

1988

Mary Butler, Mary Hill v. Hank L. Lee, and Janet W. Lee : Brief of Respondent

Utah Supreme Court

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William J. Critchlow, III; Charles T. Critchlow; Parker, Thornley and Critchlow; Attorneys for Defendants/Appellants.

Pete N. Vlahos; Vlahos and Sharp; Attorney for Plaintiff/Respondent.

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IN THE SUPREME COURT FOR THE

STATE OF UTAH

MARY BUTLER, previously known)
as MARY HILL,)
)
Plaintiff/Respondent,)
)
vs.)
)
FRANK L. LEE AND JANET W. LEE,)
)
Defendants/Appellants.)

RESPONDENT'S BRIEF

CASE NO: 870302

88-0046-CA

PRIORITY 14B

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

PETE N. VLAHOS of
VLAHOS & SHARP
2447 Kiesel Avenue
Ogden, Utah 84401
(801) 621-2464

Attorney for
Plaintiff/Respondent

WILLIAM J. CRITCHLOW, III
CHARLES T. CRITCHLOW
BAKER THORNLEY & CRITCHLOW
610 Washington Blvd.
P.O. Box 107
Ogden, Utah 84402
(801) 399-3303

Attorneys for
Defendants/Appellants

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT FOR THE
STATE OF UTAH

MARY BUTLER, previously known)		
as MARY HILL,)		RESPONDENT'S BRIEF
Plaintiff/Respondent,)		
vs.)		CASE NO: 870302
HANK L. LEE AND JANET W. LEE,)		
Defendants/Appellants.)		PRIORITY 14B

STATEMENT OF FACTS

The Respondent and Jack Hill were husband and wife and during the course of their marriage had purchased two adjacent parcels of property; one known as the Winegar property and the other one known as the Wilcox property. (R. 26)

In approximately 1973 the Winegar property which had a building located on it was leased to the Appellants to be used and operated by them as a restaurant. (R. 26) Shortly after the leasing of the restaurant and property to the Appellants, the Respondent and her husband built a storage facility on the adjacent Wilcox property which was located towards the rear of the Wilcox property and ran roughly northeast to southwest parallel to the property line between the Winegar property and the Wilcox property. (R. 27)

The storage facility located upon the Wilcox property is 60 feet by approximately 144 feet with twelve storage bays on each side of the building, with 10 foot garage doors allowing access so as to accommodate boats and other recreational equipment. (R. 27)

The northwest side of the storage building is approximately six feet from the property line separating the Wilcox and the Winegar property and a portion of the Winegar property, approximately 24 feet in width and the length of the building, is used for access to storage units on the northwest side of the facility. Mr. Hill, the previous spouse of the Respondent, had discussed the building of the units with Mr. Lee, one of the Appellants, prior to the construction of the storage units and in addition the fact that a portion of the Winegar property would be used as access to the storage units on the northwest side of the facility. (R. 27)

The Appellants had leased the Winegar property before the storage facility was built until the Appellants purchased the Winegar property in 1981, and the Appellants had on a number of occasions requested to buy the Winegar property and had discussed with Mr. Hill the necessity of the use of a portion of the Winegar property by the storage facility over the years. (R. 28) At all times the

Appellants were aware of the use of a portion of the Winegar property for access to the storage units to the west of the facility.

In 1981 the Respondent and Mr. Hill were divorced and as part of the divorce settlement, the Respondent was awarded the Wilcox property and the storage facility thereon, and Mr. Hill was awarded the Winegar property and the building leased thereon. (R. 28)

Mr. Hill represented to the Respondent that she had a continuing right to use the Winegar property for access to the northwest units of the storage facility. After the transfer of the Wilcox property to the Respondent by Mr. Hill in 1981, Mr. Hill sold the Winegar property to the Appellants in September of 1981 and discussed the operation of the storage shed as it affected the property purchased by the Appellants, and that that use would continue even though nothing was placed in the contract to the sale to that effect. (R. 28)

The Respondent has continued to operate the storage facility since 1981 using a part of the adjacent Winegar property as access to the 12 west units of the storage facility which use the Appellants were aware of and have made no objection to until the fall of 1985. (R. 28, 29)

During the summer of 1985, the Appellants developed plans for the construction of a commercial building upon their rear parking lot and the Respondent then filed an action for Declaratory Judgment claiming an easement over the Appellants' rear parking lot for ingress and egress to the storage sheds due to the Appellants proposed construction preventing vehicular access to the storage units contained in the storage shed.

The trial Judge specifically found that if the Respondent is not allowed to use the Appellants' property for access to the west 12 units, then there would be no reasonable access thereto with the exception of access that could be obtained to the west units by removing the partition separating the two 30-foot units, thus making one 60-foot unit, but such access would be impractical and economically infeasible. (R. 29)

SUMMARY OF ARGUMENT

POINT I.

The trial Court's factual findings should be afforded great deference and not be overturned unless this Court finds that the trial Court has misapplied the law or that the trial Court's findings are clearly against the weight of the evidence.

POINT II.

An easement by implication or necessity has been previously defined by the Utah Supreme Court and therefore should be followed by this Court.

POINT III.

An easement by implication or necessity need not be inferred from written documents and can be found even with the express absence of a written document based on necessity.

POINT IV.

The lower Court found that the easement was reasonably necessary to the enjoyment of the dominant estate and thereby met case authority for this jurisdiction.

POINT V.

The trial Court correctly denied the admission or testimony pertaining to the economic loss to Defendants/Appellants.

POINT VI.

The Respondent is entitled to an easement by implication or necessity, or at the very least, to an irrevocable license coupled with an interest.

POINT VII.

If the Appellants' appeal is frivolous or for delay, then the Respondent is entitled to damages including

reasonable attorney's fees, or if the judgment is affirmed, then the Respondent is entitled to costs against the Appellants.

ARGUMENT

POINT I.

THE TRIAL COURT'S FACTUAL FINDINGS ARE AFFORDED GREAT DEFERENCE AND WILL NOT BE OVERTURNED UNLESS THE TRIAL COURT HAS MISAPPLIED THE LAW OR ITS FINDINGS ARE CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE.

This Court in Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982), ruled that the Appellate Court must afford great deference to the factual findings by a trial Court unless the trial Court has misapplied the law, or its findings are clearly against the evidence.

The lower Court in this case had the opportunity of a trial wherein the Respondent and her former spouse, Mr. Hill, both testified under oath as to the factual issues in question, and further, the Appellants, Mr. and Mrs. Lee, had the opportunity to also testify.

The Court after weighing the evidence, the testimony of the parties, reviewing Memorandums of Law submitted by the parties' counsel, and having taken the matter under advisement, found that the Plaintiff/Respondent had proven by a preponderance of the evidence that there was indeed an easement by implication or necessity.

Therefore, this reviewing or Appellate Court not only should, but must, afford great deference to those factual findings unless the Appellant can show that the trial Court has misapplied the law or that the trial Court's findings are clearly against the weight of the evidence, neither of which the Appellants have accomplished, therefore, the ruling of the lower Court should stand.

POINT II.

APPELLANTS DEFINITION OF AN EASEMENT BY
IMPLICATION OR NECESSITY IS INCORRECTLY
CITED.

Appellant refers to the Restatement of the Law of Property § 476 for a list of relevant factors to be considered by this Court in determining the existence of an implied easement or easement by implication or necessity, and refers specifically to eight requirements and claims that only two of the factors cited in its brief lend support to the finding of an easement in the present case.

The Respondent in this case submitted to the trial Court a Memorandum of Law on October 27, 1986, at the request of the trial Court Judge, dated October 14, 1986. (R. 17-25) In this Memorandum, Respondent cites the trial Court to the decisions of the Utah Supreme Court in examining and ruling on the requirements necessary for an easement by implication and necessity. In Chournos v. Alkema, 494

P.2d 950 (Utah 1972), this Court quoted extensively from the Utah Supreme Court of Adamson v. Brockbank, 185 P.2d 264 (Utah 1947), which found four requirements were necessary for an easement by implication or necessity which are as follows:

1. Unity of title followed by severance;
2. The time of severance, servitude was apparent, obvious and visible;
3. Easement was reasonably necessary to the enjoyment of the dominant estate; and
4. The use of the easement must be continuous as distinguished from one use from time-to-time when the occasion arises.

This Court over 40 years ago and as reiterated in 1972, requires the above cited factors in order to find an easement by implication or necessity. Therefore, this Court has no need for reliance on the Restatement of Property Law § 476, which is dated 1944 to consider the factors necessary in reviewing a decision as to a finding by a trial Court of an easement by implication or necessity, and only the four requirements cited need to be met in order to make that finding.

POINT III.

AN EASEMENT BY IMPLICATION OR NECESSITY
NEED NOT BE INFERRED FROM WRITTEN
DOCUMENTS BUT IS AN EXPRESS EXCEPTION TO
THE WRITING RULE AND FOUND BY NECESSITY

The Appellants cite the Court to the Utah Supreme Court case of Sears v. Riemersma, 655 P.2d 1105 (Utah 1982), as evidence that a contract should be resolved against the party who had the contract drawn. The Respondent admits that her former spouse, Mr. Hill, had the sale documents and title insurance prepared and that they contained no reference to a reservation of an easement. The Sears case did not involve an easement or a license or any type of interpretation of the Deed, but dealt specifically with the questions concerning the payment provisions of the contract and the promissory note such that the cited Sears case is actually inapplicable in the immediate case at hand.

The Appellants further cite the Court to the Restatement of Real Property Law regarding doubts and construing a conveyance which should be resolved in favor of the conveyees. Again, the Appellants are citing this Court to a legal treatise written in 1944 which is of no precedential value and is even doubtful as to its persuasive value in light of the Utah Supreme Court case as cited in Respondent's Memorandum which was filed with the lower Court, to-wit: Chournos v. Alkema, 494 P.2d 950 (Utah 1972); and Adamson v. Brockbank, 185 P.2d 264 (Utah 1947); and Savage v. Nielsen, 197 P.2d 117 (Utah 1948), which found that there were four requirements essential for an easement by

implication or necessity which have been previously cited, and further found in Savage v. Nielsen, as follows:

"The three upon which way of necessity is based is that all of the property is once owned by a single person. He divides it in two tracks and conveys away one track. The physical location of the other track is such that it is not reasonably accessible without crossing the track conveyed away. If the grantor retains the track which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right-of-way to and from the track retained. (Emphasis added) If he sells the track which is thus surrounded without mention of a means of ingress and egress, it is presumed that he intended to create a servient estate in himself to the extent of a right-of-way in favor of the other track of land..."

The Utah Supreme Court case of Savage v. Nielsen, does not follow the Restatement of Real Property in every aspect and specifically held that if a grantor (conveyor) retains property which is surrounded without access, then it is presumed [either by implication or necessity] that he [grantor/conveyor] intended to reserve a right-of-way to and from the property retained.

For the first time on appeal, the Appellant discusses the issues of two Utah statutes, Utah Code Annotated § 25-5-1 entitled An Estate or Interest in Real Property, and Utah Code Annotated § 57-1-11 entitled Claimant Out of Possession May Convey. Neither of these statutes convey to

the Respondent nor should they convey to this Court the Appellants implication that the premises are free from all encumbrances if there was no easement reservation. Additionally, it was well-know case law of this Court that any issue raised for the first time on appeal is not to be considered. Killian v. Oberhansly, 743 P.2d 1200 (Utah 1987) The Appellants did not raise the statutes in either their Answer nor at time of trial and may not raise them now.

The Appellants further indicate to this Court that typical of implied easement cases is that construction or interpretation of only one document of conveyance to determine the intent of the parties, yet the Appellants failed to supply any type of Utah case law, Pacific Reporter case law, legal treatise or legal periodicals to substantiate their claim and therefore Respondent would ask this Court to not consider the "typical" statement.

Again in the next to the last paragraph in Appellants' Point I, the Appellants refer to the Restatement § d. Terms of Conveyance which again should be considered only as a legal treatise having no persuasive or precedential value with this Court when considered in light of the three Utah Supreme Court cases previously cited.

Appellants in the final paragraph of Point I refer this Court to an Alaska Supreme Court case of Freightways Term. Co. v. Industrial & Com. Const., Inc., 381 P.2d 977 (Alaska 1963), by requesting this Court to carefully note that the Alaska law does not favor easements by implication because they detract from the rules of written instruments. A review of that case would indicate that the Supreme Court of the State of Alaska held that the evidence sustained the finding that the Plaintiff had an easement by oral grant and estoppel even though the documents indicated that there was no easement, as in the immediate case at hand.

POINT IV.

THE LOWER COURT SPECIFICALLY FOUND THAT THE EASEMENT WAS REASONABLY NECESSARY TO THE ENJOYMENT OF THE DOMINANT ESTATE AND FOUND AN EASEMENT BY IMPLICATION OR NECESSITY.

The Appellants correctly cite this Court to the essential elements of an easement by severance or necessity as found in the Utah Supreme Court case of Morris v. Blount, 161 P.2d 1127 (Utah 1916), as cited by Savage v. Nielsen, infra.

The Appellants would have this Court believe that Savage v. Nielsen, Id. at 122 as cited in their brief would request this Court to not only involve principals of construction as to determine what the real intent of the

parties was at the time of the conveyance, but also to make a thoughtful consideration of principals of wise public policy, and then further cites the Court to California, New Jersey, and Wisconsin Supreme Court law and other allegedly persuasive case authority. The Utah Supreme Court has considered the elements necessary for the finding of an easement by severance, implication or necessity and has spelled those requirements out, and has not required a careful or thoughtful consideration of principals of wise public policy as the Appellants would have this Court believe this Court stated in Savage v. Nielsen, Id. at 122. Page 122 of Savage spells out the four requirements of an easement by severance or necessity and then addresses the difference between an easement by necessity and an easement by prescription.

What the Utah test does require is that the easement be reasonably necessary to the enjoyment of the dominate estate which would imply consideration of other means of access and whether or not those would be more reasonable than requiring the easement by necessity. The trial Court specifically found after consideration of other means of ingress and egress as follows:

21. It is obvious in looking at the facility that if Plaintiff [Respondent] was not allowed to use Defendants' [Appellants] property for access to the

12 west units, there would be no reasonable access thereto except by foot. (Emphasis added)

22. Although access could be obtained to the west units by removing the partitions separating the two 30-foot units, thus making one 60-foot unit, such access would be impractical and economically infeasible.

That the use of that portion of Defendants' [Appellants] property immediately in front of the storage units to a width of 30 feet in front of said units running the length of the storage facility, is reasonably necessary for the continued operation of the storage facility on Plaintiff's property. (R. 29)

The lower Court Judge did specifically consider the reasonable necessity factor as weighed against other ingress and egress and found that the easement should be implied or an easement established by necessity because the easement was reasonably necessary to the enjoyment of the dominant estate, all of which is consistent with the cited Utah case law.

The question of the consideration paid by the Appellants for the property and the manner in which it was required to be paid are both irrelevant and immaterial to the issue at hand and were considered by the trial Judge in the Motion to Vacate based on Rule 60(b) of the Utah Rules of Civil Procedure, and were denied.

Wherefore, the trial Court in finding an easement by implication or necessity contrary to Appellants position,

did not have to consider public policy in the instant case but was required only to consider whether or not the easement was reasonably necessary to the enjoyment of the dominant estate, which the Court specifically found after considering that alternate routes of ingress and egress would be impractical and economically infeasible. This meets the Utah requirements and case law of this State, even in light of the California, Missouri, New Jersey, Wisconsin and New York case law cited by the Appellants.

POINT V.

THE TRIAL COURT DID NOT ERROR IN DENYING
THE ADMISSION OF TESTIMONY PERTAINING TO
THE ECONOMICAL LOSS TO DEFEN-
DANTS/APPELLANTS.

The Appellants cite this Court to a full page of reasons and factors why the trial Court should consider the relative burdens of an implied easement and state that reciprocity of benefits is impossible of determination if it cannot be determined concomitantly exactly what losses will be sustained by the property owners, and then cites this Court to the Restatement of Property § 476, h, page 2985 (1944).

A careful review of comment h, page 2985 and 2986, simply indicates that it is preferential that both the conveyor and the conveyee receive reciprocal benefits from the implication of an easement in favor of each. Again as

frequently stated in this brief, the Utah Supreme Court has not made as one of its requirements of the four requirements for the establishment of an easement by implication that there be reciprocal benefits to the conveyor and the conveyee, but has required that the easement be reasonably necessary for the enjoyment of the dominant estate. On this basis alone, Appellants Point III is irrelevant to the immediate case at hand.

Furthermore, 25 Am. Jur. 2d entitled Easements and Licenses, defines an easement as follows:

An easement is always distinct from the right to occupy and enjoy the land itself. It gives no title to the land in which it is imposed, and confers no right to participate in the profits arising therefrom.

...An easement has been said to be a privilege which the owner of one tenement has a right to enjoy over the tenement of another...It is a charge or burden on one estate, the servient for the benefit of another, the dominant.

The Respondent in this case is simply seeking to have established by the Court her right to use, not possession, of a portion of the servient estate as found by necessity or implication for her property, the dominant estate. The Respondent has in no way acquired possession of the land and the Appellants are free in any way to exercise use of the land as they desire allowing the Respondent only the right of ingress and egress to her property as was allowed by the

Appellants while they were lessees of the property from 1973 to 1981, and as allowed by the Appellants as owners of the property from 1981 until 1985, and as is now allowed by the judgment of the trial Court after having heard the facts in dispute and having properly applied the law and making findings with the weight of the evidence.

POINT VI.

THE PARTIES BY INTENDED AN EASEMENT
BY IMPLICATION OR NECESSITY OR AT THE
VERY LEAST, AN IRREVOCABLE LICENSE
COUPLED WITH AN INTEREST.

The Appellants correctly cite this Court to 25 Am. Jur 2d entitled Easements and Licenses (1966) wherein it states as follows:

An easement always implies an interest in the land in and over which it is to be enjoyed, whereas a license merely confers a personal privilege to do some act or acts on the land without possessing an estate therein. Furthermore, an easement can be created only by grant, or by implication or prescription, each of which presupposes a grant, whereas a license may be created by parole or by an act of the licensor sufficient to show his assent. Id, 419

25 Am. Jur. 2d further states on page 525 as follows:

A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein.

and further states at pages 530 and 531 as follows:

It is generally held that a license coupled with a grant or interest is irrevocable as long as the interest continues. It is said, in this connection, that a license coupled with an interest exists where the party obtaining a license to do a thing also acquires a right to do it. In such case, the authority conferred is not merely a permission; it amounts to a grant, or an easement, and where it is so construed it amounts to a grant, or an easement, and it is so construed it takes, as such, the qualities of a right in the land itself. ...

In some jurisdictions, where a licensee has entered under a parol license and has expended money or its equivalent in labor, the license becomes irrevocable. The licensee acquires a right of entry on the licensor's land for the purpose of maintaining his structures or his rights under his license, and the license will continue for so long a time as its nature calls for.

Due to a lack of case law in the Utah jurisdiction on licenses, both Appellants and Respondent rely on legal treatises and persuasive case law of other jurisdictions.

The Oklahoma Supreme Court further explained in Anchor Stone and Materials Co. v. Carlin, 436 P.2d 650 (Okla. 1968) that where a licensee has incurred expenses in making valuable improvements to the property in reliance thereon, inuring to the benefit of the licensor-land owner, and which will continue to exist and benefit such land owner after termination of the license. This would constitute an

executed license or license by estoppel, which is irrevocable.

Even if this Court were to overcome the burden of giving great deference to the trial Court's findings and rule that the trial Court misapplied the law or found against the weight of the evidence, at the very least, the Respondent should be granted an irrevocable license coupled with an interest. The Appellants have acknowledged giving oral consent to the use of their land by the Respondent such that a license could exist and this license is reasonably necessary for the Respondent to use in order to gain access to her property and use such that it should be deemed coupled with an interest, therefore making the license an irrevocable one.

The Appellants cite this Court to the Idaho case of Howes v. Harmon, 81 P.48 (Ida. 1905), and again raise the question of statute of frauds which should not be considered as being raised for the first time on appeal.

Therefore, even if the Court were to find that the trial Court had misapplied the law and/or found against the weight of the evidence in finding the Respondent is entitled to an easement by implication or necessity, there should at least be an irrevocable oral license granting the Respondent ingress and egress.

POINT VII.

IF THE APPELLANTS APPEAL IS FRIVOLOUS OR FOR DELAY, RESPONDENT IS ENTITLED TO DAMAGES INCLUDING REASONABLE ATTORNEY'S FEES, OR IF THE JUDGMENT IS AFFIRMED, RESPONDENT IS ENTITLED TO COSTS AGAINST THE APPELLANT.

Utah Rules of Appellant Procedure, Rule 33, entitled "Damages for Delay or Frivolous Appeal" states as follows:

(a) If the court shall determine that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party.

Should the court determine that the Appellants appeal is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees to the Respondent. Rule 34 of the Utah Rules of Appellant Procedure entitled "Award of Costs" states as follows:

(a) To Whom Allowed: Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or by the court; if a judgment or an order is affirmed, costs shall be taxed against appellant unless otherwise ordered;...

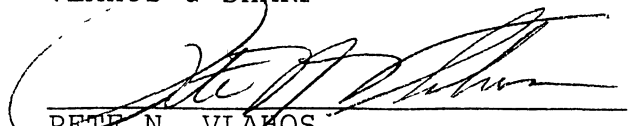
Should appellant's appeal be dismissed or respondent's judgment affirmed, costs should be taxed against the appellant unless otherwise ordered.

CONCLUSION

This Court after carefully considering the previous Utah Supreme Court cases directly in point in this matter which give the four necessary requirements for an easement by implication or necessity and affording great deference to the trial Court's factual findings should find that the trial Court has not misapplied the law and that the findings are clearly with the weight of the evidence and uphold or affirm the trial Court's decision as the trial Court has found specifically that the easement is reasonably necessary to the enjoyment of the dominant estate and other means of ingress and egress would be impractical and economically infeasible, and that even though the written documents do not allow for an easement, that is why an easement by necessity providing an exception to the writing rule will be implied, and further if this Court finds that the Appellants' appeal was frivolous or for delay, that attorney's fees and costs should be awarded to the Respondent, or if the trial Court decision is reaffirmed at a minimum costs should be awarded to the Respondent

RESPECTFULLY SUBMITTED this 31 day of December, 1987.

VLAHOS & SHARP


PETE N. VLAHOS
Attorney for Plaintiff/
Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of January, 1988, I mailed four (4) true and correct copies of the above and foregoing BRIEF OF RESPONDENT by placing same in the U.S. Mail postage prepaid and addressed to the following:

William J. Critchlow, III
Charles T. Critchlow
2610 Washington Blvd.
P.O. Box 107
Ogden, Utah 84402

