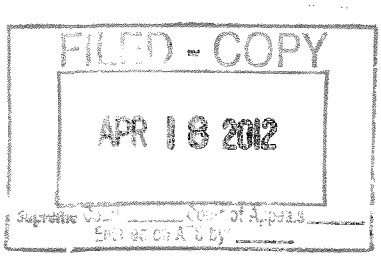
4-18-2012

Ruddy-Lamarca v. Dalton Gardens Irrigation District Respondent's Brief Dckt. 39217

IN THE SUPREME COURT OF THE STATE OF IDAHO

DIANE RUDDY-LAMARCA Plaintiff-Respondent, vs. DALTON GARDENS IRRIGATION DISTRICT Defendant-Appellant.	)	DOCKET NO. 39217-2011 RESPONDENT'S BRIEF



APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
DISTRICT JUDGE, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves two separate easements claimed by Dalton Gardens Irrigation District ("Irrigation District") across Diane Ruddy-Lamarca's ("Ruddy-Lamarca") parcel contained within Tract 48 of the Dalton Gardens Addition to Hayden Lake Irrigated Tracts. The first easement is an express easement for the placement of canals, flumes and water tanks. The second easement is a prescriptive easement arising from the placement of a 4" underground pipeline in the proximity of the western and southern boundary of the Ruddy-Lamarca parcel. The scope of neither easement was defined. Ruddy-Lamarca brought the present suit to obtain a declaration of the Irrigation District's easement rights.

B. Course of Proceedings

Diane Ruddy-Lamarca ("Ruddy-Lamarca") agrees with the Statement of the Case contained in Dalton Garden Irrigation District's Statement of the Case. ("the Irrigation District")

C. Concise Statement of Facts

The Irrigation District has set forth several facts that are not disputed by Ruddy-Lamarca in its Concise Statement of Facts. The Statement of Facts contained herein will add to those facts, and dispute those facts with which Ruddy-Lamarca does not agree.

Diane Ruddy-Lamarca purchased her property in 1990. Tr p. 10, ll. 23-25, p. 11. l. 1. Her title report did not reveal any easement in favor of the Irrigation District across her

property. Tr p. 12, l. 25, p. 13, ll. 1-11. Lamarca became aware the Irrigation District claimed an easement across her property on April 1, 2008. Tr p. 13, ll. 12-15.

Prior to trial, Ruddy Lamarca stipulated that her property was encumbered by an easement in favor of the Irrigation District for installation, construction, maintenance and repair of the existing 4" irrigation pipeline and appurtenances built by the Irrigation District and Bureau of Reclamation in 1954 and replaced in 1961. R. P. 41. However, contrary to the inference that the Irrigation District wishes to make on appeal, Ruddy-Lamarca did not concede that this easement right she stipulated to arose from the express easement that the District Court found the Irrigation District has over Ruddy-Lamarca's property. As will be argued later in this brief, there are two separate easements across Ruddy-Lamarca's property. The express easement does not include the existing 4" pipeline or any installation of irrigation pipelines and appurtenances across Ruddy-Lamarca's parcel.

Robert Wuest testified as the water master of the Irrigation District. He was not disclosed as an expert pursuant to the court's pre-trial order. The Irrigation District indicated at trial Wuest's testimony was not admitted as an expert but was directed to testimony as an owner of the project and to present factors under I.C. § 42-1102 as to current construction plans and their reasonableness. Tr p. 122, ll. 8-25; p. 12, ll. 1-2.

Mr. Wuest testified that in 1911, there was an irrigation ditch on Tract 49, immediately south of Tract 48 (Ruddy-Lamarca's parcel). Tr p. 35, l. 13-25, p. 36, ll. 1-4, p. 50, ll. 1-9. This ditch was still in existence in 1954 when the Bureau of Reclamation began its project to rehabilitate the irrigation system. Tr p. 36, ll. 11-22. Exhibit S. The irrigation works,

consisting of an underground pipeline, was moved to Tract 48 in 1954 when the project was constructed. Tr p. 36, ll. 23-25; p. 37, ll. 1-3. With respect to line installed along the southern boundary of Tract 48, both Bureau plan profiles (1954 and 1961) showed construction of the pipeline would be six (6) feet from an existing fence line on Tract 48. Trial Exhibits U and W. At trial, the Irrigation District acknowledged this fact. Tr p. 42, p. 43- ll. 1-8. p. 53, ll. 4-13. The Irrigation District and the Bureau of Reclamation had to do the project over again because the first pipeline did not hold up. Tr p. 43, ll. 19-25; p. 44, l. 1-2. The Irrigation District acknowledged the pipeline was installed in the same location and that the new set of plans for the reconstruction showed the pipeline was installed six feet from the existing fence. Tr p. 44, ll. 3-23, Wuest testified the system as rebuilt in 1961 was based on the existing system of a 4" underground pipeline. Tr p. 148, ll. 14-17. Trial exhibit W.

Regarding the drain field improvement on Ruddy-Lamarca's property, in 1996, Ruddy-Lamarca's drain field failed and was replaced by Kevin Bettis. Wuest told Lamarca to use Bettis for the repair. Tr p. 133, ll. 2-15. The contractor did a "call before you dig" prior to commencing excavation. Tr p. 19. ll. 12-25, p. 20, p. 21, ll. 1-13. Wuest knew Bettis was installing the drain field, because he talked to Bettis. Wuest knew the drain field would be adjacent to the house, yet didn't follow up on the installation. Tr p. 147, ll. 17-25; p. 148, ll. 1-4. The two maple trees discussed in the Irrigation District's brief on the Ruddy-Lamarca property are 40-50 years old. Tr p. 74, ll. 9-25; p. 75, ll. 1-2.

The Irrigation District now intends to abandon the 4" underground pipe in the ground and install a new 10" pipe parallel to it. The Irrigation District intends to use three large pieces

of heavy equipment to do the excavation for the replacement consisting of a 315 Caterpillar excavator, a Case 580C backhoe and a Case 580K backhoe. Tr p. 139, p. 140, ll. 1-3. One of the backhoes that Wuest intends to use will be a rubber tired piece of equipment. Tr p. 118, ll. 17-25; p. 119, ll. 1-2. During the 1961 reconstruction of the Bureau rehabilitation project, no rubber tired pieces of equipment were used. Only track hoes were used. Trial exhibits 1, 2, Y, CC, and DD. Sterling testified that rubber tired vehicles adversely impact drain fields and cause them to fail, and the state of Idaho prohibits their use on drain fields. Tr p. 158, ll. 9-25, p. 159-160, p. 161, ll. 1-23.

Sterling testified he could accomplish the same job as proposed by the district utilizing only a 16' width for construction. Tr p. 101, ll. 12-25, p. 102, ll. 1-6. Sterling's proposed method of construction would allow construction of a 10" pipeline but would put less burden on the property. Tr p. 157, ll. 5-19.

II. ARGUMENT

A. Standard of Review

The Supreme Court's standard of review in the present case was reiterated in *Harris, Inc. v. Foxhollow Construction & Trucking, Inc.*151 Idaho 761, 264 P.3d 400, 407 (2011), wherein this Court held:

> We review a district court's bench trial decisions to determine "whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Independence Lead Mines v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). This Court will set aside findings of fact only when clearly erroneous. *Id.* We will not disturb findings supported by substantial and competent evidence, "even if the evidence is conflicting." *Id.* "It is the province of the district court to weigh conflicting evidence and testimony

and to judge the credibility of the witnesses." *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 484, 50 P.3d 975, 979 (2002). We, therefore, liberally construe a trial court's findings "in favor of the judgment entered." Id. (internal quotation marks omitted). When it comes to matters of law, however, we are not bound by the trial court's conclusions; this Court is free to "draw its own conclusions from the facts presented." *Id.*

B. Idaho Code § 42-1102 is Inapplicable to the Present Case

The Irrigation District argues that the District Court erred in its application I.C. § 42-1102 to this case. The Irrigation District argued in its pre-trial brief that I.C. § 42-1102 defined the scope of its easement. R p. 037-038. During trial, the Irrigation District introduced the testimony of Robert Wuest, water master, not to testify as an expert witness, but rather to testify as to what width was reasonable for the Irrigation District to use under I.C. § 42-1102. Tr p. 122, ll. 15-23. In post-trial briefing, the Irrigation District again argued that the scope of the easement for its pipeline was governed by I.C. § 42-1102. R p. 045-046. On appeal, Irrigation District maintains the scope of its easement is controlled by I.C. § 42-1102.

In interpreting statutes, this Court has held:

> The objective in interpreting a statute or ordinance is to derive the intent of the legislative body that adopted the act. *Payette River Prop. Owners Ass'n*, 132 Idaho at 557, 976 P.2d at 483 (additional citations omitted). Such analysis begins with the literal language of the enactment. *Id.* Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction. *Id.* An ordinance is ambiguous where reasonable minds might differ or be uncertain as to its meaning. *Id.* However, ambiguity is not present merely because the parties present differing interpretations to the court. *Id.* Constructions that would lead to absurd or unreasonably harsh results are disfavored. *Id.* "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as

to determine the legislature's intent." *Friends of Farm to Market Rd.*, 137 Idaho at 197, 46 P.3d at 14.

Spencer v. Kootenai County, 145 Idaho 448, 180 P.3d 487, 494 (2008).

A statute should be interpreted in its entirety, including the way a Title or Chapter is enumerated. Justice Scalia has aptly characterized this approach as "[s]tatutory construction . . . is a holistic endeavor. A provision ... seen in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988). Scalia's approach was hardly novel. In 1850 Chief Justice Taney described the same process: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850). Thus, the meaning of a specific statutory directive may be shaped by the statute's overall structure. Courts also look to the broader context of the body of law into which the enactment fits. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1990).

The Irrigation District obtains its irrigation water from water drawn from Hayden Lake. *See* trial exhibits R, S and T. Idaho Code § 42-1101 states that all persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any *stream*, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed. Idaho Code § 42-1102 indicates "[w]hen any such owners or claimants to

land do not have sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation."

This case does not involve lands situated on the banks or the vicinity of a stream. Thus, by its terms, I.C. § 42-1101, *et seq.* are inapplicable to the present case. To the extent the trial court utilized this code section in its analysis, it erred. Irrigation District's claim that the trial court did not properly apply I.C. § 42-1102 in the present case is an attempt to perpetuate this error.

The Irrigation District contends the District Court erred in concluding that the Irrigation District must take reasonable precautions to preserve the two maple trees and must avoid damage to the septic system drain field on the Ruddy-Lamarca property because they were placed upon the easement without express written permission of the Irrigation District as required by I.C. § 42-1102. Because this code section does not apply, the District Court did not err .

B There is No Express Easement for the Pipeline

Hayden-CDA Irrigation Co. sold Tract 48 to E.H. Foltz by a Land and Water Deed dated July 18, 1911. Trial exhibit B. The deed reserved a right-of-way for construction, enlargement and maintenance of canals, flumes, and water tanks of the vendor already constructed or to be constructed for conveyance of irrigation water. Another portion of the

deed made the reserved easement appurtenant to Tract 48. The trial court found this easement in gross traversed a portion of the parcel adjacent to the southern boundary and a portion of the parcel adjacent to the public right of way on Sixteenth Street. (Finding No. 8.) R p. 107. The trial court found this easement reserved for canals, flumes and water tanks. (Finding No. 7.) R p. 107. The trial court thus concluded the Irrigation District had an express easement, but only for the purposes specified within the easement. (Conclusion No. 1.) R p. 109.

In *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876, 880 (1991) this court held:

> In construing an easement in a particular case, the instrument granting the easement is to be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted. Moreover, a majority of jurisdictions that have considered the issue have held that the easement owner is entitled to do such things as are reasonably necessary for the use of the easement. (Cites omitted.). The question of whether a particular use of an easement is reasonable and commensurate with the intention of the parties when the easement was granted is generally a question of fact for the trial court and its findings will not be disturbed if supported by substantial and competent evidence. (Cites omitted.)

The trial court never entered a finding of fact whether the currently proposed 10" pipeline was commensurate with the intention of the parties when the easement was granted. As the trial court found, the Irrigation District has never constructed any flumes, canals or water tanks. Therefore, even though it has an express easement over Tract 48 for this purpose, its rights under the express easement were not at issue in this trial and did not control the scope of the prescriptive easement it obtained over Tract 48 for the existing 4" pipeline.

D. The Width of an Indefinite Easement is not Fixed by the Width Used During Construction

Even if the deed encompassed the current 4" underground pipeline installed by the Irrigation District across Ruddy-Lamarca's parcel, Irrigation District is wrong that this Court has held that once the location of the easement is fixed by construction, its width cannot be changed. Irrigation District relies upon the case of *Manning v. Campbell,* ___ Idaho ___, ___ P.3d ___ (Opinion No. 37728 issued January 25, 2012) for this proposition. While the holding in this case was that the dominant estate could not reduce the width of an actively used existing driveway, this Court did not rule as a matter of law that an easement width could not be reduced. In fact, this Court held "The only issue in this case is whether the width or location of the driveway across the Manning property has changed since the driveway was initially constructed. In the absence of evidence that either its location or width has changed, we presume it has not."

In the present case, the only evidence of use of the entire easement width claimed by the Irrigation District was the width allegedly used during the initial cross country construction of the pipeline in 1954 and reconstruction in 1961. There is no evidence that the Irrigation District ever used that width again.

To the contrary, similar to other large scale cross country construction projects, the evidence in the record is after the project was completed, the need for the greater width no longer existed. The District allowed landscaping and real estate improvements to encroach into the original area the trial court found was used for construction. Further, the Irrigation District itself set

out in bylaws the width it found it needed to protect its easement rights. In a specific section dedicated to pipe line right of way, the District declared property owners must allow at least ten (10) feet on each side of the pipeline for necessary maintenance, repair, or replacement purposes. The District specifically noted in promulgating this bylaw that it was contemplating its needs for earth moving equipment. *See* trial exhibit 8, Article VI. Irrigation District presented nothing about the condition or terrain of Ruddy Lamarca's property that made the bylaw inapplicable to the excavation it proposed on her parcel. Instead, the water master tried to invalidate the action of the Board by claiming it did not know what it was doing when it passed the bylaw.

Although the Irrigation District through its bylaws defined the widths it considered it currently needed for construction, the Irrigation District faults the trial court for also considering the normal development of the servient estate in its analysis. This Court has never ruled such consideration is inappropriate. In *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 549-50, 808 P.2d 1289, 1294-95 (1991), this Court held that

> Thus, the general rule concerning easements is that the right of an easement holder may not be enlarged and may not encompass more than is necessary to fulfill the easement. *Id.* In *Merrill v. Penrod*, 109 Idaho 46, 704 P.2d 950 (Ct. App.1985), the Idaho Court of Appeals observed that an easement does not include the right to enlarge the use to the injury of the servient land.
>
> > The use of an easement claimed under a grant or reservation must be confined strictly to the purposes for which it was granted or reserved, and in compliance with any restrictions imposed by the terms of the instrument. Where the grant or reservation of an easement is general in its terms, use of the easement includes those uses which are incidental or necessary to the reasonable and proper enjoyment of the easement, but is limited to those that burden the servient estate as little as possible. In other words, an easement granted or reserved in general terms, without any limitations as to its use, is one of unlimited reasonable use. It is not restricted to use merely for such purposes of

> the dominant estate as are reasonably required at the time of the grant or reservation, but the right may be exercised by the dominant owner for those purposes to which that estate may be subsequently devoted. Thus, there may be an increase in the volume and kind of use of such an easement during the course of its enjoyment.
>
> 25 Am.Jur.2d Easements and Licenses § 74, pp. 479-80 (1966).
>
> In *Boydstun Beach Ass'n v. Allen*, 111 Idaho 370, 723 P.2d 914 (Ct.App.1986), the Idaho Court of Appeals applied the following rule to an easement: "The rule is that, absent language in the easement to the contrary, the uses made by the servient and dominant owners may be adjusted consistent with the normal development of their respective lands." 111 Idaho at 378, 723 P.2d at 922.
>
> These "secondary easements" include the right to repair and maintain the primary easement and cannot be used to enlarge the burden to the servient estate. **Such easements are to be "exercised only when necessary and in such a reasonable manner as not to increase needlessly the burden on ... the servient estate.**" 25 Am.Jur.2d Easements and Licenses § 86, p. 493 (1966). (Emphasis added.)

The *Abbott* court recognized that the use of the servient estate would change over time. While recognizing this fact, the *Abbott* court also held that secondary easements could not be utilized in a manner as to increase needlessly the burden on the servient estate. This same concept was recognized by the trial court in its findings and conclusions, although not enunciated in the same manner.

The concept of "secondary easements" was first introduced in *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 277 P. 542 (1929). Therein, the court was dealing with a grant that was indefinite as to width and location of the canal *as well as to the character of the conduit to be constructed.* (In this case, the conduit to be constructed was specified in the deed.) The court held "[t]he use to which a right of way is devoted, or for which it is created,

determines the character of title with which the holder is invested. The character of the use or the necessity of complete dominion determines the extent to which he is entitled to possession. No greater title or right to possession passes under a general grant than reasonably necessary to enable the grantee to adequately and conveniently make the intended use of his way." *Coulsen* at 628-629. However, the court did not hold that the initial exercise of the secondary easements forever fixed the width to be used in the future for repair, maintenance and reconstruction. In fact, the court held "The company, however, was entitled to no greater right than it could have enjoyed under an express grant by deed of right of way for waste ditch **of the size and location** and with the precise means of conducting water as that actually constructed." (Emphasis added.) The court concluded "[h]is estate was subject to the easement fixed by the act of the appellant or its predecessor in locating and constructing its canal and the implied "secondary easements" and it could not thereafter be subjected to a greater burden." *Coulsen* at 629: The *Coulsen* court further held the easement holder had the right to exercise "secondary easements" which accompanied the primary easement it held. *Coulsen* at 629-630. Thus, the *Coulsen* court recognized the secondary easements for reconstruction separate from the initial width of the ditch.

In *Conley v. Whittlesey,* 133 Idaho 265, 270-71, 985 P.2d 1127, 1132 (1999), the Court indicated that the right to construct, reconstruct, repair and maintain were secondary easements. The court held secondary easements could not be used to enlarge the burden to the servient estate. although the easement owner was entitled to do such things as were reasonably necessary for the use of the easement.

In the present case, there was no dispute that it was necessary for the Irrigation District to exercise its easement rights. Rather, the dispute concerned the manner in which the Irrigation District wished to exercise its rights. The trial court found the proposed method of excavation by the Irrigation District needlessly increases the burden on the servient estate. The Irrigation District does not dispute this finding. Rather, it argues that its proposed method of excavation is within the scope of its easement because it used a wider easement width when it initially installed the pipeline. However, the photographic evidence supports the trial court's finding that the area where the pipeline was installed has evolved from an agricultural field to a residential area. Thus, the use of a wider construction corridor in 1954 and 1961 did not unduly burden the agricultural servient estate at that time. However, the use of a wider corridor and wheeled vehicles does unduly burden the existing residential servient estate now. The Irrigation District presented no valid evidence at trial why it should not proceed in a more circumspect manner given the change of use of the servient estate. Thus, the trial court's decision that the district is limited to a 16' corridor for its reconstruction is supported by substantial and competent evidence, and should be upheld on appeal.

E. The Easement Obtained by Prescription did not Include the Construction Width Used During the Initial Installation of the Pipeline

The trial court found that in July 31, 1953, the Bureau of Reclamation authorized an emergency rehabilitation of the irrigation works, the construction of which commenced June 11, 1954. R p. 107. During this reconstruction, the Bureau eliminated the irrigation ditch on Tract 49, and installed an underground pipeline on Tract 48. This installation of pipeline was

the first use of Tract 48 as part of the irrigation system. R p. 108. The trial court found this construction gave the Irrigation District a prescriptive easement identical in location in width to the express easement. R p. 109.

In reviewing a prescriptive easement, this court has stated:

> A determination that a claimant has established a prescriptive easement involves entwined questions of law and fact. *Hughes v. Fisher*, 142 Idaho 474, 479, 129 P.3d 1223, 1228 (2006). When this Court reviews a lower court's decision, it determines whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Anderson v. Larsen*, 136 Idaho 402, 405, 34 P.3d 1085, 1088 (2001). " 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." *Id.* Findings of fact based on substantial and competent evidence will not be overturned on appeal even in the face of conflicting evidence. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006). It is the province of the district court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. *Id.*
>
> " [W]e exercise free review over the lower court's conclusion of law to determine whether the trial court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found." *Anderson*, 136 Idaho at 406, 34 P.3d at 1089.
>
> *Beckstead v. Price,* 146 Idaho 57, 61, 190 P.3d 876, 880 (2008).

The determination of a prescriptive easement is determined by the use made during the prescriptive period. It is not determined based upon a single act during that period of time. As this Court has held:

> A party seeking to establish the existence of an easement by prescription " must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." (Cite omitted.). The statutory period in question is five years. I.C. § 5-203; (Cite omitted.).

Akers v. D.L. White Constr., Inc., 142 Idaho 293, 127 P.3d 196, 206 (2005).

The evidence at trial was that the Irrigation District brought in excavating equipment and installed the pipeline improvement in 1961 across Ruddy-Lamarca's property, Tract 48. This event occurred once. Thereafter, during the remaining period of prescription, the property was used for the maintenance and operation of the pipeline for conveying irrigation water.

Prescription acts as a penalty against a landowner and thus the rights obtained by prescription should be closely scrutinized and limited by the courts. The quantity of use of an easement obtained by prescription is determined and fixed to the right as exercised for the full period of time required by statute. *Gibbens v. Weisshaupt,* 98 Idaho 633, 638, 570 P.2d 870, 875 (1977). Thus, during the entire period of prescription, the adverse use made of the property by Irrigation District did not encompass the entire width used during construction. It merely encompassed the area in which the pipeline was used. Further, the use was for transmission and delivery of irrigation water, not construction. Thus, the trial court's determination that the reasonable width for maintenance of this area was supported by substantial and competent evidence.

F. Easement Extinguishment

The Irrigation District claims that the drain field and the maple trees impair and impede its ability to reconstruct its pipeline. Ruddy-Lamarca's expert disagrees. However, assuming, arguendo, that these items do impair and impede the Irrigation District's easement right, these easement rights have been extinguished.

In *Winn v. Eaton*, 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct.App. 1996), the Court of Appeals held that:

> The party asserting a claim of adverse possession must prove by clear and satisfactory evidence that he or she has been in exclusive possession of the property for at least 5 years and that the possession has been actual, open, visible, notorious, continuous and hostile to the party against whom the claim of adverse possession is made. I.C. §§ 5-207 through 5-210; *Kolouch v. Kramer,* 120 Idaho 65, 67-68, 813 P.2d 876, 878-79 (1991); *Shelton v. Boydstun Beach Assoc.*, 102 Idaho 818, 819, 641 P.2d 1005, 1006 (Ct.App.1982). When applied to extinguishing an easement, the elements of exclusivity and hostility require that the land owner use the property within the boundaries of the easement in a manner wholly inconsistent with enjoyment of the easement. *Shelton*, 102 Idaho at 820, 641 P.2d at 1007.

The drain field improvements were known by the Irrigation District in 1996 and the maple trees have been in place for 40-50 years. Thus, the portion of easement encroached upon by the trees and drain field have been actual, open, visible, notorious, continuous and hostile and are extinguished.

G. The Irrigation District in not Entitled to a New Judge on Remand

In a passing comment dicta in the decision, the District Court commented it was perplexed why the case was not amenable to resolution by both parties prior to trial based upon financial considerations given the cost of trial. This portion of the decision was dicta and was not an expression of displeasure to either party as characterized by the District. Based upon this comment, the Irrigation District claims the District Court is now disqualified by the Section E(1) of the Idaho Code of Judicial Conduct because his impartiality is now questionable by the Irrigation District. An expression of confusion is not an expression of partiality.

In *Beck v. Beck*, 766 A.2d 482, 485 (Del. 2001), the Delaware Supreme Court visited the issue of whether to utilize a different trial judge on remand and held that courts should generally consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

The Irrigation District claims that reassignment on remand is advisable to preserve the appearance of justice. To reach this conclusion, the Irrigation District makes much ado about nothing. The comment does not demonstrate partiality by the judge. Further, the findings of fact and conclusions of law also rejected several of Ruddy-Lamarca's contention. Thus, the case taken in context demonstrates the parties were treated impartially and there is no grounds to question the trial court's impartiality.

IV. CONCLUSION

The Irrigation District's argument that it is entitled to use the construction width found by the trial court to have been used during the initial construction is not supported by law or fact. The Irrigation District merely wishes to construct the job quickly at the expense of Ruddy-Lamarca's property, without heed or care for her drain field or her landscaping. The trial court's determination that the Irrigation District can reasonably achieve its objective with a

sixteen foot easement and giving heed to Ruddy-Lamarca's improvements is supported by substantial and competent evidence and should be affirmed on appeal.

Submitted this 16th day of April 2012.

JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of April, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Malcolm Dymkoski
1110 W. Park Place Suite 210
Coeur d'Alene, ID 83814

☑ U.S. Mail
☐ Hand Delivered
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☐ Telecopy (FAX) to (208) 664-6089

Christine Hinde