8-16-2017

Lemhi County v. Moulton Appellant's Reply Brief Dckt. 44498

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEMHI COUNTY, a political subdivision of the State of Idaho, by the Board of County Commissioners, Robert E. Cope, Richard Snyder, and John Jakovac,

Plaintiff-Counterdefendant,

and

VERDELL OLSON, SCOTT HARTVIGSON, as trustee of the ZENAS R. HARTVIGSON LIVING TRUST,

Defendants-Counterclaimants-Cross Defendants-Appellants,

v.

PHILLIP F. MOULTON, JAMES SKINNER, PRATT CREEK RANCH LIMITED PARTNERSHIP; LYLE SKINNER, trustee of the ELLIS RAY SKINNER FAMILY LIVING TRUST,

Cross-Defendants-Cross-Claimants-Respondents.

Supreme Court No. 44498-2016
Lemhi County No. CV-2011-324

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Lemhi

Honorable Alan C. Stephens presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Pages

Cases

Statutes

I. INTRODUCTION

This case involves an action for declaratory judgment as to whether an uphill landowner, Phil Moulton ("Moulton"), the owner of two separate parcels of land, the Skinner Ranch and the Moulton Ranch, has a prescriptive easement for diverted unused irrigation water from Pratt Creek and a natural servitude for natural water, across real property located downhill, the Hartvigson Ranch, owned by Scott Hartvigson and managed by Verdell Olson.

Hartvigson and Olson do not dispute that water travels downhill, and that natural water has flowed onto the Hartvigson Ranch from the Skinner Ranch via the Draw. However, Pratt Creek does not flow through the Draw, and its natural watercourse is not through the Draw. Moulton, the respondent, attempts to use evidence of the flow of natural water down the Draw to support his claim for a prescriptive easement; namely, to send unused diverted irrigation water from Pratt Creek down the Draw. However, Moulton has failed to prove the scope of his easement as to unused diverted irrigation water from Pratt Creek. Moulton makes the same mistakes that the district court made by improperly intertwining the doctrines of prescriptive easement and natural servitude. The Court should not allow evidence and arguments relating to the flow of natural water down the Draw to support a claim for a prescriptive easement. Likewise, the Court cannot allow diverted water from Pratt Creek to serve as the basis for a natural servitude because that water does not naturally flow down the Draw.

Hartvigson and Olson seek the following relief on appeal: 1) that the district court erred when it found that Moulton proved his claim for prescriptive easement across the Hartvigson Ranch for unused diverted irrigation water from Pratt Creek and reverse the district

court's ruling; 2) that the district court erred when it found that unused diverted irrigation water from Pratt Creek can form the basis of a claim for natural servitude and reverse the district court's ruling; and 3) that the district court's Amended Judgment is vague and that it should be voided or, at the very least, the case should be remanded so the Amended Judgment can be modified in accordance with the Court's decision.

II. ARGUMENT

A. The Court Should Reverse the District Court's Findings that a Prescriptive Easement Exists Across the Hartvigson Ranch.

Moulton bore the burden at trial of proving the prescriptive easement of 3.25 cfs by clear and convincing evidence. Moulton failed to prove all of the elements with clear and convincing evidence and the district court did not rely upon substantial and competent evidence to sustain that finding. "Substantial and competent" evidence is evidence that a reasonable trier of fact would accept and rely upon in determining whether a disputed point of fact has been proven. *PFC, Inc. v. Rockland Tel. Co.*, 121 Idaho 1036, 1038, 829 P.2d 1385, 1387 (Ct. App. 1992).

Moulton failed to prove the scope of his prescriptive easement at trial. With respect to man-made irrigation systems, a prescriptive right to wastewater into a lower canal "cannot be established short of direct proof that the water has actually flowed therein during the period necessary to establish the right." *Last Chance Ditch Co. v. Sawyer*, 35 Idaho 61, 67, 204 P. 204 (1922). It is the burden of the claimant of a prescriptive right to show the "***extent and amount*** of his use of the right claimed." *Id.* (emphasis added). No witness was able to testify regarding the scope of Moulton's claimed prescriptive easement for diverted unused irrigation

water from Pratt Creek across the Hartvigson Ranch. Neither Skinner, Moulton, Kerry Cheney, Bob Loucks, Verdell Olson, Bud Bartlett[1], nor Roger Warner testified that 3.25 cfs of diverted unused irrigation water from Pratt Creek regularly flowed out of the Draw onto the Hartvigson Ranch for the statutory period. In fact, Moulton's expert, Bob Loucks, testified that Moulton should not be putting irrigation water from Pratt Creek down the Draw, that it would be impossible to measure the amount of irrigation water from Pratt Creek going down the Draw, and that the irrigation water from Pratt Creek going down the Draw has never been measured. Tr. 206:13 – 207:12, 209:9-14. As there is no evidence of the scope of the prescriptive easement that a reasonable trier of fact can rely on, the finding of the prescriptive easement requires reversal.

As evidence that the scope of the prescriptive easement was proven by clear and convincing evidence, Moulton cites to the testimonies of Lemhi County employee Kerry Cheney, Skinner, and Olson, and evidence of water flows down the Draw and through the Hartvigson Ranch. This evidence fails to demonstrate the scope of the prescriptive easement by clear and convincing evidence. Moulton points to the testimony of Cheney, who testified that the south culvert could carry 3.25 cfs of water and that there has been water near the south culvert. Moulton fails to explain how this evidence supports a conclusion as to the scope of a prescriptive easement for unused diverted irrigation water from Pratt Creek. Again, Hartvigson and Olson do

[1] Moulton referenced the testimony of Bud Bartlett in his Statement of Facts. Bartlett apparently saw water near the south culvert, but there is no evidence in the record as to the source or amount of said water.

not dispute that at various times irrigation water and natural water have flowed down the Draw onto the Hartvigson Ranch. However, Moulton must prove that the use is continuous and uninterrupted, and the scope. Just because there was water near the south culvert and the south culvert would be large enough to handle 3.25 cfs does not mean that unused diverted irrigation water from Pratt Creek has flowed down the Draw across the Hartvigson Ranch in such a way to satisfy the elements for a prescriptive easement. Indeed, the water that Cheney observed might have been runoff or spring water. Cheney never measured the water and never investigated the source, so the Court should not consider his testimony. Tr. 150:24 – 151:12. This evidence is also unhelpful in determining this appeal because the ditch that ran between the north culvert near the Draw and the south culvert went unused from the early 1990's until 2008 or 2009. Tr. 378:25-383:1. Even if the south culvert could handle a certain amount of water, Cheney fails to address how water would get to the north culvert from the early 1990's until 2008 or 2009.

Moulton also cites to the testimony of Skinner, who did mention 3.25 cfs, but later clarified his testimony as he testified more specifically about the historic irrigation practices:

> Q: So, Jim, in the issue of our request for prescriptive easement, what amount of wastewater are you -- do you feel should be requested?
>
> A: Well, I feel, you know, there should be a request -- or an allowance for some. I would say that -- 3 1/4 cfs.
>
> . . . .
>
> Q: The question before the court is, historically, how much wastewater went down the draw towards Hartvigson? Did all of

your wastewater go down the draw towards Hartvigson, historically?

A: Years ago, yes, when we -- we flood irrigated all those fields down there.

Q: But didn't you testify at your deposition that most of the wastewater went south, down toward your property and Drakes' and Wilsons'?

A: No, not most. I wouldn't -- whether most, half and half. But when we flood irrigated those fields on the south side, it went down the Hartvigson draw.

Q: ***So are you saying it wasn't most; it might have been half went down the south, half went down the north?***

A: Uh-huh.

Q: So you had --

THE COURT: Is that a yes?

THE WITNESS: Yes.

Q: (By Mr. Williams) You had a total cfs of 5. And did you have much excess wastewater when you were flood irrigating?

A: Not a lot. But what -- we have a ditch up in Moultons' that takes water to the Warm Springs side. So I divert 5 at the top, and I take 2 1/2 or 3 to Warm Springs. That is in a complete different drainage. You probably -- you guys seen it. So I don't have that much water in the Hartvigson side, or that side.

Q: Okay. And so I think you testified today when you flood irrigated, you would re-use it up to five times.

A: Yes.

Q: So you tried to get the most use out of it you could?

A: Yes.

Q: ***So I'm guessing -- you had 5 cfs. You used it five times. There wasn't much wastewater. How much wastewater was there, historically, when you flood irrigated?***

A: ***I wouldn't -- 1 or 2.***

Q: ***1 or 2? And half of that would go down to Wilsons' and half to Hartvigsons'?***

A: ***(Nodded head.)***

. . . .

Q: ***Okay. Now, do you know -- water that comes down the draw out of Hartvigsons' -- do you know, historically, how much came out of the draw onto Hartvigsons' property?***

. . . .

A: ***Not the precise. It was never measured.***

Tr. 229:21 – 230:1, 237:7 – 239:3, 240:17-20, 241:3 (emphasis added). Skinner testified that when he would flood irrigate, he estimated that .5-1 cfs of diverted wastewater from Pratt Creek would flow down the Draw toward the Hartvigson Ranch. However, he testified that it was never measured. He also testified that water would go in a northerly direction away from the Hartvigson Ranch.

Moulton also cites to the testimony of Olson regarding water flows on the Hartvigson Ranch relating to spring flows resulting from snow melt. This evidence has nothing to do with the claim for prescriptive easement because it does not deal with unused diverted irrigation water from Pratt Creek. Again, Moulton, like the district court, continues to intertwine the doctrines of prescriptive easement and natural servitude. However, the doctrines are different and relate to the source of water. As one court noted:

> A true easement is man-made. It arises from a grant or from prescription. Such an easement cannot arise from enjoyment of a natural right to flowage or drainage . . . . ***The natural right to drainage is measured by the drainage according to the course of nature***. The right to drainage under an easement is measured . . . ***in the case of a prescriptive easement by the extent of the adverse use for the period necessary to ripen into such a right.***

Duenow v. Lindeman, 27 N.W.2d 421, 427 (Minn. 1947) (emphasis added). Moulton's claims for prescriptive easement and natural servitude are different, and the sources of water for those are different and the evidence to support such a claim is different. Evidence of flows of naturally occurring water, including snow melt and spring water, is not evidence to support a claim for prescriptive easement.

Moulton goes on to argue in Respondent's Brief that "Witnesses at trial testified to the existence of .80 cfs of Hartvigson water rights through the draw then 2, 3, 3.25, 3, 5, 5, 6 and 7 cfs traveling through the draw, and onto the Hartvigson ranch. This evidence is sufficient for a trial court to find a prescriptive easement of 3.25 cfs appropriate." Respondent's Brief at 18. The Court should not consider this argument. There is no evidence that these amounts of water consisted of 1) diverted unused irrigation water from Pratt Creek, or 2) regularly flowed down the Draw. Just because different people saw water at different times, does not result in the creation of a prescriptive easement.

Moulton did not produce substantial and competent evidence to support his claim for a prescriptive easement. As such, the district court erred when it found the existence of a prescriptive easement. The Court should reverse that finding.

B. The District Court Erred in Applying the Doctrine of Natural Servitude.

The district court failed to properly apply the doctrine of natural servitude when it found that water diverted from Pratt Creek could drain down the Draw and onto the Hartvigson Ranch pursuant to the doctrine of natural servitude. The district court found that "there is a 'natural servitude across the Hartvigson ranch in favor the Moultons [sic] ***for the water that travels from Pratt Creek***, through the basin, and through the Hartvigson draw and across the Lemhi County Road, over the Hartvigson ranch and eventually into the Lemhi river.'" R. at 262 (emphasis added). The district court's Amended Judgment states that "the watercourse that carries irrigation water from the Pratt Creek Diversion, through the Moulton Property, down the Hartvigson Draw, and ultimately onto the Hartvigson Ranch is a natural watercourse, and Moulton may send water down this natural watercourse through the Hartvigson draw and onto the Hartvigson Ranch in the amount of 3.25 CFS." R. at 303.

It is an error of law to hold that water that would not naturally flow onto an adjoining landowner's property can do so under the doctrine of natural servitude. Idaho recognizes "a natural servitude of natural drainage between adjoining lands so that the lower owner must accept the 'surface' water which naturally drains onto his land, however waters cannot be artificially accumulated and then cast upon lower lands in unnatural concentrations." *Dayley v. Burley*, 96 Idaho 101, 103, 524 P.2d 1073, 1075 (1974). That case is instructive here. In that case, the City of Burley constructed a series of curbs and storm drains, which gathered natural water, and then discharged that natural water through a natural creek channel through the plaintiffs' land. The plaintiffs objected to the discharge, and the court found that there was no

right to drain the water through the plaintiffs' land pursuant to the doctrine of natural servitude because the collected waters had "never drained onto the plaintiffs' lands prior to construction of the storm sewer drains." *Id.* The court also found that there was insufficient evidence of a prescriptive easement to drain the water through the plaintiffs' lands.

The same is true here. Water from Pratt Creek does not naturally flow through the Skinner Ranch, Moulton Ranch, down the Draw, and onto the Hartvigson Ranch. The diversion is man-made, the pipes from the diversion are man-made, and the ditches conveying the water are man-made. Tr. 106:6-16. The bottom line is that water from Pratt Creek cannot form the basis of a natural servitude.

Moulton makes two arguments to support a conclusion that water from Pratt Creek can form the basis of a natural servitude. He first argues that diverted and stored irrigation water can serve as the basis for a natural servitude, citing to *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 805 P.2d 1223 (1991), and *Smith v. King Creek Grazing Association*, 105 Idaho 644, 671 P.2d 1107 (1983). In *Burgess*, landowners who owned land downstream from a dam on Salmon Falls Creek sued the canal company who operated the dam when excessive seepage from the dam damaged their property. The water flowed through the natural watercourse of Salmon Falls Creek. The landowners also sued the highway department, alleging failure to maintain a culvert that became plugged during the flood. At issue in the case was the duty owed by the canal company to the landowners and also whether the highway department was immune from suit. Another issue on appeal was whether the canal company could discharge accumulated water into the natural stream bed of the creek. The Court noted:

> While we recognize that this servitude which is placed upon a lower landowner requires the landowner to bear the burden of natural drainage waters, this servitude cannot be augmented or made more burdensome by the upper landowner. Thus, the upper landowner cannot artificially accumulate the water only to release it upon the lower landowner in an unnatural concentration.

Burgess, 119 Idaho at 315, 805 P.2d at 1229. The court went on to analyze whether the lower court had erred in preventing the canal company from submitting certain evidence to the jury regarding historic flows through the creek bed.

The *Burgess* case has no application here. While it is true that the water was being dammed for use of irrigation, it was being discharged back into its natural course. At issue was whether the discharge was increasing the burden on the lower landowners. Here, Pratt Creek does not flow down the Draw towards the Hartvigson Ranch. But for Moulton's diversion of Pratt Creek water from the natural stream bed, Pratt Creek water would not be an issue on the Hartvigson Ranch. Any discharge of Pratt Creek water onto the Hartvigson Ranch by Moulton increases the natural burden on the Hartvigson Ranch, so such water cannot form the basis for the natural servitude.

Moulton also cites to *Smith v. King Creek Grazing Association*, 105 Idaho 644, 671 P.2d 1107 (Ct. App. 1983), for the proposition that a natural servitude can exist for water other than rain or snow melt. In that case, above-hill landowners collected spring water for stockwater and, during the autumn and winter, discharged the spring water into a natural channel towards down-hill landowners. The Court held that an uphill landowner can alter the flow and maybe even increase the flow of natural water, as long as that water is discharged into the natural

watercourse of the flow. This case is also inapplicable here, as it specifically states: "T]he 'civil law' rule may apply differently to surface water drainage within a natural watercourse than to drainage outside such a watercourse. If a natural watercourse exists, ***the upper landowner may alter the natural flow so long as it remains within the watercourse***." *Smith*, 105 Idaho at 647, 671 P.2d at 1110 (emphasis added). Moulton appears to be arguing that because he takes the Pratt Creek water from one natural watercourse and puts it into another, it can serve as the basis for a natural servitude. In *Smith*, the uphill landowner gathered the spring water, but discharged the unused water into the spring water's natural watercourse. Pratt Creek's natural watercourse is not through the Draw and the Hartvigson Ranch. Pratt Creek water cannot serve as a source of a natural servitude across the Hartvigson Ranch.

The Court may ask itself why this distinction is important to Hartvigson and Olson. Hartvigson and Olson recognize that they must accept naturally occurring water, namely spring water, snow melt, and rain runoff that flows down the Draw and onto the Hartvigson Ranch. However, if the district court judgment is allowed to stand, Moulton will be able to send unused diverted irrigation water at his leisure as part of the natural servitude. This type of water cannot serve as part of Moulton's natural servitude. The Court should reverse the district court's finding that unused diverted irrigation water from Pratt Creek can form the basis for a natural servitude.

C. The Court Should Find that the District Court's Judgment Is Vague.

Hartvigson and Olson argued in their opening brief that the district court's Amended Judgment was vague. They argued that it was 1) vague because it failed to distinguish

between the doctrines of natural servitude and prescriptive easement; 2) vague as to the phrase surface waters; 3) vague as to whether the easement and servitude are separate or collective as to the amount; and 4) vague as to the location of the easement and servitude.

The focus of Hartvigson and Olson's first, second, and third arguments relating to the Amended Judgment relate to the district court's purposeful or accidental intertwining of the doctrines of natural servitude and prescriptive easement. Here, Moulton repeats his arguments that the courts' holdings in *Burgess* and *Smith*, which he argues stand for the argument that irrigation water can serve as the basis for a natural servitude. However, as already described, a natural servitude cannot include water that is taken from one watercourse and placed in another. This is an important distinction for Hartvigson and Olson because, while they understand they must accept spring water, snow melt, and rain runoff that flows naturally down the Draw onto the Hartvigson Ranch, with the way the district court's ruling is currently drafted, Moulton could send unused diverted irrigation water from Pratt Creek down the Draw at will under either doctrine.

Hartvigson and Olson's fourth argument relating to the Amended Judgment is that it fails to specify the location across the Hartvigson Ranch of the natural servitude and the easement, because, under Idaho law:

> A judgment which affects the title or interest in real property must describe the lands specifically and with such certainty that the court's mandate in connection therewith may be executed, and such that rights and liabilities are clearly fixed and that all parties affected thereby may readily understand and comply with the requirements thereof.

Kosanke v. Kopp, 74 Idaho 302, 261 P.2d 815, 818 (1953). According to Moulton's arguments at trial, the water, from whatever source, comes down the Draw to the Lower Y near the north culvert. It then makes a left-hand turn into a ditch that parallels the Lemhi County Back Road. The water then needs to make a right-hand turn at the south culvert and into the so-called Hartvigson Ranch ditch. No evidence was presented at trial as to the precise location of the natural watercourse or prescriptive easement through Hartvigson Ranch. The evidence at trial demonstrated that both the ditch between the culverts and the Hartvigson Ranch ditch were man-made. Without more specific information regarding the location of the easement and servitude, the Amended Judgment is vague.

D. Attorney's Fees.

Moulton seeks attorney's fees on appeal pursuant to Idaho Code Section 12-121, arguing that Hartvigson and Olson have pursued this appeal frivolously, unreasonably, or without foundation. Moulton fails to elaborate how Hartvigson and Olson have pursued this appeal frivolously.[2] As outlined above, Hartvigson and Olson are seeking the following rulings: 1) that Moulton failed to satisfy his burden of proof in providing evidence of the scope of the prescriptive easement with clear and convincing evidence; 2) that unused diverted irrigation water from Pratt Creek cannot form the basis of a claim for natural servitude; and 3) that the Amended Judgment is void for vagueness. Hartvigson and Olson have made good faith arguments in requesting this relief.

[2] This failure to elaborate on the claim for attorney's fees may be, on its own, grounds to deny the claim for attorney's fees. *Weaver v. Searle Bros.*, 129 Idaho 497, 503, 927 P.2d 887, 893 (1996).

Circumstances exist for an award of fees when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law. *City of Boise v. Ada Cnty.*, 147 Idaho 794, 812, 215 P.3d 514, 532 (2009). Conversely, fees generally will not be awarded when "the losing party brought the appeal in good faith and where a genuine issue of law was presented." *Id.* Hartvigson and Olson have made arguments in good faith on both the facts and the law of the case. Moulton may be arguing that Hartvigson and Olson are only asking the Court to reweigh the evidence relating to whether Moulton met his burden of proof for his prescriptive easement. Hartvigson and Olson's arguments relate to the kind of proof required to prove a prescriptive easement for irrigation wastewater. Hartvigson and Olson are not asking the Court to second-guess the district court on conflicting evidence, rather, they are asking the Court to determine whether the proof of the 3.25 cfs for the prescriptive easement was demonstrated with substantial and competent evidence, where no witness was able to testify as such.

Likewise, there are legitimate questions relating to the district court's intertwining of the doctrines of natural servitude and prescriptive easement. As Hartvigson and Olson have raised legitimate errors on the part of the district court, attorney's fees are not awardable. *Thomas v. Thomas*, 150 Idaho 636, 646-47, 249 P.3d 829, 839-40 (2011).

III. CONCLUSION

Based upon the foregoing, Appellants respectfully request that the Court grant it the relief described, *supra*.

DATED this 16th day of August, 2017.

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August, 2017, I caused a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF to be served by the method indicated below, and addressed to the following:

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