5-14-2012

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

DIANE RUDDY-LAMARCA

Plaintiff/Respondent,

v.

DALTON GARDENS IRRIGATION DISTRICT,

Defendant/Appellant.

DOCKET NO. 39217-2011

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho
The Honorable John T. Mitchell, District Judge, Presiding

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A. Standard of Review.

The Irrigation District agrees with the standard of review set forth in the *Respondent's Brief.*

B. Idaho Code §42-1102 does apply to the irrigation easements in this litigation even though the Irrigation District draws its irrigation water from a lake rather than a stream.

Ruddy-Lamarca argues that I.C. §42-1102 does not apply in this litigation because Chapter 11 of Title 42, Idaho Code only applies to irrigation distribution systems where the water is obtained from streams, and in the present case, Dalton Irrigation district obtains its water from Hayden Lake. *Respondent's Brief*, pp. 6-7. This Court has not previously held that I.C. §42-1102 only applies to irrigation works distributing water from streams. To the contrary, it has held that I.C. §42-1102 applies to easements for distribution systems, without reference to the source of the water for that system. See, e.g., *Sellers v. Powell,* 120 Idaho 250, 815 P.2d 448 (1991).

Furthermore, Ruddy-Lamarca did raise any objection to the trial court as to

the applicability of that statute. The trial court specifically concluded in its *Memorandum Decision* that I.C. §42-1102 applied to this matter. R., p. 105. The Irrigation District specifically argued in the *Defendant's Pretrial Memorandum Concerning Scope of Easement*, that I.C. §42-1102 applied in this matter. R., pp. 37-38. Counsel for the Irrigation District argued at trial that its water master, Robert Wuest, would testify concerning the reasonableness of the scope of the proposed project, because "[p]art of the statute 42-1102 talks about what is reasonable." Tr., p. 122, line 17. The Irrigation District again argued, in *Defendant's Closing Argument*, that I.C. §42-1102 applied. R., p. 45. Ruddy-Lamarca never objected or otherwise argued that I.C. 42-1102 did not apply because the Irrigation District did not obtain its irrigation water from a stream. Since it failed to do so at the District Court level, it should not be allowed to raise this issue on appeal.

C. The placement of a pipe underground within the easement, to transmit the irrigation water, rather than using a flume or canal, is within the scope of the express easement.

Ruddy-Lamarca argues that an express easement for the pipeline does not exist. *Respondent's Brief*, pp. 7-8. However, in the *Plaintiff's Proposed Findings of Fact and Conclusions of Law*, Ruddy-Lamarca stated:

II. Conclusions of Law

1. Defendant has an express easement over Plaintiff's property.
2. The construction fo the pipeline by the Bureau fixed the location, width, course and the character of the means to be employed to convey the irrigation water. This use measured the District's rights.
3. The dimensions of the easement south of the existing pipeline along the southern boundary of Plaintiff's parcel is six (6) feet. The dimension of the easement north of the existing pipeline along the southern boundary of Plaintiff's parcel is ten (10) feet.
4. The dimension fo the easement as it traverses the eastern portion of the Plaintiff's parcel that is adjacent to public right of way along Sixteenth Street is six (6) feet.
5. The easement is extinguished with respect to the two trees along the fence line and the drain field. The District shall preserve these encroachments in any repair, maintenance or replacement of its pipeline.

R., pp. 79-80. Noting the Plaintiff's proposed conclusions of law, the trial court found that "Lamarca has apparently conceded that there is an express easement across her land in favor of the district." R., p. 94. The trial court concluded: "1. District has an express easement over Ruddy-Lamarca's property." R., p. 109. The trial court stated:

> IT IS HEREBY ORDERED the District has an express easement across Ruddy-Lamarca's property, but the location of that easement is entirely unknown....
> IT IS FURTHER ORDERED the District has a prescriptive easement across Ruddy-Lamarca's property.
> IT IS FURTHER ORDERED that both the express easement and the prescriptive easement are currently located where the existing four-inch water line exists at present (and since 1962) on the Ruddy-Lamarca

property.

R., p. 110. Those orders were subsequently repeated by the trial court in its *Judgement*. R., p. 112. If the trial court was in error in finding, ordering, and adjudging that an express easement existed for the purpose of a water pipe, that error was invited by Ruddy-Lamarca.

Ruddy-Lamarca appears to also argue that the express easement, as set forth in the Land and Water Deed, trial exhibit B., reserved a right of way for the construction, enlargement, and maintenance of canals, flumes, and water tanks, for the conveyance of irrigation water. *Respondent's Brief*, p. 7. Ruddy-Lamarca further argues that the Irrigation District never constructed, nor is it now proposing to construct canals, flumes, and water tanks.

The Irrigation District had the right, pursuant to the express easement, to install and maintain pipes, rather than flumes or canals, for the purpose of transmitting irrigation water. The change of use of an easement is allowable so long as the change is a matter of degree and not of kind. *The Villager Condominium Association, Inc., v. Idaho Power Company*, 121 Idaho 986, 829 P.2d 1335 (1992). A pipe is substantially similar to a flume or a canal, in that all three of those are used to transport water. A flume or a canal is typically open so that the water contained in it

is visible, and it is usually located at or above the surface of the ground. A pipe is closed and, as in this case, can be located underground. It is axiomatic that transmitting the irrigation water through a pipe rather than an open flume or canal is probably less burdensome on the servient estate.

D. The width of the easement was established by the width of the land used during the original construction of the pipeline.

Ruddy-Lamarca argues that the width of the easement is not established by the width used during the original installation of the pipeline. *Respondent's Brief*, p. 9. Repeating the argument made by the Irrigation District in its *Appellant's Brief*, "The construction of the ditch by appellant as definitely fixed its location, its width, its course and the character of the means to be employed to convey the waste water from the ditch to the bottom land as if such matters had been specifically fixed by formal contract. The initial use measures appellant's rights under an indefinite grant. [Citations omitted.]" *Coulsen v. Aberdeen-Springfield Canal Company*, 47 Idaho 619, 629, 277 P. 542, 552 (1929).

Ruddy-Lamarca argues that the area used during construct was never again used by the Irrigation District. *Respondent's Brief*, p. 9. However, once a pipe is installed underground there is no need to use the area that was used for the

installation until the need again arises to replace, maintain, or repair the pipe. Until that time, the only space being "used" is the space occupied, in this case, by a 4-inch diameter pipe buried 5 feet underground. And, during the period of that limited "use", the dominant owner of the easement, the Irrigation District, has no right to exclude the owner of the servient estate, Ruddy-Lamarca, from use of the easement so long as that use does not interfere with the Irrigation District's operation, maintenance or repair of the easement. *Coulsen*, 47 Idaho at 631, 277 P.554. If Ruddy-Lamarca's argument were carried out to its logical conclusion, the easement would have started at about 40 feet in width during construction in 1962, shrunk to 4 inches in width shortly thereafter, and would then be redetermined when the Irrigation District wanted to repair or replace the pipe. But, that redetermination would be contrary to the holding in *Coulsen*, above, that "[t]he construction of the ditch ... fixed its location, [and] its width...."

Ruddy-Lamarca also argues that the Irrigation District has, in essence, conceded that it has a narrower easement than it had in 1962, because it has adopted a bylaw stating that the servient property owners should not place any improvements within 10 feet of the pipe. *Respondent's Brief*, pp. 9-10. The adoption of that bylaw does not decrease the width of the easement on Ruddy-Lamarca's parcel.

First, there is no evidence that Ruddy-Lamarca ever constructed any

improvements on the easement in reliance upon that bylaw provision. Those bylaws were adopted on April 9, 2007. Trial Exhibit 8. Ruddy-Lamarca testified that the septic system drain field was installed in about 1996. The two trees growing in the easement are at least 40 years old.

Second, that bylaw provision is a policy statement, advising the Irrigation District's members of the space that the District is choosing to restrict itself in maintaining its infrastructure. However, that does not meat that the Irrigation District is necessarily abandoning its property rights, which include the width of its easement(s) as established when the pipe was installed.

Ruddy-Lamarca further argues that this Court has never held that it is inappropriate to decrease the scope of an easement in consideration of the changed use of the servient estate. *Respondent's Brief*, p. 10. Ruddy-Lamarca quotes *Abbot v. Nampa School District Nol 131,*, 119 Idaho 544, 808 P.2d 1289 (1991). However, this Court's holding in *Abbot* does not lead to the conclusion argued by Ruddy-Lamarca, that the changed use of the servient estate acts to diminish the easement rights of the dominant owner. Rather, this Court held that the exercise of the secondary easement rights, to repair and maintain the primary easement, cannot be used to increase the burden on the servient estate. "Thus, the Irrigation District could make modifications to the irrigation ditch and its location within the bounds of the

easement grant so long as it does not unreasonably increase the burden on Abbots' property." *Abbot*, 119 Idaho at 550, 808 P.2d at 1295. The boundaries of the easement could not be diminished. The Irrigation District was free to work within those boundaries, but was restricted to doing so in a manner that would not unreasonably increase the burden on the servient estate. That did not give the servient estate owner the right to increase his use of the servient estate at the expense of the dominant owner.

Ruddy-Lamarca also argues that this Court's holding in *Coulsen*, supra, does not state that the initial use of an indefinite easement establishes the scope and size of the easement. That is not accurate. In *Coulsen*, the canal company was arguing that its had an exclusive easement, similar to a railroad easement, in which the servient estate owner could not possess, in any fashion, the land where the easement was located. This Court held that, absent specific language to the contrary, an easement for a right of way for irrigation water delivery is not an exclusive easement. However, the sized of the easement is determined by its initial use. The dominant owner could "impose upon the servient estate no unnecessary burden" and to "make its right of way no more burdensome than it was originally." *Coulsen*, 47 Idaho at 630, 277 P. 553. In the present case, the trial court found that, when the Bureau of Reclamation installed the irrigation lines in 1962, its use of tracked equipment

"imposed the least amount of burden on the property." R., p. 108, ¶ 12.

Ruddy-Lamarca concludes that "[t]he trial court found the proposed method of excavation by the Irrigation District needlessly increases the burden on the servient estate." *Respondent's Brief*, p. 13. That does not accurately reflect the trial court's finding. The trial court actually found that the changed use of the servient estate by Ruddy-Lamarca made it inappropriate for the Irrigation District to make same use of the easement as it had been in 1962. It is not that the Irrigation District was increasing the burden on Ruddy-Lamarca's parcel. Rather, it is that Ruddy-Lamarca's use of the servient estate is increasing the burden on the Irrigation District's use of the easement.

E. The prescriptive easement rights obtained by the Irrigation District includes the width of the area used in the original construction of the pipeline.

Ruddy-Lamarca argues that the Irrigation District did not obtain a prescriptive easement that included the construction width used during the initial construction. *Respondent's Brief*, p. 13. She argues that the Irrigation District did not occupy the width of land that it used for construction, for the full 5-year statutory period. Therefore, the width of the prescriptive easement is only that portion

occupied for the full 5 years, which only is the area occupied by the pipe.

Assuming, for the sake of argument, that the Irrigation District did not have a deeded easement on and across Tract 48, in 1954, then it has established that it has prescriptive easements where the pipes are located. (1) The placement of the pipes was open and notorious, as the soil had to be excavated in order to place the pipe; (2) The use has been continuous and uninterrupted since 1954, as the pipe, although replaced in 1961, remains in the same location and is still being used by the Irrigation District for distribution of irrigation water; (3) The use is adverse and under a claim of right. There is no evidence that the use is by permission of the Ruddy-Lamarca, or her predecessors, of those portions of Tract 48, and the Irrigation District contends, as it has always contended, that it has had the right to place its distribution lines where it did on Tract 48; (4) The Irrigation District placed the lines on Tract 48 with actual or imputed knowledge of the owner of the servient tenement, as the soil had to be excavated in order to place the pipe; (5) The Irrigation District has maintained and used the pipe lines on Tract 48 for the statutory period set forth in I.C. §5-203. From 1881 to 2006, the statutory period was 5 years. From 2006, the statutory period was, and remains, 20 years.

Taken to its logical conclusion, Ruddy-Lamarca's argument leads to an absurdity. The land continuously occupied for the 5-year statutory period is located

where the 4-inch pipe diameter is located. Therefore, following that argument, the width of the easement is only 4 inches, which does not allow the Irrigation District sufficient space to operate, maintain, and repair the irrigation line. In fact, Ruddy-Lamarca argues exactly that.

> 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.

Respondent's Brief, p. 15. If the Irrigation District failed to establish a prescriptive easement wider than 4 inches, because it did not, and could not, establish a continuously use wider than 4 inches for the statutory period, then the ownership of the easement becomes illusory. If the easement is not wide enough to allow maintenance and repair of the pipeline, then the pipeline will become functionally useless. If an unspecified width is allowed for maintenance and repair, and that width varies from time to time, depending upon what is deemed to be reasonable when maintenance or repair must be undertaken, then the ownership of easement rights is transformed into a shifting grant of a license by the servient land owner, based upon the use to which the servient owner has placed her servient estate.

However, this Court has held, in a case involving the creation and maintenance

of a prescriptive easement, that "[t]he owner of an easement has the right and duty to maintain, repair, and protect the easement. [Citations omitted.] *Gibbens v. Weisshaupt*, 98 Idaho 633, 640, 570 P.2d 870, 877 (1977). That means that the use of the easement consists of, not just the use of a 4-inch pipe to carry water, but also the ability to maintain, repair, and protect the easement. That implies that sufficient space for exercise of those duties is part of the easement. But, for the pipeline to exist, it must first be installed, which means that the easement must also include the area required for the installation. The use of the easement is therefore not limited to the transmission of water through a pipe located on the easement. The use of the easement started when the pipe was installed, and the use continued for the statutory period while the pipe was being repaired, maintained, and used for transmission of irrigation water. The most frequent use to which the easement was put was for transmission of the water, virtually continuous during the irrigation season. The less frequent use was for maintenance and repair of the pipe. The least frequent use was for installation and replacement of the pipe. Nevertheless, all three of those uses constitute use of the easement for the prescriptive period, and all three uses establish the scope and width of the easement.

F. The easement was not extinguished to the extent that the maple trees and septic system drain field encroached upon the easement.

Ruddy-Lamarca argues that, to the extent that the septic system drain field and the two maple trees encroach upon, and impair the Irrigation District's easement rights, then those easement rights are extinguished. The trial court specifically found that the Irrigation District's easement rights were not extinguished. R., p. 110, ¶4. The trial court's finding are supported by ample evidence and by law.

As the Irrigation District argued earlier, Ruddy-Lamarca has the right to cultivate the easement and to put it to use in any manner that would not interfere with the Irrigation District's "operation, maintenance or repair" of its easement. *Coulsen*, 47 Idaho at 631, 277 P. at 554. If the property owner wishes to place items on the easement that will interfere with the use of the easement, she must obtain written permission. She can cultivate the easement, or otherwise use it without written permission, if she does not interfere with the operation, maintenance, and repair of the easement. Looking at the issue from the opposite direction, the Irrigation District does not have the right to prevent Rudy-Lamarca from using the easement, so long as she does not interfere with the operation, maintenance, and repair of the easement. The trial court was correct in finding that the Irrigation District's easement rights were not extinguished by placement of the drain field and

maple trees within the easement. However, the trial court erred in concluding that the Irrigation District had the duty to protect the encroachments that Ruddy-Lamarca placed within the easement.

G. Upon remand, this matter should be assigned to a different District Court Judge.

Ruddy-Lamarca finally argues that, upon remand, this matter should not be heard by a different District Court Judge, as requested by the Irrigation District. Ruddy-Lamarca argues that the trial court's comments "[were] dicta and [were] not an expression of displeasure to either party as characterized by the District." *Respondent's Brief*, p. 16. Unfortunately, the trial court's comments were an expression of displeasure directed at the Irrigation District, taking it to task for not agreeing to use the construction method proposed by Ruddy-Lamarca. The trial court stated: "However, given the fact that a construction method was available to the District (which apparently would cost no more than the District's preferred method), which would have fit into the width proposed by Ruddy-Lamarca, it is perplexing that this case was not capable of resolution prior to trial."

In making its decision in this matter, the trial court drew heavily upon non-Idaho court decisions. That factor alone indicates that the decision is rather novel.

For the trial court to then express perplexity because the Irrigation District did not agree to settle this matter in the manner which the trial court believed was proposed by Ruddy-Lamarca leaves the Irrigation District with the concern that the trial court could not remain impartial. Furthermore, the Irrigation District's concerns will remain upon remand.

CONCLUSION

The Court should order that the Irrigation District has an express, though indefinite, easement, and a prescriptive easement, forty feet in width, and centered on the location of the existing four inch pipe, and that the width of the easement was initially determined by the area used when the pipe was originally installed.

The Court should further order that the Irrigation District may use the full width of the easement, for the replacement, maintenance, cleaning, and repairing of the pipeline located in the easement.

The Court should hold that the Irrigation District does not have the duty to preserve the trees and drain field while performing any repair, maintenance, or replacement of its pipeline, and that the easement has not been extinguished by the placement of the septic system drain field and maple trees within the easement.

That the Court should order, upon remand to the District Court, that a different judge be assigned to preside in this matter.

Dated May 10, 2012.

MALCOLM DYMKOSKI

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of this document were hand delivered on May 10, 2012, to:

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