nothing in the grant indicates an intent to restrict the use of the alley to lot 11.

The plain language of the deed provides that Daughters, *his heirs and assigns*, shall have a permanent right of way across lots 1 and 2 for the purpose of an alley. Sletegar was an assign of Daughters and Coward is an assign of Sletegar. *Brinton v. Johnson*, 208 P. 1028, 1030 (Idaho 1922) ("Without doubt, the word 'assigns' in the statute is intended to include remote grantees of the premises").

The only argument against this straightforward interpretation is that at the time the alley was created, Daughters no longer owned lots 1 and 2, so the right to use the alley could not

"attach" to those lots. This exact argument was raised and rejected in *Boydstun Beach Ass'n*, 111 Idaho 370, 723 P.2d 914.

In *Boydstun*, the owners of the servient estate were claiming that an easement was not appurtenant to a parcel of land because the grantees did not own that parcel at the time of the grant. The Court of Appeals rejected the argument:

> Even if W.B. Boydstun was only a *record* owner of the thirty acre parcel when the six acres and the easement were conveyed to him in October 1926 and he had already conveyed away the thirty acres, it is nevertheless clear that his "assigns" were then the owners of the thirty acre parcel. The phrase "heirs and assigns" "generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law." BLACK'S LAW DICTIONARY 109 (5th ed. 1979).
>
> *Id.* at 375, 723 P.2d at 919.

The plain language of the deed grants the right to use the alley to Daughters and his heirs and assigns. Coward is an assign of Sletegar and entitled to use the alley.

Lots 1, 2, and 11 did not have an alley when Daughters conveyed lots 1 and 2 to Sletegar, but the surrounding lots all had alley access, other than one. Under these circumstances, Daughters signed a deed that reserved a permanent access to him, his heirs and assigns, and called it an alley. Daughters did not restrict use of the alley in the instrument that created it, nor did he when he sold Lot 11 three years later. While one could argue that this is just sloppy drafting of that deed, the Grantor created an unrelated reversionary interest to himself in the same deed. (Aug.R 6) Given Daughters' or his lawyer's ability to write more than simple deeds, it seems likely he would have not used the word "alley" if he intended to convey only a

private thoroughfare for only the owners of Lot 11. Daughters intended to make an alley along the back of lots 1 and 2 and to not restrict its use to the owner of lot 11.

B. Alternatively, this Court should adopt the rule that a grant containing an alley creates an implied right to use the alley. Idaho has already adopted a similar rule.

Idaho has adopted the rule that when a plat is recorded that shows a "way," there is a dedication of that way to public use. *Smylie v. Pearsall*, 93 Idaho 188, 191, 457 P.2d 427, 430 (1969).

> It is useless for us to cite other cases upon this proposition but there are many well-considered cases holding that dedication is complete when a plat is filed showing streets and alleys thereon, and sales are made with reference thereto, and that such dedication is irrevocable, and does not require an acceptance on the part of the city....
>
> *Boise City v. Hon*, 94 P. 167, 169 -170 (1908).

The deed from Daughters to Sletegar made reference to an alley, although the alley was not shown on a plat. If a platted lot which is sold references an alley in the plat and that creates a right to use the alley, then the same should hold true for a deed that includes an "alley" and does not restrict the alley to any particular lot.

Idaho has already adopted the rule that conveyance by reference to a plat that contains an alley includes the right to use that alley. It follows that when a grant is bounded by an alley an implied right to use that alley in all those who abut it arises. This is not a novel theory, just one not specifically adopted in Idaho. Coward has met all the elements of an implied right to use an alley as adopted in other jurisdictions.

An easement of this type requires that the parcels involved have a common grantor. *Brown v. Berry,* 46 Tenn 98 (1868 WL 2178, *2); *MDC Blackshear, LLC v. Littell*, 273 Ga 169, 172 (2000); *Gallagher v. Williams,* 36 Del.Ch. 310, 311, 129 A.2d 554, 554 (Del.Ch.1957); *Murawski v. Kurlancheek,* 82 Pa. D. & C. 3, 36, 1953 WL 4325, *20 (Pa.Com.Pl., 1953). In this case, a common grantor exists, as Freeman Daughters owned the Hadley lot, the Coward lot, and lot 11 when he created the alley. (R. p. 100).

An easement of this type requires that the alley in question be designated as a limit on the grantee's property. *Friday v. Parkhurst,* 13 Wash. 439, 443, 43 P. 362, 363 (1896); B*rown v. Berry,* 46 Tenn 98 (1868 WL 2178, *3); *Murphy v. Martini,* 884 A.2d 262, 266 (Pa.Super.2005); *Koch v. Strathmeyer,* 357 Md. 193, 202, 742 A.2d 946, 951 (Md.1999); *Murrane v. Clarke County*, 440 N.W.2d 613, 615 (Iowa App.1989). The grant from Daughters to Sletegar expressly set forth that the eastern 12 feet of the property conveyed is an alley. The fact that the alley was created by reservation does not defeat the claim of an implied easement. In *Miller v. Culpepper*, 556 So.2d 1074, 1074 (Miss. 1990), the Supreme Court of Mississippi affirmed the lower Court, which found an implied easement to use the road in question from the first and subsequent grants in the chain of title. *Id.* at 1077. In this case, the property transferred to Sletegar in 1922 was limited by the reservation of the alley. It makes no difference to the analysis how the road was created, only that it was intended to be a road or alley, and, as set forth above, the facts of this case make it clear that an alley was intended.

Idaho has adopted the rule that a sale of land with reference to a plat that contains an alley creates an implied dedication to the public to use that alley. There is no logical reason that a grant which refers to an alley that is not on a plat would create anything different. Either way,

a strip of land is being represented as an alley, and this Court should conclude that the alley is for the use of the adjacent parcels of property.

CONCLUSION

The fence line agreement between Hadley and Coward by its terms only pertains to the boundaries and ownership of property and not to any easement rights. No party testified otherwise, and it was error for the Trial Court to conclude it was the intent of the parties to extinguish Coward's right to access the rear of Coward's property through Hadley's property.

In 1922, when Freeman Daughters reserved a permanent right of way to himself and his assigns and he called it an alley. Not an easement, not a private drive, but an alley. At the time Daughters called it an alley, the State of Idaho had already adopted the rule of law that implies the public's right to use alleys if they are on plats and lots on that plat are conveyed. *Boise City,* 94 P. at 169 -170.

The lots Daughters owned at the time did not have an alley, but all the other lots in the subdivision did, other than one. Nothing in that grant indicates that the alley was for the exclusive use of lot 11 and the grant expressly reserves the right to Daughters' assigns, one of which is Coward.

Under these circumstances, this Court should hold that the 1922 deed from Daughters to Sletegar created an alley and the right to use that alley is appurtenant to lot 2 Block "JJ" of Law's Second Addition to Sandpoint, Idaho.

Respectfully submitted this 24th day of February, 2010.

ARTHUR M. BISTLINE
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Gary Finney
120 E Lake St., Ste. 317
Sandpoint, ID 83864
Fax: 208-263-8211

[ ] Hand-delivered
[X] Regular mail
[ ] Certified mail
[ ] Overnight mail
[ ] Facsimile
[ ] Interoffice Mail

BY: _____
JENNIFER HOSKINS