2007

# Garth Lunt v. Harold Lance and Diane Lance : Reply Brief

Utah Court of Appeals


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Kraig J. Powell; Shawn W. Potter; Tesch Law Offices; Attorneys for Appellants.

**IN THE UTAH COURT OF APPEALS**

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|---|---|
| GARTH LUNT, Trustee of the GARTH O. LUNT REVOCABLE TRUST,<br><br>Plaintiff/Appellee/Cross Appellant<br><br>v.<br><br>HAROLD LANCE and DIANA LANCE,<br><br>Defendants/Appellants | **REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT MR. GARTH LUNT**<br><br>Civil No. 020500612<br>Appellate No. 20070014-CA |

APPEAL AND CROSS APPEAL FROM JUDGMENT OF
THE FOURTH DISTRICT COURT, WASATCH COUNTY,
THE HONORABLE DEREK PULLAN


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## ARGUMENT

### I. ABANDONMENT WAS NOT TRIED BEFORE THE TRIAL COURT WITH EXPRESS OR IMPLIED CONSENT.

The issue of abandonment was not tried by either express or implied consent. For an issue to be ruled on by implied consent, it must be "squarely raised" and "fully aired" at trial. *Clark v. Second Circuit Court*, 741 P.2d 956, 957-58 (Utah 1997). The law clearly states that "Proof of abandonment of such an easement requires action releasing the ownership and the right to use with clear and convincing proof of intentional abandonment." *Harmon v. Rasmussen*, 375 P.2d 762, 765 (Utah 1962). The issues of release of ownership and right to use were not raised or tried by implied consent.

First, abandonment was not tried by implied or express consent if the Lances never raised the issue and it was not "squarely raised" or "fully aired" before the trial court. The burden of proving abandonment belongs to the party asserting it. *See Provo River Water Users Ass'n v. Lambert*, 642 P.2d 1219, 1221 (Utah 1982). The Lances failed to meet this burden. They failed to raise, expressly or impliedly, the legal issues of intent to abandon or actual abandonment and consequently, these issues were not expressly or impliedly tried before the trial court. As such, Mr. Lunt was prejudiced by the trial court's ruling on abandonment because he had no opportunity to address intent to abandon or present evidence against actual abandonment of his easement on the Lane.

The Lances assert that they did not have to amend the pleadings to include abandonment because abandonment was tried by implied consent. If, as in the *Clark*

case, the issue of abandonment had "been squarely raised" and "fully aired" at the trial such an argument would apply. *See Clark* 741 P.2d at 957-58. However, the issue of abandonment was only raised for the first time by Judge Pullan during the Lances closing argument. R. 959 at 357:21-23. At that time, the Lances admitted that they had not even looked at the issue of abandonment. R. 959 at 358. This is in essence an admission that the issue of abandonment was raised for the first time by the Court in closing argument. As such, abandonment was not squarely raised or fully aired.

Finally, the Lances misapply the burden of proving the issue of abandonment. They allege without supporting testimony or documentation that "clear evidence of abandonment was presented, much of it by Cross Appellant Lunt." *Reply Brief* at 15. Mr. Lunt had no reason to present evidence of abandonment. Not only is the prescriptive easement still in use, it would be adverse to his own position of establishing a prescriptive easement to present evidence of abandonment. Tellingly, the Lances do not cite any testimony or evidence from the record to show this "clear evidence" of abandonment allegedly presented by Mr. Lunt.

In short, for the trial court to have found that Mr. Lunt abandoned the easement, the Lances had to meet the burden of showing by "clear, unequivocal and decisive evidence" that Mr. Lunt intended to abandon the Lane and actually did abandon use of the Lane. *Tuttle v. Sowadski*, 126 P. 959, 965 (Utah 1912). The Lances have failed to meet this burden. They did not offer evidence at trial and are unable, even now, to muster

testimony to demonstrate "the intention to abandon and the external act by which that intention [was] carried into effect." *Botkin v. Kickapoo, Inc.*, 505 P.2d 749, 752 (Kan. 1973). Mr. Lunt did not impliedly consent to try the issue of abandonment. As such, the trial court was incorrect to rule that Mr. Lunt abandoned portions of the Lane.

## II. THE SCOPE OF THE LANE'S USE DURING THE PRESCRIPTIVE PERIOD WAS FOR INGRESS/EGRESS FOR RESIDENTIAL AND AGRICULTURAL NEEDS, CONSISTENT WITH THE PRESENT USE OF THE LANE.

The historical and prescriptive use of the Lane is broad and applies generally to residential and agricultural use. Great deference should be granted to the trial court's finding regarding the use of the Lane for ingress/egress. *See Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). The Lances argument that the Lane was abandoned by Mr. Lunt due to a change in use is without merit and entirely unsupported by the record. There has been no significant change in use of the Lane such to constitute an abandonment of the easement by Mr. Lunt, nor is the use limited to agricultural use.

The trial court made clear that the use of the lane was for broad and general ingress/egress purposes when it ruled that the McNaughtens and Lunts relied on the lane to "access the rear of their respective acreage" for both residential and agricultural purposes. R. at 729. The court further concluded that Mr. Lunt "proved these elements by clear and convincing evidence." *Id.* The trial court based this conclusion on what it termed "particularly credible" testimony from Elden Carlisle that both parties used the Lane to access their properties from the 1930's to the 1950's. R. 958 at 114-127; R. 728. Testimony from Monaves Boren, Jack Lunt, and Garth Lunt cited to in the initial brief, as well as in the trial court's decision, clearly and convincingly

supported the conclusion that the Lane was used as a driveway to access both properties for residential and agricultural purposes. Great deference should be granted to the trial court's finding regarding the use of the Lane for ingress/egress.

The Lane was historically and is currently used as a driveway to meet residential and agricultural needs. After trial, the Lances requested that the order describing the easement allow only "ingress, human and vehicular, ingress and egress and no other use." *Hearing Transcript*, Electronically Recorded Feb. 16, 2006, p. 7. The Lances indicated at that time that they were concerned with potential underground use of the easement for utility easements. They also requested a ruling from Judge Pullan to define the scope and use of the easement from the bench. *Id.* at 8. Judge Pullan acquiesced by refusing to limit the use beyond the memorandum decision and reasserting the broad nature of the easement, consistent with residential and agricultural use. *Id.* at 8, 10. While the Lane was driven on to meet agricultural needs, the main purpose for using the Lane was and still is for property ingress and egress.

Now, the Lances labor to redefine the trial court's finding that the use of the easement is consistent with the use of a driveway and meets both residential and agricultural needs. The Lances argue that the current use of the easement is incompatible with the original use and therefore extinguishment or abandonment of the easement has occurred. This argument asks this Court to view the use of the prescriptive easement in a very narrow and unrealistic way.

In addition, the fact that the ingress and egress is not limited solely to agriculture, but recognizes other uses for a driveway, does not increase the burden on the Lances property. The Lances continue to claim that the historical use of the lane was for "agricultural purposes" only. This claim is derived from testimony of the witnesses as they stated that agricultural equipment,

hay, and animals were transported to the back of the property by use of the Lane. This argument ignores the testimony that cars were parked on the Lane and vehicles have consistently used the Lane as a driveway to access the McNaughten/Lunt property. The argument that agricultural use constitutes the sole historical use of the Lane as "for agricultural purposes" is a very narrow, subjective, and unworkable interpretation of the facts. Drawing the conclusion that the Lane was used solely for "agricultural purposes" completely ignores the purpose of the easement. The McNaughtens and the Lunts did not need an easement for the agricultural purpose of a place to move hay, machinery, or drive livestock up and down. Rather, the purpose of the easement was to allow the McNaughtens/Lunts access to the rear of their property via the driveway for agricultural and residential purposes.

The Lances have failed to produce any evidence to show that they suffer an increased burden property as agricultural use has slowed and residential use remained consistent. There are few vehicles that even use the Lane and any burden on the Lances from this prescriptive easement is negligible. The only change to the use of the Lane has come with the type of vehicle, new cars rather than farm machinery, and the lack of livestock being run on the Lane. Mr. Lunt has not shown any intent to abandon or actual abandonment. Rather, Mr. Lunt and those currently living on the property have shown just the opposite by continually using the Lane for ingress and egress to the rear of the property.

## III. THE COURT ERRED BY LIMITING THE SIZE AND SCOPE OF THE EASEMENT.

Utah case law clearly states that the physical measure and limit of a prescriptive easement is to be determined by its use during the prescriptive period. *See McBride v. McBride*, 581 P.2d

996, 997 (Utah 1978); *see also Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct.App. 1993). The witnesses for the Lances estimated the length of the Lane to be anywhere from 150 feet at the shortest, to approximately 200 feet. All of the Lances' witnesses based their testimony on the length of the Lane on estimation from their memory of the Lane. None of the Lances' witnesses testified that they actually measured the Lane.

On the other hand, the witnesses called by Mr. Lunt all testified that the Lane was 235 to 247 feet in length. This testimony was made from actual measurements taken by the parties. The testimony of Mr. Lunt's witnesses was far more credible than the testimony of the Lances' witnesses as it was based on actual measurements. The testimony provided by the Lances' witnesses was based on estimations and memories of buildings long since torn down. (*See* R. 959 at 264-267; R. 959 at 258). Therefore, the trial court erred when it limited the length of the easement to 180 feet. The record, and the trial court's findings, clearly support a holding that the length of the easement was and is at least 235 feet in length. This Court should issue an order finding that the length of the easement is at least 235 feet.

In regards to the width of the easement, the record reflects testimony that the historical width was approximately 34 to 35 feet. (*See* R. 958 at 182 and R. 958 at 135-136). In fact, the Lances' witness, Mr. Duane Smith testified that the Lane was approximately 40 feet in width. R. 959 at 258). The evidence presented at trial clearly supports a finding that the Lane should be approximately 34 feet in width. The trial court erred by finding the width of the Lane to be 20 feet and this Court should issue an order finding the easement to be at least 34 feet wide.

## CONCLUSION

In view of the facts and arguments set forth above, Cross-Appellant Garth Lunt requests this Court to reverse the judgment of the court below in regard to the issue of abandonment and to issue an order finding the easement to be at least 235 feet in length by 34 feet in width as supported by the record, and together with all further relief the Court deems just and appropriate under the circumstances.

DATED this 14 day of September, 2007.

BOSTWICK & PRICE P.C.

Randy B. Birch
Corey S. Zachman
*Attorneys for Appellee and Cross-Appelllant Mr. Garth Lunt*

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **BRIEFS OF APPELLEE AND CROSS-APPELLANT MR. GARTH LUNT** to be sent by United States Mail, postage prepaid, on this 14th day of September, 2007, as follows:

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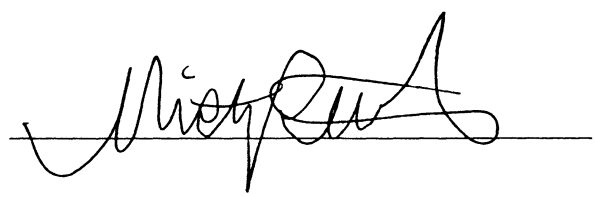

Tab A

IN THE FOURTH JUDICIAL DISTRICT COURT
OF WASATCH COUNTY, STATE OF UTAH

| | |
|---|---|
| GARTH LUNT,<br><br>Plaintiff,<br><br>vs.<br><br>HAROLD LANCE and DIANA LANCE,<br><br>Defendants. | ) Case No. 020500612 |

Hearing
Electronically Recorded on
February 16, 2006

BEFORE: THE HONORABLE DEREK P. PULLAN
Fourth District Court Judge

APPEARANCES

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PROCEEDINGS

(Electronically recorded on February 16, 2006)

MR. BIRCH: Randy Birch appearing for and behalf of plaintiff, your Honor.

MR. POWELL: Kraig Powell, your Honor, for Harold and Diana Lance. I apologize. We were discussing with Counsel.

THE COURT: The Court decided this case by written memorandum decision several months back, I believe. I've read -- I reread that decision in preparation for today's hearing. There's an objection to the proposed order that I've reviewed. Have you been able to work those issues out?

MR. BIRCH: We haven't, your Honor, and a couple of things. We did -- no, none of them, quite honestly.

THE COURT: Okay.

MR. BIRCH: We've talked about two or three of them. The issue we were most recently trying to deal with is they prepared a conflicting survey that says that it's 150 feet from the eastern most corner to this gate, this road or this fence. Mel McCorry measured it and said it was 160. Christensen says it's 150. It sounds like they're both trying to go to the furthest east portion. I don't know whether they're off the same mark or not, but supposedly they're both coming from the gate and going towards the east. I don't know -- I don't know how to adjust it.

THE COURT: Okay. Well, do we need an evidentiary

hearing on that limited question? If it's a factual question I don't know how to resolve it if you can't do it yourselves.

MR. POWELL: I hope we can resolve it, and maybe we could -- if necessary, depending on some of the other issues, we could set such a hearing and hopefully we'll be able to resolve it before then.

THE COURT: Is there further disagreement about the width of the --

MR. BIRCH: Well, I think my letter, which I copied down accurately set forth my question about the width.

THE COURT: Okay.

MR. BIRCH: I couldn't tell whether it was supposed to be 20 or 34. I believe there was two provisions that directly conflicted each other, so I prepared both and I submitted in the alternative to the Court, so as to hopefully avoid this hearing, but --

THE COURT: Yeah.

MR. BIRCH: The width I don't know.

THE COURT: It was my intent when I issued that decision that the width of the easement was at one period of time the broader width but that it had been abandoned, and what was -- what remained was a 20-foot width for purposes of a driveway is essentially what they had used it for from the mid '80's.

MR. BIRCH: I didn't see anything in the findings that talked -- that they ever mentioned that the width was even

disputed. Indeed when the Court was out there the fence was still there. We looked at it.

THE COURT: Yeah.

MR. BIRCH: So that's why I didn't come to that conclusion. I did understand the abandonment on the land.

THE COURT: Right.

MR. POWELL: And your Honor, as I've indicated, our client at this point after considering the matter would certainly be willing to stipulate to the 20 feet because we interpreted the Court's ruling that way also.

THE COURT: Okay. Well, in my -- I had not seen the objection come in and had actually signed the 20-foot easement order that -- in findings and judgment that had been prepared. Yesterday I signed that, and then I realized that there was an objection. That was my intent from the beginning is that it would be the 20 feet, and that the balance of the easement had been abandoned. I would think that you could work out the distance between the gate and the property line. It seems to me that that's just the distance between two points, and I think --

MR. BIRCH: Well, I think clearly --

THE COURT: -- mathematicians would probably tell you --

MR. BIRCH: -- we all agree --

THE COURT: -- there's only one distance there, so --

MR. BIRCH: You know, and that's the problem. I said, "Well, as long as you're measuring from the gate towards the

road, I don't care where you stop because we've got the road."

THE COURT: Yeah.

MR. BIRCH: If it goes beyond the eastern boundary, so what, but there -- I think we could do this with the narrative and forget the legal, your Honor, because Moore's descriptions say legal description subject to an easement along the southern, northern, 20 foot.

THE COURT: Yeah.

MR. BIRCH: And I think we could do that back to approximately 150 feet from 6th West.

THE COURT: Uh-huh.

MR. BIRCH: But approximately is not --

THE COURT: From the mid --

MR. BIRCH: -- is not adequate for -- if you want to go to center of road. I went out there today and --

THE COURT: From the center of the roadway.

MR. BIRCH: -- there was about 180 feet from center of road.

THE COURT: Yeah.

MR. BIRCH: Just to represent the Court, okay. I personally went out with my measuring tape, and I can bring it in for verification if you need, and I measured from the fence. I hooked on a metal thing that was in the middle of fence. I walked out and at 153 feet there's a telephone pole.

THE COURT: Uh-huh.

MR. BIRCH: It's a newer pole that sits actually further west than another pole, but it's the main telephone pole.

THE COURT: Okay.

MR. BIRCH: At 155 feet is where the mailboxes were planted, and at 180 feet is where the center of road -- approximate center of road was. Now it snowed today, so I'm out here doing this trying to figure center.

THE COURT: Yeah.

MR. BIRCH: But it was real close to 180 feet.

THE COURT: This isn't the ruler that you measure your fish with, is it?

MR. BIRCH: Nay, your Honor.

THE COURT: Okay. All right.

MR. POWELL: If I could briefly respond to that, your Honor, I think it is important for us to have a legal description because this is exactly the question that's going to come up. The reason it matters, your Honor, is in the broader context of this case, there is a parcel of land back there that the Court ruled that an easement has been abandoned. If an additional 10 feet exists, somehow in the future interpretation beyond that gate due to an oversight that we make right now, then that easement will effectively not be abandoned in order to access that rear property. So I would like to get a surveyor and we could -- I think it's a Wasatch County monument. The only question -- we were on the phone right now with Mel McCorry and

Bing Christensen. The only question is whether that Wasatch County monument is somehow in dispute, and I don't think it is. I think we can resolve this pretty quickly, and then we will be able to --

THE COURT: It seems to me yeah, that you're right, that as long as we're measuring from the gate east that -- my ruling is that that gate is where it ends.

MR. BIRCH: And those were the instructions that were given to the engineer.

THE COURT: Yeah. So I'm -- if I gave you, I don't know, 30 days to work this out can you do it within that time period?

MR. BIRCH: With regard to that issue, your Honor. The other concern that I had is in the objection that they raise, they wanted it limited to foot traffic or something. You know, the evidence is pretty clear that over the years there's been equipment and foot traffic and cars parked and whatnot. I'm trying to find their objection right now, but -- yeah. The defendants request that the easement say, quote, "Ingress, human and vehicular, ingress and egress and no other use." Well, I don't think that's appropriate to limit it to that. I think an easement is an easement, which means neither of them can block it. That's why I added -- I did put that language in the order that I prepared. Both of them have got to clean their crap out of the way. Both of them need to avoid blocking it, because if

it's an easement by definition they both -- she owns it -- the land, arguably. He has a right to use it. Neither of them can block it by definition.

MR. POWELL: And your Honor, we weren't concerned. I think we'll be able to enforce the blocking issue. We're concerned more about underground type uses. That's why I wrote "surface." So a utility easement would not be allowed, for instance.

I think during -- if we're going to have 30 days on the other, I think Randy Birch and I can easily come up with agreeable language on this as well.

THE COURT: You know, that's -- I think driveways are used for a host of reasons that are incidental to residential use, including for even livestock. They can be used for those purposes. It seems to me -- and, you know, utility easements frequently go under driveways. If you believe you can work it out I'll give you more time to work it out. If you want a decision today I can give you a decision today. Ultimately I hate to take away your destiny out of your hands if you feel like you can work something that's going to be a better arrangement for both of you.

MR. POWELL: Although I'd like to know the -- you know, I actually would like to know the Court's opinion on this matter. I guess what your Honor was just indicating was that even if utilities were used there, it once again highlights the

importance of limiting that to 150 feet. If they could take utilities back there and if they could go back 160 feet past the gate they could reach another lot that the Court's decision has now landlocked. It is a very weighty matter for my client, and -- which is why we've taken this unusual step of substituting Counsel on, and now at this late date bringing up some of these issues.

I would actually, so that my client knows, I would actually like a ruling from the Court on that today if --

THE COURT: Do you need time to respond to the objection in writing or --

MR. BIRCH: I don't think I do, your Honor.

THE COURT: Okay.

MR. BIRCH: I think you directed that we pay for a surveyor to prepare a legal description. The surveyor was given a copy of your decision, and the order is as it's been submitted. The 20 foot one I believe accurately reflects the order of the Court.

I also believe that in this case they say, "Well, Birch didn't win -- or Lunts didn't win because the Court threw out their boundary by acquiescence." Well, your Honor, I don't see any offer of judgment where they made any offer to do anything in this matter of settlement. We -- as a matter of fact, we -- well, it doesn't matter. There were discussions had, offers made by my client which were rejected. There were counter offers that

were rejected. My point is they own the land. We now have the right by Court order to go across that land. I've given the Court a breakdown of costs that includes filing fees, service of process, witness fees, and in this case the aerial photos and exhibits that were related to that We would ask for an award of costs based on my memorandum that has been submitted as the prevailing party.

Counsel did point out that I inadvertently put the 38-1-18, probably because I use this form on a mechanic's lien case. Clearly that's not the case. We're not asking for fees in this case We realize that that's not an option. As the prevailing party we're entitled to reimbursement of Court costs, and we would ask the Court to enter judgment for that amount.

THE COURT: Okay. Where is the --

MR. BIRCH: With regard to the other issues, I think we've addressed --

THE COURT: -- reference to -- I'm sorry, where is the reference to 38 in the proposed order

MR. BIRCH: Your know, Counsel mentioned it. I didn't even see it, but I believe it's there because --

MR. POWELL: It's the first line in Mr. Birch's memorandum of costs.

THE COURT: Oh, in his memorandum, okay.

MR. BIRCH: That can be stricken because that is the wrong statute, your Honor.

THE COURT: I'm looking at the wrong thing Okay

MR. BIRCH: Now did you have any other questions about the boundary description? You already addressed the width. We've argued about the length. Costs and the scope, I think we've addressed all of those questions. If you have any other questions for me I'd be happy to address it.

THE COURT: I don't. Thank you.

MR BIRCH: Thank you, your Honor

THE COURT: I think it's your objection, Mr Powell, so I'll hear you last.

MR. POWELL: Thank you. Just not much time here, your Honor. I would appreciate a 30-day period, as the Court has suggested, to work out the boundary issue If the Court somehow wanted to enter a provisional ruling today on the language I have proposed about the scope of the easement, I'd be happy to hear that. Finally, on the costs, your Honor, I've researched this quite a bit and I'm very surprised that I cannot find Utah case law or an AOR annotation or other annotation on the issue of costs. Rule 54 does allow the Court in its discretion to award costs, and the prevailing party shall be entitled to costs, unless the Court otherwise orders

Given that it seems to my client that this case was about a large issue that the plaintiffs did not prevail on and that she has -- the Lances have incurred large costs themselves, we are simply requesting that the Court in its discretion rule

that both parties shall pay their own costs. That would be the balance of my arguments for today. Thank you.

THE COURT: Thank you. All right. Initially as to the scope of the easement, it's not my intent to limit its use beyond the memorandum decision that has been issued. It's -- that question was not really tried on its facts, and in my view a driveway used incidentally to residential use has a host of uses that really would be impossible for me to define. It's an easement. It can be used by the property owners for purposes that are consistent with their residential use, and those uses are very broad. I'm not inclined to grant the objection as it relates to limiting the scope of the use of the easement.

As to the issue of its width, I've explained it was my intent that the width of the driveway would be 20 feet. If my written decision was not clear in that regard, the objection has brought that to the floor, and I intend to approve an easement in that width.

As to the issue of the length of the easement, there's no question that measurement should commence from the gate that's referenced in the memorandum decision, and that we should measure east to 600 West. For predictability of everyone, I think we should measure from the center line of 600 West. That will give predictability to future owners. That point isn't going to change. Especially I know that there's been some concern about corners in Wasatch County and disagreements about which one

should be measured from, and so let's measure from the center line of 600 West, whatever that is. That's my decision. If you can agree that it's 180 feet, we can put that into the order, but it's -- that's what I'm going to order.

As to the issue of costs, Rule 54(b) grants discretion to the Court to award costs to the prevailing party in the case. In my view, Mr. Birch's clients were the prevailing party, and should be awarded costs in the amount that has been sought, $2,332.20. Do the findings, order and judgment on the 20-foot easement need to be changed in any way based on what I've ordered today?

MR. BIRCH: I believe the only change that I perceive to be need would be that my narrative description will say -- will go 20 feet wide and 180 feet the extent -- running from the gate on the west to the center of 8th -- the center of 6th West Street.

THE COURT: Right.

MR. BIRCH: And so the description will need to be tweaked in that regard.

THE COURT: Will you make that change?

MR. BIRCH: I will have that description prepared. I will submit it to Counsel for review, and hopefully approval. I will incorporate the entire changes so that the order that's been prepared can be torn up or initiated or --

THE COURT: Okay. That's what I needed to know.

MR. BIRCH: Okay.