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Maybell Griffiths v. Archulious Buttars Archibald and David Archibald : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAYBELL GRIFFITHS,

Plaintiff and Appellant

vs.

ARCHULIOUS BUTTARS ARCHIBALD
and DAVID ARCHIBALD,

Defendants and Respondents.

APPELLANT'S REPLY BRIEF

Case No. 8135

FILED

APR - 6 1954

Clerk, Supreme Court, Utah

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Appeal from the District Court of the First
Judicial District of the State of Utah
In and for the County of Cache

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendants and Respondents.

STATEMENT

Defendants in their statement of facts as contained in their brief have stated new material not in accordance with the findings of the jury. Defendants have also cited portions of previous opinions of this Court in an attempt to find a new law in Utah in relation to presumptions as applied to easements. Plaintiff therefore feels it is necessary to file a reply brief.

STATEMENT OF POINTS

POINT I: THE DEFENDANTS FAILED TO OBSERVE RULE 75 (p) IN MAKING THEIR STATEMENT OF FACTS IN THEIR BRIEF AND INCLUDED STATEMENTS INCONSISTENT WITH THE FACTS, AND DID NOT CONTRAVERT PLAINTIFF'S STATEMENT OF FACTS.

POINT II: THE DEFENDANTS INCONSEQUENTLY CITE PORTIONS OF PREVIOUS OPINIONS OF THIS COURT TO GIVE SUPPORT TO THEIR THEORY OF THE LAW OF PRESUMPTIONS AS APPLIED TO EASEMENTS.

ARGUMENT - POINT I

The Utah Rules of Civil Procedure were revised to take effect January 1, 1980, "to secure the just, speedy, and inexpensive determination of every action." Accordingly Rule 75 (p) (2) paragraph two provides:

"If the respondent agrees with the statement of facts set forth in appellant's brief he shall so indicate. If he controverts it, he shall state wherein such statement is inconsistent with the facts and shall make a statement of the facts as he finds them giving reference to the pages of the record supporting his state-

ment and controverting appellant's statement . . ."

Respondents do not controvert any of appellant's statements of fact in the prescribed manner, but contrary to the above rule make their own statement of facts part of which requires clarification and part of which is inconsistent with the facts as the jury found.

On pages 1 and 2 of respondents' brief they attempt to find an inconsistency in the answers of plaintiff on cross-examination and re-direct examination. It should be noted that on page 9 of the reporter's transcript of the proceedings most of the questions asked dealt with the question whether anyone made a verbal objection to plaintiff's use of the ditch. It is clear that this line of questioning was still on plaintiff's mind when she was

asked, "You don't claim you were using it against the will of Archuleta prior to 1962, do you? You weren't using it against her will, were you?" because plaintiff answered, "Well, she never objected or said a word about it." Plaintiff was then asked, "Well, you weren't using it against her will, were you?" With the question of whether defendants had ever made a verbal objection to her using the ditch still on her mind, plaintiff answered, "No". To make it clear that this was her meaning plaintiff was asked on re-direct examination, "What did you mean by 'against her will'?" Plaintiff answered, "A verbal opposition to using it" (Tr. 30).

Defendants then attempt to find on page 40 of the reporter's transcript an admission by plaintiff that "adverse and hostile use of the ditch began in 1962."

Even after defendants' counsel had read the legal definition of "hostile" (Tr. 34) (that it does not mean "ill will" but means only that "one in possession of land claims the exclusive right thereto"-- 1 Am. Jur. p. 472) he appears to be confused as to the meaning of the word for he asks, "Tell the jury when this hostility or this ill will between you and your sister arose." The question as stated did not use the legal definition of the word "hostile" and hence was not referring to when plaintiff claimed to be using the ditch adverse to defendants or when she started using it under a claim of right, but referred only to when the two sisters stopped feeling friendly towards one another.

Skipping for the moment to the bottom of page 2 of defendants' brief, we find

that they claim the jury understood thoroughly what was meant by the use of the term 'hostile', because it was discussed as bearing on the question of use by or without permission," even though defendants' own counsel was confused as to its meaning after he had read the legal definition of the word "hostile". Prior to the discussion referred to by defendants on page 74 of the reporter's transcript the jury had been told that "hostile" meant a number of things. On page 33 of the reporter's transcript plaintiff is asked on cross-examination:

Q. Now, Mrs. Griffiths, do you understand, so that you won't figure I'm confusing you and your lawyer, do you understand what the term "hostile" means?

A. No.

Q. You don't know what "hostile" means?

A. No; will you explain it to me?

Q. Do you remember the last war?

A. Yes

Q. Did you ever read anything about the United States being in a war with hostile Japanese forces?

A. Yes

Q. Do you know now what "hostile" means?

A. They didn't know their rights, I guess.

Q. How much schooling have you had?

A. The eighth grade.

Q. And how old are you, Mrs. Griffiths?

A. Sixty

Q. And you don't know what the term "hostile" means. Mr. Perry, will you explain to your client, because I want this next question--

Mr. Perry: You do it.

Mr. Preston: I thought maybe she'd understand it better.

Mr. Perry: I don't understand it the way you do, I will admit, but you explain it like you understand the word.

Mr. Preston: I'll ask the bailiff to get me a dictionary . . .

Mr. Perry: I think there's a legal definition in American Jurisprudence.

THE COURT: I notice in the definition that bigger words are used than the word "hostile".

Mr. Perry: It's not venomous.

C. The definition of the word "hostile" given by the lexicographer--a man that writes legal books--means, "Showing ill will and malevolence or a desire to thwart--that means block--or to do injury to." That means an attitude hostile, being against another person.

Mr. Perry: Now read the rest of it.

C. Well, it says, "Does not correctly state the character of the occupancy necessary to create adverse possession," and so on. "It means only the one in possession claims the exclusive rights thereto" and so on. Now, since the lawyers can't get the legal meaning of that, why, maybe I shouldn't ask you to understand it.

Defendants' counsel, however, remained confused as to the meaning of "hostile" for he said it was synonymous with "ill

will" (Tr. 40); and that it was the feeling that arose when plaintiff brought a law suit against her sister in 1952 (Tr. 40, 41). The Court also was confused as to the meaning of "hostile", and at one time used it synonymously with "venomous" (Tr. 28) and later helped confuse the jury by using "hostile" as an antonym to "friendly" (Tr. 74). After the brief discussion on page 74 of the reporter's transcript the jury is told that "hostile" means the opposite of "friendly" (Inst. No. One, Question 3); exclusive; adverse; and something else in addition to exclusive and adverse (Inst. No. One, paragraph 3, and see plaintiff's brief pp. 29 to 31). Defendants claim that all these varied meanings of the word "hostile" are supposedly made clear to the jury by the state-

ment on page 74 of the reporter's transcript made by defendants' counsel, "That's right, but it (hostile) also has a bearing whether he used it with or without permission."

Defendants also claim that the above confusion as to the meaning of the word "hostile" was cleared up by that portion of Instruction No. One, paragraph three which read, "If you find that Mrs. Archibald permitted the use of this ditch as a neighborly, or even a sisterly accommodation, you cannot find that the use was hostile and adverse." But the court fails to tell the jury what the meaning of "neighborly accommodation" is in Utah (See plaintiff's brief pp. 39-40) and this statement following the previous definitions of the word "hostile" in the instruction

does not clear up the meaning of the word in the minds of the jury.

Returning to page two of defendants' brief they claim that "Defendants' exhibit '2' is the first notice defendant had that her sister, plaintiff, claimed an absolute right to the use of the ditch". Defendants so claimed at the trial, but the jury found that plaintiff's twenty year use was exclusive and was "evidenced by such acts and conduct as are sufficient to put a man or woman of ordinary prudence on notice of the fact that the ditchway in question is claimed by the plaintiff as her own" (Inst. No. One; Special Verdict). In other words contrary to defendants' contention the jury found defendants knew plaintiff claimed the ditch as hers for twenty years before

receiving the letter in question. A finding by the jury that plaintiff claimed the ditchway as her own is also equivalent to finding that the use by plaintiff of the ditchway was adverse to the defendants by the very definitions of the words (1 Am. Jur. p. 793), and thus contrary to the contention by the defendants in their brief that the jury found plaintiff's use was not adverse (See defendants' brief, page 9).

Defendants claim on page 2 that "the jury found that the use of the ditch had been by permission" and they quote defendants' testimony to support this position on pages 2 and 3 of their brief. Then realizing that the jury in fact only found that the use was "friendly" and never found that it was permissive at

any time (See Special Verdict), on page 4 they claim without explanation that "friendly" and "permissive" are synonyms. Plaintiff can find no support for such a conclusion according to either laymen's or legal definitions of the words. Plaintiff still contends that in using the word "friendly" instead of "permissive" in the third question, as was requested by plaintiff, the lower court clearly erred.

Defendants would also have us reject the jury's special verdict and accept their own theory as to the location of the ditch and the length of time plaintiff used it. On page 3 they say that defendant "knew that there was no ditch across the property prior to 1939" and "the ditch was located in a different place then." The jury found, however, that plaintiff's

possession of the ditch was continuous for a twenty year period and that it followed a definite and certain line for twenty years (See Inst. No. One; Special Verdict).

On the last page of their brief defendants state certain allegations of theirs as though they were found as facts by the jury. They say (1) that "consent was sought and had each year". The jury made no finding on this issue but found only that the use was "friendly". Plaintiff's request for a finding as to whether permission had been given or not was denied (See plaintiff's request for special interrogatories).

"Permissive" and "friendly" are not synonyms. Defendants say (2) that "plaintiff never did treat the ditch as her own". The jury found (See Special Verdict and Instruction No. One) that "the ditchway in question

(was) claimed by the plaintiff as her own" and that plaintiff showed "an exclusive dominion over the land and an appropriation of it to her own use and benefit". Defendants say that (3) "each year defendant David Archibald gave his separate consent". Again the jury made no finding on the issue. Plaintiff said that consent was never given or asked for (Tr. 5, 17). Defendants say that (4) plaintiff sought permission in 1946. Again this statement is controverted by the plaintiff and no finding was made upon the express issue by the jury. However, the finding that the use was exclusive and under claim of right would be an implied finding by the jury that they believed the plaintiff and not the defendants and concluded that no permission was given or asked for.

Defendants attempt to justify their making of statements contrary to the facts as found by the jury by certain language contained in *Arnold v. City of San Diego* (Calif.) 261 P.2d 33 (Defendants' brief, p. 8). That case was tried before the court sitting without a jury (and even under the rule stated in that case the court reversed a judgment for the defendant on the basis of the finding of long, continued, and open use by the plaintiff.) But we have a different situation presented here. Plaintiff asked for her constitutional right of a jury trial and was granted that right. The jury made certain findings of fact by their answers to special interrogatories. If judgment for the defendants annuls all those findings on appeal and all conflicting issues are

resolved in favor of the defendants, even where the jury found for the plaintiff (as they did in the answers to four of the questions and in the fifth found for neither party) then plaintiff has in effect lost her right to a jury trial. The jury found that plaintiff established an actual, open, notorious, continuous use for 20 years under claim of right and that such use showed an exclusive dominion over the land and an appropriation of it to plaintiff's own use and benefit. This is sufficient to give judgment to plaintiff. But because the jury found the use was "friendly" the lower court gave judgment for defendants and now defendants would have us resolve all conflicts in their favor as a result of that judgment. The argument is so contrary to reason and to the constitutional

right of a jury trial that it is not worthy of further mention here.

ARGUMENT - POINT II

The rule stated in *Zollinger v. Frank* 110 Utah 514, 175 P.2d 714, 170 ALR 770, that "where a claimant has shown an open and continuous use of the land for the prescriptive period (20 years in Utah) the use will be presumed to have been against the owner" was not rejected in *Big Cottonwood Tinner Litch Co. v. Moyle*, 109 Utah 213, 174 P.2d 148, as defendants would have us believe but was supported by that case (See page 155). Defendants fail to understand that the result the court was "trying to get away from" was the common law rule that the servient tenement could claim the benefits of the dominant owner's easement, not the rule

that twenty year open and continuous use raises a presumption that the use was against the owner. Defendants in leaving out a full column of print between their quoted portions from that case were able to arrive at their erroneous conclusions.

The presumption stated in *Zollinger v. Frank*, *supra*, is still good law in Utah. As was stated in plaintiff's brief (see page 41) the rule does not apply where a landowner opens a way for his own use and another uses it without causing damage, or interfering with his use. The *Zollinger* case put a further limitation on this exception by stating that if the landowner only uses the way infrequently and then only a part of the way then the rule as to a presumption of adverse use arising from continuous use applies and

not the exception (See page 716).

The Court makes this clear in the case cited by defendants for the opposite conclusion, Cache Valley Banking Co. v. Cache Co. Poultry Gr. Ass'n, 116 Utah 258, 209 P.2d 251. Defendants quote a portion of the opinion in that case but fail to present a complete picture of the rule announced in that case. The court quotes the exception to the Zollinger v. Frank rule that "Where a person opens a way for the use of his own premises, and another person uses it also without causing damage, the presumption is . . . that such use by the latter was permissive" and then says: "In the Zollinger case we affirmed the correctness of that doctrine, but held it not applicable to the facts there because the right of way in that

case was used by the owner only infrequently and then he only used a portion of it."

The presumption as stated in the Zollinger case should apply here because the jury found an open, actual, exclusive, notorious and continuous use for over twenty years. The ditchway was opened up for the use of plaintiff's land (Tr. 8, 14, 80, 96), never for defendants' land or use, and has been used exclusively by plaintiff for her own land (Tr. 80, 82, 96), which makes this case stronger than the Zollinger case, *supra*. Plaintiff's use of the ditch causes damage to defendants' land and interferes with their use (Tr. 81, 90). A look at the testimony of both parties and the findings of the jury shows that this case is very similar to Zollinger v. Frank, *supra*, and not at

all similar to those cases cited by defendants in which a way was opened up for the landowner's own use and another used it without causing damage or interfering with that use. (The defendants apparently noted that similarity because they failed to distinguish Zollinger v. Frank, supra, from the case at hand--See defendants' brief, p. 7.)

It is apparent that upon reading defendants' brief that they have failed to answer plaintiff's reasons why the judgment of the lower court should be reversed. Plaintiff should be granted the relief she has prayed for, together with her costs expended herein.

Respectfully submitted,

PERRY & PERRY

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and Appellant.