4-19-2010

Coward v. Hadley Appellant's Reply 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' REPLY ON APPEAL

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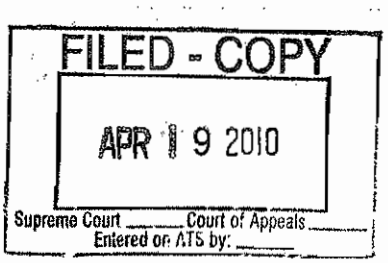

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A. The parties did not intend the fence line agreement to apply to the access, but even if they did, the access came into existence in 1922 and the agreement cannot by its own terms be used to extinguish the access.

Hadley makes no attempt to argue that either party to the fence line agreement intended that it pertain to the present dispute before the Court. Hadley only argues that the agreement could be read to apply to an easement because an easement is an ownership interest in property. The fence line agreement does not by its terms apply to the disputed access and no party testified that it did. Furthermore, even if it did apply to the disputed access, by its own terms, it cannot be used to extinguish that access.

Coward's argument is that Coward's lot 2 was benefitted from an alley access that came into existence in 1922. The parties agreement specifically provides 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." (emphasis supplied). The Trial Court utilized contract law, a legal or equitable theory, to extinguish the existing access. The fence line agreement specifically prevents utilization of a legal or equitable theory to alter the parties existing rights.

No witness testified that the parties intended the fence line agreement to extinguish Coward's access to the rear of Coward's lot, and the agreement plainly does not pertain to that access. Even if the agreement does pertain to this particular access, then it cannot be used to extinguish Coward's access because that access existed before the agreement.

B. Hadley did not argue the access had been extinguished by common ownership and cannot do so for the first time on appeal. The access did not cease to exist because the estates benefitted by the access were owned by two different people

Hadley argues one cannot have an easement in his own lands for the first time on appeal at page nine of her brief; this Court should not consider that argument because it is disallowed. *Magnuson Props. P'ship v. City of Coeur D'Alene,* 138 Idaho 166, 170, 59 P.3d 971, 975 (2002). Furthermore, this doctrine would not apply to extinguish the access because the entire dominant estate was never owned by Sleteger, and even then, the access still would not have been extinguished.

At pages 9 and 12, Hadley argues that because Lots 1 and 2 were owned by Sleteger, there could be no easement in favor of Lot 2 over Lot 1 because Sleteger owned them both and the general rule that one cannot have an easement in his or her own property. *Johnson v. Gustafson,* 49 Idaho 376, 381, 288 P. 427, 429 (1930).

However, "where the owner of an entire tract employs a part thereof so that he 'derives from the other a benefit or advantage of a continuous and apparent nature, and sells the one in favor of which such continuous and apparent quasi easement exists, such easement being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication.'" *Id.*, citing 19 C. J. p. 914.

In this case, Sleteger, Daughters' grantee in 1922, owned both lots 1 and 2. Thereafter, Lots 1 and 2 were owned separately, (R.100) , and the owner of Lot 2 made use of the alley. (Tr. p. 38, L. 16-25). Under these circumstances, the easement would not be extinguished by common ownership of both the dominant and servient parcels even if Lot 1 and 2 were the only

lots affected by the alley. The fact that Lot 11 also benefitted from the alley is another reason that the easement was not extinguished by Sleteger's common ownership of Lots 1 and 2.

Sleteger did not own lot 11 at the time of the creation of the alley and therefore did not own the entire dominant estate as required for the easement to be extinguished:

> In order that an easement will be extinguished under the doctrine of merger, there must be unity of title....The requirement that the ownership of the dominant and servient tenement be 'permanent and enduring' and 'coextensive and equal in validity' means the unity of ownership must be of a fee simple absolute estate in both the dominant and servient tenements, and that the common ownership is of the **entire** dominant and servient tenement, not merely a fractional share.
>
> *Zanelli v. McGrath*, 166 Cal.App.4th 615, 628-629, 82 Cal.Rptr.3d 835, 845 - 846 (Cal.App. 1 Dist., 2008) (emphasis supplied)

In this case, Sletegar owned one of the dominant parcels, lot 2, but did not own the other dominant parcel, lot 11, so the easement was not extinguished.

The alley in this case was created to benefit lots 2 and 11 because those lots, unlike almost every other lot in the subdivision and all the surrounding subdivisions (see Attachment A to Respondent's brief), did not have an alley. Sletegar's ownership of both lots 1 and 2 did not extinguish this easement.

C. The Trial Court's amended memorandum decision only recites the prior findings of fact which were wholly unnecessary to the Trial Court's final decision and not binding on this Court.

Hadley argues at page 11 of her brief that Coward did dispute the finding that "Lot 2 in the chain of title has never had an appurtenant easement over Lot 1." The findings of fact in the Amended Memorandum Decision and Orders on Post Trial Motions (R. 99) are merely a

recitation of the prior findings of fact in the prior memorandum decision. None of the findings of fact or conclusions of law pertaining to the effect of the deeds in each party's chain of title was relevant to the Trial Court's decision.

Coward presented reasoned argument based on the deeds and surrounding circumstances to support Cowards' position that Coward had the right to use the alley. In essence, the Trial Court's final response was that even if Coward's legal arguments are correct, it did not matter because Coward extinguished whatever right Coward may have had with the fence line agreement. The findings regarding any document other than the fence line agreement are wholly unnecessary and not binding on this Court.

The Trial Court's finding that any easement that did exist had been extinguished was not relevant to its decision, and is therefore not binding on the appellate court. *See Chen v. Conway*, 116 Idaho 901, 904, 781 P.2d 238, 241 (Idaho. App. 1989), citing *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982) (holding that reversal for finding of facts was unnecessary where "such findings and conclusions would not affect the judgment entered"). An appellate court may make its own findings of facts "where the record is clear, and yields an obvious answer to the relevant question." *Pope*, 103 Idaho at 225, 646 P.2d at 996. Thus, this Court need not consider the trial court's findings of fact regarding the ruling that any easement that did exist had been extinguished by the fence line agreement.

Furthermore, the conclusion that Cowards' lot did not have an appurtenant easement is a conclusion of law based on the review of the title documents, and no conflicting parol evidence was presented. This conclusion is not binding on this Court, *Winet v. Price*, 4 Cal.App.4th 1159, 1166, 6 Cal.Rptr.2d 554, 557 (Cal.App. 4 Dist. 1992), even if still relevant to this appeal.

D. Coward raised and briefed the issue of implied easement at the trial level. Coward is asking this Court to specifically adopt a legal theory which provides that calling something an alley implies those who abut the alley may also use it, unless the deed provides a contrary intention

Hadley argues at page 12 of her brief that that Coward did not raise or brief the issue of the implied easement below. Coward raised the argument in the closing brief. (R 71 – 73).

Hadley also argues that Coward did set forth the Idaho Law on the subject of implied easements. Idaho has not adopted a rule that says that the grant of an alley implies a right of use in those who abut it, so there is no Idaho law on the subject. However, Idaho has adopted a law that says that referring to something as an alley on a plat map creates a right of use in the public, which is very similar to what Coward is asking this Court to adopt.

E. Coward's pursuit and defense of this case was not frivolous and Hadley is not entitled to attorneys fees below or on appeal.

An award of fees at the trial court level is subject to a three-tiered inquiry by the appellate court: "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason." *Lowery v. Board of County Com'rs for Ada County*, 115 Idaho 64, 68, 764 P.2d 431, 434 (1988). A court has the discretionary authority to award fees where it makes a finding that the case was "'brought, pursued, or defended frivolously, unreasonably, or without foundation.'" *Id.*, citing *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1978). A frivolous or baseless case is not merely a "misperception of law or one's interest

under the law;" instead, it is where the claim is "so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation." *Id.* at 69, 764 P.2d at 435.

The Trial Court in this case initially ruled that no express easement was created because "Mr. Daughters kept Lot 11 and deeded out Lots 1 and 2. In doing so he reserved an appurtenant easement in favor of Lot 11 for a permanent right of way over the east 12 feet of the lots he conveyed to Sletegar, Lots 1 and 2." (R. 84). The Trial Court then held that the stranger to the deed rule prevented the creation of the easement. Id. Coward pointed out that the Court had not explained its conclusion that Freeman Daughters only intended to benefit Lot 11, (R.103), and that the Court did not address the issue raised by the Cowards that a reservation of an alley has the same effect of a designation of an alley. (R.104). The Trial Court avoided addressing those arguments by ruling that whatever rights did exist were extinguished by the fence line agreement.

Defendant argued at the trial court level that attorneys fees should be granted because Coward's lawsuit was frivolous. (Tr. 9-9-09, p.4, ln. 7-9). The court recognized its discretion in awarding fees where a case is without basis in fact or law, and in fact saw that that it must first find that the case was brought or defended frivolously, unreasonably or without foundation" before implementing that discretion. (Tr. 9-9-01, p.23, ln. 22-25, p.24 ln. 1-2). However, the court ruled that there were reasonable arguments made on both sides regarding unclear issues. ((Tr. 9-9-01, p.22-23). The court exercised reason in coming to this conclusion, recognizing that this issue was not "plainly fallacious" by pointing out that there was reasonable conflicting evidence on both sides, including an unclear deed and boundary line agreement that had to be subjected to interpretation.

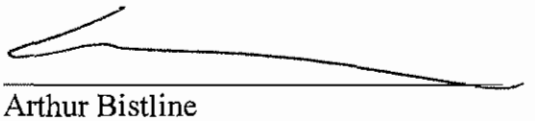
Coward made a good faith, reasoned, argument for both the existence of an express easement and the existence of an implied easement. Coward cannot be said to have pursued or defended this matter frivolously.

Conclusion

The goal of contract interpretations is to give effect to the intent of the parties. The fence line agreement references a fence line dispute and no party testified that it had anything to do with the present dispute. It was error for the Trial Court to conclude that the fence line agreement extinguished whatever rights Coward had in Hadley's lot for access purposes.

Freeman Daughters, or his lawyer, knew how to draft more than a simple deed when Daughters deeded to Sletegar. It is unlikely that the word alley was just sloppy drafting and Daughters likely intended to create an alley for use by lots 2 and 11. When a deed contains a reservation of an alley, that should be enough to imply a right to use the alley by at least those who abut it unless the grant otherwise restricts its use. Idaho has already adopted a similar law that grants rights to the general public to use an alley if it is noted on a plat. Assuredly, noting an alley on a deed should be treated no differently.

Respectfully Submitted,



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Attorney for Appellant Coward

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 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:

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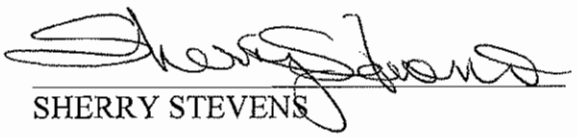
BY: 
SHERRY STEVENS