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Collins v. Swinger, No. 01-157, 2001 MT 265N (Mont. Dec. 17, 2001)

Christine Ellison

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Collins v. Swinger, No. 01-157, 2001 MT 265N (Mont. Dec. 17, 2001)

Service Commission (“Commission”) to provide public utility water service to Parkview. The commission decided the water company was not required to obtain the city’s franchise or consent to provide water to Parkview because the water company was not going to use public rights of way to provide its service. Osage had chosen not to intervene in the Commission hearings but later filed an application for rehearing with the Commission. That application was denied and Osage then filed a petition for writ of review in the circuit court. Osage served a summons and copy of the petition to the Commission, but not to the Water Company.

The circuit court awarded judgment to Osage. Thereafter, the Water Company filed an application to intervene in the proceeding, a motion to set aside the judgment, a motion to dismiss the petition for review, or in the alternative, a motion for rehearing, based on the fact they were not given notice of the action as an interested and effected party under Rule 100.01, Mo. Ann. Stat. § 386.510 (West 2000).

The Court of Appeals of Missouri, Western District held the statutory provision governing judicial review of the Public Service Commission’s orders or decisions was inadequate and constitutionally defective as to the notice requirement, and had to be supplemented by statute requiring notice to be served on all parties. The court therefore quashed the order of the circuit court for lack of jurisdiction.

Sarah A. Hubbard

MONTANA

Collins v. Swinger, No. 01-157, 2001 MT 265N (Mont. Dec. 17, 2001) (affirming district court’s decision that an easement by implication was created where there was (1) separation of title; (2) a long-standing, obvious use before the separation, which shows that the use was meant to be permanent; and (3) necessity of the easement for the beneficial enjoyment of the land granted or retained).

Keith and Marie Swinger (“Swingers”) appealed a decision of the district court for the Fourth Judicial District in Missoula County, Montana, granting Gary Collins’ (“Collins”) request for injunctive relief, damages, and attorney’s fees. The district court had ordered injunctive relief to allow Collins access to his water rights to Hayes Creek on the Swingers’ property, by right of easement by implication. The Supreme Court of Montana affirmed that decision.

In the appeal, the Swingers and Collins disputed two issues. First, the parties disagreed over who owned water rights from Hayes Creek, a tributary of the Bitterroot River in Missoula County. The second dispute hinged on whether the Swingers interfered with Collins’ ditch easement from Hayes Creek and his secondary easement to reach the ditch diversion point on the Swingers’ property. The Montana

Supreme Court immediately dismissed the water rights issue, as the matter had already been litigated in *In re Adjudication of Existing Water Rights (Swinger v. Collins)*.

The court then moved to the central issue in this appeal. Collins claimed he had a ditch easement across the Swingers' property and the Swingers wrongfully interfered with that easement. The district court found for Collins and the Swingers appealed. In affirming the district court's judgment, the court first considered whether an easement by implication actually existed over the Swingers' property. It then reviewed whether § 70-17-112, MCA included easements by implication. The court finally looked briefly at whether the district court erred in adopting Collins' proposed findings of fact.

Collins' water right diverted from Hayes Creek by way of a ditch located just within the Swingers' property. Until the early 1990s, Collins accessed his diversion point through a gate in the Swingers' fence at the north boundary of the Swingers' land. The Swingers removed the gate in 1993 and told Collins he could no longer access his diversion point. Since 1996, Collins has not been able to access his diversion point and therefore has had no control over water flow to his property. Before any dispute over water rights, the Swingers never challenged Collins' easement claim. It had also already been established that Collins water right was senior to the Swingers' right.

Therefore, the court turned to whether an easement by implication had arisen. An easement by implication arises where there has been: (1) separation of title; (2) a long-standing, obvious use before the separation, which shows that the use was meant to be permanent; and (3) necessity of the easement for the beneficial enjoyment of the land granted or retained. The court ultimately found Collins satisfied each element.

Collins' and the Swingers' properties had been common ownership from the 1920s until 1948. Collins' ditch was visible and obviously in use when the property was severed in 1948; it has been in continuous use since 1948. Since 1948, no deed in either parties' chain of title evidences a desire to terminate or restrict the ditch use rights of either Collins or his predecessors. These facts satisfied the first two elements of an implied easement. The fact that Collins could not access water for irrigation of his land satisfied the third element in that it deprived him of the beneficial enjoyment of his land. Therefore, the court found an easement by implication.

The court then turned to the Swingers' claim that § 70-17-112(4), MCA's scope was limited to easements acquired by prescription or conveyance. The court again agreed with the district court's holding that the statute was not an exclusive list of the easements to which the statute applied and was not limited to easements by prescription or conveyance. Finally, the court held that where the district court's findings of fact were based on substantial evidence and were not clearly erroneous, the district court did not err in adopting Collins' proposed findings of fact. The court affirmed the judgment of the district court, awarded costs and attorney's fees to Collins and

remanded to the district court for further proceedings.

Christine Ellison

Gaudreau v. Clinton Irrigation Dist., 30 P.3d 1070 (Mont. 2001)

(affirming the district court's holding that: (1) the Clinton Irrigation District ("CID") had no duty to prevent flood waters caused by ice jams on the Clark Fork River from overflowing their irrigation system and damaging Gaudreau's property; (2) CID exercised reasonable care in the maintenance of its system; and (3) CID had no duty to warn Gaudreau of flooding conditions so that they could protect their property).

Appellants, Jeanne Gaudreau ("Gaudreau") and Jerry Montelius ("Montelius") operate a horse riding and boarding facility near Clinton, Montana near the Clark Fork River. Upstream from the Gaudreau facility, the Clinton Irrigation District ("CID") owns and operates an irrigation ditch. A headgate on the CID system diverts water from the Clark Fork River into a canal. Once waters enter the canal, they are directed through a series of culverts under an interstate highway and into a channel that runs adjacent to the Gaudreau facility. On the evening of February 7, 1996, an ice jam formed on the Clark Fork River downstream from the headgate, causing river water to back up and flood the channel upstream from the Gaudreau facility. Another ice jam formed on the channel, which caused overland flooding of the area adjacent to the channel, including the Gaudreau facility. After the flooding receded, significant damage was revealed to real and personal property at the Gaudreau facility.

Gaudreau and Montelius sued CID in the District Court, Fourth Judicial District, Missoula County, for negligence, trespass, and nuisance. At trial, Gaudreau and Montelius abandoned the trespass and nuisance claims and proceeded on the negligence claims. The district court ruled in favor of CID. Gaudreau and Montelius appealed to the Supreme Court of Montana asserting that the district court erred in: (1) determining that CID had no duty to prevent flood waters caused by ice jams on the Clark Fork River from overflowing the CID system and damaging their property; (2) determining that CID exercised reasonable care in the maintenance of its system; and (3) concluding that CID had no duty to warn them of the flooding conditions so that they could protect their property.

First, the supreme court noted that Gaudreau and Montelius' reliance on a Montana statute governing the liability of water user associations for damages stemming from improper maintenance was misplaced because: (1) the statute did not apply to irrigation districts, like CID; (2) it did not impose liability, but disclaimed liability by the state; and (3) only applied to damages "occurring on the works," and not property damages such as those Gaudreau and Montelius alleged. As such, the statute did not support the existence of a duty by CID to prevent flooding due to ice jams.