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Opal C. Wells, And Opal C. Wells, As Guardian For The Estates Of Patricia Ann Hill, Ramona Hill, John Roland Hill, Mary Kate Hill, And Joseph William Hill, Minors v. William Marcus And Audrey Y. Marcus : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

OPAL C. WELLS, and OPAL C. WELLS, as guardian for the estate of PATRICIA ANN HILL, RAMONA HILL, JOHN ROLAND HILL, MARY KATE HILL, and JOSEPH WILLIAM HILL, minors,

Plaintiff and Respondent,

vs.

WILLIAM MARCUS and AUDREY Y. MARCUS,

Defendants and Appellants.

Case No. 11989

BRIEF OF RESPONDENT

Appeal from a judgment quieting title in the Second District Court, Davis County, State of Utah Honorable Thornley K. Swan, presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

OPAL C. WELLS, and OPAL C. WELLS, as guardian for the estate of PATRICIA ANN HILL, RAMONA HILL, JOHN ROLAND HILL, MARY KATE HILL, and JOSEPH WILLIAM HILL, minors,

Plaintiff and Respondent,

vs.

WILLIAM MARCUS and AUDREY Y. MARCUS,

Defendants and Appellants.

Case No. 11939

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The respondent does not agree with the appellants' statement of the facts. The source of water involved in this case is Corbett Creek not "*Corbert* Hollow and Springs."

From the year 1921 to 1950 there was no pipeline diverting water from Corbett Creek except a four-inch pipeline to the Hill residence (now Wells residence). (Tr. 9.) The pipeline referred to by the appellants in their statement of facts, (app. br. p. 2) was actually constructed in 1950 by John Hill, the deceased first husband of the respondent, as a soil conservation project. See Exhibits I, J and K. He employed the appellant William Marcus, sometimes referred to as Bus Marcus, (hereinafter referred to as "Marcus") to work on the line. (Tr. 15) John Hill died in 1961 and soon thereafter Marcus "disrupted" the 1950 pipeline with his back hoe and installed a plastic pipeline from the channel of Corbett Creek to his home (Tr. 15, 16) and he claimed and took all the water from Corbett Creek (Tr. 16, 32). The Plaintiff did not give Marcus permission to enter upon her property (Tr. 16). Marcus claimed that wherever the water ran he owned the ground (Tr. 17, 31, 32). He practically kicked the plaintiff off her own land (Tr. 17). The plaintiff did not orally or in writing grant an easement to Marcus (Tr. 18). This was admitted by Marcus (Tr. 45). There was no agreement or understanding for the creation of an easement.

STATEMENT OF POINTS

1. The findings that the defendants have no easement or other interest in the plaintiff's land is supported by the evidence.

2. The decree does not cut off the defendants' access to Corbett Creek.

ARGUMENT

1. THE FINDINGS THAT THE DEFENDANTS HAD NO EASEMENT OR OTHER INTEREST IN THE PLAINTIFF'S LAND IS SUPPORTED BY THE EVIDENCE.

The trail court properly found that the defendants had no easement or other interest in the plaintiff's land described in the complaint. The defendants contend that an easement was created in this case by a ". . . verbal agreement, either partially or wholly performed by which both parties benefitted; . . . removing this issue from the Statute of Frauds and creating an enforceable, valid easement . . ." (App. br. 5, 6).

Under the Utah statute of frauds, section 25-5-1, U.C.A. 1953, an easement, being an interest in real estate, cannot be created, granted or assigned otherwise than by operation of law or by deed or conveyance in writing subscribed by the party creating, granting or assigning the same.

The rule is that an easement may be created or passed only by deed or by prescription which presupposes a grant. This is subject to exceptions, as under some circumstances an easement may be created by estoppel, by agreement, express or implied, and by part performance of a parol agreement. 28 C.J.S. p. 640.

> "An easement is an interest in land within the meaning of the statute of frauds." 37 C.J.S. p. 578.

"Unless the evidence is clearly to the contrary, the Court will presume that a parol agreement to impress real property with a servitude was made with knowledge of the statute of frauds, and intended as a license only, and not as an easement." 37 C.J.S. p. 579. Howes v. Harmon, 11 Idaho 64, 81 P. 48, Tiffany Real Property 3rd Ed. Sec. 776, p. 241.

The principle of executed oral agreement relied upon by the appellants to avoid the statute of frauds has these important elements: (1) an oral agreement to create an easement and (2) part or full performance of the oral agreement such that a court of equity would entain a suit for specific performance if the contract had been in writing.1 Thompson on Real Property, Perm. Ed. sec. 357 at page 575. It should be noted that the quotation from Thompson on pages 5 and 6 of appellants' brief omits the following:

> "It is to be observed, however, that eminent judges have regretted the introduction of this equitable doctrine, and have declared that it should not be carried further than it has been carried by well-recognized authorities."

Equitable estoppel also relied upon by the defendants:

> ". . . imports overt acts and declarations of the party charged, designed to induce another to alter his position, coupled with the requirements that the other party must have acted upon the same to his injury. The effect of an equitable estoppel is to transfer property rights from one party to the other, so it must be established by clear and con-

petent evidence." Holbrook Irr. District v. Arkansas Rand Company, 42 F2d 541, at p. 548.

The record does not support the acquisition by Marcus of an easement for his plastic pipeline under any theory, but on the contrary the testimony of the defendant Marcus affirmatively shows that no easement or other interest was acquired. We quote from the transcript:

"Q. Now, when you went up, in the 'sixties, and did work with a backhoe, and dug a trench and put your line three feet down, did you get permission from Mrs. Wells to go up there?

"A. Well, I had a mutual understanding.

"Q. Just a minute. Just answer the question regarding Mrs. Wells. Did Mrs. Wells give you permission?

"A. Mrs. Wells wouldn't give me permission to go on my own, to fix my own pipeline.

"Q. Well, in other words, you claim that you own the property that's covered by your, that's passed over by your pipeline?

"A. I have a right-of-way for my water to come through.

"Q. Well—

"A. For my pipeline that was put in.

"Q. Do you have any written instrument showing any right-of-way?

"A. No, I haven't. I have a written instrument for from the highway up, for a thousand foot of it.

"Q. But you don't have any instrument that affects the Wells property, do you?

"A. Not, not—not the Wells property." (Tr. 45).

There is no evidence of an oral agreement between the plaintiff and defendants for the grant of an easement and no evidence of the elements of estoppel. (Tr. 16).

The plaintiff's first husband, John Hill, who died in 1961, (Tr. 15, 16) employed Marcus in 1950 to construct a pipeline to his pond and from the canyon down to the plaintiff's home (Tr. 15). This pipeline was crushed and became unusable a few years later (Tr. 38-40). At the time the pipeline was constructed by John Hill, Marcus constructed his own pipeline from a common diversion point to his home west of the highway. (Tr. 38.) After Mr. Hill died, Marcus constructed the present plastic pipeline across the plaintiff's land and in so doing completed the destruction of the existing concrete ditch and pipeline that had served the plaintiff's property (Tr. 16). He entered the plaintiff's property without the owner's permission (Tr. 16). This was admitted by Marcus (Tr. 45).

There is absolutely no evidence of any agreement, verbal or written, to grant an easement. The case of Ross v. Peters, 59 Cal App. 2d 833 139 P2d 983, cited by the appellant on the oral agreement theory is not in point because in that case there was actually an oral agreement

proved by competent evidence. Here, the only evidence is that a pipeline was constructed in 1950, part of which was beneficial to both parties, but the record is absolutely silent as to any agreement relating to the pipeline. The plastic pipeline constructed in 1961 or 1962 was admittedly constructed without permission of the landowner. It was a trespass.

The cases cited by the appellant on the theory of "implied easements" are not in point. In Wagner v. Fairlamb, 151 Colo. 481, 379 P2d 165 the court points out that before a way of necessity exists there are three requirements, (1) ownership of entire tract by single grantor prior to diversion, (2) necessity existing at time of severance, and (3) great necessity for the particular right of way. None of the requirements are met in this case. Here there was no ownership of an entire tract and, of course, no severance.

2. THE DECREE DOES NOT CUT OFF THE DEFENDANTS' ACCESS TO CORBETT CREEK.

It is argued by the appellants (app. br. 6) that the denial to Marcus of the continued use of the pipeline easement ". . . in effect excludes Mr. Marcus from all rights to water in *Corbert* Creek Canyon. There is no other feasible way for the water to be removed to the Marcus property without access across Hills' real estate." This argument is not supported by any reference to the transcript or exhibits. The contrary is stated in the testimony of Marcus.

On page 37 of the Transcript Marcus testified:

"Q. And where did you get your culinary water for those homes?

"A. Well, it was spring water out of Corbett Creek Canyon.

"Q. I see. And where did you get—where did you actually take this from?

"A. We took it below the, west of the highway, where it seeped down through the rocks. If we went up and in the summer and cleaned out the canyon, by hand, why, it would seep all the way down through. Then we took and pumped it up to the houses."

The map Exhibit L shows the natural channel of Corbett Creek crossing the north boundary of the Hill property. Marcus testified that he had an easement from the highway up ". . . for a thousand foot of it." He has access to the channel after it crosses the north boundary of the Wells property.

The argument of lack of access to the creek is therefore without merit.

CONCLUSION

The finding of the trial court that the defendants have no easement or other interest in the plaintiff's land is supported by competent evidence and should not be

disturbed. The evidence shows that the denial of the easement does not cut off the defendants' access to Corbett Creek. The decree of the district court should be affirmed.

Respectfully submitted,

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