

2006

Lee McElprang and Lorie McElprang v. Blake Jones and Wilda Jones : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEE McELPRANG and LORIE McELPRANG,
Plaintiffs/Appellants,

v.

BLAKE JONES and WILDA JONES,
Defendants/Appellees,

PETITION FOR REHEARING

Utah Court of Appeals Case No.
20060165CA

BLAKE JONES and WILDA JONES,
Counterclaim Plaintiffs

v.

LEE McELPRANG and LORIE McELPRANG,
Counterclaim Defendants

Appeal from the Seventh Judicial District Court, Emery County, State of Utah
The Honorable George M. Harmond

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ARGUMENT

Rule 35(a) of the Utah Rules of Appellate Procedure provides that a party to an appeal may petition this Court to rehear an argument when “the court has overlooked or misapprehended” a “point[] of law or fact.” In this case, the Appellants (collectively referred to hereinafter as “the McElprangs”) respectfully submit that this Court overlooked or misapprehended the facts and the law when it deferred to the trial court’s determination that McElprangs may not use the prescriptive easement across the Joneses’ property to access a silage pit located on the McElprangs’ property. Accordingly, the McElprangs request this Court to rehear their argument with respect to whether the prescriptive easement may be used to access the silage pit.

I. BECAUSE THE TRIAL COURT MADE NO FINDING OR CONCLUSION AS TO WHETHER THE SILAGE PIT IMPERMISSIBLY EXPANDED THE SCOPE OF THE PRESCRIPTIVE EASEMENT, DEFERENCE TO THE TRIAL COURT ON THAT POINT IS NOT MERITED

This Court should grant rehearing on the issue of whether the McElprangs may use their prescriptive easement to access the silage pit because the Court’s deference to the trial court was inappropriate where the trial court made no findings of fact or conclusions of law on the essential issue—whether accessing the silage pit was an impermissible expansion of the easement. In its memorandum decision in this matter (the “Memorandum Decision”), this Court concluded that the McElprangs satisfied their burden in establishing a prescriptive easement to the curved road in the north portion of the West Disputed Area but deferred to the trial court in concluding that accessing the

silage pit would impermissibly expand the scope of that easement. *McElprang v. Jones*, 2007 UT App 42U, ¶¶ 9-12. The Memorandum Decision correctly states that “[w]hile the finding of an easement is a conclusion of law, it is highly fact-sensitive and ‘accords the trial judge a broad measure of discretion *when applying the correct legal standard to the given set of facts.*’” *Id.* ¶ 12 (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998) (emphasis added). Accordingly, the Memorandum Decision states, “[the Court] will overturn ‘the finding of an easement only if [it] find[s] that the trial judge’s decision exceeded the broad discretion granted.’” *Id.* But deference to the trial court on the expansion issue was not merited because there is no indication from the trial court’s findings that it “appl[ied] the correct legal standard.” *Id.* (internal quotation marks omitted).

As recognized in the Memorandum Decision, “[t]he key consideration is whether using the road to access the silage pit impermissibly expanded the use of the road from the McElprangs’ customary uses during the prescriptive period.” *Id.* ¶ 10. Thus, the Memorandum Decision recognizes that the “correct legal standard” is the standard for determining whether there is an impermissible expansion of an easement. But the trial court’s Findings of Fact and Conclusions of Law give no indication that it even considered much less applied this legal standard. (R. 424-25 ¶ 25, 428 ¶ 3.) Rather, the trial court appears to have considered only whether the McElprangs had an independent prescriptive right to access the silage pit. (*Id.*) The trial court’s only findings and conclusions on this issue are as follows:

The [Trial] Court finds that the Plaintiffs have developed prescriptive

easement to use the curved road which is located at the top of the [West Disputed Area] for the purpose of accessing their property that is located to the east of the [West Disputed Area]. The Court finds that said road has been used for access to the property owned by the Plaintiffs prior even to the time the Plaintiffs purchased the property in 1969. That road has been used for purposes of access to those eastern fields for a period in excess of twenty (20) years prior to 1983. However, the Plaintiff did not develop a prescriptive easement on said road for the purpose of accessing the silage pit because the evidence shows that the silage pit was not built until 1983 and, the road was therefore not prescriptively used for the purpose of accessing a silage pit for a period of over twenty years.

(R. 424-25 ¶ 25.)

The Court concludes that the Plaintiffs established all of the elements for and hold a prescriptive easement to utilize the curved road to access Plaintiffs [sic] land but due to the fact that the silage [sic] pit was not installed by Plaintiffs until 1983 Plaintiffs have not established a prescriptive easement over the same curved road for the purpose of accessing the silage [sic] pit on the Plaintiffs [sic] land.

(R. 428 ¶ 3.)

While the Memorandum Decision correctly notes that “[t]he trial court . . . heard contradictory testimony regarding the silage pit’s effect upon use of the curved road,” *McElprang*, 2007 UT App 42U, ¶ 11, there is no indication that the trial court made a decision on that factual issue. Indeed, the trial court made no finding that the construction of the silage pit on the McElprangs’ property resulted in an increase in the use of the curved road. The trial court’s ruling that the McElprangs did not have a prescriptive easement to access their silage pit was based solely on the fact that the silage pit was not built until 1983. (R. 421, 428.) The lone fact that the silage pit was not built until 1983 does not, however, cut off the McElprangs’ legal right to use the curved road to enter the western portion of their property and access the silage pit so long as there is

no additional burden on the servient estate. Furthermore, the mere addition of a new facility on the McElprangs' property accessed via the curved road does not impermissibly extend the scope of the prescriptive easement, and indeed many courts have held that even an "increase in the volume of traffic across [an easement] will not constitute a per se overburdening." *Gutcheon v. Becton*, 585 A.2d 818 (Me. 1991); *see also Gaither v. Gaither*, 332 P.2d 436, 438 (Cal. Ct. App. 1958) ("If the change is not in the kind of use, but merely one of degree imposing no greater burden on the servient estate, the right to use the easement is not affected."); *Pipkin v. Torosian*, 35 Cal. App. 3d 722, 728 (Cal. Ct. App. 1973) (stating that it should "be of no moment" to the owners of the servient estate if the owners of the dominant estate are using the easement for the purpose of accessing a residential home or for agricultural purposes, "so long as the amount of traffic is not substantially increased."); *Valcarce*, 961 P.2d at 312 ("The right cannot be enlarged to place a greater burden or servitude on the property." (internal quotation marks and citation omitted)); *Lutheran High School Ass'n v. Woodlands III Holdings, LLC*, 2003 UT App 403, ¶ 15, 81 P.3d 792 (stating that an overburdening of an express easement by the dominant estate "may only occur if use of the easement substantially increases use of the servient estate") Thus, the trial court's findings and conclusions are insufficient, as a matter of law, to establish that accessing the silage pit via the prescriptive easement impermissibly expands that easement's scope.

If the trial court had entered a finding or conclusion that using the curved road to access the silage pit was an impermissible expansion of the easement, then deference may have been appropriate given Blake Jones's testimony. But where the trial court did not

enter such a finding, and, indeed, where the trial court apparently did not even consider the central issue of expansion, there is no basis for deferring to the trial court's conclusion on that issue. Because the trial court made no finding of fact regarding whether the McElprangs' accessing the silage pit via the prescriptive easement increased the burden on the servient estate, this Court was put in the position of needing to weigh the evidence on that issue without the trial court's assistance. This appellate body is, however, ill-equipped to make such a determination in the first instance because doing so would require the Court to assess the credibility of the various witnesses. *See Valcarce*, 961 P.2d at 314. Therefore, this Court should amend its Memorandum Decision to require entry of a ruling allowing the McElprangs to use the properly established prescriptive easement to the same level as during the prescriptive period in which it was established regardless of what the McElprangs do on their own property after using the road. In the alternative, if the Court desires greater certainty as to permissible uses of the prescriptive easement, it should amend its Memorandum Decision to provide for remand to the trial court for the factual determination of whether accessing the silage pit via the prescriptive easement impermissibly expands the scope of the easement.

II. THE COURT SHOULD AMEND ITS MEMORANDUM DECISION TO CLARIFY THAT SCOPE OF THE PRESCRIPTIVE EASEMENT DEPENDS ON HISTORIC USE OF THE EASEMENT AND NOT USE OF THE DOMINANT ESTATE

Even if the Court concludes that it properly deferred to the trial court's decision on expansion of the easement, the Court should nevertheless modify its decision to make clear that an easement holder is limited only in its use of the prescriptive easement and

not the use of the dominant estate after using the easement. In the Memorandum Decision, this Court noted that “[t]he trial court determined that because the silage pit was constructed in 1983, the road had not been used to access the silage pit for the entirety of the prescriptive period.” *McElprang*, 2007 UT App 42U, ¶ 10. This Court also properly noted that “[t]he general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period.” *Id.* (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998)). While the scope of a prescriptive easement is limited by the historical use during the prescriptive period, the use of the prescriptive easement is not defined by the specific destination within the benefited property that is reached, but rather by the burden that traveling over the prescriptive easement places on the affected property or servient estate.

The trial court found that the McElprangs did not establish a prescriptive easement to use the curved road at the northwestern edge of the Joneses’ property. (R. 428.) This Court overturned the trial court’s ruling and held that the McElprangs had established a prescriptive easement to use the curved road to access their property for irrigation and agricultural purposes. *McElprang*, 2007 UT App. 42U, ¶ 7. However, this Court also held that “the use of the road was impermissibly expanded by the addition of the silage pit.” *Id.* ¶ 12. A silage pit certainly fits within the definition of agricultural use, and the “addition” of the silage pit as a destination on the McElprangs’ property should not be a reason for denying a prescriptive easement. Rather, the focus is and has always been the historic type of use of the easement. *See Valcarce*, 961 P.2d at 312.

The end destination of such traffic on the McElprangs’ property should not be

limited by this Court if such traffic complies with historic use and does not materially increase the burden placed on the servient estate. Utah courts have long recognized that whether a prescriptive easement has been enlarged hinges on whether the increased burden on the servient estate is material. “The servient estate can only be subjected to the easement to the extent to which the easement was acquired, and the easement owner cannot change this use so as to put any greater burden upon the servient estate.” *Nielson v. Sandberg*, 105 Utah 93, 141 P.2d 696, 701 (1943). Stated another way in the same case, “[a] right of way for one purpose gained by user cannot be turned into a right of way for another purpose if the latter adds materially to the burden of the servient estate.” *Id.* (quotation and citations omitted); *accord McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978) (“[T]he extent of an easement acquired by prescription is measured and limited by the use made during the prescriptive period. . . . [T]he owner of the dominant estate . . . may not alter its character so as to further burden or increase the restriction upon the servient estate.”) A change in use of a prescriptive easement may only be proscribed if the change in use causes a material change to the burden of the servient estate.

The McElprangs did not change the historical use it made of the prescriptive easement across the Joneses’ property. The McElprangs continued to use roadway for agricultural purposes; during the prescription period, they simply added an additional destination—the silage pit. Indeed, accessing the silage pit was a use made of the roadway during most of the prescriptive period, though admittedly not throughout the entirety of the prescriptive period. There is no greater burden created if a tractor or truck

travels down the curved road to access the McElprangs' property for irrigation purposes or reach the cows in the field on the one hand or to travel down the road to access a silage pit on the other. The burden is the same even though the destination is different. While this Court may have the proper legal authority to limit the amount of traffic to historical amounts for agricultural purposes after there has been a proper finding that an increase in traffic has occurred which has materially increased the burden on the servient estate, this Court should not be able to hold that an existing prescriptive easement cannot be used to access a particular destination on the McElprangs' property simply because the prescriptive easement has not been used to reach that particular destination for at least twenty years.

This Court held that the McElprangs' prescriptive easement across the Joneses' property could not be used to access the silage pit. The McElprangs assert that this Court cannot limit the prescriptive easement to prohibit accessing the silage pit. Instead, the McElprangs argue that, at most, this court may only limit or restrict the McElprangs' use of the prescriptive easement to historical uses that do not materially increase the burden on the Jones' property. This Court's memorandum decision improperly attempts to limit the destination within the McElprangs' property that can be reached by using the existing prescriptive easement. Therefore, the McElprangs request that this Court clarify that the use of the prescriptive easement is simply limited to historic use and not limited to exclude a particular destination within the McElprangs' property.

RULE 35(A) CERTIFICATION

Counsel for the McElprangs certify that the petition is presented in good faith and


is not submitted for purposes of delay.

CONCLUSION

The trial court incorrectly concluded, after finding that a prescriptive easement existed, that the McElprangs could not use that prescriptive easement to access the silage pit on their property. This Court improperly deferred to the trial court's conclusion on this point. Therefore, the McElprangs respectfully request that this Court reconsider its conclusion and amend the Memorandum Decision to allow the McElprangs to use the prescriptive easement for all agricultural purposes as long as such use does not materially increase the burden on the servient estate. In the alternative, this Court should amend the Memorandum Decision, remanding this case to the trial court for a factual determination on whether accessing the silage pit via the prescriptive easement impermissibly expands the scope of the easement. Under either alternative, the McElprangs request that this Court clarify that the scope of use of a prescriptive easement is measured and limited solely by historical use and not by the particular destination accessed within the dominant estate.

Dated this 5th day of March, 2007,

SMITH HARTVIGSEN, PLLC



J. Craig Smith

R. Christopher Preston

Attorneys for Lee and Lorie McElprang

CERTIFICATE OF SERVICE

On the 5th day of March, 2007, two true and correct copies of the foregoing
PETITION FOR REHEARING was mailed, first-class United States mail, postage
prepaid, to:

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475 East Main Street #1
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R. Untch Ruston