5-21-2010

Bratton v. Scott Appellant's Reply Brief Dckt. 36275

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES E. BRATTON and MARJORIE I. BRATTON, husband and wife,

Plaintiffs/Appellants,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT, husband and wife,

Defendants/Respondents.

Supreme Court No. 36275

PLAINTIFFS/APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho in and for the County of Canyon

Honorable Renae J. Hoff, Presiding

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I. INTRODUCTION

This is a simple case concerning the destruction of an irrigation ditch and interference with water rights used and owned by Appellants (Brattons) for 34 years. Mr. and Mrs. Bratton are both retired school teachers from the Caldwell School District. They had saved judiciously in order to buy rural property to raise hay and to pasture horses. In 1973 they had the money saved and purchased acreage from Harold Ford. As part of the transaction, Mr. Ford conveyed an easement for an irrigation ditch to convey water to the Brattons' pasture. The easement allowed for construction and maintenance of an irrigation ditch for the Brattons, as well as ingress and egress on the Ford property. Brattons also purchased water rights from Canyon Hill Ditch Company and Middleton Mill Ditch Company. After conveyance of the easement and as soon as spring weather permitted, Mr. Ford placed the ditch to be used to irrigate the Brattons' property. Mr. Ford located the ditch 5-6 feet away from the border fence of his property (servient estate). At the time of the ditch construction, Mr. Ford gave Brattons a 12-foot easement/right-of-way for cleaning and maintenance and filed an express easement indentifying a 3 foot wide ditch.

This ditch ran in the same location from 1973 until 2007. Its uppermost portion began at the head gate of the lateral canal, and ran in a downward slope the full length of the Ford property, or servient estate. The ditch exited the Ford property via an underground metal culvert. The ditch was configured in a elongated "C shape" due to the slope and gradient of the field. The top of the ditch that exited the canal head gate culvert was not tiled or buried, the next one-third of the ditch was housed underground in galvanized pipe, and the remaining one-half was

configured in recessed cement culverts. Mr. Ford also used a portion of this ditch to irrigate an upper corner of the servient estate.

The Fords and Brattons enjoyed the continuous use of this ditch for 34 years without interruption or conflict.

Respondents, the Scotts, acquired the Ford property (servient estate) in 2005. Their deed identified that they took the property "together with all . . . ditches, ditch rights, easements . . . and subject to any encumbrances or easements as appear of record or by use upon such property." In 2006, the Scotts moved from Alaska to the servient property. The Scotts did not want anyone to access their property. Examples of their isolationism include, but are not limited to: head high tall noxious weeds overtook the servient property and were out of control, but the Scotts rejected an offer by their neighbor to control or mow the weeds; Scotts constructed exterior surveillance cameras around their house; and posted "No Trespassing" signs on their property and driveway.

By 2007, after educating literally hundreds of Idaho citizens, the Brattons, were now in their 70's and retired from the Caldwell School District. Mr. Bratton had come to enjoy spending more time on his rural property working with and enjoying his horses.

The Scotts testified that prior to the spring of 2007, they had knowledge that the Brattons used an irrigation ditch that was located on their property, knew the location of the ditch, and knew that the Brattons used and maintained the ditch for irrigation purposes. They admitted seeing Mr. Bratton open head gates and work on the ditch, to include burning weeds on the right-of-way/easement. In fact, when the weeds were head high, Mr. Bratton observed Mr. Scott

hiding in the weeds and watching while Mr. Bratton worked with the ditch during a time he was irrigating his (Bratton) pasture.

After having prior knowledge of the Brattons' ditch, as set forth above, in the spring of 2007, John Scott destroyed the full length of the Brattons' ditch. Mr. Scott removed the cement culverts and leveled the entire length of the ditch. Mr. Scott committed this destruction while Mr. Bratton was away from his property, without Mr. Brattons' knowledge, and certainly without written or verbal permission.

When the Brattons discovered that the ditch was destroyed, they tried to negotiate a resolution. They met at the property with their mutual attorneys. The Scotts first denied destroying the ditch. Next, the Scotts took the position that the Brattons asked them to "fix" the ditch. Finally, the Scotts admitted that Mr. Scott had leveled the ditch. The Scotts refused the Brattons' request to replace the ditch. The Scotts did not want the Brattons to have access to the servient estate. After the ditch had been destroyed, the Scotts placed "No Trespassing" signs where the 34 year old ditch had been located, at the easement ingress and egress, and at the head gate. The Scotts then roped off an area 3 feet out from the fence.

The Scotts contend that the Brattons' express easement is limited to 3 feet immediately adjacent to the border fence line and the Scotts completely ignored the existence of the long standing irrigation ditch. The Scotts' interpretation of the express deed only allows 3 feet for the entire ditch, maintenance, and ingress/egress needs without regard to its original and long term location. The Scotts also ignored the statutes protecting an existing ditch, refused to allow for

required maintenance of the ditch, and ignored their own deed, which conveyed the property with notice of easements and ditches in use upon the property.

The fence that borders the servient estate is co-owned by the Scotts and a third party. As stated, the Brattons' ditch was never located adjacent to the fence, but rather was always 5-6 feet out from the fence. At trial, along with Bratton and Ford, a number of other witnesses verified the location of the 34-year-old ditch as being 5-6 feet out from the fence. Mr. Ford testified that he gave Brattons a 12-foot easement/right-of-way in 1973, and that this easement/right-of-way was used continuously thereafter.

II. PROCEEDINGS

After this lawsuit was filed, no hearing was held regarding the pled injunction relief. A hearing was not held due to the unavailability of the trial court and the fact that by the time a hearing could be held, the 2007 irrigation season was over and trial was set to commence well before the commencement of the 2008 irrigation season. Thereafter, the trial court granted Defendants' two separate motions to vacate trial dates, which left the Brattons to endure the summer of 2008 without irrigation water. By the time the 2008 irrigation season approached, it was clear to the Brattons that the trial court would not favorably entertain their requested injunctive relief.

III. ONE JURY, THREE SEPARATE VERDICTS

A. First Phase.

The case was segmented into three sections and Jury Instructions were used with the same jury for each of the three verdicts. The first phase covered the implied easement by

operation of law. The Brattons moved to use the controlling statutes and argued implied easement by operation of law (i.e., Idaho Code § 42-1102). The statutory Jury Instructions requested in part by the Brattons is as follows:

REQUESTED INSTRUCTION NO. 20

> The right-of-way onto an irrigation easement shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work.

See R. Vol. I, p. 290.

The Brattons had presented evidence of the width needed to accommodate the statutory provision of Idaho Code § 42-1102. The trial court erroneously held that Idaho Code Section 42-1102 did not apply because the Brattons' land was not riparian, and was not land locked. In denying the statutory instruction, the court instructed the jury using a strict interpretation of the elements of common law implied easement. Over the Brattons' objection and in-depth briefing and arguments to the contrary, the trial court instructed on the three elements of implied easement as contained in Instruction No. 8 set forth in *Thomas v. Madsen*, 142 Idaho 635, 432 P.3d 392 (2006).

INSTRUCTION NO. 8

> Plaintiffs claim that they have an implied easement over Defendants' property based upon prior use. In order to establish an implied easement by prior use, Plaintiffs must prove the following three elements:

(1) Unity of title or ownership and subsequent separation by grant of the dominant estate;

(2) Apparent continuous use long enough before conveyance of the dominant estate to show that the use was intended to be permanent; and

(3) That the easement is reasonably necessary to the proper enjoyment of the dominant estate.

See R. Vol. III, p. 405.

The Brattons also requested additional Jury Instructions regarding easements, which requests were overruled by the court. These additional instructions include: Jury Instruction Nos. 10-16 (*see* R., Vol. I, pp. 280-286); Jury Instruction Nos. 18 & 19 (*see* R., Vol. I, pp. 288 and 289); and Jury Instruction No. 21 (*see* R., Vol. I, p. 291).

Although the Brattons argued that Idaho Code Section 42-1102 controlled as operation of law and that *Madsen* did not apply in this matter as to this irrigation ditch or right-of-way, the trial court ruled to the contrary. Because of the trial court's Jury Instruction No. 8, the jury returned a verdict finding that there was no implied easement. *See* Verdict entered September 4, 2008, at R. Vol. III, pp. 437-438. But, of note, the jury was not asked to decide the location of the ditch.

B. Second Phase.

The same jury heard and decided the second phase. The trial court instructed on and prepared a Special Verdict, which in part followed Idaho Code Section 42-1207. The jury returned a verdict that the Scotts negligently interfered with the Brattons' easement, that the negligence was a proximate cause of harm to the Brattons, that the Scotts had unlawfully

changed the ditch, and had done so without written permission. *See* R. Vol. IV, pp. 439-440. The jury also found that there was not an impediment of flow (which is obviously unavoidable due to the downward drop of the servient estate from the head gate to the Brattons' property). This is not to say that there was a ditch available to carry the water, just that the water would run downhill.

Of note, is the unanticipated manner in which the trial court utilized the Special Verdict from phase two during the damages phase of the trial. Idaho Code Section 42-1207 states, in pertinent part regarding when a ditch is changed:

> Such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change. (Emphasis added.)

See Plaintiffs' Second Supplemental Requested Jury Instruction No. 1. R. Vol. III, p. 372.

The important aspect to this discussion is the disjunctive -**OR**- within Idaho Code Section 42-1207. The trial court interpreted the "or" to mean "and." The trial court held that to allow damages, the Brattons would have had to have received a verdict that flow was impeded and that the impediment caused the harm. The Brattons argued unsuccessfully that Idaho Code Section 42-1207 allows for damages if the Brattons were harmed by either impedance of flow or to otherwise injure any person or persons . . . . *See* IDAHO CODE § 42-1207. Respondent cites to *Weaver v. Stafford,* 134 Idaho 699, 8 P.3d 1242 (2000), for the premise that impediment of flow

is required to recover damage due to an unlawful change in a ditch. The *Weaver* quote on page 699 states as follows:

> or "otherwise injures any person or persons using or interested in such lateral ditch."

Weaver at 699.

In the *Weaver* case, the issue that the case turned on was the fact that the party at issue regarding this element was not interested in receiving water. The Court did not hold that impediment of flow is the only means to suffer harm.

C. Third Phase.

Because the trial court interpreted Idaho Code Section 42-1207 to require impediment of flow before damages were allowed, the trial court then notified Plaintiffs' that it would exclude all of the Brattons' damage evidence, except for testimony on replacement of an open ditch. Of note, the Brattons' ditch was only open at the top, but was buried in galvanized pipe or housed in recessed cement culvert thereon.

The trial court excluded Plaintiffs' evidence on crop loss, loss of pasture for the livestock, increased feeding costs for the livestock, the need to replant the pasture due to 2 years without water, and cost of boarding horses until replanting had matured. The Brattons presented an offer of proof on the above stated damages.

The Brattons had timely disclosed all the above listed evidence as well as evidence on replacement of an underground ditch and not an above ground ditch. As stated, the trial court would only allow evidence as to replacement of an above ground ditch and ruled that since the Brattons had not disclosed the cost for an above ground ditch, they would now be barred from

presenting any evidence on the cost to replace such a ditch. The trial court did allow the damage phase to go forward, but only with testimony regarding an above ground ditch construction and did so without allowing any evidence of the construction cost.

The jury returned a verdict in favor of Brattons on damages.

IV. JUDGMENT NOTWITHSTANDING THE VERDICT

Upon post-trial motion by the Scotts, the trial court granted a Judgment Notwithstanding only as to the damage verdict. The liability verdict was left intact. The trial court reversed the jury's damage verdict on the basis that there was no replacement cost evidence to support the damage verdict and also found that the general damage verdict regarding harm caused by the Scotts would additionally not be allowed because there was no impediment of flow, and because the damage award was not nominal.

Again, the trial court allowed the Brattons to put on minimal damage evidence and allowed the jury to deliberate damages to reach the third verdict. But, when the jury returned a verdict awarding damages to the Brattons, the trial Court, in the Judgment Notwithstanding the Verdict, found that the damages were not based on the evidence allowed at trial, were not as a result of impediment of water flow, and were not nominal.

V. CONCLUSION

At every aspect of this case, the Appellants' effort to replace their ditch and obtain irrigation water was thwarted by the Respondents and the trial court. To date, the Brattons are still without a means to exercise their 37-year-old irrigation water rights. This appeal is taken in the hope that they will be granted a new trial conducted by a different district judge who will

follow the relevant statutory provisions of Idaho Code Section 42-1101, *et seq.*, and Idaho Code Section 42-1200, *et seq.*, and the law applicable to this matter.

DATED this 21st day of May, 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Nancy J. Garrett – Of the Firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2010, I caused a true and correct copy of the foregoing **PLAINTIFFS/APPELLANTS' REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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