

1-28-2016

Capstar Radio Operating Co. v. Lawrence Appellant's Reply Brief Dckt. 42326

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CAPSTAR RADIO OPERATING
COMPANY, a Delaware Corporation,

Plaintiff/Respondent,

vs.

DOUGLAS LAWRENCE and BRENDA J.
LAWRENCE,

Defendant/Appellants.

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) Docket No. 42326-2014
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APPELLANT'S REPLY BRIEF

Appealed from the District Court of the First Judicial District in the State of Idaho,
In and For the County of Kootenai

The Honorable Steve Verby District Judge Presiding

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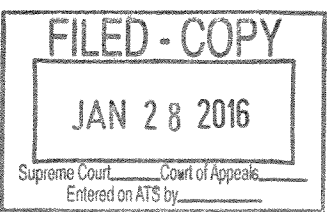


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ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING CAPSTAR AN IMPLIED EASEMENT

The district Court, and Capstar, rely on *Schultz v. Atkins*, 97 Idaho 770, 773-74, 554 P.2d 948, 951-52 (1976) , *Bird v. Bidwell*, 147 Idaho 350, 209 P.3d 647 (2009), and *Davis v. Peacock*, 133 Idaho 637, 641, 991 P.2d 362, 366 (1999) to stand for the proposition that Capstar did not need to show apparent continuous use. However, all three cases state that apparent continuous use is a required element to create an implied easement.

In *Shultz*, the Court compared the four elements needed to create an implied easement for right of way as set out in 1 Thompson, Real Property Treatise. Those elements were:

(1) Unity and subsequent separation of title; (2) obvious benefit to the dominant and burden to the servient tenement existing at the time of the conveyance; (3) use of the premises by the common owner in their altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) necessity for the easement.

Shultz, at 774, 554 P.2d at 952. The Court went on to list the essential elements necessary to create an implied easement under Idaho's case law. The Court said:

To establish an easement by implication in favor of the dominant estate, three essential elements must be made to appear; (1) Unity of title and subsequent separation by grant of dominant estate; (2) Apparent continuous user; (3) The easement must be reasonably necessary to the proper enjoyment of the dominant estate.

Id. (citing *Davis v. Gowen*, 83 Idaho 204, 210, 360 P.2d 403, 407 (1961)). The Court went on to state “that while the phraseology of the requirements set out in *Davis v. Gowen*, *supra*, is somewhat different from that discussed in 1 Thomson s 396, the same principles are involved.” *Id.* The *Shultz*

case clearly identifies apparent continuous use as an essential element necessary to create an implied easement.

The *Bird* Court held that the three elements necessary to establish an implied easement by prior use where:

(1) unity of title or ownership and a subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

Bird, at 352, 209 P.3d at 649 (2009) (citing *Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.3d 392, 395 (2006)).

In *Bird*, the plaintiff had established apparent continuous use prior to the separation but did not establish that the use was intended to be permanent. *Id.* At 352, 209 P.3d at 649. The *Bird* Court did not do away with the need to show apparent continuous use, but only clarified that a plaintiff needed to prove that the apparent continuous use was intended to be permanent.

The *Davis v. Peacock* Court also affirmed the need to establish apparent and continuous use in order to establish an implied easement by prior use when it stated: “One of the requirements for establishing an implied easement by prior use is that there has been open and continuous use of the easement prior to the severance of the dominant and servient estates.” *Davis*, at 641, 991 P.2d at 366 (1999) *overruled on other grounds by Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 226 P.3d 1263 (2010).

All of these cases stated apparent continuous use as one of the required elements necessary

to create an implied easement by prior use. The district court did not make a finding that Capstar had proven apparent continuous use, nor does the evidence support a finding that Funke had used the long enough or sufficiently enough to show it was intended to be permanent. Mr. Funke testified that he used the disputed road 20-30 times from 1968 to 1975. (Tr. P. 323, L. 2-5). This is an average of three to four times a year. This use over undeveloped lands does not constitute apparent and continuous use.

II. THE DISTRICT COURT ERRED IN GRANTING CAPSTAR A PRESCRIPTIVE EASEMENT

Capstar argues that Mr. Rook's use of the road, nor his agent's use of the road, was permissive. This argument ignores the facts of the case. On July 14, 1966, the General Telephone Company, ("GTC"), obtained an easement to access an acre of land in Section 22. (R. P. 139). This easement road is crossed what is now the Lawrence's property. (R. P. 140). Mr. Rook testified that after he purchased the property he entered into an access agreement with GTE to use the access road. (Tr. P. 513, L. 18-24; P. 514, L. 1-10). Mr. Rook's testimony was that he had GTE's permission through their right to use the access road. Using a road across a servient landowner's property with the permission of the dominant estate is not hostile or adverse. Neither Rook or Capstar did anything to indicate that it was claiming an independent right to use the road other than the right it received under GTE.

The facts of the case are clear that GTE had the legal right to cross the Lawrence property. GTE gave Rook the right to use property under their right and gave them a key to access the road that


crossed the Lawrence property. (Tr. P. 513, L. 18-24; P. 514, L. 1-10). Capstar must put Lawrence on notice that they are claiming some independent right separate than Rook's agreement with Capstar. This reasoning is similar to the purpose behind the public use exception. See, *Hughes v. Fisher*, 142 Idaho 474, 481, 129 P.3d 1223, 1230 (2006) where the Court held that when a claimant is using the land along with members of the general public, it would simply be unfair to impute knowledge to the landowner that the claimant is making an adverse claim.

CONCLUSION

For the reasons stated above the Lawrences respectfully request this Court to reverse the District Court's Amended Final Judgment holding that respondents have an ingress, egress, and utility easement arising from prior use and a prescriptive easement across their real property located in Section 21, Township 51 North, Range 5 West, the Courts finding that the scope of said easements is for reasonable use without limitation, the Courts issuance of an injunction enjoining the Lawrences, agents, and heirs from interfering with, impeding, or preventing Capstar, its agents, servants, contractors, employees, tenants, successors, or assigns from using, developing, maintaining, improving, and/or servicing said easement. The Lawrences request this Court remand this case back to the District Court with instruction to enter a judgement holding that the respondents do not have an easement across their property.

Respectfully submitted this 25th day of January, 2016

CLARK and FEENEY, LLP

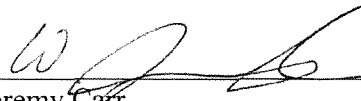
By: 
W. Jeremy Carr, a member of the firm
Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2016, I caused to be served **two** true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

Susan P. Weeks
James Vernon and Weeks
1626 Lincoln Way
Coeur d'Alene ID 83814

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Delivery
- email

By: 
W. Jeremy Carr