1980

# Donna Charlene Hadden and Stanley William Hadden v. Farr Construction Company, Wayne Farr and Miland Farr : Brief of Appellants

Utah Supreme Court


DARRELL G. RENSTROM; Attorney for Appellants;DONALD C. HUGHES, JR.; Attorney for Respondents;

IN THE SUPREME COURT FOR THE

STATE OF UTAH

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| DONNA CHARLENE HADDEN and STANLEY WILLIAM HADDEN, | ) | |
| Plaintiffs - Appellants, | ) | |
| vs. | ) | Case No. |
| FARR CONSTRUCTION COMPANY WAYNE FARR and MILAND FARR | ) | 16811 |
| Defendants - Respondents. | ) | |

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# BRIEF OF APPELLANTS

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Appeal from the Decision of the Second Judicial
District Court for Weber County, Utah
The Honorable John F. Wahlquist, Judge

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IN THE SUPREME COURT FOR THE

STATE OF UTAH

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| DONNA CHARLENE HADDEN and STANLEY WILLIAM HADDEN, | ) | |
| Plaintiff/Appellants, | ) | PLAINTIFF/APPELLANT'S BRIEF |
| vs. | ) | Case No. |
| FARR CONSTRUCTION COMPANY, WAYNE FARR AND MILAND FARR, | ) | 16811 |
| Defendant/Respondents. | ) | |

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## NATURE AND TYPE OF CASE

The plaintiff/appellants seek damages from the defendant/respondents for the interferrance with and destruction of plaintiff/appellants rights to use certain spring waters located on the defendant/respondents property.

## DISPOSITION IN LOWER COURT

The Honorable Judge John F. Wahlquist of the District Court of Weber County ordered a non-suit on the morning set for trial on oral motion of the defendant/respondent's attorney on the grounds that the plaintiff/appellants could not show that they had rights to certain spring waters prior to the year 1903.

## APPELLANT'S PRAYER

That said matter be remanded to the District Court of Weber County for trial.

## STATEMENT OF FACTS

The plaintiff/appellants if given the opportunity would prove the following:

That the plaintiff/appellants or their predecessors in interest had used waters from a spring on land recently purchased by the defendant/respondents.

That the plaintiff/appellants will produce witnesses showing that the plaintiff/appellants or their predecessors had used said waters for irrigation and potable purposes since 1920.

That the original piece of ground in question was used for farming purposes and was owned by the parents of one Mrs. Bernice Bills and the same was owned by them from 1906 to 1940 when the said property in question was divided and that during all of that time to the recall of said Mrs. Bernice Bills (said recollection begins approximately 1920) spring water was delivered from the spring to the old family farmhouse where Mrs. Bernice Bills was raised.

That after 1940 the farm was divided and the plaintiff/appellants herein purchased the old family farmhouse and have continuously used the water from the spring in question (located on another portion of the old farm and not owned by plaintiff/appellants) during all of their tenure for both irrigation and potable purposes.

That the defendant/respondents within the last several years acquired a portion of the old farm in question and upon which the spring in question rests apart from the old family farmhouse.

That upon acquiring title to said property the defendant/respondents knowing full well of the plaintiff/appellant's established use and rights to said spring water destroyed the water pipes leading said water to the

plaintiff/appellants home and further in wanton disregard of their rights destroyed the spring and holding box.

## QUESTION OF LAW

Could someone acquire water rights to a small spring confined to their property between legislative acts of 1903 and 1935 and pass the same on to subsequent owners.

## PLAINTIFF/APPELLANT'S ARGUMENT

### POINT I

THE TRIAL COURT HAS MADE ELABORATE FINDINGS OF FACT WITHOUT A TRIAL OR STIPULATION AND THE SAME ARE THE COURT'S FANTASIES.

If one were to look at the record and the court's Findings of Fact, it leaves a great chasm between the two bridged by the court's imagination.

The following are the facts as rendered by His Honor Judge John F. Wahlquist with that part underlined which plaintiff/appellants claim there is nothing in the record to sustain such a finding:

> "1. Immediately before the scheduled trial, a pre-trial conference was held with the attorneys for each side. The attorneys substantially agreed on what part of the Findings of Fact would be if the case were submitted to a jury. Those facts are as follows:"
>
> "A. The area in question is bordered on the south by a plateau that contains Hill Air Force Base. Just north of the plateau, the land breaks very abruptly down to a new flat area which is adequately described as the valley of the Weber River, and is a wide, expansive area, where the river at one time or another has meandered, causing a rich, flat area. The plaintiff/appellant's land in question is on or near this rich river flat, and may be characterized as a large building lot."

The plaintiff/appellant's land cannot be called a large building lot as this suggests no buildings presently exist on said land, which in fact plaintiff/appellants will show and prove that there is a

family residence on the same and has been for over 60 years. That the balance of said paragraph is without factual support in the record but could conceivably be arrived at, by the court taking judicial notice on its' own, however, plaintiff/appellants do not take exception to this portion.

> "B. Before the turn of the century, the entire area, including both that belonging to the plaintiff/appellants and to defendants/respondents went into private ownership. Originally, this belonged to the Union Pacific Railroad, and is all part of the same section. Before the turn of the century, it passed from the railroad into a series of private ownerships. One of the owners thereon is the Ritters."

Plaintiff/appellants have no exception.

> "C. While the plaintiff/appellants have alleged that the basis of their water right was the appropriation of waters before enactment of the 1903 statute, the plaintiff/appellants did concede at that time, when asked, and continue to concede, that the earliest evidence they would have would come from a lady who is now in her 60's, and was a "Ritter," who would testify that when she was a young girl she recalls her father using the water from the spring to irrigate a garden. The location of the garden (where the water was used) was not offered."

Plaintiff/appellants evidence will not limit their evidence to the use of a garden but will - prove - that said water was piped to the family home (now owned by plaintiff/appellants) for irrigation and potable purposes.

> "D. The plaintiff/appellants allege that, at maximum, the flow from the spring was approximately 20 gallons per minute, and that for a good portion of the year it would dry up. It is not likely, therefore, that the water could have moved very far before it was piped for irrigation purposes."

Plaintiff/appellants dispute the entire finding of the court.

> "E. A general map of the area is attached to the complaint, and is obviously a portion of a "recorder's plat." This map discloses that the spring itself is located on

the defendant/respondent Farr's property, and that the pipe runs some 300 feet from the site of the spring, and a concrete box there inserted, over across the road, and some adjoining lands, and eventually reaches the boundary of the plaintiff/appellant's property. Plaintiff/appellants further allege that they are entitled to the majority of the water coming from this spring -- approximately sixty (60%) percent."

No exception, but plaintiff/appellants would show that the road in question came into existence as it was carved out of the old family farm and after the rights of plaintiff/appellants and predecessors had been established.

"F. The parties agree, for this motion, that the effectiveness of the concrete box and pipe as a water collection device was destroyed by construction work, carried out by the Farr Construction Company recently."

Plaintiff/appellants have no exceptions.

"G. The parties agree that the box, together with the pipe, were installed in the year of 1935, but the exact time of the installation is not available."

Plaintiff/appellants do not agree with the date in question.

"H. The parties agree that both the lands owned by the defendant/respondents, and the lands now owned by the plaintiff/appellants, were, at the time the spring was in use in the 1920's, owned by the same person as one land holding."

Plaintiff/appellants have no exceptions.

"I. The parties agree that in their natural state, the little spring came to the surface and then soaked back into the ground, before leaving the property owned by the land owner."

Plaintiff/appellants contend this finding is ambiguous and that the water when it came to the surface never did leave the original owners land, but the same was captured, retained and delivered to the family farmhouse.

"J. The parties agree that the properties now owned

by the defendant/respondents were the first properties sold, in the sense that they were sold or alienated by the then owner while he continued to hold the plaintiff/appellant's lands; and later, the plaintiff/appellant's lands were transferred. The parties agree that there is no evidence of a written contract or any reservation of water right or easement known or available as evidence."

Plaintiff/appellants take exception to the entire finding.

2. Plaintiff/appellants take no exceptions.

3. Plaintiff/appellants take no exceptions.

4. Plaintiff/appellants take no exceptions.

5. Plaintiff/appellants take no exceptions.

Based upon the foregoing plaintiff/appellants contend the trial court has improperly found facts absent from any record or stipulation.

PLAINTIFF/APPELLANT'S ARGUMENT

POINT II

THE SUPREME COURT OF UTAH CARVED OUT A SERIES OF EXCEPTIONS TO THE 1903 STATUTE INVOLVING THE APPROPRIATION OF WATER AND PLAINTIFF/APPELLANT FALL WITHIN THE EXCEPTION.

The lower court seems to concede plaintiff/appellants position if they could prove a certain set of facts. Plaintiff/appellants maintain that it can and will if given the opportunity of a trial prove they fall within the exception.

The law of the case is as follows:

Prior to 1903, a person acquired title or ownership to waters merely by putting waters to beneficial use with some form of posting. However, in the year 1903, the legislature adopted a statute with the following language:

"The water of all streams and other sources in this state, whether flowing above or under the ground in known or defined natural channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof."

In 1935, the legislature adopted new language amending the 1903 language as follows:

> "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."

There is no question that the above new language in 1935 was brought about due to a decision handed down by the Utah State Supreme Court on January 2, 1935, known as Wrathall v. Johnson, 86 U. 50, 40 P. 2d 755.

In that decision, the Supreme Court of the State held that an appropriator of water actually diverting water and applying it to beneficial use, but failing to file an application in the State Engineer's office, had priority to right sought to be acquired by a subsequent filing of an application. It further held that a landowner under whose land there exists a source of supply of water may draw therefro to fully supply his needs as long as no prior appropriator's supply is appreciably or sensibly diminished, and further provided that he could not take a quantity of water to appreciably and visibly diminish the quantity of water of the prior appropriator (see attached case).

While it would appear that between 1903 and 1935, there was a requirement to file claims with the State Engineer's office in order to appropriate water, there were exceptions. As early as 1918 in Peterson v. Eureka Hill Mining Company, 53 Utah 70, 176 Pac. 729, the Court enunciated the following principle:

> "Where a mining company has appropriated the waters of a spring located on the public domain and has subsequently acquired title to the premises, another cannot over the owner's protest, acquire any rights to such waters by making application to the State Engineer's office.

It further quoted in its' decision from Kinney's work in irrigation:

"The waters from springs arising upon lands that have been segregated from the public domain and the title thereto has passed into private ownership cannot be appropriated by a person other than the owner of the land unless the waters from the springs should flow below the tract of land whereon the same is located."

The Supreme Court cited several cases in support of this proposition: Willow Creek Irrigation Company v. Michaelson, 21 Utah 248, 60 Pac. 943, 51 L.R.A. 280, 31, An. St. Rep. 687.

Again in 1925, the Utah State Supreme Court in the Deseret Livestock Co. v. Hooppiania et. al., while holding to the principle that a method established to secure the rights to unappropriated waters is limited to the method or means prescribed by law, it also held that perculating waters on private lands were not subject to appropriation.

CONCLUSION

That the plaintiff/appellants should be entitled to a trial on the facts of the case in order to prove that it falls within the exceptions which the trial-court concedes exist.

WHEREFORE, plaintiff/appellants respectfully pray that the Supreme Court order said matter remanded to the District Court of Weber County for re-trial.

DATED this 8th day of February 1980.

DARRELL G. RENSTROM
Attorney for Plaintiff/Appellants

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing brief was mailed to the defendant/respondent's attorney, Mr. Donald C. Hughes, Jr., at his address at 2411 Kiesel Ave, Ogden, Utah 84401 on this 8th day of February 1980 and I further certify that 11 copies of the above and foregoing brief were mailed to the Utah State Supreme Court on the same date.

DARRELL G. RENSTROM
Attorney for Plaintiff/Appellants