

1988

# Mary Butler, Mary Hill v. Hank L. Lee, Janet W. Lee : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Pete N. Vlahos; Vlahos and Sharp; attorney for respondent.

William J. Critchlow, Charles T. Critchlow; Parker, Thornley and Critchlow; attorney for appellants.

---

## Recommended Citation

Brief of Appellant, *Butler v. Lee*, No. 880046.00 (Utah Supreme Court, 1988).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1918](https://digitalcommons.law.byu.edu/byu_sc1/1918)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

FAH  
DOCUMENT  
FU  
6  
110

NO. 88-0046-CA THE SUPREME COURT OF THE  
STATE OF UTAH

MARY BUTLER, previously known  
as MARY HILL,

Plaintiff-Respondent,

vs.

HANK L. LEE and JANET W. LEE,

Defendants-Appellants.

Case No. 870302

88-0046-CA

BRIEF OF APPELLANTS

Appeal from the Judgment on Declaratory Judgment of the  
Second Judicial District Court of  
Davis County, State of Utah  
THE HONORABLE RODNEY S. PAGE  
DISTRICT COURT JUDGE

William J. Critchlow, III  
Charles T. Critchlow  
PARKER, THORNLEY & CRITCHLOW  
2610 Washington Boulevard  
P.O. Box 107  
Ogden, Utah 84402  
Telephone: (801) 399-3303  
Attorney for Appellants

Pete N. Vlahos  
VLAHOS & SHARP  
Legal Forum Building  
2447 Kiesel Avenue  
Ogden, Utah 84401  
Telephone: (801) 621-2464  
Attorney for Respondent

FILED  
DEC 4 1987

Clerk, Supreme Court, Utah

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES PRESENTED ON APPEAL . . . . .	1
STATEMENT OF THE CASE . . . . .	2
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	3
ARGUMENT . . . . .	5
I. WHETHER AN EASEMENT BY IMPLICATION MAY BE INFERRED FROM WRITTEN DOCUMENTS OF SALE, CONVEYANCE AND INSURANCE BETWEEN THE PARTIES, ALL OF WHICH EXPRESSLY NEGATE ANY OTHER REPRESENTATIONS, COVENANTS OR AGREEMENTS BETWEEN THE PARTIES . . . . .	6
II. WHETHER ABUNDANT ALTERNATIVE ACCESS TO LAND AND IMPROVEMENTS THEREON PERMITS A FINDING OF EASEMENT BY IMPLICATION OR NECESSITY PURSUANT TO A CLAIM THAT THE ALTERNATIVE ACCESS IS INADEQUATE, INCONVENIENT, DIFFICULT OR COSTLY . . . . .	9
III. WHETHER THE TRIAL COURT ERRED IN DENYING THE ADMISSION OF TESTIMONY PERTAINING TO THE ECONOMIC LOSS TO DEFENDANTS- APPELLANTS IF THEIR PROPERTY SHOULD BE SUBJECTED TO THE EASEMENT CLAIMED BY PLAINTIFF- RESPONDENT . . . . .	13
IV. WHETHER THE PARTIES INTENDED A REVOCABLE LICENSE OR AN EASEMENT . . . . .	14
CONCLUSION . . . . .	15

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Adamson v. Brockbank</u> , 185 P.2d 264 (1947) . . . . .	6
<u>A.J. &amp; J.O. Pillar, Inc., v. Lister Corporation</u> , 121 A.2d 741 (N.J. 1956) . . . . .	10
<u>Dressler v. Isaacs</u> , 343 P.2d 714 (Or. 1959) . . . . .	14
<u>Freightways Term. Co. v. Industrial &amp; Com.</u> <u>Const., Inc.</u> , 381 P.2d 977 (Alaska 1976) . . . . .	9
<u>Howes v. Harmon</u> , 81 P.48 (1905) . . . . .	15
<u>Kuczek v. Arpino</u> , 319 N.Y. Supp.2d 253 (1971) . . . . .	12
<u>Miller v. Hoeschler</u> , 105 N.W. 790 (Wis. 1905) . . . . .	10
<u>Missouri State Oil Co. v. Fuse</u> , 232 S.W.2d 501 (Mo. 1950) . . . . .	10
<u>Morris v. Blunt</u> , 161 p. 1127 (Utah 1916) . . . . .	10
<u>Orr v. Kirk</u> , 224 P.2d 71 (Cal. 1950) . . . . .	10, 12
<u>Savage v. Nielsen</u> , 197 P.2d 117 (Utah 1948) . . . . .	10
<u>Sears v. Riemersma</u> , 655 P.2d 1105 (Utah 1982) . . . . .	7
 <u>Statutes</u>	
<u>Utah Code Ann. §25-5-1</u> (1984 Repl. Vol.) . . . . .	7
<u>Utah Code Ann. §57-1-11</u> (1986 Repl. Vol.) . . . . .	8
 <u>Miscellaneous</u>	
<u>25 AM. JUR. 2d Easements and Licenses §§1,</u> <u>123</u> (1966) . . . . .	14

<u>2 AMERICAN LAW OF PROPERTY §8.36, p.258</u> (Casner ed. 1952) . . . . .	10
<u>RESTATEMENT, PROPERTY §476 (1944)</u> . . . . .	6
<u>RESTATEMENT, PROPERTY §476, comment c, p.2977</u> (1944) . . . . .	7
<u>RESTATEMENT, PROPERTY §476, comment d, p.2980</u> (1944) . . . . .	8
<u>RESTATEMENT, PROPERTY §476, comment g, p.2983</u> (1944) . . . . .	11
<u>RESTATEMENT, PROPERTY §476, comment h, p.2985</u> (1944) . . . . .	13

IN THE SUPREME COURT OF THE  
STATE OF UTAH

---

MARY BUTLER, previously known )  
as MARY HILL, )  
 )  
Plaintiff-Respondent, )  
 )  
vs. )  
 )  
HANK L. LEE and JANET W. LEE, )  
 )  
Defendants-Appellants. )

---

BRIEF OF APPELLANTS

HANK L. LEE and JANET W. LEE

---

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether an easement by implication may be inferred from written documents of sale, conveyance and insurance between the parties which expressly negate any other representations, covenants or agreements between the parties.

2. Whether abundant alternative access to land and improvements thereon permits a finding of easement by implication pursuant to a claim that the alternative access is inadequate, inconvenient, difficult or costly.

3. Whether the trial court erred in denying the admission of testimony pertaining to the economic loss to

defendants-appellants if their property should be subjected to the easement claimed by plaintiff-respondent.

4. Whether the parties by implication intended a permanent easement or a revocable license.

#### STATEMENT OF THE CASE

This is an appeal from a judgment on declaratory judgment entered in the District Court of Davis County, State of Utah, July 23, 1987, by the Honorable Rodney S. Page, granting an easement by implication or necessity. A motion to vacate the judgment was filed by defendants-appellants under Rule 60 (b) (1), (2), (3) and (7), alleging that the uniform real estate contract understated the true purchase price by \$30,000.00 which was paid by defendants to plaintiff's former husband as a condition precedent to the sale. After hearing on November 3, 1987, the Honorable Rodney S. Page denied the motion.

#### RELIEF SOUGHT ON APPEAL

Appellants seek to have the judgment of the trial court reversed and vacated.

#### STATEMENT OF FACTS

Pursuant to the terms of a uniform real estate contract, dated September 1, 1981, Hank and Janet Lee, defendants-appellants and first generation Chinese immigrants, purchased real property, comprised of a restaurant with front and rear parking lots, from Jack Hill, a used car salesman and the former husband of Mary Butler, the plaintiff-respondent. The said uniform real estate contract did not reflect the true purchase price because it contained no mention of a \$30,000.00 cash payment by Hank and Janet Lee, the buyers, to Jack Hill, the seller, as an unmentioned cash payment requested by Hill as a necessary condition precedent to said sale. After principal payments by Hank and Janet Lee totaling \$115,000.00 plus interest, title to the property was conveyed to them from Hill by means of a warranty deed dated September 11, 1986, which conveyance occurred more than one year after the commencement of this action by Mary Butler, plaintiff-respondent.

None of the documents provided Hank and Janet Lee at the closing of said sale by Hill's agent, Security Title Company, Farmington, Utah, including the uniform real estate contract, a copy of the proposed warranty deed, the title insurance policy, or the closing statement, contained any reservation of an easement upon or over the subject property. Contrary to any such reservation, however, was the language of



the uniform real estate contract negating any other "representations, covenants or agreements between the parties." All sale documents were prepared by Security Title Company, the agent of the seller, Jack Hill.

Prior to the purchase Hank Lee had leased the restaurant and parking lots from Jack Hill and was aware of his clients' driving over and across the rear parking lot to gain access to the storage stalls located on the north side of Mr. Hill's storage shed. Mr. Lee testified that he had no objection to the temporary use of his rear parking lot by others because, "...when they use them they might be the customers that come to the restaurant and so it's generally what they want to do." (T. 69.)

During the summer of 1985, Hank Lee developed plans for the construction of a commercial building upon his rear parking lot. Mary Butler filed an action for declaratory judgment claiming an easement over Mr. Lee's rear parking lot for ingress and egress to the storage shed located on the southeast corner of her property acquired from Mr. Hill as part of her divorce settlement. Mr. Lee's proposed construction would prevent vehicular access to only four of the twenty-four storage spaces contained in plaintiff's storage shed. (Ex. 2.) Although the use of Mr. Lee's land had been a convenience to Mrs. Butler and her clients, it was not the only access to her

land and the storage shed, nor was it absolutely necessary to her enjoyment of her land and its improvements. On the other hand, the easement established by the judgment in question precludes any development of Mr. Lee's property subject to said easement which extends essentially over his entire rear parking area.

#### ARGUMENT

Although there have been many decisions of this court finding easements by implication or necessity, the facts of all such cases are substantially different from the present case. Prior decisions have involved roads, lanes, narrow strips of land, sidewalks, driveways, alleys, canals, ditches, pipe lines, power lines and bridges, but none have involved an implied easement over and across a very substantial land area servient to only a portion of a storage shed. Consequently, the Utah cases can be clearly distinguished from the present case, necessitating a consideration of other authority frequently cited by this court. The RESTATEMENT OF THE LAW OF PROPERTY contains a list of relevant factors previously considered by this court in determining the existence of an implied easement:

In determining whether the circumstances under which a conveyance of land is made imply an easement, the following factors are important

- (a) whether the claimant is the conveyor or the conveyee,
- (b) the terms of the conveyance,
- (c) the consideration given for it,
- (d) whether the claim is made against a simultaneous conveyee,
- (e) the extent of necessity of the easement to the claimant,
- (f) whether reciprocal benefits result to the conveyor and the conveyee,
- (g) the manner in which the land was used prior to its conveyance, and
- (h) the extent to which the manner of prior use was or might have been known to the parties. RESTATEMENT, PROPERTY §476 (1944); Adamson v. Brockbank, 185 P2d. 264, 270-271 (Utah 1947).

Only two of the factors above cited lend support to the finding of an easement in the present case -- use of the land prior to the conveyance and knowledge of that use by the parties. A majority of the other applicable or pertinent factors to be considered lend no support to an implied easement in the present case.

I. WHETHER AN EASEMENT BY IMPLICATION MAY BE INFERRED FROM WRITTEN DOCUMENTS OF SALE, CONVEYANCE AND INSURANCE BETWEEN THE PARTIES, ALL OF WHICH EXPRESSLY NEGATE ANY OTHER REPRESENTATIONS, COVENANTS OR AGREEMENTS BETWEEN THE PARTIES.

All documents pertaining to the sale and conveyance of the property upon and over which the implied easement is claimed were prepared by Security Title Company, Farmington, Utah, as the agent of the conveyor, Jack Hill -- the seller in the

instant case. Mr. Hill gave said agent all instructions for the preparation of the sale documents and paid for the title insurance (T. 48-49.), none of which documents contained any reference to or reservation of an easement.

The applicable rule frequently enunciated by this court is that a contract should be resolved against the party who had the contract drawn. Sears v. Riemersma, 655 P.2d 1105 (Utah 1982). Additionally, the first factor cited by the RESTATEMENT suggests that any doubts in construing the conveyance should be resolved in favor of the conveyees because

...the conveyor controls both the language of the conveyance and the circumstances under which it is made and has power to make the language of the conveyance express the intention of the parties. To the extent to which this is true his failure to make it do so is held to operate to his disadvantage rather than to the disadvantage of the conveyee. What is true in construing the language of a conveyance is likewise true in drawing inferences from the circumstances under which the conveyance was made. Accordingly, circumstances which may be sufficient to imply the creation of an easement in favor of a conveyee may not be sufficient to imply the creation of one in favor of the conveyor. RESTATEMENT, PROPERTY §476, comment c, p. 2977 (1944).

In Utah no implication of easement from a warranty deed can be entertained without special and deliberative consideration of two pertinent Utah statutes, the statute of frauds, Utah Code Ann. §25-5-1 (1984 Repl. Vol.), and the

statute pertaining to warranty deeds, Utah Code Ann. §57-1-11 (1986 Repl. Vol.), which alternatively require a writing subscribed by the creator of the easement, or "... that the premises are free from all encumbrances...." if there is no easement reservation.

Typical of the implied easement cases is the construction or interpretation of only one document of conveyance to determine the intent of the parties; however, the instant case presents three documents for construction of intent, i.e., the uniform real estate contract, the title insurance policy and the warranty deed, all containing express negations of any encumbrance or easement and all requiring a construction favorable to the conveyees, Mr. and Mrs. Lee. It is rationally impossible to infer any easement or any other type of encumbrance from the terms of these conveyance documents. They all totally negate any such inference.

There is only one overruling factor cited by the RESTATEMENT. It is the second, the terms of the conveyance.

d. Terms of Conveyance. The implication of an easement may always be prevented by language sufficiently explicit to negative it. No matter how clear the implication would otherwise be, it is always subject to being overcome by the language used. RESTATEMENT, PROPERTY §476, comment d, p.2980 (1944).

It should also be carefully noted that the law does not favor easements by implication because they detract from the rule that written instruments speak for themselves. Thus the law should imply an easement in favor of a grantee more readily than in favor of a grantor. Freightways Term. Co. v. Industrial & Com. Const., Inc., 381 P.2d 977, 983 (Alaska 1963).

II. WHETHER ABUNDANT ALTERNATIVE ACCESS TO LAND AND IMPROVEMENTS THEREON PERMITS A FINDING OF EASEMENT BY IMPLICATION OR NECESSITY PURSUANT TO A CLAIM THAT THE ALTERNATIVE ACCESS IS INADEQUATE, INCONVENIENT, DIFFICULT OR COSTLY.

A critical fact in the instant case is that none of Mary Butler's property is landlocked. All of the land has ample access to U.S. Highway 89-91. (T. 85.) It is only a portion of the storage shed -- 4 stalls out of a total of 24 or approximately 1/6th of the total improvement -- that would have limited access, but only from the north, if Mr. Lee is permitted to build his commercial building across the rear of his parking lot. Not even the space within those few stalls would be deprived of vehicular access if modest and relatively

inexpensive alterations were made in a manner similar to the same modification which had been previously made to two units of the same storage shed. (T. 44.)

The most frequently cited Utah authority recognizing ways of necessity is Morris v. Blount, 161 P.2d. 1127, 1132 (Utah 1916), which defines the essential elements of an easement by severance or necessity to be as follows:

- (1) Unity of title followed by severance;
- (2) That at the time of the severance the servitude was apparent, obvious and visible;
- (3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
- (4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.

Savage v. Nielsen, 197 P.2d 117, 122 (Utah 1948).

Any implied easement necessitates not only an involvement of principles of construction to determine what the real intent of the parties was at the time of the conveyance, Savage v. Nielsen, Id. at 122, but also thoughtful consideration of principles of wise public policy. For example, implied easements should not be favored by the courts because they fetter estates, retard building and improvements, and violate public policies of recording acts. Orr v. Kirk, 224 P.2d 71 (Cal. 1950); 2 AMERICAN LAW OF PROPERTY §8.36, P. 258 (Casner ed. 1952); Missouri State Oil Co. v. Fuse, 232 S.W.2d 501 (Mo. 1950); A.J. & J.O. Pillar, Inc., v. Lister Corporation, 121 A.2d 741 (N.J. 1956); Miller v. Hoeschler, 105 N.W. 790 (Wis. 1905).

In brief, any inference as to intention should be "...influenced largely by considerations of public policy in favor of land utilization." RESTATEMENT, PROPERTY §476, comment g, p. 2983 (1944).

The Utah test of "reasonable necessity" should be balanced against the many other factors which weigh against an implied easement. Added to the already mentioned factors of the construction against the conveyor and preparer of the documents, the terms of the documents and the constraints of public policy are the special factors in the instant case of the lopsided accrual of benefits to the dominant tenement at the total expense of the servient tenement and the obvious lack of consideration to support an implied easement reservation. Also, inveighing against implication of an easement are the consideration paid by Mr. Lee for his property and the manner in which it was required to be paid. (See Affidavit in Support of Motion to Vacate Judgment.) The undisclosed \$30,000.00 downpayment required by the seller for some unknown, but suspect reason, while possibly conferring some less than legitimate tax benefit on Mr. Hill, has certainly proven to be a tax detriment to Mr. Lee, including the loss of \$30,000.00 of legitimate tax deductions. An additional detriment to Mr. Lee is his underinsured status as a title policyholder. No stretch of the



imagination could find any reciprocal benefit flowing to the servient tenement from the implied easement upon and over Mr. Lee's property.

In view of the preponderance of the pertinent factors and circumstances favoring a finding of no easement, California and New York precedents are not only suggestive, but also persuasive. The New York case, Kuczek v. Arpino, 319 N.Y.Supp.2d 253 (1971), denied an easement to a homeowner seeking to gain access to a cellar which the court suggested could probably be accessed by reopening a front entrance to the cellar. In California the court suggested that a landowner could gain access to the rear of her property by removal of a portion of a chicken shed. Orr v. Kirk, 224 P.2d 71 (Cal. 1950). The significant principle suggested by these cases, although probably by "strict necessity" jurisdictions, is that the minimal expense involved in developing one's own alternate access to obviously lower land use improvements, not to the land itself, should not overburden adjoining commercial property with a greater economic burden or loss. An implication of easement should arise only when the benefits and burdens to the adjoining property owners are relatively equal.

III. WHETHER THE TRIAL COURT ERRED IN DENYING THE  
ADMISSION OF TESTIMONY PERTAINING TO THE ECONOMIC LOSS TO  
DEFENDANTS-APPELLANTS IF THEIR PROPERTY SHOULD BE SUBJECTED TO  
THE EASEMENT CLAIMED BY PLAINTIFF-RESPONDENT.

In order to determine the relative burdens of an implied easement on the respective tenements, all implication factors impacting the tenements must be considered, especially the different costs, expenses, losses, limited uses, restraints and restrictions resulting from imposition of an implied easement. In the instant case Mr. Lee will lose a substantial business opportunity because of the easement's restraint against his developing and improving valuable commercial property. At the trial Judge Page refused to permit Mr. Lee to testify to the amount of loss he would sustain if an easement were imposed on the land he had planned to develop. (Tr. 67, 68.) It is, therefore, submitted that said ruling was in error and should justify a reversal of the judgment because without such evidence it is impossible to ascertain an important factor necessary to the determination of the existence or nonexistence of an implied easement. Reciprocity of benefits is impossible of determination if it cannot be determined concomitantly exactly what losses will be sustained by the property owners. RESTATEMENT, PROPERTY §476, comment h, p. 2985 (1944).

IV. WHETHER THE PARTIES BY IMPLICATION INTENDED A  
PERMANENT EASEMENT OR A REVOCABLE LICENSE.

The facts and circumstances of the present case suggest the implication of an oral license rather than an easement. A license, being a personal, revocable and unassignable privilege to do one or more acts on land without the ownership of any interest therein, fits the evidence of the instant case better than an easement which entails an interest in the land and is permanent, restricting thereby the free use of the fee. 25 AM. JUR. 2d Easements and Licenses §§1, 123 (1966). Even if Mr. Lee had promised or consented to the use of his land by others, there was no evidence of any consideration which he received for such alleged promise. No one acted in reliance thereon, and no one paid him for it. Even written documents expressly creating servitudes should be strictly construed in favor of the free use of land. Dressler v. Isaacs, 343 P.2d 714 (Or. 1959).

Mr. Lee testified that he and Mr. Hill had never discussed an agreement. (Tr. 64, 65.) It was also his testimony that he had no objection to the use of his property by others to access the storage stalls on the property adjoining his property if it didn't interfere with his use. (Tr. 17, 74, 82-87.) The clearest inference from Mr. Lee's testimony of conversations with Mr. Hill is that there was never a discussion

of an easement, although Mr. Lee did give oral consent to the use of his land by others. (Tr. 75, 86, 87.) With special emphasis he expressed his understanding that the use of his property by others was not to last forever. (Tr. 82.) Although the testimony of Mr. Lee was controverted by Mr. Hill with testimony that Mr. Lee had promised to give him an easement and had even agreed to an easement (Tr. 91.), it is only reasonable to believe that some expression of that promise or agreement would then appear in at least one of the conveyance documents which Mr. Hill had prepared.

The long standing Idaho case, Howes v. Harmon, 81 P.48 (1905), in addition to its clear distinguishing of a license from an easement, contains the persuasive suggestion that a court should not impress real property with a servitude pursuant to oral agreement because of the writing required by the statute of frauds, unless the evidence be clearly to the contrary.

#### CONCLUSION

It is respectfully submitted that Mr. and Mrs. Lee acquired their restaurant property free of an easement or encumbrance to adjoining land, but did agree to allow the permissive use of their rear parking lot to accommodate the prior use of the land until they should develop a higher and

better use for the same. It is suggested that the inordinate burden placed on the servient tenement is grossly inequitable compared to the minimal expense involved in developing Mrs. Butler's own alternate access to the four storage stalls that would lose access from the Lee property when Mr. Lee's commercial building is completed. The decision of the lower court should be reversed and vacated.

Dated this 3rd day of December, 1987.

PARKER, THORNLEY & CRITCHLOW

William J. Critchlow, III  
Charles T. Critchlow



Attorneys for Hank L. Lee and  
Janet W. Lee

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing BRIEF of APPELLANTS HANK L. LEE AND JANET LEE were mailed, postage prepaid, this 3rd day of December, 1987, to the following:

Pete N. Vlahos  
VLAHOS & SHARP  
Legal Forum Building  
2447 Kiesel Avenue  
Ogden, Utah 84401  
Attorneys for Respondent

