

IN THE UTAH COURT OF APPEALS

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<u>Dee Henshaw</u> , Barbara Henshaw, and Dana Henshaw,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	Case No. 20080715-CA
)	
v.)	F I L E D
)	(December 24, 2009)
Estate of Jack King and Bonnie King,)	2009 UT App 388
)	
Defendants and Appellees.)	

Sixth District, Loa Department, 000600007
The Honorable Wallace A. Lee

Attorneys: Charles A. Schultz, Brigham City, for Appellant
David R. Williams and Anthony M. Grover, Salt Lake
City, for Appellees

Before Judges Orme, Davis, and McHugh.

McHUGH, Judge:

Dee Henshaw appeals the trial court's denial of his motion to vacate the portion of the directed verdict issued on May 15, 2006, that held that he did not acquire full water rights from his predecessor in interest. Henshaw claims that Jack¹ and Bonnie King lacked standing to assert that Henshaw did not acquire all of the water rights through the acquisition of his home,² thereby rendering the trial court's ruling void. Henshaw therefore contends that the trial court's order denying his rule 60(b) motion to vacate judgment was erroneous. We affirm.

¹Jack King is now deceased, and his estate has been substituted as Bonnie King's codefendant on appeal. We refer to Bonnie King and the estate collectively as the Kings.

²Henshaw acquired his home from his mother, Barbara Henshaw, who purchased the water rights simultaneously with the home from Mildred Watrous. Barbara Henshaw and Mildred Watrous are not involved in this appeal. For a complete recitation of the background facts in this case, see Henshaw v. Estate of King, 2007 UT App 378, ¶¶ 2-11, 173 P.3d 876.

"A denial of a motion to vacate a judgment under rule 60(b) [of the Utah Rules of Civil Procedure] is ordinarily reversed only for an abuse of discretion." State Dep't of Soc. Servs. v. Vijil, 784 P.2d 1130, 1132 (Utah 1989). We review questions of standing, however, for correctness. See Edwards v. Powder Mountain Water & Sewer, 2009 UT App 185, ¶ 10, 214 P.3d 120.

Henshaw argues that because the Kings lacked standing to assert an interest in the water rights, the trial court did not have jurisdiction to enter the directed verdict. Contrary to Henshaw's assertion, there is no standing issue here because the directed verdict in favor of the Kings was not entered on a claim asserted by the Kings. Rather, the challenge to Henshaw's ownership of the water rights was part of the Kings' defense to Henshaw's quiet title and easement claims.³

In the original action, Henshaw claimed he had an interest in three hours of the Kings' water every eighteen days (the water rights) and an easement to connect his pipeline to the Kings' pipeline to facilitate his use of the water. Henshaw asserted that he had acquired the water rights and the easement from Mildred Watrous via her sale of the water rights and the easement to Barbara Henshaw and Barbara Henshaw's subsequent conveyance of those interests to Henshaw. The Kings challenged that assertion, arguing that Henshaw failed to demonstrate that Raymond Watrous's share of the water rights passed to his wife, Mildred Watrous, upon his death, which was prior to Mildred Watrous's sale to Barbara Henshaw. The Kings claimed that, as a result, Henshaw was entitled, at most, to Mildred Watrous's share of the water rights and easement. Regarding the easement, the Kings asserted that Henshaw had presented no evidence from which the trial court could conclude that an express easement existed. The trial court agreed and directed a verdict that Henshaw "acquired no right, title or interest of Raymond Watrous to Pine Creek water or to an easement."⁴

When a plaintiff claims he has a right to use water, he must prove ownership of those rights. See Church v. Meadow Springs Ranch Corp., 659 P.2d 1045, 1048-49 (Utah 1983) (stating that to prevail in an action to quiet title to water rights, the plaintiff must rely solely on the strength of his own title, not

³Although Henshaw did not initially assert a quiet title or easement action, the trial court conformed the pleadings to the evidence so that Henshaw's claims to water rights and an easement were at issue.

⁴Henshaw's direct appeal of that decision was untimely, and this court dismissed it due to a lack of jurisdiction. See Henshaw, 2007 UT App 378, ¶ 15.

on the weakness of the defendants' title); Clark v. North Cottonwood Irrigation & Water Co., 79 Utah 425, 11 P.2d 300, 305 (1932) (quieting title of water rights in the plaintiffs where the plaintiffs demonstrated that their water rights were superior to the defendant's, but declining to quiet title in the plaintiffs with respect to other water rights because the plaintiffs presented no evidence that they had acquired the right to use those waters). Thus, Henshaw had the burden of establishing ownership of the water rights and, as defendants, the Kings could defend against those claims by asserting that Henshaw did not do so.

Henshaw also claimed that he had an easement to connect his pipeline to the pipeline on the Kings' property. To establish an express easement, a plaintiff must generally show compliance with the statute of frauds. See Orton v. Carter, 970 P.2d 1254, 1259 (Utah 1998) (stating that express easements require a writing transferring interest). However, a verbal agreement may suffice if the plaintiff shows evidence of (1) an agreement, (2) full or partial performance, and (3) reliance. See id. The Kings' argument that Henshaw failed to present evidence of a written or oral agreement is, like the Kings' challenge of Henshaw's ownership interest, a challenge to Henshaw's ability to meet his burden of proof. In light of their position as defendants in this action, the Kings could argue that Henshaw failed to meet his burden on both the quiet title and easement actions.⁵

We now consider whether the trial court exceeded its discretion when it denied, as untimely, Henshaw's motion to vacate. A motion under rule 60(b)(4) of the Utah Rules of Civil Procedure must be filed within "a reasonable time." Utah R. Civ. P. 60(b). What constitutes "a reasonable time" depends upon the facts of each case, considering such factors as the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." Menzies v. Galetka, 2006 UT 81, ¶ 65, 150 P.3d 480 (internal quotation marks omitted). In deeming Henshaw's motion untimely, the trial court first noted that the motion was filed twenty-one months after the entry of the directed verdict. Because two decisions on post-trial motions had been issued and an appeal had been taken, the trial court ruled that the motion was not brought within a reasonable time. The trial court also determined that because Henshaw had argued at trial, in his rule 59 motion to alter or amend judgment, and in his original appellate brief, that the Kings lacked standing to challenge his claims, standing was not a new

⁵Consequently, we do not address Henshaw's argument that a lack of standing renders a judgment void for purposes of rule 60(b)(4) of the Utah Rules of Civil Procedure.

issue sufficient to make a twenty-one-month delay in filing a rule 60(b)(4) motion reasonable.⁶ After nearly ten years of litigation between these parties, the trial court did not exceed its discretion in denying Henshaw's motion. The trial court correctly noted that Henshaw has had sufficient opportunity to argue this issue at trial, in subsequent motions, and on appeal. See generally Zions First Nat'l Bank v. C'est Bon Venture, 613 P.2d 515, 517 (Utah 1980) ("The Rules of Civil Procedure are so designed as to promote the finality of judgments by an expeditious resolution of any post-judgment motions."). Therefore, we affirm the trial court's ruling.

The Kings request attorney fees under rule 33 of the Utah Rules of Appellate Procedure, which provides that a prevailing party is entitled to damages, including "reasonable attorney fees," if the appellate court determines that an "appeal taken under these rules is . . . frivolous." Utah R. App. P. 33(a). However, "[t]he sanction for filing a frivolous appeal applies only in 'egregious cases' with no 'reasonable legal or factual basis.'" Cooke v. Cooke, 2001 UT App 110, ¶ 14, 22 P.3d 1249 (quoting Maughn v. Maughn, 770 P.2d 156, 162 (Utah Ct. App. 1989)). "Although [Henshaw]'s appeal is unsuccessful, it does not rise to the level of an egregious case deserving sanctions." See LD III, LLC v. BBRD, LC, 2009 UT App 301, ¶ 21, 641 Utah Adv. Rep. 26. Accordingly, the Kings' request is denied, and the parties shall bear the costs of their own attorney fees.

Carolyn B. McHugh, Judge

WE CONCUR:

Gregory K. Orme, Judge

James Z. Davis, Judge

⁶Henshaw's standing argument was not previously addressed by the trial court in response to Henshaw's rule 59 motion to amend or alter judgment or by this court in his direct appeal because neither the rule 59 motion nor the petition for appeal were timely filed.