

IN THE SUPREME COURT OF THE STATE OF NEVADA

SYBIL ABBOTT,  
Appellant,  
vs.  
THE CITY OF RENO,  
Respondent.

No. 36018

**FILED**

**JUL 13 2001**

JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

ORDER REVERSING AND REMANDING

This is an appeal from a district court order granting respondent City of Reno summary judgment on appellant Sybil Abbott's trespass claim, based on the court's determination that the City had acquired a prescriptive easement over Abbott's property. Because we conclude that a genuine issue of material fact undermines that determination, we reverse the district court's order granting summary judgment and remand this case to the district court for further proceedings consistent with this order.

Abbott owns real property in the City of Reno. Abbott acquired the property on August 4, 1969. Sometime between August 17, 1955, and August 4, 1969, before Abbott owned the property, the City of Reno installed a sewer line along the eastern boundary line of the property. The sewer line encroaches two and one-half feet onto Abbott's property and extends the entire length of her eastern boundary line. The total footage of the encroachment is 142.86 square feet.

When Abbott purchased the property, she was informed that Sierra Pacific and Bell Telephone held easements through her property; however, Abbott was not told and did not know about the sewer line encroachment. Abbott did not become aware of that encroachment until August 1997, when her property was surveyed. The survey revealed that on June 11,

peaceable use for a five-year period."<sup>5</sup> Further, the standard of proof in establishing a prescriptive easement is clear and convincing evidence.<sup>6</sup>

As to adverse use, this court has stated that "[m]ere use does not constitute adverse use."<sup>7</sup> Rather, "[a]dverse use occurs when the user asserts a claim of right to use the land."<sup>8</sup> Moreover, this court has determined that "[a] permissive use cannot ripen into an adverse use absent specific notice to the owner of the servient estate that such use is henceforth adverse for purposes of creating a prescriptive easement."<sup>9</sup>

Here, Abbott argues that the City's use of the property was not adverse for five years because there is no evidence that the City asserted a claim of right to use the property. Thus, because the City cannot show adverse use by clear and convincing evidence, Abbott argues that the City does not have a prescriptive easement over her property.

The record reveals that the City mistakenly installed the sewer line outside the designated easement granted by an adjacent landowner, Earl Games. The City's improper installation of the sewer line resulted in an encroachment on Abbott's property. Because this court has held that mere use does not constitute adverse use, we conclude that mistaken use does not constitute adverse use.

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<sup>5</sup>Jordan v. Bailey, 113 Nev. 1038, 1044, 944 P.2d 828, 832 (1997).

<sup>6</sup>See id.

<sup>7</sup>Michelsen v. Harvey, 107 Nev. 859, 863, 822 P.2d 660, 663 (1991).

<sup>8</sup>Id.

<sup>9</sup>Jordan, 113 Nev. at 1046, 944 P.2d at 833.

Additionally, we conclude that the City has not shown by clear and convincing evidence that it asserted a claim of right to use the property. Rather, the City summarily contends that "[s]ewer lines are not constructed surreptitiously[,] . . . [they] would have been staked out and open for all to see." From this contention, the City invites this court to infer that Abbott's predecessor in interest was put on notice of the City's claim of right to use the property. Such an inference is not, however, warranted because the City has not presented clear and convincing evidence to show that either the City or Abbott's predecessor in interest knew that the sewer line was being installed on the wrong property. Further, the City has not presented clear and convincing evidence to show that, irrespective of the improper installation of the sewer line, it was asserting a claim of right to use that property. Therefore, absent clear and convincing evidence that the City and Abbott's predecessor in interest were aware of the City's mistake and that it was asserting a claim of right to use the property, we conclude that a prescriptive easement has not been established.

In Continental Illinois National Bank and Trust Co. of Chicago v. Village of Mundelein,<sup>10</sup> the Appellate Court of Illinois, dealing with strikingly similar facts, held that the Village of Mundelein's original easement remained valid, but that the Village did not acquire a prescriptive easement over the property where the sewer line was mistakenly installed. The Village's mistaken installation did not ripen into a prescriptive easement because the Village's use "was not adverse or hostile since it was not under a claim of right to the land actually used and it could not be said to be open or

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<sup>10</sup>407 N.E.2d 1052 (Ill. App. Ct. 1980).

notorious because neither party, apparently, was conscious that the sewer line had strayed from the grant of easement."<sup>11</sup> Accordingly, the court held that the Village did not acquire a prescriptive easement. This case warrants a like result, since the City has failed to show neither that it was aware of the sewer line deviation nor that it had asserted a claim of right to use the property.

Nonetheless, the City urges this court to adopt the analysis set forth in Riddock v. City of Helena.<sup>12</sup> In Riddock, the City of Helena also constructed its water supply line outside the granted easement. Consequently, Riddock filed a complaint against the City, alleging that the City had constructed the pipeline across the land of his predecessors in interest without permission or payment of compensation. Summary judgment in the City's favor was affirmed by the Montana Supreme Court, which held that the City had obtained a prescriptive easement over the property that ripened prior to Riddock's acquisition of the land.<sup>13</sup> Further, the court concluded that Riddock's lack of knowledge of the pipeline was immaterial.<sup>14</sup>

Riddock is distinguishable, however, from the facts of the instant case. In Riddock, the court stated that "[t]he record contains substantial uncontradicted evidence satisfying the elements necessary to obtain an easement by prescription."<sup>15</sup> The court noted that the City had "openly and visibly" constructed the water supply line across the property

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<sup>11</sup>Id. at 1055.

<sup>12</sup>687 P.2d 1386 (Mont. 1984).

<sup>13</sup>Id. at 1390.

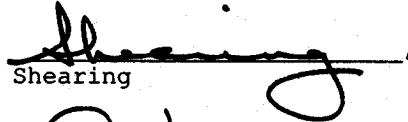
<sup>14</sup>Id.

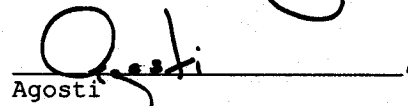
<sup>15</sup>Id.

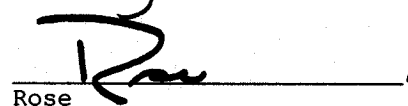
because "[t]he intended location of the pipeline was staked out for all to see."<sup>16</sup> But, in the instant case, the City merely contends that the sewer line installation "would have been staked out and open for all to see." The record does not contain "substantial uncontradicted evidence" that this was actually done.

Additionally, we decline to adopt the analysis set forth in Riddock because the Riddock court failed to address the mistaken use issue. Because Nevada requires an adverse user to assert a claim of right to use the land, we conclude that mere use, mistaken or otherwise, does not constitute adverse use. Thus, we conclude that the City has not shown by clear and convincing evidence that it has satisfied the elements of a prescriptive easement.

The district court erred in granting summary judgment in favor of the City because adverse use has not been shown by clear and convincing evidence; therefore, we REVERSE the district court's order granting summary judgment and REMAND this case for further proceedings.

  
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Shearing J.

  
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Agosti J.

  
\_\_\_\_\_  
Rose J.

cc: Hon. Brent T. Adams, District Judge  
Law Office of James Shields Beasley  
Reno City Attorney  
Washoe County Clerk

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<sup>16</sup>Id. at 1389.