1995

El Ray Davis and Merelda V. Davis v. Larry Bud Johnson, Archie Dean Johnson ,marjorie Johnson, and Stella Johnson : Reply Brief

Utah Court of Appeals

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Richard C. Coxson; Attorney for defendants/Appellants.

IN THE UTAH COURT OF APPEALS

El Ray Davis and Merelda V. Davis, husband and wife,	:	
Plaintiffs-Appellees,	:	
vs.	:	Case No. 950553-CA
Larry Bud Johnson, Archie Dean Johnson, Marjorie Johnson and Stella Johnson	:	Priority 15
Defendants-Appellants.	:	

REPLY MEMORANDUM OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE FOURTH CIRCUIT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE JOHN BACKLUND, JUDGE, PRESIDING

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IN THE COURT OF APPEALS
STATE OF UTAH

EL RAY DAVIS and MERELDA V. DAVIS, husband and wife, Plaintiffs/Appellee VS. LARRY BUD JOHNSON, ARCHIE DEAN JOHNSON, MARJORIE JOHNSON and STELLA JOHNSON Defendants/Appellant	**REPLY MEMORANDUM OF APPELLANTS** Civil No. 950553-CA

FACTS

1. This is an appeal from Summary Judgment. R at 35.

2. Appellants established reasonable necessity in their Affidavits. R at 10.

ARGUMENT

POINT I.

THE **STANDARD** OF REVIEW FAVORS APPELLANTS' POSITION

Appellees' Brief starts with the premise that the Appellants are under a burden to show, after identifying all facts that support the judgment, that the judgment was incorrect. This is not the procedural status of this appeal because the judgment appealed from was a partial summary disposition in favor of Appellees. (R at 35). The court in Ron Case Roofing & Asphalt v. Blumquist, 773 P.2d 1382(Ut. 1989) held as follows:

> In determining whether the trial court correctly found that there was no genuine issue of material fact, we view the facts

> and inferences to be drawn therefrom in the light most favorable to the losing party. And in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, we give no deference to the trial court's view of the law; we review it for correctness. Ron Case Roofing & Asphalt v. Blomquist 773 P.2d at 1385.

If, based upon the facts as viewed in the light most favorable for the non-movants, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law", then the movant is entitled to summary judgment. However, if there is a genuine issue of material fact, or when, as here, the facts as seen most favorably for the losing party do not support judgment as a matter of law, there can be no judgment for the movant, and summary judgment is inappropriate.

In this matter, summary disposition is the basis of judgment for the Appellees. (R at 35). It is therefore appropriate for the court to reverse and remand in as much as the Appellees are not entitled to judgment as a matter of law.

POINT II.

APPELLANTS HAVE ESTABLISHED AN EASEMENT FOR USER BY THE FACTS AS SEEN IN THE LIGHT MOST FAVORABLE TO THEM

A. AN EASEMENT BY IMPLICATION ONLY REQUIRES REASONABLE NECESSITY

Appellees appropriately set out the standard for recognition of an easement by implication at page 7 of their brief. However, from there they go on to restate the standard improperly; that is, that an easement must not just be reasonably necessary, but must be absolutely necessary. Under this standard, if there is some other way by which the dominant tenant could have some of the benefit received by easement by using other property, no easement could

exist. That is not the standard set out by this court, however. Reasonable necessity is the standard. Butler v. Lee, 774 P.2d 1150, 1154 (Ut.App. 1989).

B. APPELLANTS HAVE SATISFIED THE REQUIREMENTS FOR EASEMENT

It is uncontested that the barns and structures were used for the benefit of the whole property, including that of Appellants, since at least 1964. (R at 2). The Appellants have stated that the structures were reasonably necessary for the farming they do on their property and significantly impact their operations. (R at 10). The use was continuous, open, visible and obvious from at least 1964 until the date of trial. (R at 10). A trial court may not weigh evidence in entering summary judgment, and the facts, for purposes of the motion only, must be considered as proven. Appellants therefore established that an easement was reasonably necessary and existed.

C. A GOOD FAITH ARGUMENT HAS BEEN MADE

The only question before this court is whether user of an implied easement extends in Utah beyond simple right-of-way to that of use of any other type. Appellants have cited case law from other jurisdictions in their main brief in support of the proposition that user may be other than for passage only. This constitutes a good faith argument that current easement law includes users other than right-of-way.

By contrast, Appellees have cited no cases limiting easement to passage. In as much as the procedural basis of this case mandates that all facts alleged by the Appellants by Affidavit

stand as proven, and easement for user extends beyond right-of-way has been found to exist by other courts, easement by implication should be found to include all types of user by this court, and not limited easements to right-of-way only.

The requirements of user by implication have been satisfied by the Affidavits of the Appellants in the Record, as set forth by Butler v. Lee, 774 P.2d 1150(Ut.App. 1989), Tschaggeny v. Union Pacific Land Resource Corp., 555 P.2d 277(Ut. 1976) and others. Because Appellants Affidavit is legally sufficient to establish reasonable necessity, neither this court nor the trial court should weigh, as Appellees request, the facts and make a finding as to whether such necessity factually exists. The judgment of the trial court must therefore be reversed, if this court finds that in Utah user extends to other than simple passage.

CONCLUSION

Appellants have made a good faith argument for amplification of the law of easement by implication in the State of Utah in this matter. The facts, when seen in the light most favorable to them, show that they in fact had established an easement by implications since 1964. Appellants have cited case law from other jurisdictions to show that user for other than passage is part of current easement law. No sanctions are applicable should the court rule against them. However, it is appropriate for this court to find that easement by implication for other than right-of-way is the law in Utah, and reverse and remand for trial.

Dated this 27 day of February, 1996.

Richard C. Coxson

MAILING CERTIFICATE

I hereby certify that on the 27 day of February, 1996, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing REPLY MEMORANDUM OF APPELLANT'S, to the following:

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