12-5-2016

Fuquay v. Low Appellant's Reply Brief Dckt. 44155

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. FUQUAY; CLINTON WARD FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs/Appellants,

v.

SUSIE LOW; CAL LOW; GILBERT KING as Trustee of the HEART K RANCH TRUST UTA DECEMBER 28, 2012; AVCO FINANCIAL SERVICES OF IDAHO FALLS, INC.; THE ESTATE OF GORDON G. KING; ROSE M. KING; FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendants/Respondents.

GILBERT KING, as Trustee , and ROSE M. KING, as Beneficiary of the HEART K RANCH TRUST UTA DECEMBER 28, 2012,

Counterclaimants,

vs.

JOHN E. FUQUAY; CLINTON WARD FUQUAY and HAILEY ROSE FUQUAY,

Counterdefendants.

Supreme Court No. 44155

Owyhee District Court No. CV-2014-0278

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Third Judicial District for the State of Idaho,
In and for Owyhee County
Honorable Thomas J. Ryan, District Judge, Presiding

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I. LEGAL STANDARD

Summary judgment is properly granted only when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material facts and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c). In determining whether an issue of material fact is in dispute, facts should be liberally construed in favor of the party against whom summary judgment is sought and all doubts are to be resolved against the moving party. A motion for summary judgment must be denied if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions. Ashby v. Hubbard, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979).

The question for this Court is whether the trial court erred in granting summary judgment to the Lows and the Kings. This court reviews the record de novo. In doing so, the Court must determine if there are disputed issues of material fact, and, when the facts and inferences are viewed in the light most favorable to the Fuquays, could a reasonable person find in favor of the Fuquays? If so, then the trial court's Judgment must be reversed and the matter remanded for trial.

II. ARGUMENTS

A. There are Disputed Issues of Material Facts

Because this Court exercises de novo review of a summary judgment ruling, the first question is whether there are any disputed issues of material fact. If there are, summary judgment is improper and the case should be remanded for trial.

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Many of the material facts are disputed, and a chart of some of the disputed testimony is included with the Fuqays Opening Brief. Neither the Kings nor the Lows address the disputed facts other than to suggest that they are "indefinite" (King Brief at 16, 17). However, in doing so, the Kings and Lows invite the Court to *weigh* the disputed facts in favor of the Kings and Lows. Weighing disputed facts in favor of the non-moving party is improper for a summary judgment motion. All reasonable inferences from the facts must be construed in favor of the Fuquays, and against the Lows or Kings.

When the disputed facts are properly construed against the Kings and Lows, and all reasonable inferences are properly construed in favor of the Fuquays, the facts do not support summary judgment.

B. Reasonable Inferences Support Fuquay's Arguments

If the disputed facts and inferences from those facts are properly construed in favor of the Fuquays, a reasonable person could find that:

- The roadway had been used by the predecessors to the current parties by use of the roadway for nearly 100 years;
- The origin of the roadway is unknown and therefore is presumed to be adverse to the Kings and Lows;
- Prescriptive rights to use the roadway had already been established for the benefit of the Fuquay property prior to 1973;
- The Kings and Lows acquired their properties subject to the easement rights over the roadway;

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- Jim Fuquays' purchase of his property and placement of a new mobile home in 1979 constituted a distinct adverse act that rebutted any presumption of permissive use and put the Kings and Low predecessors on notice of John Fuquay's claim of right to use the roadway;
- The Fuquays' and their renters' use of the roadway to access their homes was sufficiently distinct and adverse to establish the prescriptive easement;

1. How Did the Roadway Begin?

It is important to distinguish between the *existence* of King Lane as an access road, and the improvements to the road *surface* that the Kings began in 1973. While the Lows and Kings focus on the *improvements* to the roadway that the Kings made in 1973, they offered no evidence of how the roadway was actually created and established before the Kings purchased the property in 1973. The testimony from Sam Steiner was that the access road had been there since before he was born in 1959. R 237 (Declaration of Samuel V.C. Steiner at ¶ 5). The testimony from Rose King was that the fence lines had been in existence since the property was surveyed in the late 1800s. R 574. Deposition of Rose King at 15-16.

In the absence of evidence as to how the roadway was created (as opposed to how it was improved), the burden of showing that Fuquays' use was permissive shifted to the Kings and the Lows. The Kings and Lows presented no evidence that the Fuquays' use was permissive. Based on the testimony in the record, a reasonable person could conclude that the origin of the roadway is unknown. The use of the roadway for access is, therefore, presumed adverse regardless of when the Kings began to improve the road surface. A reasonable person could conclude that the roadway was in existence for nearly 100 years, and that prescriptive

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use rights had vested before the Kings purchased their property and began to improve the roadway surface in 1973.

2. **Was the Fuquay's Use "In Common with the General Public"?**

The Kings and Lows argue that the use of the roadway by the Fuquays was "in common" with the Kings and the Lows. However, the correct issue is whether the Fuquays use was "in common **with the general public**." An individual using land as a road in common *with the general public* cannot acquire a prescriptive right of way against the owner. Simmons v. Perkins, 63 Idaho 136, 118 P.2d 740, 744 (1941).

According to the Kings and Lows, *any* use by the general public means that there can be no prescriptive rights. The Kings and Lows are incorrect because that is not what "in common" means. The phrase "in common" means equal or undivided. Black's Law Dictionary defines "in common" as: "Shared equally with others, undivided into separately owned parts." IN COMMON, Black's Law Dictionary (10th ed. 2014). I.C. 55-104 states: "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, or unless acquired as community property."

Thus, it is not simply whether the general public *ever* used the roadway. For use to be "in common with the general public," the Kings and Lows must prove that the Fuquays' use of the roadway was no different than, or was equal to, use by the general public. The Kings and Lows must show that the general public used the roadway, and that the Fuquays' use of the roadway was indistinguishable from the general public. If the Kings and Lows do that, *then* the burden shifts to the Fuquays to show an independent adverse use that is

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distinguishable from the use by the general public. "Once such use *by the public* is established, the claimant is obligated to identify some independent act signifying the adverse claim to the landowner." Hughes v. Fisher, 142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006).

In this case, the Kings and Lows never established "use in common with the general public." At the very least, it is a disputed issue of fact. While the undisputed testimony established that the Fuquays used the road for regular residential access since 1977, Rose King testified that the general public did not use the roadway:

> Prior to this lawsuit, I am not aware of any use by UPS, post office or other delivery services of King Lane to provide services to Fuquay properties. To the contrary, the mailboxes for the Fuquays are located at the end of Castle Lane and I have not observed any services using King Lane to provide deliveries to the Fuquay properties....I am not aware of any guests of the Fuquays using King Lane to access the Fuquay properties.
>
> R 232. Affidavit of Rose King dated December 4, 2014.

> A. Let me tell you one thing before you go too far. If you're looking at the picture, if you're going to drive across our bridge and you don't know that there's a lane that goes to the left, you're going to come directly into my yard. We had that. We told people where they wanted to go. They turned around and went back. So most of the people that I would have came or if there was a hunter, as you have asked before, then they would ask.
> Q. Okay. So if somebody didn't know that the road took the left turn after the bridge to go out there, they would have usually ended up in your driveway?
> A. That's correct.
> Q. And then they would have either said, "Oops, sorry," turned around and left, or if they were looking for somebody they might have stopped and asked? Is that a fair statement?
> A. Yes. And we would have told them how they went to get there.
>
> R 576-577 (Rose King Deposition at 25-26).

Rose King's own testimony puts her testimony clearly at odds with "use in common with the general public." Because the Lows and Fuquays did not establish use in common

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with the general public, summary judgment is improper. At the very least, a trier of fact must determine whether the Fuquays' use of the roadway was indistinguishable from, and equal to, the general public or not.

3. Was there Evidence of Independent Adverse Actions?

The Kings argue that the roadway came into existence in 1973 when the Kings began improving the roadway. However, the testimony shows that the Kings were improving an *existing* roadway, not creating a new one. The *roadway itself* already existed in 1973 and had perhaps existed for over 100 years – the Kings just improved it and made it better. Thus, the King's argument that the Fuquays used the improved roadway *surface* in common with the general public is irrelevant if the prescriptive rights to use the roadway for access had already vested before the 1973 improvements. The Fuquays could have continued to use the roadway for access as a matter of right, regardless of whether the roadway surface had been improved by the Kings.

Even if the court were to find that the origin of the roadway was undisputed, or that the roadway was created in 1973, the next question is whether the Fuquays presented any evidence of an independent adverse act that put the roadway owners on notice of the Fuquays' intent to use the roadway. The Kings and Lows argue that the first adverse use of the roadway was in 2011 when the Fuquays began using the roadway for large trucks. That is incorrect. The Fuquays' distinct adverse use began either: 1) in 1977 when Jim Fuquay purchased his property and began using the roadway, or 2) the placement of the mobile home by Jim Fuquay in 1979 and subsequent use of the roadway for access to the home. The 2011 use by the Fuquays might be relevant to the *scope* of the easement, but not whether the

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prescriptive easement had been *established* before then. Further, the Fuquays are entitled to "tack" their adverse use onto the adverse use by others before them, so the use of the roadway by others prior to 1973 becomes relevant.

The Kings and Lows minimize Fuquay's arguments about the placement of the new mobile home by Jim Fuquay in 1979 and the subsequent use of the roadway by various renters. However, a reasonable person could conclude that the placement of new mobile home in 1979, and the use of the roadway by the Fuquays and their renters after that point in time, was sufficient to put the Kings and Low predecessors on notice of the Fuquays' adverse claim of right to use the roadway. The Kings and Lows may disagree whether those acts were *sufficiently* distinct, but that is an issue of fact that must be weighed and determined at trial. It is not an issue of law that can be decided without weighing the evidence. Therefore, it cannot be determined on summary judgment.

III. ATTORNEY FEES

The Lows and Kings argue that they are entitled to attorney fees under I.C. 12-121. However, unless otherwise provided for by statute or by contract, "attorney fees will only be awarded when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." Minich v. Gem State Developers, Inc., 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). Attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law is presented, even if the arguments are not persuasive. Baker v. Sullivan, 132 Idaho 746, 751, 979 P.2d 619, 624 (1999).

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In this case, there are clear issues of factual dispute and substantive arguments on whether the trial court properly applied the law. The appeal is not frivolous and without foundation.

IV. CONCLUSION

The trial court erred when it granted summary judgment in favor of the Kings and Lows. The Kings and Lows did not establish that the Fuquays' use of the roadway was "in common with the general public." There are disputed issues of material fact, the trial court did not construe reasonable inferences in favor of the Fuquays, and a reasonable person could find in favor of Fuquays. The trial court's Judgments must be reversed and the case remanded for trial.

Dated: November 29, 2016

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CERTIFICATE OF SERVICE

On the date given below, I caused to be served **2 Bound Copies** of **Appellants' Reply Brief** and an electronic copy on the following individuals by the manner indicated:

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Supreme Court of Idaho	1 Original Bound Brief 6 Copies of Bound Brief 1 Copy of Unbound, Unstapled Brief 1 Electronic copy of brief emailed to: sctbriefs@idcourts.net

Dated: December 2, 2016.

Estela Acosta

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