2-9-2017

Mortensen v. Berian Appellant's Brief Dckt. 44303

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JADE MORTENSEN AND KYLIE MORTENSEN, Respondents/Plaintiffs, vs. GALUST BERIAN AND YVETTE N. STURGIS, Appellants/Defendants.	)	Docket #44303
GALUST BERIAN AND YVETTE N. STURGIS, Appellants/Counter-claimants, vs. JADE MORTENSEN AND KYLIE MORTENSEN, Respondents/Counter-Defendants.	)	

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Madison County
Honorable Alan C. Stephens, District Judge, Presiding

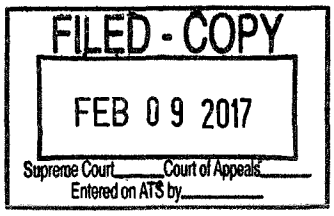

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EXHIBIT
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Adm. Hrg.

Legend

Streets
- U.S. Highway
- State Highway
- Road

City Limits

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Notes

STATEMENT OF THE CASE

Galust Berian is a professional artist and European immigrant residing in Madison County, Idaho. He performs his artistic endeavors from his studio which is attached to his residence. The subject of this lawsuit is about a ditch that runs east and west crossing the Berian real property. He is the appellant herein and will be referred to as "Berian."

Berian moved to the subject location in 1989.1 In December of 2011 he encountered financial troubles on the subject real property. Yvette N. Sturgis paid the bank note and entered into a repurchase agreement with Berian for the real property.2 Sturgis was not an active participant in the litigation. She is the legal owner but Berian is the equitable owner. She is an art enthusiast and is being repaid from artwork as Berian's artwork is placed in many art galleries throughout the United States.

Jade and Kylie Mortensen are husband and wife and purchase abutting property on the westerly side of the Berian real property. They purchased 3.5 acres. Exhibit 28 used jointly by the parties but marked Plaintiff's Exhibit 28 describes the general lay-out of the property. The Berian home is on the far east; a ditch known as the Fyfe ditch runs north and south through the Berian property; next to the ditch is a north south roadway and a canal referred to as the Texas Slough. These three monuments separate the next parcel of property which was referred to at trial for ease as the "Sturgis Property" consisting of

1 Reporter Tr. P. 18:2-5
2 Reporter Tr. P. 20:11-12

about 14 acres. The Mortensen property is on the far west of the properties.3 Exhibit 28 gives a clearer picture for the reader of this brief (which has plaintiff's markings and notes on the exhibit).

Thus, going east to west the property is as follows: Berian home and studio—canal, roadway and ditch; Sturgis 14.85 acres; and, the Mortensen 3.5 acres.

The north south ditch referred to as the Fyfe ditch ends at the north end of the Sturgis real property. The dispute is about a ditch or semi-ditch that runs east and west from the Fyfe ditch across the Sturgis property to the Mortensen 3.8 acres.

Berian leveled the ditch, via a contractor, when he found that it was being used by Mortensen.

ATTORNEY FEES SHOULD BE GRANTED AT TRIAL AND ON APPEAL

For the reasons stated later in this brief, fees and costs should be granted on appeal and for the trial work.

ARGUMENT

Introduction.

The respondents, via their complaint, asked the court to impose a statutory right of

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3 The dispute centers over a ditch that may or may not have been properly established or was abandoned that runs east and west over the Sturgis real property. This alleged service ditch breaks off from a ditch that runs roughly north and south and is described as the Fyfe ditch. The Fyfe ditch is serviced from the Reid Canal wherein ownership rights are derived for water shares. An aerial photograph described as Plaintiffs' Exhibit 2 show the entire layout of the water system. Plaintiffs' Exhibit 1 shows a Google Earth map from a survey performed by Kevin Thompson which predates the November 7, 2012 survey; and is an aerial photograph that more closely resembles the subject properties.

way for the ditch and alleged negligence and breach for interference with the ditch. The court ruled for the respondents on these issues. The appellant counter-claimed for trespass and damages. The court awarded nominal damages, in amended findings of fact, to the appellant for trespass. Neither party received attorney fees but costs were awarded to the appellants as prevailing parties.

1. A ditch owner does not enjoy exclusive rights in its primary easements and rights-of-way. The trial court misapplied the unquestioned facts, from both parties, resulting in the law being also misapplied. I.C. § 42-222(2).

Every single witness in this case, including the plaintiff Jade Mortensen, who was mistruthful in his deposition or trial testimony4, indicated that the alleged ditch and right of way had not been used for about 30 years; or many witnesses stated a substantial period of time without giving the 30 year period. The ditch and water rights were abandoned and forfeited by not being beneficially used for such a lengthy period of time.5

In going through the trial transcript, prepared by the reporter, every witness stated, in some form, that the ditch in question had not been used or maintained for a substantial period of time, believed to be 30 years, as follows:

Galust Berian: P. 18:2; P.19:16-.18 Moved to current location in 1989.

P. 26: 16-18 There was no ditch.

P. 28: 8-11; 30:15-25 No ditch.

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4 See P.185 of Reporter's Transcript.

5 The land described as Mortensen was a bare parcel of real estate that had been owned by the following denoted family names: Fyfe to Flagger; Flagger to Robison; and Robison to Mortensen. This period of time covered in excess of 30 years.

P. 32:25 2013 Ditch appears.

P.34-35 Illegal ditch. No water before.

Sandra Cress: P. 47:8-14 [The land was] all her father's land.

P.49: 10-13 Irrigated when she was 8 or 9 years old.

P. 50: 3-4 Filled in by mother nature and not used. P. 58:18-25

P.52: 15-17 She had walked property and observed.

P. 55:6-19 Texas Slough separates Sturgis Property (North/South)

P.57:8-9 Fence separated Sturgis property (East/West).

Larry Atkinson: Pp. 62:11: 65:20-21 77 years old.

P.64 Never saw water in ditch

***P.64:17-21 had not been maintained for 30 years

P. 68: 18-19 Never saw water in ditch.

George Benson: P. 74:21-24 15 years earlier filled in portion of ditch; Pipes lying on ground

P.76:6-10 Nobody cleaned it (referring to Larry Atkinson)6

P. 77:5-9 No water delivered

Lyle Thompson P. 84: 14 acres he cut wood saw no ditch

P.87;1-15 no ditch then later pipes on ground; Saw guy digging with track hoe in

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6 George Benson testified that the ditch in question was not used for years and he had last seen when Larry Atkinson had cleaned which was over 30 years ago according to Atkinson. Benson stated he had never seen water delivered through the ditch in question. He stated the ditch was eroded and that he filled in a portion of the western part of the ditch on the Sturgis property over 15 years earlier. He testified the Sturgis property was flood irrigated.

2010 or 2012.

Pp. 90-91 started wood hauling in 1995 ended in 2012

P. 92: 7-12 didn't recall a ditch because he had to drive a trailer to the end and could not have gone through a ditch

Roddy Robison P. 134: 10-25 worked on Fyfe ditch not the east west ditch

P. 136:1-7 Cleaning Fyfe Ditch that had nothing to do with the east/west ditch

30 years earlier didn't see ditch P. 129: 23-24

P. 111:8-13 no maintenance or water usage observed.

Kevin Thompson (son of Lyle Thompson) P.103: 7-18 1989 never saw a ditch came back for survey on Nov. 7, 2012 merely did survey for financial institution. P. 100:23-25;

Jade Mortensen P. 146 moved to location in 2004

P.156:19-25 Started Excavation business in 2010 (Couldn't have dug ditch prior)

P. 161:1-4 Dug ditch deeper

**P. 185:4-17 In deposition he said he ran water in 2008; at trial he changed his testimony to 2004. (Impeached and shows his untruthful nature).

Julia Berian: P. 212:13-14 Never saw ditch when growing up.

P. 213:9-19 First time she was aware of ditch.

P. 213:7-8 December 2011 first of bank issues.

Every single witness for both sides said it was a long time and approximately 30 years since the ditch was used or maintained until Jade Mortensen moved to the real

property. He was untruthful in his testimony; yet, the district court tried to minimize or exclude relevant testimony from all of the defendant witnesses. Moreover, the plaintiff witnesses corroborated the testimony of the defendant witnesses! The lower court simply errored in its factual analysis and misapplied the law.

Idaho Code §42-222(2) states as follows:

2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code Idaho Code Ann. § 42-222.

An abandonment of a water right must have been continuous for five consecutive years. Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944). Id.

This court should be aware that the entire property described as Sturgis, Mortensen and the land south of this property was all one contiguous parcel of property owned by Fyfe. It is believed that the Fyfe ditch carried water which was then allowed to flood irrigate the pasture land known as Sturgis and the Mortensen property by flooding from east to west. Ms. Cress testimony substantiates this belief. It is also believed that is consistent with the Fyfe ditch ending at the northern end of the property described as Sturgis. Quite simply, this ditch flood irrigated everything by either tubes or cuts in the ditch to allow flow. A third, but less likely scenario is the ditch was merely damned and allowed to overflow onto the Sturgis/Mortensen piece of property. The alleged ditch had not been cleaned for over 30 years by Atkinson. "Mother nature" filled in the ditch according to Cress. Benson filled in a westerly portion of the alleged ditch 15 years earlier. Thus, the alleged ditch could not have been usable.

One must remember that this entire parcel did not have separate water shares and was not divided. The first division of this entire parcel came upon the sale to Berian. Flagger then had the Mortensen property. Thus, at first he made a crude attempt to water the Mortensen property with blue piping about 8 to 10 inches wide. The piping was removed and Flagger did nothing more.

The property came into the possession of Robison. When he sold to Mortensen was the FIRST TIME that shares of water were ever associated with the Mortensen property. Thus, it was very ordinary to have a diversion point on the Fyfe ditch to flood the Sturgis property. Berian testified he tried to hand shovel a small ditch to water some trees on the Sturgis property and could not get the water to flow to the trees.

Case law supports the abandonment and forfeiture theories as follows:

A water right may be extinguished by any act showing an intent to surrender or abandon the right, after which, if the person having the right, ceases its use for the statutory period of abandonment, his interest is lost. (Pringle Falls Power Co. v. Patterson, 65 Ore. 474, 132 P. 527; Camp Carson Min. & P. Co. v. Stephenson, 84 Ore. 690, 165 P. 351 Zezi v. Lightfoot, 57 Idaho 707 (1937).

The code sections relied upon by the district court (I.C. §§ 42-1102 and 1209) is not absolute and further explained as follows:

The district court held that, pursuant to I.C. §§ 42-1102 and 1209, Pioneer enjoys exclusive rights in its primary easements and rights-of-way. We disagree.

Before turning to these particular statutes, it is appropriate to look at this Court's earlier statements explaining the scope of rights of a ditch owner. In Idaho, the common law has long recognized that irrigation easements and rights-of-way are not exclusive. E.g., City of Bellevue v. Daly, 14 Idaho 545, 550-51, 94 P. 1036, 1038-39 (1908) (owner of servient estate not liable for pollution caused to irrigation waters by his cattle in the ordinary course of husbandry and likewise not responsible for constructing a fence to protect the irrigation easement or right-of-way); Coulsen v. Aberdeen-Springfield Canal Co., 47 Idaho 619, 630-31, 277 P. 542, 546 (1929) (irrigation easement owner not entitled to exclusive possession of property upon which easement is located and cannot assert trespass where servient estate owner's cattle enter easement; rather where easement owner fails to

adequately maintain irrigation conduit and injury to servient estate owner's cattle results, easement owner is liable); Pioneer Irr. Dist. v. Smith, 48 Idaho 734, 739, 285 P. 474, 476 (1930) (irrigation district's right-of-way is not exclusive and servient landowner's reasonable, ordinary, and usual farming of hogs near and on easement is permissible; irrigation easement owner is responsible for damages to irrigation conduit resulting therefrom); Nampa & Meridian Irr. Dist. v. Mussell, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003) (owners of servient estate "entitled to make any uses of their property that d[o] not unreasonably interfere with the District's enjoyment of its [irrigation] easement."). In fact, this Court has expressly recognized railroad easements as distinguishable from irrigation and other types of easements and rights-of-way, and held that only railroad easements are exclusive. Lake CDA Invest., LLC v. Idaho Dep't of Lands, 149 Idaho 274, 281-82, 233 P.3d 721, 728-29 (2010)5(citing Coulsen, 47 Idaho at 627-28, 277 P. at 544-45).

As previously noted, the Legislature is presumed to be aware of this Court's [*602] earlier decisions. Druffel, 136 Idaho at 856, 41 P.3d at 742. Certainly, our Legislature knows how to abrogate decisions from this Court. See, e.g., Act of March 4, 2010, ch. 29, 2010 Idaho Sess. Laws 49, 49-50 (abrogating holding of Rammell v. Idaho State Dep't of Agric., 147 Idaho 415, 422-23, 210 P.3d 523, 530-31 (2009)). This Court will not interpret a statute as abrogating the common law unless it is evident that was the Legislature's intent. Statewide Constr., Inc. v. Pietri, 150 Idaho 423, 429, 247 P.3d 650, 656 (2011), abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011). See also Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 583, 513 P.2d 627, 635 (1973) ("Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law."). Nothing in the language of I.C. § 42-1209 indicates legislative intent to overturn our longstanding precedent that ditch owners' rights are non-exclusive.

Further, this Court has previously addressed whether I.C. § 42-1102 expands the rights of irrigation easement holders. In Nampa & Meridian Irrigation District v. Washington Federal Savings, 135 Idaho 518, 20 P.3d 702 (2001), this Court rejected the irrigation district's claim that the statute expanded the rights of ditch owners. Id. at 522, 20 P.3d 706 ("We conclude that neither the provisions expressed in [a channel change easement] nor the quoted language of the statute . . . operate to create a greater right"). Instead, we stated: "I.C. § 42-1102 only contemplates a right-of-way for cleaning, maintaining, and repairing canals. The statute provides notice to owners of land that the owner of the ditch or canal has the right-of-way, and serves to clarify what the right-of-way includes." Id. at 524, 20 P.3d at 708. Although the issue presented in Nampa & Meridian Irrigation District related to a dispute between the ditch owner and the owner of the servient estate, this Court rejected the suggestion that I.C. § 42-1102 expanded the rights of ditch owners: "Missing from the statute is any suggestion that owners of the right-of way may, in cleaning, maintaining, or repairing the canal or ditch, restrict the servient landowner's use of the right-of-way because of safety concerns." Id.

As the statutes lack a clear expression of legislative intent to abrogate the common law and grant easement owners an exclusive right to possession, we conclude that the

district court erred in holding that owners of irrigation easements and rights-of-way have an exclusive possessory interest in those easements Pioneer Irrigation Dist. v. City of Caldwell, 153 Idaho 593 (2012)

Certainly, abandonment or forfeiture occurs with the passage of 30 years without beneficial use; and, in fact, no use.7 No landowners of the property known as "Mortensen" used water for a beneficial use on the Mortensen property for over 30 years and at a minimum before the year 2008. Mortensen did not even receive written water certificates until May of 2004.

In construing this section of our statute, this court, in the case of Albrethsen v. Wood River Land Company, 40 Ida. 49, 231 P. 418, which was brought to declare a forfeiture of certain water rights, on petition for rehearing, said: "The law safeguards

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7 The witnesses who testified could not establish any actual usage of the alleged ditch by Flagger or Robison for the years before Mortensen came into existence. No one testified of ever seeing or observing water diverted across the Sturgis property during the ownership of Flagger and Robison. The last cleaning was over 30 years earlier and a portion had been filled in 15 years earlier. Ms. Cress testified that "mother nature" had pretty much filled in the entire ditch. The alleged ditch, if it did exist in any form, was forfeited or abandoned by the Flagger/Robison ownership of the real property described as "Mortensen". Facts must be established by a preponderance of evidence other than evidence of interested parties. *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933); Idaho Bank of Commerce v. Chastain, 86 Idaho 146 (1963). (However, the standard is more stringent for the establishment of a right-of-way by adversity.) Non-use for an unreasonable period of time creates a rebuttable presumption that there was an intention to abandon. *Sieber v. Frink*, 7 Colo. 148, 2 P. 901 (1883). Forfeiture of water rights is conceptually distinct from common law abandonment. Abandonment is predicated upon the elements of intent and conduct. It requires intent to abandon and the actual surrender or relinquishment of water rights. *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981). Statutory forfeiture focuses instead upon time and conduct. Idaho Code § 42-222(2) provides that all rights to water are lost where the appropriator fails to make "beneficial use" of the water for a continuous five-year period regardless of intent. See, e.g., *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976). Under either theory, the alleged ditch, in the case at bar, was abandoned or forfeited prior to the Mortensen ownership of real property.

decreed rights as well as other rights by providing that a loss by abandonment cannot arise until after a failure to apply the water to a beneficial use for a period of five years, and this intent must be made to appear by clear and convincing evidence. But a decreed right is not immune from a showing that it has been abandoned and such showing does not impeach the decree upon which such right was based, where the evidence received with reference to the abandonment relates to a time subsequent to the decree. To hold otherwise would defeat a well settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law. We think this statute applies equally to rights to the use of water based upon a decree with that of rights based upon an appropriation and actual use and that such abandonment begins at the time the appropriator claiming under a decree fails to apply the water to a beneficial use. And when such failure continues for the statutory period and the other required conditions are shown to exist, the right may be lost. "It will be noticed that it is the non-use for five years which works the abandonment. Abandonments and forfeitures are not favored. (Hurst v. Idaho Iowa L. & R. Co., 42 Ida. 436, 246 P. 23.)In 67 C.J., page 1062, paragraph 529, the rule is stated as follows: "Clear and convincing evidence however, is required [*288] to establish abandonment, adverse use, prescription, or as against a prior appropriator, the development of water; clear and conclusive evidence is necessary to authorize the issuance of a perpetual injunction; and the extent of an appropriation must be proved with certainty." Graham v. Leek, 65 Idaho 279 (1943).

2. The counter-claim of Berian was not correctly analyzed by the district court.

Appellant Berian filed a counter-claim for trespass against the respondent/plaintiff. The counter-claim requested damages for Jade Mortensen coming onto Galust Berian property (crossing the Fyfe Ditch, Texas Slough and roadway) wherein he threaten Berian and his daughter and used profane and vulgar language.

The district court did not follow this testimony in the initial trial and it had to be brought before said court in a reconsideration hearing. The court then ruled that there was an actual trespass: multiple signs around the perimeter of the Berian property and a picture showing Mortensen looking at the sign.

The court awarded nominal damages of $50 which seems rather cavalier. Very few people, let alone judges, would award $50 if it were their daughter and self that were being threatened and subjected to vulgar and profane language on their own property by a drunken individual. Mortensen had been drinking alcohol to make matters worse and

presented great fear in Galust and Julia Berian.

As an artist who is intent on privacy and concentration, such a distraction is devastating. Berian discussed his migraines, inability to work, fear and emotional imbalance as a result of the action.

In essence the district court found that the appellant prevailed on the counter-claim but failed to award adequate damages or award fees which are available. I.C. § 6-202.

ATTORNEY FEES AT TRIAL

The appellant should have been granted his fees at trial on the defense of the respondents' claims. I.C. § 42-222(2) is very clear that a water use and transfer of water over a right-of-way is abandoned or forfeited by statute and also by the common law if not used for a beneficial purpose and for a period of five (5) years. The evidence is very clear, from all witnesses, on this point.

The appellant should have been granted fees on his counterclaim pursuant to the trespass statute of I.C. § 6-202. The same reasoning should be applied on appeal as stated hereafter.

ATTORNEY FEES ON APPEAL

Throughout this brief, appellant has repeatedly suggested the reasons for an award of attorney fees on appeal. The respondent believes he will be the prevailing party on appeal. (The prevailing party concept is centered on the I.R.C.P, Rule 54 and I.A.R. 41 analysis.)

This court has awarded fees, on appeal, when:

"In awarding reasonable attorney fees to the prevailing party on appeal, this court will be guided by the following general principles. Since the statutory power is discretionary, attorney fees will not be awarded as a matter of right. Nor will attorney fees be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. In normal circumstances, 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. See I.R.C.P. 54(e)(1)."
Minich v. Gem State Developers, Inc., 591 P.2d 1078, 99 Idaho 911, (Idaho 1979)
---------- Excerpt from page 591 P.2d 1085.

The Minich standard is well known to all Idaho attorneys and to this court. Thus, it is believed that I.C. § 12-121 applies to the foregoing case. The principles set forth in Minich guide this court. The common law/statutory principles of abandonment and forfeiture are well known.

Finally, I.A.R. 41 is applicable to fees and costs on appeal.

Also, the trespass statutes, upon which the appellant prevailed apply for the award of fees pursuant to IRCP, Rule 54 should be available for the counterclaim. See, I.C. § 6-202.

For the reasons set forth above, the respondent believes his fees and costs should be awarded at trial and on appeal.

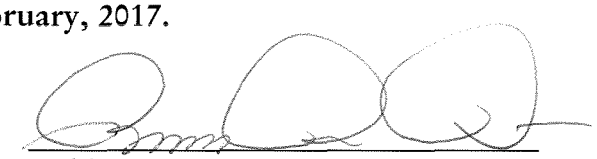
CONCLUSION

If a ditch did exist breaking off from the Fyfe canal and running over the "Sturgis" real property, it was abandoned by the common law or forfeited by the statutory law of Idaho under I.C. § 42-222(2). The "ditch" had not been maintained or beneficially used for over 30 years and had been filled in at least 15 years earlier on the west end. Mother nature had filled in the ditch over the period of 30 years.

The counter-claim of appellant was greater than nominal damages and should have so reflected; and, attorney fees should have been awarded to the appellant on trespass.

Fees and costs should be awarded at trial and on appeal by either I.C. §§ 12-121 or 6-202 including the appellate rules and case law.

Dated this 7th day of February, 2017.



Robin D. Dunn
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of February, 2017, a true and correct copy of the foregoing was delivered, postage prepaid mail, to the following persons(s):

Hyrum Erickson, Esq.
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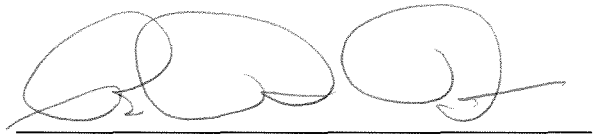
Rexburg, ID 83440



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