

1-1-2000

Dority v. Hiller, 986 P.2d 636 (Or. Ct. App. 1999)

Karina Serkin

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Karina Serkin, Court Report, Dority v. Hiller, 986 P.2d 636 (Or. Ct. App. 1999), 3 U. Denv. Water L. Rev. 484 (2000).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

this case, the Staats' water rights allowed for diversion of water for irrigation.

The court also noted that under the department's administrative rules, "irrigation" was defined as the artificial application of water to promote growth of crops, and that the department interpreted the rule to mean that only the artificial application of water constituted "irrigation." Furthermore, according to the court, the department's interpretation of the administrative rule deserved highly deferential judicial review, as long as the interpretation was plausible. The court finally concluded that the department's findings that the Staats' artificial ditches were incapable of irrigation use, and therefore irrigation had occurred through naturally occurring subsurface seepage on their land, were both reasonable.

Steven Marlin

Dority v. Hiller, 986 P.2d 636 (Or. Ct. App. 1999) (holding that: (1) an irrevocable license existed for a pipeline through plaintiff's property; (2) defendants did not abandon such license when they changed the location of the pipeline; (3) plaintiffs did not have a property interest in the license; and (4) the trial court did not abuse its discretion by granting an injunction requiring plaintiffs to remove riser and restore defendant's pipeline connection).

Milton Wolsborn originally owned Dority's property, which was situated on a diversion point on the Willamette River. In 1964, the Hillers applied for and were granted a permit to take water from a point on Wolsborn's property. The Hillers buried a steel pipeline from the river, across the Dority's field, and into their property. The Hillers also installed an electrical pole and box in order to operate the pump. They used this pipeline to irrigate their fields.

In 1967, the Doritys purchased Wolsborn's property. The Doritys applied for a permit to take water from the same diversion point where Hillers obtained their water. In 1975, the Hiller's sought to replace the steel pipeline with a plastic one. When Dority asked if they had an easement, the Hillers replied that they had a written easement from Wolsborn. Dority then gave them permission to install the plastic pipeline.

In 1994, quarrels began between the two parties. Dority installed a rise and disconnected Hiller's pipeline at least once. Dority then filed suit against the Hillers to quiet title to real property and for damages on theories of trespass, private nuisance, and public nuisance.

The Hillers's counterclaims sought a declaration of a right to maintain an irrigation pipeline across Dority's property. The Hillers moved for summary judgment on the grounds that they possessed an irrevocable license to use Dority's property for the pipeline. The trial court granted the motion and enjoined the Doritys from interfering with the pipe connection. The Doritys appealed.

Before reaching the merits, the Oregon Court of Appeal decided

several preliminary issues. First, the court ruled on hearsay questions. The court found that defendant's sworn statements as to Wolsborn's consent were uncontroverted. Dority's affidavit stated that Wolsborn told her he never gave permission for the pipeline or for an easement. Because neither party ever deposed Wolsborn, nor offered this information in the form of an affidavit, the court deemed the statements as hearsay. As such, the evidence was such to survive the motion for summary judgment. Second, the court found that because the Hillers installed a pipeline and electrical device in reliance of Wolsborn's consent, such evidence sufficed to carry the burden of proving the element of detrimental reliance.

The court then examined the merits of the case. The appeals court held that an irrevocable license existed. A license is "an interest created in real property when a landowner consents to the use by another of the landowner's property in a way that would otherwise be wrongful." An irrevocable license is one in which "the landowner's promise to allow a use of the land for an unlimited time induces the other party to make significant expenditures for permanent improvements, consistent with the use for which consent was given." Thus, the court found Hillers held an irrevocable license.

The court held that the Hillers did not abandon their license by burying the plastic pipeline in a different location. In order to raise a genuine issue of a material fact about abandonment, the Doritys needed to offer evidence that the Hillers either verbally expressed an intention to abandon, or that their conduct demonstrated unequivocally an intent to make no future use of the license. Here, the Doritys gave express permission for the installation of the plastic pipe. In the eyes of the court, this was more than "passive acquiescence." In addition, the Hillers never indicated intent to abandon the use of the servient estate. Nor did the court find an inference that the Dority's permission was conditional.

Finally, the court held the Hillers properly plead entitlement to injunctive relief and offered facts sufficient to justify injunctive relief. Hiller's counterclaims were equitable claims. As such, the trial court was empowered to fashion relief as would best accomplish the ends of justice." The Doritys interfered with Hiller's use of the pipeline for two years. The Hillers depended on the pipeline to irrigate their crops and sufficiently stated that compensatory damages were impossible to calculate. In addition, the Doritys had other points of diversion from which they could draw water. This being so, any hardship caused by the injunction would be minimal. The court ultimately held that the trial court did not abuse its discretion when it granted injunctive relief in favor of the Hillers.

Karina Serkin