1980

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

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

DONNA CHARLENE HADDEN and STANLEY WILLIAM HADDEN, Plaintiffs/Appellants,	)	
-vs-	0	
FARR CONSTRUCTION COMPANY, WAYNE FARR and MILAND FARR, Defendants/Respondents.	)	Case No. 16811

BRIEF OF RESPONDENT

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

DONNA CHARLENE HADDEN and STANLEY WILLIAM HADDEN, Plaintiff/Appellants, -vs- FARR CONSTRUCTION COMPANY, WAYNE FARR and MILAND FARR, Defendant/Respondents.	Defendant/Respondents Brief Case No. 16811

NATURE OF CASE

The Plaintiff/Appellants, hereinafter referred to as Plaintiff, seek damages from the Defendant/Respondents, hereinafter referred to as Defendant, for interference with certain claimed water rights in a spring located on Defendant's property.

DISPOSITION IN LOWER COURT

The Honorable John F. Walquist of the District Court of Weber County held a pre-trial conference the morning of trial and requested each side to state what evidence they were capable of producing. Upon hearing the evidence of the Plaintiff, the Judge ruled that even if they were able to prove all that they alleged, they would be unable to maintain a cause of action, and the Court, therefore, dismissed Plaintiff's Complaint.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the decision of the District Court of Weber County upheld and sustained.

STATEMENT OF FACTS

The morning of the trial, in a pre-trial conference, the Court requested each side through their attorneys to state the facts and anticipated proof. The facts stated by the Plaintiff are those that the Court determined as Findings of Fact in the Court's Memorandum Decision which in essence are:

1. The case involves a dispute over water rights to a spring that formerly existed on ground just north of the Hill Air Force Base plateau.

2. The property passed under the ownership of the Ritter family, who evidently in the 1920's developed a spring in the area and about the year 1935 installed a collection box to gather water for the spring.

3. During the 1940's, the Ritter family alienated a portion of the ground containing the spring. Ultimately, this portion of the ground containing the spring was purchased by the Defendant.

4. Another portion of the property ultimately came into the hands of the Plaintiff.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN MAKING FINDINGS OF FACT FOR THE PURPOSE OF GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

The Trial Court granted Defendant's motion to dismiss Plaintiff's Complaint for failure to state a cause of action upon which relief may be granted. The Court, in pre-trial conference, asked each side what facts they were going to be able to prove at trial. The Plaintiff admitted to their attorney that they would be unable to provide any evidence that would show use of a water right prior to 1903. Paragraph 3 of Plaintiff's Complaint indicates, at best, that 1909 is the first possible year of any water usage. Plaintiff further indicated through affidavit of Bernice Bills that she had childhood recollections dating to about the year 1920 for use of the water in question. The Findings of Fact entered for purpose of Defendant's motion to dismiss all come from the allegations contained on the face of Plaintiff's Complaint, Plaintiff's Answers to Interrogatories, and the representations of Plaintiff's counsel.

POINT II.

PLAINTIFFS SEEK TO FIND AN EXCEPTION TO THE GENERAL RULE THAT WATER RIGHTS MUST BE ACQUIRED BY APPROPRIATION AND FILING WITH THE STATE ENGINEER'S OFFICE.

Plaintiff's admit in their brief that to prevail they must prove an exception to the general rule as enunciated in the 1903 statute which is correctly quoted in Plaintiff's

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

The Plaintiffs in Point II of their brief assert that an exception to the general rule exists for percolating waters. Case law has established three different kinds of underground water:

1. Waters that are part of definite underground channels.

2. Waters that are part of the underflow or support flow of a surface stream.

3. Percolating waters.

Deseret Livestock Co. v. Hooppiania, 66 Utah 25, 239 P 479; Summary of Utah Real Property Law, Brigham Young University Legal Studies, J. Reuben Clark Law School, Volume 2, Page 635. The first two categories on definite underground channels and those waters that make up the support or underflow of surface streams are clearly not at issue in this case and were clearly handled by the 1903 law. The Plaintiff relies on the case of Peterson v. Eureka Hill Mining Company, 53 Utah 70, 176 Pac. 729, and its statement:

> 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.

Two elements become crucial to this exception enunciated by the Utah Court:

1. The spring be initially located on the public domain and user of the spring subsequently acquires ownership to the land; and

2. The water does not flow below the tract of land whereon the same is located.

It is clear that we are not dealing with this kind of exception as outlined in Peterson. Plaintiffs have admitted in their Interrogatories and in their representations to the Court that this land has not been in the public domain since well before 1903. The facts enunciated in this case by Plaintiff's counsel as contained in Plaintiff's Complaint further fail the second element of the exception in that they have affirmatively alleged that the water from the spring ran through a pipe below the property whereon the spring is located. It is also essential to note that the Plaintiffs have never at any time owned or claimed ownership of the ground upon which the spring is located.

The general law in Utah from 1925 on this subject is contained in Hooppiania. The Court is clear in its statement that the manner prescribed by the 1903 law of appropriating and filing with the State Engineer was the exclusive way of determining water rights.

Plaintiffs also rely on the case of Wrathall v. Johnson, 86 Utah 50, 40 P. 2d 755. The Wrathall decision is not a clear basis to establish authority. Justice Moffat in his main opinion seems to be attempting to overrule Hooppiania, however, Justice Moffat is unable to secure a majority of the Court to agree on anything but the result of remanding the case back to the District Court for trial. Both of the concurring decisions should be read for their limitation on Justice Moffat's attempted overturning of the Hooppiania decision. Even if the full implication of Justice Moffat's words are taken literally the net result of his decision is "a landowner under whose land there exists a source of supply may draw therefrom the full supply of his needs as long as no prior appropriators supplies appreciably or sensibly diminish." 40 P. 2d at 774. The legislature took the impact of Justice Moffat's decision to mean that artesian wells, basins, and wells in general were now to be called percolating water, and therefore not subject to the statute requiring appropriation and registration through the State Engineer's office and that appropriation may not be the exclusive means of appropriating waters from wells. The legislature which was in session at the time of Justice Moffat's decision immediately passed the 1935 law declaring all water, whether subterrain or surface, to be subject to requirements of appropriation and registration through the State Engineer's office.

In any event, even if Justice Moffat's decision is given full impact, the facts proferred by the Plaintiffs do not constitute a cause of action under Wrathall. That situation alleged in Plaintiff's Complaint is simply a spring on another property owner's land with a pipe running from the spring off the other party's ground and unto Plaintiff's ground, which is a far cry from the fact situation in Wrathall.

The facts proferred by Plaintiff in no way fit either Justice Moffat's definition of percolation or the more standard definitions of percolation enunciated by the Utah Court. The definitions of percolation that have been adopted by the Utah Court are reflective of a state of geology and hydrology of the time that they are made. The Court has given an excellent discussion and critique of percolating waters in Riordan v. Westwood, 203 P. 2d 922, 924 ff.

POINT III.

EVEN IF PLAINTIFFS ARE CORRECT IN ESTABLISHING AN EXCEPTION TO THE LAW OF APPROPRIATION, ANY WATER RIGHTS IN THE SPRING HAVE LONG SINCE BEEN CONVEYED TO THE DEFENDANT.

Even if Plaintiffs are correct, and this particular spring does fall within the meaning of percolating water, Plaintiff's predecessors in interest long ago conveyed away any right to the water.

> Until 1935, the decisions of this Court created the waters of artesian basins as percolating waters and such the ownership went with the owner of the ground where such waters were located and were not considered to be the subject of appropriation. (Riordan Supra, 203 P. 2d at 925.)

It is clear that if Plaintiff's predecessor in interest did in fact establish a water right in an artesian basin as in this particular spring, when Plaintiff's predecessor in interest divided the land and sold the spring, he sold the right to the waters. Plaintiffs have not asserted nor proferre nor offered any evidence of a reservation of any kind.

Subsequent to 1935, artesian basins have not been considered percolating waters placing them outside of the reach of the statute and necessity of appropriation and filing through the State Engineer's office. Riordan Supra.

CONCLUSION

The Trial Court was correct in taking the facts as proferred by Plaintiff's counsel at the pre-trial hearing based upon Plaintiff's Complaint, Plaintiff's affidavits, and Plaintiff's Answers to Interrogatories, and accepting them as true for purposes of Defendant's motion to dismiss.

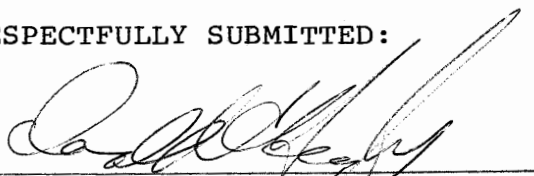
Plaintiff's asserted facts do not create an exception to the general rule that water rights are acquired in Utah by appropriation and filing with the State Engineer's office.

Even if everything that Plaintiff says is taken as true and a water right was created in Plaintiff's predecessor

in interest, that water right was sold and ultimately conveyed to the Defendants where any water right ultimately presides. It is interesting to note that even in Plaintiff's own case Peterson v. Eureka Hill Mining Company, Supra, acquisition of the premises upon which the spring exists is an essential element. This Court should affirm the Trial Court's decision to dismiss Plaintiff's Complaint.

DATED March 6, 1980.

RESPECTFULLY SUBMITTED:



DONALD C. HUGHES, JR.
Attorney for Defendant/Respondents

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the above and foregoing brief to Darrell G. Renstrom, Plaintiff/Appellant's attorney, 2640 Washington Boulevard, Ogden, Utah 84401, and I further certify that eleven copies of the above and foregoing brief were delivered to the Supreme Court on the 10th day of March, 1980.

Shon L. Hay
SECRETARY