2006

Jennings Investment, LC, Gilbert Jennings, Mansfield Jennings, Conrad Bowler, Lewis J. and Dorcus N. Bowler, H. Val Hafen, Randy and Gai Bowler, Troy and Kerrie Bowler, and John Bowler v. Dixie Riding Club, Inc. and John Does 1-20 : Brief of Appellant

Utah Court of Appeals

V. Lowry Snow; Lewis P. Reece; Snow Jensen & Reece; Attorneys for Platiniffs/Appellees Jennings Investment, LC, Gilbert Jennings, Mansfield Jennings, Conrad Bowler, Lewis J. and Dorcus N. Bowler, H. Val Hafen, Randy and Gai Bowler, Troy and Kerrie Bowler, and John Bowler.
Robert J. Dale; Bradley L. Tilt; Matthew B. Hutchinson; Fabian & Clendenin, PC; Attorneys for Defendant Dixie Riding Club.

IN THE UTAH COURT OF APPEALS

JENNINGS INVESTMENT, LC; GILBERT JENNINGS; MANSFIELD JENNINGS; CONRAD BOWLER; LEWIS J. and DORCUS N. BOWLER; H. VAL HAFEN; RANDY and GAI BOWLER; TROY and KERRIE BOWLER; and JOHN BOWLER, Plaintiffs and Appellees, vs. DIXIE RIDING CLUB, INC., a Utah corporation; and JOHN DOES 1-20, Defendant and Appellant.	)	Case No. 20060631-CA

BRIEF OF APPELLANT DIXIE RIDING CLUB, INC.

Appeal from a Judgment of the Fifth Judicial District Court, Washington County, Honorable G. Rand Beacham, District Judge

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PARTIES TO THE PROCEEDINGS

Pursuant to Rules 24(a)(1) and 24(b) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the trial court proceedings that are the subject of this appeal, and their respective party designations in those proceedings:

1. Jennings Investment, LC – Plaintiff
2. Gilbert Jennings – Plaintiff
3. Mansfield Jennings – Plaintiff
4. Conrad Bowler – Plaintiff
5. Lewis J. Bowler – Plaintiff
6. Dorcus N. Bowler – Plaintiff
7. H. Val Hafen – Plaintiff
8. Randy Bowler – Plaintiff
9. Gai Bowler – Plaintiff
10. Troy Bowler – Plaintiff
11. Kerrie Bowler – Plaintiff
12. John Bowler – Plaintiff
13. Dixie Riding Club, Inc. – Defendant
14. John Does 1-20 – Defendants

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear and decide this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2006).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF APPELLATE REVIEW

Issue No. 1: Whether the District Court erred in its determination that Plaintiffs met their burden to prove all of the elements required to give rise to a dedication and abandonment of private property for a public highway under the governing statute, Utah Code Ann. § 72-5-104, by competent, clear and convincing evidence.

Standard of Review: All elements required for the dedication and abandonment of private property for a public highway must be proven by the plaintiff by clear and convincing evidence. *E.g., Petersen v. Combe*, 20 Utah 2d 376, 379, 438 P.2d 545, 547 (1968). The ultimate determination of whether the facts meet the statutory definition of a public highway "is a mixed question of fact and law," which the appellate court reviews "for correctness." *Heber City Corp. v. Simpson*, 942 P.2d 307, 309 (Utah 1997). Additionally, since the District Court decided this case on summary judgment, the appellate court must "review a trial court's summary judgment ruling for correctness and afford no deference to its legal conclusions." *Gottling v. P.R. Inc.*, 2002 UT 95 5, 61 P.3d 989, 991 (quoting *Utah Coal & Lumber v. Outdoor Endeavors Unlimited*, 2001 UT 100, ¶ 9, 40 P.3d 581) (internal quotations omitted).

Demonstration that Issue No. 1 Was Preserved in the District Court: The attorneys who represented Dixie Riding Club, Inc. ("**Dixie**") in the summary judgment

proceedings below argued, for example, in Dixie's summary judgment reply memorandum, that "Plaintiff's (sic) have a burden with clear and convincing evidence to establish, under the mandates of § 72-5-104(1), that the private property of the Defendant's (sic) should now be declared a public roadway. This Honorable Court should see that this burden cannot be met[.]" (R. 289 (Dixie's Reply)).

Issue No. 2: Whether the District Court erred in failing to assess the reasonable and necessary width of any public highway, even if any public highway was properly found to exist (which Dixie denies).

Standard of Review: Plain error. Utah Code Ann. § 72-5-104(3)(2005) (stating width of a public thoroughfare dedicated under governing statute "is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances"); *Kohler v. Martin*, 916 P.2d 910, (Utah Ct. App. 1996) ("even if a public thoroughfare was created, the District Court erred in failing to assess the reasonable and necessary width of the roadway") (emphasis added).

Statement of Grounds for Seeking Review on Issue No. 2: Plaintiffs failed to provide for the District Court any evidence at all regarding the reasonable and necessary width of any public highway. The District Court therefore had no basis to, could not, and did not conduct any assessment of the reasonable and necessary width of any public highway as is required by the governing Utah statute and case law. It therefore was plain error for the District Court to dedicate a fifty-foot wide swath of Dixie's property as a public highway, particularly where there was no evidence of any use of such width.

Issue No. 3: Whether the District Court abused its discretion in ruling that all facts set forth by Plaintiffs in support of their cross-motion for summary judgment were deemed admitted by Dixie, purportedly because Dixie did not separately list and quote verbatim Plaintiffs' fact claims that were disputed by Dixie, even though Dixie filed affidavits and memoranda opposing and disputing material facts.

Standard of Review: Abuse of discretion. *Gary Porter Constr. v. Fox Constr., Inc.*, 2004 UT App 354, ¶¶ 13-15, 101 P.3d 371, 375-76.

Statement of Grounds for Seeking Review on Issue No. 3: This abuse of discretion did not become apparent until after the summary judgment briefing was completed and the District Court issued its ruling based upon and chiding Dixie's then attorneys for this issue. Since Dixie's memoranda discussed and was supported by facts set forth by affidavit, the District Court's abandonment of Dixie's property as a public highway was an abuse of discretion, and is appropriate for this Court's review.

Issue No. 4: Whether the District Court improperly engaged in a weighing of disputed facts and evidence on summary judgment.

Standard of Review: "Summary judgment is proper only when 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.' Utah R. Civ. P. 56(c). 'In determining whether the lower court correctly found that there was no genuine issue of material fact, we view the facts and inferences to be drawn therefrom in the light most favorable to the losing party.' In other words, 'we

review the factual submissions to the District Court in a light most favorable to finding a material issue of fact.' Moreover, '[i]n reviewing a grant of summary judgment, we accord no deference to the trial court's conclusions of law and review them for correctness.'" *Nyman v. McDonald*, 966 P.2d 1210, 1212 (Utah Ct. App. 1998) (citations omitted).

Demonstration that Issue No. 4 Was Preserved in the District Court: Dixie submitted to the District Court affidavits disputing the claimed facts set forth by Plaintiffs in support of their motion, and argued those disputed facts in opposition to Plaintiffs' motion. The District Court's statement in its ruling drawing a contrast between the parties' respective summary judgment materials and noting that Plaintiffs' materials struck the court as "clearly more detailed and analytical," (R. 309, Ruling n.1), shows an improper weighing of evidence on summary judgment appropriate for this Court to review. This abuse of discretion did not become apparent until after the summary judgment briefing was completed and the District Court issued its ruling.

Issue No. 5: Whether the District Court erred in ruling that Plaintiffs have standing to maintain this action, misstating the standing argument as whether private citizens may rely upon Utah Code § 72-5-104, where the standing issue actually pertains to whether the claimed evidence of use that was presented to the District Court was use by the "public" sufficient under the statute, or merely use by private parties and neighboring property owners that as a matter of law cannot create a public highway dedication.

Standard of Review: "We review a trial court's summary judgment ruling for correctness and afford no deference to its legal conclusions." *Gottling v. P.R. Inc.*, 2002 UT 95 ¶ 5, 61 P.3d 989, 991 (quoting *Utah Coal & Lumber v Outdoor Endeavors Unlimited*, 2001 UT 100, ¶ 9, 40 P.3d 581) (internal quotations omitted).

Demonstration that Issue No. 5 Was Preserved in the District Court: Dixie's attorneys below argued, for example, in Dixie's opening summary judgment memorandum, that "[t]he first issue is that the Plaintiff's (sic), each and every one of them, or (sic) in fact individuals, and are not members of any body politic entitled to pursue a dedicated road on behalf of the City of St. George" (R. 130); "private persons are seeking to deprive the Plaintiff's (sic) of their property with no standing to do so" (R. 135); and "Plaintiff's (sic) by seeking to have property dedicated, paid for, and taxes having been rendered, declared a public thoroughfare, these Plaintiff's (sic) are, in essence, claiming to privately act on behalf of the public having no standing to pursue the rights of the City of St. George." (R. 135-36).

Issue No. 6: Whether Plaintiffs' claims are barred for failure to name the city of St. George as a necessary and indispensable party, where the evidence presented to the District Court by Plaintiffs (which Dixie does not admit) claiming the disputed alleged roadway at issue may have been either owned by or subject to an easement in favor of the city of St. George. The effect of Plaintiffs' claims in this case and the District Court's Decree of Dedication were to declare property and property rights purportedly owned by

the city of St. George to have been abandoned to the state, without Plaintiffs naming St. George as a party to this case.

Standard of Review: Rule 19 of the Utah Rules of Civil Procedure states that a person or entity who claims an interest relating to the subject matter of the action whose interests may be affected by the outcome of the case "shall" be joined as parties to the action. Rule 56(c) states that summary judgment is appropriate only if the moving party is entitled to judgment as a matter of law. Plaintiffs' entitlement to judgment as a matter of law to abandon property rights and interests Plaintiffs claim were owned by St. George, without naming St. George as a party, should be reviewed for correctness and afforded no deference. *Gottling v. P.R. Inc.*, 2002 UT 95 ¶ 5, 61 P.3d 989, 991.

Demonstration that Issue No. 6 Was Preserved in the District Court: Plaintiffs themselves submitted evidence below claiming that the alleged roadway was either owned by or subject to an easement in favor of St. George. (*E.g.*, R. 171-72 (Aff. of David Elwess, title searcher, ¶¶ 5 & 19 (discussing same)). Dixie objected below that "[t]he City of St. George is a municipal corporation that is not a party to this lawsuit," despite Plaintiffs' claim that the City owns land which Plaintiffs seek to have dedicated as a public highway. (R. 130 & 135-36).

Additionally, a party to a lawsuit may raise the issue of failure to join an indispensable party at any time in the proceedings, including for the first time on appeal. *Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989); Utah R. Civ. P. 19(a).

CONTROLLING STATUTE

Utah Code § 72-5-104 (2005): Public use concerning dedication -- Scope

> (1) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.
>
> (2) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.
>
> (3) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This action was originally filed by Plaintiffs H. Val Hafen, Gilbert Jennings, Mansfield Jennings, Conrad Bowler, and Lewis Bowler (collectively referred to herein as "**Plaintiffs**") on April 11, 2003. (R. 1-4.) The original complaint named David T. Welch and John Does 1 through 20 as defendants and sought a declaratory judgment that a certain purported "roadway" was dedicated and abandoned to the use of the public pursuant to Utah Code Ann. § 72-5-104. On October 14, 2003, Plaintiffs moved to amend their complaint, naming Dixie Riding Club ("**Dixie**") as defendant, removing David T. Welch as defendant, adding Jennings Investment, LC as plaintiff, and adding a cause of action for a prescriptive easement. (R. 61-63). The amendment was allowed and Plaintiffs' "Second Amended Complaint" (there is no first amended complaint in the record) was filed on October 29, 2003. (R. 77-83).

Dixie moved for partial summary judgment ("**Dixie's Motion**") seeking dismissal of Plaintiffs' public highway claim on January 14, 2005. Dixie's Motion was supported by a memorandum of points and authorities and an Affidavit of Charles Welch. (R 127-144).

Plaintiffs filed a cross motion for summary judgment ("**Plaintiffs' Cross-Motion**") on March 9, 2005, along with a supporting memorandum and affidavits, seeking an order dedicating as a public highway a portion of real property owned by Dixie. (R. 139-285).

Dixie filed an Opposition to Cross Motion for Summary Judgment and Reply Brief to Plaintiffs' Cross-Motion ("**Dixie's Reply**") with a second and supplemental Affidavit of Charles Welch on April 28, 2005. (R. 286-292). Plaintiffs filed their final reply brief ("**Plaintiffs Reply**") on July 11, 2005, (R. 293-301), and the parties' motions were then submitted for decision on July 12, 2005. (R. 302-303).

On November 10, 2005, Fifth District Court Judge G. Rand Beacham held a hearing on the parties' summary judgment motions. (R. 308). On January 12, 2006, Judge Beacham entered his Rulings on Motions for Summary Judgment, denying Dixie's Motion and granting Plaintiffs' Cross-Motion. (R. 309-311.) On March 7, 2006, Judge Beacham entered Findings of Fact and Conclusions of Law (R. 319-337) and a Decree of Dedication (R. 338-340), both of which were prepared by Plaintiffs' counsel.

Dixie filed a Notice of Appeal of the District Court's decision on April 5, 2006. (R. 377-378). Dixie's appeal ultimately was assigned to this Court.

II. Statement of Facts

a. Background Facts

1. Dixie owns certain real property in Washington County, Utah (the "**Dixie Property**"), upon which is located an equestrian arena that historically has been used for rodeos and similar events. (R. 79 (Plaintiffs' Second Amended Complaint ¶¶ 3 & 4); R. 83 (Exhibit 1 to Plaintiffs' Second Amended Complaint)).

2. Plaintiffs claim that a purported "roadway" crosses the Dixie Property (the "**Alleged Roadway**"), and that Plaintiffs and the general public have an interest in the Alleged Roadway as a public highway or public thoroughfare. (R. 78-79 (Plaintiffs' Second Amended Complaint ¶¶ 1 & 2)).

b. Facts Relating to Ownership of the Alleged Roadway.

3. Plaintiffs allege that the Washington County Assessor recognized some portion of the Alleged Roadway as a "public road," and that the Alleged Roadway had not been carried under the Washington County tax rolls. (R. 80 (Plaintiffs' Second Amended Complaint at ¶ 8).

4. In the summary judgment proceedings below, Plaintiffs submitted the affidavit of David Elwess, a title searcher for Plaintiffs, which stated that "it appears that [the Alleged Roadway] was specifically omitted from the legal description of property subject to tax or assessment by Washington County." (R. 171-72 (Aff. of David Elwess ¶ 19)).

5. The Elwess affidavit further stated that "[i]n about 1972 or 1973, [Dixie] started deeding out separate parcels from the overall parent parcel." (R. 167 (Aff. of David Elwess ¶ 5)).

6. In Plaintiffs' initial memorandum filed in support of their Cross-Motion for partial summary judgment, Plaintiffs stated that "[o]n May 30, 1974, [Dixie] deeded a four foot easement to the City of St. George which was added to an existing 46 foot right-of-way easement the City held, making a total 50 foot easement. The May 30, 1974 warranty deed specifically refers to the [Alleged Roadway] and states that: '[t]he following described property to be added to and be part of an existing roadway to be used by the grantee as and for a public roadway and easement for utilities.'" (R. 149 (Statement of Facts at ¶ 18 (a))).

7. In Plaintiffs' memorandum in support of their Cross-Motion for partial summary judgment, Plaintiffs stated that "the [Alleged Roadway] connects between 1100 West and 1230 North, and has been in existence since about 1972 as [Dixie] deeded out lots of the larger arena parcel." (R. 160 (Plaintiffs' Memorandum at 22)).

8. By contrast, on behalf of Dixie, Charles Welch testified by affidavit that the land of the Alleged Roadway was included in the legal description in the conveyance deed to Dixie, and that Dixie has paid all taxes on the Alleged Roadway property. (R. 139 (Aff. of Charles Welch ¶¶ 4-5.)

9. Arthur L. Partridge, the Washington County Assessor, in an April 15, 2004 letter to Dixie, wrote that "[a]fter a recent survey of two properties owned by Dixie Riding Club, Inc., it was brought to the attention of the Washington County Assessor's

office and the Washington County Recorders offices, that the acreage had been understated for many years." Mr. Partridge also wrote that the understatement of acreage had been corrected and that Dixie has never been delinquent in its payment of property taxes. (R. 142 (Exhibit 1 to Aff. of Charles Welch)).

10. Charles Welch testified by affidavit that Dixie had had discussions with the City of St. George about making the Alleged Roadway a dedicated road, and that neither the City of St. George nor Dixie decided to make the Alleged Roadway a dedicated road. (R. 139 (Aff. of Charles Welch ¶¶ 6-7)).

c. Facts Relating to the Use of the Alleged Roadway.

i. *Evidence of Use Only by Neighboring Landowners*

11. In support of their Cross-Motion for partial summary judgment, Plaintiffs filed six affidavits discussing claimed use of the Alleged Roadway purportedly by members of the general public. (R. 231-250, 271-285 (Affs. of Conrad Bowler, Ethan Bundy, H. Val Hafen, Gilbert Jennings, Mansfield Jennings, and Lewis Bowler)).

12. Five of those six affiants (Conrad Bowler, H. Val Hafen, Gilbert Jennings, Mansfield Jennings, and Lewis Bowler), however, are named Plaintiffs in this action and whom the evidence showed owned real property immediately abutting the Alleged Roadway. (R. 231-236, 243-250, 271-285 (Affs. of Conrad Bowler, H. Val Hafen, Gilbert Jennings, Mansfield Jennings, and Lewis Bowler); *see also* R. 139 (Aff. of Charles Welch ¶ 3)).

13. The sixth of those affiants (Ethan Bundy) is not a party to this case, but was an owner of property abutting the Alleged Roadway until August 2000, including during

the time Plaintiffs claim the Alleged Roadway was created. (R. 239 (Aff. of Ethan Bundy ¶ 2)).

14. All six of those affidavits primarily discussed use of the Alleged Roadway merely by neighboring landowners, including the affiants themselves, rather than by members of the general public, including:

(a.) Plaintiff Conrad Bowler's affidavit discussed claimed use by property owners in the Ence Bowler Marsh Subdivision, which he developed, located immediately to the west of the Alleged Roadway, to ride their horses from one part of the neighborhood to another part of the neighborhood, and sometimes to head toward Snow Canyon. (R. 232 (Aff. of Conrad Bowler ¶¶ 2 & 5));

(b.) Other affiants also discussed use of the Alleged Roadway merely to get from one part of the adjacent neighborhood to another. (R. 233 (Aff. of Conrad Bowler ¶ 6)); R. 240 (Aff. of Ethan Bundy ¶ 5); R. 244 (Aff. of H. Val Hafen ¶¶ 4 & 5); R. 273-74 (Aff. of Gilbert Jennings ¶¶ 5 & 9); R. 279 (Aff. of Mansfield Jennings ¶¶ 5 & 8).

15. The evidence presented by Dixie, however, was that Dixie allowed adjacent land owners to use the Alleged Roadway from time to time with Dixie's express or implied permission. (Aff. of Charles Welch ¶ 9)).

ii. *Evidence of Use by Persons other than Neighboring Landowners*

16. The six affidavits submitted by Plaintiffs discussing use of the Alleged Roadway set forth only the following relating to the claimed use of the Alleged Roadway purportedly or possibly by persons other than neighboring landowners:

(a.) On the north end of the Alleged Roadway was a trail head where "many people" used to ride out in the country. (R. 233 (Aff. of Conrad Bowler ¶ 5)); R. 239 (Aff. of Ethan Bundy ¶ 4); R. 272 (Aff. of Gilbert Jennings ¶ 4); R. 278 (Aff. of Mansfield Jennings ¶ 4).

(b.) Instead of riding their horses on the nearby paved 1100 West road, "people" used the Alleged Roadway to ride to the north and around an old turkey farm that was about a mile away. (R. 233 (Aff. of Conrad Bowler ¶ 5)); R. 239 (Aff. of Ethan Bundy ¶ 4); R. 273 (Aff. of Gilbert Jennings ¶ 4); R. 279 (Aff. of Mansfield Jennings ¶ 4)..

(c.) The Alleged Roadway was traveled by the "public in general" from about 1972 until 2002, approximately when the gate was put up by Dixie. (R. 233 (Aff. of Conrad Bowler ¶ 6)); R. 240 (Aff. of Ethan Bundy ¶ 5) (until 2000); R. 244-45 (Aff. of H. Val Hafen ¶¶ 4 & 5); R. 273 (Aff. of Gilbert Jennings ¶ 5); R. 279 (Aff. of Mansfield Jennings ¶ 5).

(d.) The "general public" drove on the Alleged Roadway to look at horses stabled along the Alleged Roadway, to take horses to be bred or stabled, to discuss business regarding their horses, and to buy horses and sell horses. (R. 234-35 (Aff. of Conrad Bowler ¶¶ 7 & 11); R. 240-41 (Aff. of Ethan Bundy ¶¶ 8 & 10); R. 245 (Aff. of H. Val Hafen ¶ 6); R. 274 (Aff. of Gilbert Jennings ¶ 9);

(e.) The "general public" used the Alleged Roadway to watch people use the sheriff's arena on the Dixie Property. (R. 234 (Aff. of Conrad Bowler ¶ 7)

R. 240-41 (Aff. of Ethan Bundy ¶ 10); R. 245 (Aff. of H. Val Hafen ¶ 6); R. 274 (Aff. of Gilbert Jennings ¶ 8);

(f.) The "general public" used the Alleged Roadway "almost daily," even when no public event took place at the arena. (R. 234 (Aff. of Conrad Bowler ¶ 8);

(g.) The "general public" accessed a tack and saddle shop just south of the arena via the Alleged Roadway. (R. 235 Aff. of Conrad Bowler ¶ 10); R. 241 (Aff. of Ethan Bundy ¶ 9); R. 245 (Aff. of H. Val Hafen ¶ 6);

(h.) The Alleged Roadway was used "by the public as a thoroughfare." R. 246 (Aff. of H. Val Hafen ¶ 68).

17. Charles Welch testified in his affidavit on behalf of Dixie that Dixie has never allowed the general public to use the property as a thoroughfare, a roadway, a right-of-way, or any other use except if by implied or express permission. (R. 140 (Aff. of Charles Welch ¶ 10)).

18. In its answers to Plaintiffs' requests for admissions (which Plaintiffs cited purportedly in support of their Cross-Motion), Dixie also stated that "any and all access to the property in question was, in fact, done with the implied or express permission of the general leadership, or membership of the Dixie Riding Club, Inc." (R. 256 (Answer to Plaintiff's First Request for Admission No. 14)).

19. A photograph of the Alleged Roadway taken in January 2005 shows the approach to the Alleged Roadway, which Plaintiffs claim is a part of the Alleged

Roadway, is a narrow pathway through large overgrown bushes. (R. 143 (Exhibit 2 to Aff. of Charles Welch)).

d. The District Court's Findings and Rulings.

20. The District Court ruled that Dixie's legal counsel below did not properly object to and dispute the facts as claimed by Plaintiffs because he did not separately state and quote each fact claimed by Plaintiff and follow each quoted fact with a discussion of the evidence disputing each such claimed fact. The District Court therefore ruled that all claimed facts set forth by Plaintiffs were deemed as admitted pursuant to Utah R. Civ. P. 7(c)(3)(B). The District Court therefore ruled that the Alleged Roadway "was 'continuously used as a public thoroughfare for a period of [far more than] ten years,' as is required to establish dedication and abandonment to the use of the public pursuant to Utah Code Ann. § 72-5-104," (R. 310 (Rulings on Motions for Summary Judgment) (alteration in original). A copy of the Rulings on Motions for Summary Judgment is attached hereto as Addendum No. 1. Based on that ruling, the District Court entered Findings of Fact and Conclusions of Law and also a Decree of Dedication, both of which were drafted by Plaintiffs' counsel, declaring a 50-foot wide swath of the Dixie Property to be dedicated and abandoned as a public highway. (R. 319-37 (Findings of Fact and Conclusions of Law); R. 338-40 (Decree of Dedication). Copies of the Findings of Fact and Conclusions of Law and of the Decree of Dedication are attached hereto as Addenda 2 & 3, respectively.).

SUMMARY OF ARGUMENT

The District Court erred in declaring a portion of the Dixie Property dedicated and abandoned as a public highway on Plaintiffs' Cross-Motion for summary judgment. Plaintiffs failed their burden to prove by clear and convincing evidence all of the elements required for dedication of private property as a public highway, particularly on summary judgment where there were disputed facts on required elements of Plaintiffs' claim as to whether any claimed use shown to the court was use by the public and whether it was by permission. The District Court also abused its discretion in declaring Plaintiffs' claimed facts as admitted by Dixie where they were actually disputed by sworn affidavit.

Even if Plaintiffs had met their burden of proof (which Dixie denies), and even if there were not disputes of material fact precluding summary judgment for Plaintiffs in any event (which there were), the District Court still erred in granting Plaintiffs' Cross-Motion in this case because it failed to receive any evidence regarding, or to make any analysis or evaluation of, the reasonable and necessary width and use of the Alleged Roadway, which is required under the governing statute and dispositive case law.

Declaration of a public highway in any event also was in error because the evidence presented by Plaintiffs themselves showed that the City of St. George either owned or had an easement to the Alleged Roadway. The City of St. George is therefore a necessary and indispensable party to this case that concerns the parties' respective rights to that property which Plaintiffs themselves claim the City may own. Plaintiffs, however,

failed to join the City as a party to this case so that it could assert and protect its rights in and to that property.

The District Court improperly rushed to summary judgment on this case. Its decision is erroneous and indeed contrary to established rules of law and procedure in several different regards. This Court therefore should reverse the District Court, and remand this case for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT PLAINTIFFS MET THEIR BURDEN TO PROVE, BY UNDISPUTED, COMPETENT, CLEAR, AND CONVINCING EVIDENCE, ALL OF THE ELEMENTS REQUIRED UNDER THE GOVERNING STATUTE TO GIVE RISE TO A DEDICATION AND ABANDONMENT OF DIXIE'S PRIVATE PROPERTY FOR A PUBLIC HIGHWAY

A. Plaintiffs Failed Their Burden of Proof.

Plaintiffs were required, but failed, to prove by clear and convincing evidence all elements required for the existence of a public highway. The ultimate determination of whether the facts meet the statutory definition of a public highway "is a mixed question of fact and law," which the appellate court reviews "for correctness." *Heber City Corp. v. Simpson*, 942 P.2d 307, 309 (Utah 1997).

In order to establish dedication for public use, the person seeking dedication must demonstrate each of the following: (1) continuous use, (2) as a public thoroughfare, and (3) for a period of ten years. Utah Code Ann. § 72-5-104 (emphasis added). The "public

thoroughfare" element consists of and requires proof of all the following: (i) passing or travel, (ii) by the public, (iii) without permission. *Heber City*, 942 P.2d at 311 (stating above elements, including that "use by permission does not constitute use as a public thoroughfare") (quoting *Morris v. Blunt*, 161 P. 1127, 1131 (Utah 1916) (emphasis added). Plaintiffs' public highway claim fails, and the District Court erred in granting summary judgment for Plaintiffs, because Plaintiffs did not prove use by the public and without permission.

The Utah Supreme Court has admonished that "the dedication of one's property to a public use should not be regarded lightly." *Bonner v. Sudbury*, 417 P.2d 646, 648 (Utah 1966). Accordingly, that Court has held repeatedly that "[t]he presumption is in favor of the property owner" and against a dedication, *id.*, and all of the above-referenced required elements for dedication of private property as a public highway must therefore be proven by clear and convincing evidence.

The ultimate question in public dedication cases like this one is:

> Was there sufficient evidence by competent testimony, by witnesses who were not self-serving, to show by clear and convincing evidence, that the public generally, -- not just a few having their own special and private interests in the road, had used the road continuously for 10 years? [*Petersen v. Combe*, 20 Utah 2d 376, 438 P.2d 545, 546-47 (Utah 1968) (emphasis added)].

The District Court's dedication of the Alleged Roadway to the public in this case, based solely on Plaintiffs' handful of self-serving affidavits by neighboring property owners including some of the Plaintiffs themselves, reveals a misapprehension of the sanctity and respect which should be afforded to the ownership of property in Utah.

For at least ninety years, Utah courts addressing the issue of public dedication by use have consistently distinguished between use of a road by the general public, and use by owners of adjoining property. "Such [adjoining] property owners cannot be considered members of the public generally, as that term generally is used in dedication by user statutes." *Petersen*, 438 P.2d at 546. Plaintiffs' affidavits submitted in this case, however, establish at most only that neighboring landowners and their guests may have used the Alleged Roadway to get from one part of the neighborhood to the next, to visit one of the businesses located on property adjacent to the Alleged Roadway, or to observe others using the equestrian arena on the Dixie Property.[1] Such private uses of Dixie's land, however, are insufficient as a matter of law to establish, and do not establish, dedication to the public under Utah Code § 72-5-104. *See e.g., Pitts v. Roberts*, 562 P.2d 231, 232 (Utah 1971) (holding evidence insufficient to establish public use element under public highway statute where only evidence presented was use by abutting land owners); *Thompson v. Nelson*, 273 P.2d 720, 723 (Utah 1954) (emphasis that "use must be by the public" in order to meet the public highway statute) (quoting *Morris v. Blunt*, 161 P. 1127, 1131(Utah 1916); *See also Renfro v. McCowan*, 2006 WL 3254509 at *4

[1] *See e.g.,* R. 232-35 (Affidavit of Conrad Bowler) ("Property owners who owned horses west and south of the arena frequently rode their horses through the [Alleged Roadway]," "The people having horses in the [adjacent] Ence Bowler Marsh Subdivision also road (sic) their horses north through the [Alleged Roadway], and headed towards Snow Canyon," "In addition, people frequently walked through the [Alleged Roadway] or drove cars to get from one part of the neighborhood to the next," "numerous people used both 1100 West and the [Alleged Roadway] to get to the [neighboring] Ence feed mill.").

(D. Utah 2006) (noting that under Utah's public highway statute "the 'public' includes those normally recognized as being the public, with the exception of owners of adjoining property and those using the road by permission."). Thus, section 72-5-104's "use as a public thoroughfare" requirement cannot be satisfied by any amount of use by the owners of adjoining property.

Nor does any amount of use, even if it is by the public, give rise to a public thoroughfare if such use is by permission. *See e.g.*, *Heber City*, 942 P.2d at 311. "[U]se by permission does not constitute use as a public thoroughfare." *Id.* (quotation omitted).

These well-established rules of law requiring use by the public generally and not by permission in order to establish a public thoroughfare precluded summary judgment in this case for at least three reasons. First, it is undisputed that all of Plaintiffs' affiants were direct or indirect current or former owners of property abutting the Alleged Roadway. Thus, any use by them as a matter of law is not use by the general public and therefore cannot give rise to a public thoroughfare. Second, both in the affidavits it submitted in opposition to Plaintiffs' Cross-Motion, and in its responses to Plaintiffs' discovery requests (which were cited by Plaintiffs), Dixie stated that any and all access to the Alleged Roadway was in fact with and by Dixie's express or implied permission. Such permissive use as a matter of law cannot give rise to a public thoroughfare. Third, in light of Dixie's affidavits and cited discovery responses there were in this case, and are, issues and disputes of material fact as to whether people using the Alleged Roadway were members of the general public whose use could ripen into a public highway or whether they were merely neighboring landowners whose use could not ripen into any

public highway, and as to whether use of the Alleged Roadway by anybody was permissive and therefore not supportive at all of any public highway. Where there is any dispute of material fact, summary judgment may not be granted. *See* Utah R. Civ. P. 56(c).

The landmark case of *Petersen v. Combe*, 20 Utah 2d 376, 438 P.2d 545 (Utah 1968) is highly instructive to this one. In *Petersen,* the plaintiffs seeking to prove dedication of a roadway as a public thoroughfare called numerous witnesses at trial, most of whom were either property owners abutting or straddling the road in question. Many of these witnesses were direct or indirect successors in title from a homesteader who had settled the area. Based on these facts, the court concluded that these witnesses

> were not a part of the general public, but were interested persons entitled individually to use the road personally in virtue of their documentary title, and they or their personal visitors cannot be numbered in the class of members of the general public using such road in a fashion that might ripen into a dedication of a road under the statute." *Petersen*, 20 Utah 2d at 379, 438 P.2d at 547.

Likewise, in the case at bar Plaintiffs failed to prove use by the public generally. Plaintiffs provided six affidavits regarding claimed use of the Alleged Roadway. None of those affiants, however, were disinterested members of the general public. Each of them admitted that they own, had recently owned, or were members of a limited liability company (Plaintiff Jennings Investment, LC) which owns, property adjacent to the Alleged Roadway. Each of them also discussed use primarily by neighboring property owners as discussed more fully above. The only evidence Plaintiffs presented of use of the Alleged Roadway by persons other than neighboring landowners is a set of self-

serving and impermissibly conclusory statements, without foundation, by Plaintiffs' affiants to the effect that the "general public" used the Alleged Roadway. Not one member of the "general public" is identified. Nor do Plaintiffs indicate how many members of the "general public" used the Alleged Roadway, or how often. Not one member of the "general public" provided an affidavit describing his or her use of the Alleged Roadway. In short, there is nothing in Plaintiffs' affidavits that establishes at all, and certainly not by the required quantum of "clear and convincing evidence," that the persons who purportedly used the Alleged Roadway were not other neighboring landowners or otherwise were not using the Alleged Roadway with Dixie's permission. Since no disinterested party provided testimony regarding use of the road by the general public, and the evidence provided by Plaintiffs' affiants to the effect that the "general public" used the Alleged Roadway is, at best, vague, conclusory and without foundation, the facts alleged in Plaintiffs' affidavits simply do not and cannot constitute the required "clear and convincing evidence" of use "as a public thoroughfare."[2] *See Petersen*, 438 P.2d at 547 ("we believe the testimony of plaintiffs' own witnesses defeated the plaintiffs' cause on the simple principle that the testimony of one's own witnesses is no stronger than its weakest link"). It therefore was plain error for the District Court in this case to hold that the use alleged by Plaintiffs established use by the general public "as a

[2] Indeed, Plaintiffs' affidavits are inadmissibly vague, conclusory, and without foundation, and therefore should not have been relied upon at all in the summary judgment proceedings. *See e.g.*, Utah R. Civ. P. 56(e).

public thoroughfare" by clear and convincing evidence,[3] particularly on summary judgment in light of the disputes of material facts.

B. Even if Plaintiffs Had Met Their *Prima Facie* Burden of Proof, Disputes of Fact Precluded Summary Judgment for Plaintiffs

The District Court erred in granting summary judgment for Plaintiffs where there were disputes of material fact. Summary judgment can be granted only if "there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. Rule 56(c), Utah R. Civ. P.; *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982) ("a motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which, if resolved in favor of the nonmoving party would entitle him to judgment as a matter of law.").

It is well-settled that "'[o]ne sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding summary judgment.'" *Nyman v. McDonald*, 966 P.2d 1210, 1213 (Utah Ct. App. 1998) (quoting *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah Ct. App. 1989)) (alteration in original). In proceedings on a motion for summary judgment, all facts and inferences must be viewed in the light most favorable to the non-moving party. *E.g., Drysdale v.*

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[3] The District Court misstated Dixie's standing argument as whether private citizens may ever bring suit under Utah Code § 72-5-104. The standing issue articulated by Dixie below actually pertains to whether the claimed evidence of use that was presented to the District Court was use by the "public" sufficient under the statute, or use by private parties and neighboring property owners that legally cannot create a public highway. As shown above, the District Court's grant of summary judgment to Plaintiffs despite the fact that the affidavits they filed in support of their Cross-Motion for summary judgment were all made by current or former neighboring landowners, and which failed to establish by clear and convincing evidence that the Alleged Roadway was used "as a public thoroughfare," was error.

Ford Motor Co., 947 P.2d 678, 680 (Utah 1997). Also, all facts asserted by Dixie in opposition to Plaintiffs' Cross-Motion for summary judgment were required to be taken as established for the purposes of these proceedings. *E.g., Durham v. Margetts*, 571 P.2d 1332, 1334-35 (Utah 1977).

In reviewing a grant of summary judgment, the Court of Appeals views "the facts in a light most favorable to the losing party below." *Johnson v. Utah Dept. of Trans.*, 2004 UT 284 ¶ 9 (Utah Ct. App. 2004) (quotation omitted). "Because the question of whether summary judgment is appropriate is a question of law," the Court of Appeals "accord[s] no deference to the trial court." *Id.* (quotation omitted).

Here, the District Court impermissibly granted summary judgment for Plaintiff over and despite the presence of genuine disputes of material fact raised by Dixie. In particular, the District Court determined that the claimed use being made of the Alleged Roadway was not permissive, despite sworn testimony from Dixie that it was. The court further declared that the claimed use was by members of the general public, where that claim was also disputed.

Public highway dedication cases are inherently fact intensive, and not prone to resolution on summary judgment, particularly in light of plaintiffs' burden to prove all required elements by "clear and convincing evidence." Indeed, amid the seventeen reported Utah appellate opinions that have reviewed a district court's grant of a claim for dedication of a roadway to the public under Utah Code Ann. § 72-5-104 and its

predecessors, only one (*Draper City v. Bernardo*, 888 P.2d 1097 (Utah 1995)) involved such a dedication granted on summary judgment and without a trial.[4]

In the one reported Utah case that involved a public highway dedication granted on summary judgment, the Utah Supreme Court reversed because there were issues of disputed material facts. *Id.* at 1099. Specifically, it was disputed that users of the road in question were members of the general public and using the road without permission:

> The main thrust of the affidavits filed by defendants is that people using the road as described in the court's findings of fact prior to about 1960 did so with the permission of the landowners over whose property the road coursed. For example, the people using the road during the 1920s and the 1930s to extract silica from a pit, to gather firewood, and to transport and graze cattle and sheep were either owners of land adjacent to the road, their employees, or people to whom permission had been given by the landowners.
>
> ***

[4] Those Utah appellate court opinions reviewing a district court's grant of a claim for dedication of a public roadway after a trial are: *Whittaker v. Ferguson*, 51 P. 980 (Utah 1898); *Schettler v. Lynch*, 64 P. 955 (Utah 1901); *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646 (Utah 1929); *Jeremy v. Bertagnole* 116 P.2d 420 (Utah 1941); *Bonner v. Sudbury*, 417 P.2d 646 (Utah 1966); *Petersen v. Combe*, 438 P.2d 545 (Utah 1968); *Blonquist v. Blonquist*, 516 P.2d 343 (Utah 1973); *Thurman v. Byram*, 626 P.2d 447 (Utah 1981); *Memmott v. Anderson*, 642 P.2d 750 (Utah 1982); *Butler, Crockett, and Walsh Development Corps. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225 (Utah 1995); *Kohler v. Martin*, 916 P.2d 910 (Utah App. 1996); *Chapman v. Uintah County*, 2003 UT App. 383, 81 P.3d 761; *AWINC Corp. v. Simonsen*, 112 P.3d 1228 (Utah App. 2005); *Utah v. Six Mile Ranch*, 2006 UT App. 104, 132 P.3d 687; *Utah County v. Butler*, 2006 UT App. 444, ___ P.3d ___; *Wasatch County v. Okelberry*, 2006 UT App 473, ___ P.3d ___. The United States District Court for the District of Utah recently held that a road was "abandoned and dedicated to the use of the public" under Utah Code § 72-5-104 on summary judgment. *Renfro v. McCowan*, 2006 WL 3254509 (D. Utah 2006). That case is clearly distinguishable from this one, however, since in *Renfro* the defendant conceded that the general public used the road without permission, s*ee id.* at *5, whereas use by the public and use by permission both are contested issues in this case.

> Thus, we find that there is a material issue of fact as to whether people using the road prior to 1960 were members of the general public whose use could ripen into a public way or whether they were landowners in the area who had either a private right to use the road or permission of the owners over whose land the road coursed. [*Id.* at 1099-1100 (emphasis added)].

In reversing the district court's grant of a public highway by summary judgment, the Supreme Court noted that "[f]act-sensitive cases such as this case do not lend themselves to a determination on summary judgment." *Id.* at 1101.

The same disputed issues of fact the Supreme Court identified in *Bernardo* as precluding summary judgment also exist in the case at bar. The District Court's findings and conclusions that use of the Alleged Roadway was not by permission are directly contrary to the facts stated in the affidavit of Charles Welch and Dixie's responses to Plaintiffs' discovery requests that were cited in the summary judgment proceedings. Since "[o]ne sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding summary judgment," *Nyman,* 966 P.2d at 1213, and particularly since facts asserted by Dixie in opposition to Plaintiffs' summary judgment motion were required to be taken as true, and all facts and inferences were required to be viewed in the light most favorable to Dixie against Plaintiffs' motion, *Durham*, 571 P.2d at 1334-35, *Drysdale*, 947 P.2d at 680, summary judgment in this case was improper. There were and are disputes of the material facts as to whether the claimed use of the Alleged Roadway was by the general public, and even if so, whether it was by permission. Both of those material facts go to whether Plaintiffs established use "as a public thoroughfare," a required element of their case, within the meaning of Utah Code § 72-5-104. Since that required element was disputed factually, the District Court's

grant of summary judgment to Plaintiffs must be reversed and this case remanded for trial.

C. The District Court Improperly Engaged In A Weighing Of Disputed Facts and Evidence On Summary Judgment

As shown above, there were, and are, disputes of material facts on required elements of Plaintiffs' claim. By ruling as it did that the Alleged Roadway was used by the general public, without permission, as a public thoroughfare, the District Court necessarily weighed the disputed and contradictory facts and evidence on those points. Indeed, it acknowledged as much in its Ruling, drawing a contrast between the parties' respective materials and noting that Plaintiffs' materials struck the court as "clearly more detailed and analytical." (R. 309, Ruling n.1). It is well-established, however, that: "It is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment." *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah App. 1988) (emphasis added) (citations omitted). "It matters not that the evidence on one side may appear to be strong or even compelling." *Id.* (citations omitted). "'One sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding summary judgment.'" *Nyman*, 966 P.2d at 1213. In light of the disputed evidence before the District Court, and the District Court's impermissible weighing of that evidence, summary judgment for Plaintiffs was improper and must be reversed.

D. The District Court Abused Its Discretion By Dedicating Dixie's Property To The Public Because Of Dixie's Prior Counsel's Failure To Strictly Comply With The Technical Requirements Of Rule 7 For Statements Of Fact

The District Court decided to deem as admitted all of the claimed facts set forth by Plaintiffs in support of Plaintiffs' Cross-Motion because they were not specifically controverted by Dixie's prior counsel in numbered paragraphs that quoted verbatim the claimed facts submitted by Plaintiffs and separately articulated disputing facts specific to each paragraph. (R. 310 (Rulings on Motions for Summary Judgment); R. 320 (Findings of Fact ¶ 1)).

The Utah appellate courts have repeatedly grappled with balancing the need for efficient judicial resolution of litigation and the rights of litigants who may not fully comply with the format requirements of the rules of civil procedure.[5] The District Court's ruling in this case is a stark example of the elevation of form over substance, and an abuse of the District Court's discretion.

The Utah Supreme Court has recognized that even where an "opposing memorandum [does] not set forth disputed facts listed in numbered sentences in a separate section as required by [Rule 4-501(2)(B) of the Utah Rules of Judicial Administration, as long as] the disputed facts [are] clearly provided in the body of the

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[5] Most of the Utah case law considering the issue of whether a district court has abused its discretion by requiring strict compliance with the format requirements of motions was decided under Rule 4-501(2)(B) of the Utah Rules of Judicial Administration. Effective November 1, 2003, Rule 4-501(2)(B) of the Utah Rules of Judicial Administration was repealed, and its procedural content was moved to its present location in Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure. *See Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App 354, ¶ 9, n.1, 101 P.3d 371 (2004).

memorandum with applicable record references, . . . failure to comply with the technical requirements of rule 4-501(2)(B) is harmless." *Salt Lake County v. Metro West Ready Mix, Inc.*, 89 P.3d 155, 160, n. 4 (Utah 2004); *see also Gary Porter Const. v. Fox Const., Inc.*, 101 P.3d 371, 375-76 n. 2 (Utah App. 2004) (examining facts set forth in the body of summary judgment memorandum despite noncompliance with rule 7(c)(3)).

Here, the two Affidavits of Charles Welch filed by Dixie clearly state facts which dispute factual allegations set forth in Plaintiffs' Cross-Motion and affidavits. For example, Charles Welch's sworn affidavits discuss and state both that the Plaintiffs' affiants are or have been at all times relevant to this case owners of neighboring property, which disputes the "public" use element of Plaintiffs' claims, and that any and all use of the Alleged Roadway has been with Dixie's permission. (R. 138-44 & R. 290-92).[6] Mr. Welch's affidavits were referred to and discussed in the body of Dixie's summary judgment memoranda. (*E.g.*, R. 129-37 & R. 286-89).

When Mr. Welch's affidavit testimony is compared with the statements set forth in Plaintiffs' affidavits, Dixie successfully stated facts which directly dispute a central element of Plaintiffs' case – whether the use of the Alleged Roadway was "as a public thoroughfare" within the meaning of Utah Code § 72-5-104, which as shown above requires both use by the public without permission. Accordingly, under *Salt Lake County v. Metro West Ready Mix, Inc.*, Dixie's failure to comply with the technical format requirements of Rule 7(c)(3)(B) was harmless, and the District Court's decisions to deem

[6] Due to an apparent error at the District Court, there are two pages in the record numbered 140 (as well as 139, 141, 142, and 143).

all facts set forth by Plaintiffs in support of their Cross-Motion as admitted by Dixie, was an abuse of the District Court's discretion, particularly in light of the principle that "the dedication of one's property to a public use should not be regarded lightly." *Bonner v. Sudbury*, 417 P.2d 648 (Utah 1966). This decision should be reversed and this case remanded for trial.

II. THE DISTRICT COURT COMMITTED PLAIN ERROR IN FAILING TO ASSESS THE REASONABLE AND NECESSARY WIDTH OF THE ALLEGED ROADWAY.

Even if a public highway were properly found to exist, which Dixie denies, the District Court erred in failing to assess its "reasonable and necessary" width of it. The public dedication statute expressly states that the scope of public highway found to exist is "that which is reasonable and necessary to ensure safe travel under the facts and circumstances." Utah Code Ann. § 72-5-104(3). Since the Utah Supreme Court has held that determination of the "necessary and reasonable width" of a dedicated road requires "the full adjudication of the relevant facts . . . unearthed at trial," such a finding is simply not amenable to summary judgment. *Draper City v. Bernardo*, 888 P.2d 1101, 1101 (1995); *see also Butler, Crockett and Walsh Development Corp. v. Pinecrest Pipeline*, 909 P.2d 225,232 (Utah 1995) ("Determining what width is necessary and proper is a question of fact . . . [which] involves a careful balancing of 'what is reasonable and necessary' given the particular facts of a given case."). Particularly not in this case where there was no evidence whatsoever presented by Plaintiffs to show in any way what the reasonable and necessary width of any Alleged Roadway would be. The District Court's Findings of Fact and Conclusions of Law did not contain any findings as to the

reasonable and necessary width of the Alleged Roadway dedicated to the public, nor could it since there was no evidence presented by Plaintiffs on that material issue. Plaintiffs merely unilaterally and subjectively wished to have a roadway fifty feet in width, so they inserted that figure into the Decree of Dedication that was entered by the Court, without any analysis or findings whatsoever regarding whether that was the reasonable and necessary width. This is plain and reversible error.

In *Kohler v. Martin*, this Court held that "even if a public thoroughfare was created, the trial court erred in failing to assess the reasonable and necessary width of the roadway." 916 P.2d 910, 914 (1996) (emphasis added). The trial court had held that the public thoroughfare extended to a certain noted width, without making a determination of what was "reasonable and necessary under all the facts and circumstances." *Id.* (*quoting Memmott v. Anderson*, 642 P.2d 750, 754 (Utah 1982)). Because the trial court had failed to make this determination, this Court remanded the case for the purpose of determining the appropriate width of the declared roadway.

Likewise, in the case at issue here, "a careful review of the record herein contains no evidence concerning the reasonable and necessary width of the [Alleged Roadway.]" *Memmott*, 642 P.2d at 754. Accordingly, there was no basis for the District Court's dedication of a roadway to the public that is fifty feet wide. That ruling therefore was plain error and must be reversed and remanded.

In determining the appropriate width of a dedicated road, the trial court must take into consideration the uses to which the road historically has been put, and set the width "according to what was reasonable and necessary, under all the facts and circumstances,

for the uses which were made of the road." *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 649 (Utah 1929). Here, the primary use of the Alleged Roadway was by people walking and riding horses across the Dixie Property.[7] Indeed, photographs presented to the District Court showed the Alleged Roadway overgrown by vegetation, and far more narrow than fifty feet. The fifty-foot wide roadway dedicated to the public by virtue of the District Court's Decree of Dedication is therefore far wider than is "reasonable or necessary" for the historical use of the Alleged Roadway. Indeed, fifty feet was a width unilaterally and subjectively chosen by Plaintiffs, likely because that is the width required by St. George City Code for development, an obvious and impermissible expansion of the scope of any Alleged Roadway and the historic use even as claimed by Plaintiffs.

The District Court must be reversed, and this matter must be remanded to the District Court for discovery and a trial, including on the issue of the reasonable and necessary width of any Alleged Roadway in light of, and to be limited by, the historical use of the Alleged Roadway.

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[7] *See* R. 232-33 (Affidavit of Conrad Bowler) (describing use by riders on horseback and walkers); R. 239-40 (Affidavit of Ethan Bundy) (same); R. 244-45 (Affidavit of H. Val Hafen) (same); R. 272-73 (Affidavit of Gilbert Jennings) (same); R. 278-79; (Affidavit of Mansfield Jennings) (same); R. 283-84 (Affidavit of Lewis J. Bowler) (same).

III. IF THE CITY OF ST. GEORGE OWNS OR HAS EASEMENT RIGHTS TO THE ALLEGED ROADWAY, AS PLAINTIFFS' OWN EVIDENCE INDICATES, PLAINTIFFS' CLAIMS ARE BARRED FOR FAILURE TO NAME THE CITY OF ST. GEORGE AS A NECESSARY AND INDISPENSABLE PARTY.

A person or entity who claims an interest relating to the subject matter of the action whose interests may be affected by the outcome of the case "shall" be joined as parties to the action. Utah R. Civ. P. 19 (emphasis added). Under Rule 56(c) of the Utah Rules of Civil Procedure, summary judgment is appropriate only if the moving party is entitled to judgment as a matter of law. Plaintiffs' entitlement to judgment as a matter of law to abandon property rights and interests Plaintiffs claim were owned by St. George, but without naming St. George as a party, should be reviewed for correctness and afforded no deference. *Gottling v. P.R. Inc.*, 2002 UT 95 ¶ 5, 61 P.3d 989, 991.

The basic purpose of Rule 19 is "'to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.'" *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990). When faced with a Rule 19 determination, a court must first decide whether a party is "necessary" under Rule 19(a). *Id.*; *Seftel v. Capital City Bank*, 767 P.2d 941, 945 (Utah App.1989).

A party is "necessary" if

> he [or she] claims an interest relating to the subject of the action and is so situated that the disposition of the action in his [or her] absence may (i) as a practical matter impair or impede his [or her] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his [or her] claimed interest. [Utah R. Civ. P. 19(a)(2)].

Plaintiffs' own evidence shows that the city of St. George is a "necessary" party. To begin with, it is undisputed that the Alleged Roadway is located within the city limits of the City of St. George. Plaintiffs then presented evidence through the affidavit of title searcher David Elwess that the City has had an easement to a 46-foot wide portion of the Alleged Roadway since at least 1974, and that Dixie had granted an additional four-foot easement to the City which was added to that allegedly pre-existing 46-foot wide strip. Plaintiffs also presented evidence through the Elwess affidavit to the effect that the Alleged Roadway property was not on the tax rolls of Washington County, presumably to show the Alleged Roadway was already owned by the City as a public road.[8] If any of that evidence is correct (which Dixie does not admit), then the City's interest in the property that is the subject of this case makes the City a necessary party to this case, because the resolution of this litigation in favor of either Plaintiffs or in favor of Dixie is likely to impair or impede the City's ability to protect its alleged interests. That also could leave Plaintiffs and Dixie subject to a risk of incurring inconsistent obligations by reason of the City's claimed interests.

"[U]nder the language of [Rule 19(a)], if the [absent] party is necessary and joinder is feasible, then joinder is mandatory." *Landes*, 795 P.2d at 1131. Joinder of the City of St. George as a party to this case therefore is mandatory.

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[8] Dixie disputed those claimed facts, submitting the Affidavit of Charles Welch stating the Alleged Roadway property was included in the deed to Dixie, that Dixie had at all times continued to own and pay the taxes on that property, and that the City had previously refused to dedicate that property as a public road. (R. 139). This additional dispute of facts further precluded summary judgment for Plaintiffs in addition to the disputes of fact discussed above. Utah R. Civ. P. 56(c). The District Court therefore should be reversed for this additional reason.

Plaintiffs' claim fails, and the District Court erred, for not joining St. George as a necessary and indispensable party to this case. A district court's failure to follow the two-step analysis under Rule 19 constitutes reversible error. *Seftel*, 767 P.2d at 945; *see also Landes*, 795 P.2d at 1130 (court erred by failing to discuss specific facts and reasoning leading to conclusion whether that party is necessary or indispensable under Rule 19). The District Court never conducted the analysis required by Rule 19 and binding caselaw construing it. Accordingly, the Court's dedication of the Alleged Roadway to the public should be reversed, and this case should be remanded for joinder of St. George as a necessary and indispensable party, and for discovery and trial.

CONCLUSION

For each of the foregoing reasons, the decision of the District Court should be reversed and this case should be remanded for trial.

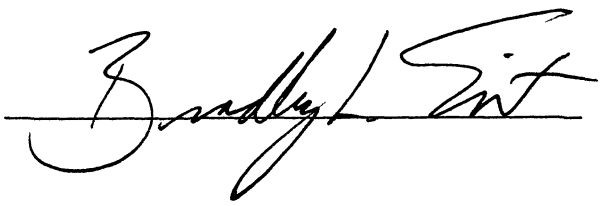
RESPECTFULLY SUBMITTED this 4th day of January, 2007.

Robert J. Dale
Bradley L. Tilt
Matthew B. Hutchinson
FABIAN & CLENDENIN, PC
Attorneys for Defendant /Appellant
Dixie Riding Club, Inc.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLANT DIXIE RIDING CLUB, INC.** were mailed by first-class mail with postage fully prepaid this 4th day of January, 2007, to:

V. Lowry Snow
Lewis P. Reece
SNOW JENSEN & REECE
134 North 200 East, Suite 302
St. George, Utah 84771



ADDENDUM NO. 1

IN THE FIFTH DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

JENNINGS INVESTMENT, LC, et al., Plaintiffs, vs. DIXIE RIDING CLUB, INC., et al., Defendants.	RULINGS ON MOTIONS FOR SUMMARY JUDGMENT Civil No. 030500781 Judge G. Rand Beacham

This matter came before me pursuant to Defendant's "Motion for Partial Summary Judgment" and Plaintiffs' "Cross Motion for Summary Judgment." Each party filed the necessary supporting and opposing memoranda, affidavits and other materials. Having studied the memoranda and other documents, having heard the arguments of counsel at a hearing, and having reviewed the file for this action, I have determined to deny Defendant's Motion and to grant Plaintiffs' Motion. I will not undertake extensive analysis,[1] however, and will only make a few observations:

1. Defendant's supporting memorandum does not meet the formal or substantive requirements of Rules 7 and 56 of the Utah Rules of Civil Procedure for summary judgment. Defendant's Motion for Partial Summary Judgment would be denied for this reason alone, because Defendant cannot meet its burden of proof without substantially complying with these rules.

2. Plaintiffs' supporting memorandum and materials are thorough and comprehensive,

[1]The brevity of this Ruling is not indicative of the time I have spent in the review of these Motions. It has been my experience and that of other judges of the trial bench, however, that the parties are primarily interested in the outcome and that the appellate courts seldom acknowledge the opinions and reasoning of the trial courts. In addition, the Utah appellate courts have consistently reversed far more summary judgment decisions than they have affirmed. Finally, Plaintiffs' memoranda and materials are clearly more detailed and analytical than Defendant's memoranda and materials, so that few serious issues are adequately framed for discussion. Consequently, the time required to prepare a comprehensive memorandum decision does not seem to be warranted.

and they substantially comply with the requirements of Rules 7 and 56. Plaintiffs have established their factual statements by competent evidence, so that Defendant was required to respond as provided in Rule 7(c)(3)(B). Defendant did not do so, however; Plaintiff is correct in noting that it is not the court's burden "to ferret out Defendant's attempts to controvert Plaintiffs' facts by a careful winnowing of Defendant's evidence." *See* "Reply in re: Cross Motion for Summary Judgment," p. 4. Consequently, each fact set forth in Plaintiffs' Statement of Facts "is deemed admitted for the purpose of summary judgment." *See* Rule 7(c)(3)(A).

3. Plaintiffs' memoranda also clearly analyze the relevant precedents of the Utah appellate courts and their application to the issues of this case. Defendant's arguments are also clear, but in my judgment, are not correct as to the facts which are without controversy in this case.

4. The facts before me for purposes of summary judgment clearly demonstrate that the disputed property was "continuously used as a public thoroughfare for a period of [far more than] ten years," as is required to establish dedication and abandonment to the use of the public pursuant to Utah Code Ann. § 72-5-104.

5. Defendant has provided no authority for its argument that Plaintiffs lack standing to maintain this action. The Utah precedents cited by both parties demonstrate that an action under Section 72-5-104 can be maintained by private citizens.

Accordingly, Defendant's Motion is hereby denied and Plaintiffs' Motion is hereby granted. Plaintiffs' counsel should submit an appropriate judgment.

Dated this 10 day of January, 2006.

G. Rand Beacham

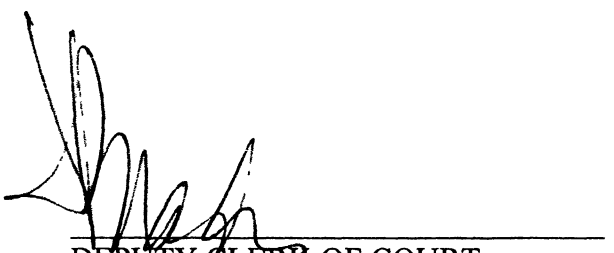
G. RAND BEACHAM, JUDGE

CERTIFICATE OF DELIVERY

I hereby certify that on this 12 day of June, 2006, I provided true and correct copies of the foregoing RULING to each of the attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah:

V. Lowry Snow and
Lewis P. Reece
Attorneys for Plaintiffs

Alan D. Boyack and
Matthew Bishop
Attorneys for Defendant



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ADDENDUM NO. 2

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IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JENNINGS INVESTMENT, LC, GILBERT JENNINGS, MANSFIELD JENNINGS, CONRAD BOWLER, LEWIS J. AND DORCUS N. BOWLER, H. VAL HAFEN, RANDY AND GAI BOWLER, TROY AND KERRIE BOWLER, JOHN BOWLER, Plaintiffs, v. DIXIE RIDING CLUB, INC., a Utah Corporation, and JOHN DOES 1 THROUGH 20, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 030500781 Judge: G. Rand Beacham

Defendant having filed its Motion for Summary Judgment, and Plaintiffs having filed a Cross Motion for Summary Judgment, and following oral argument on both motions on November 10, 2005, and the Court having previously entered its Ruling on Motions for Summary Judgment on January 12, 2006, the Court now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Court has studied in depth the parties' respective memoranda and affidavits. Defendant has not properly objected to the facts as alleged by Plaintiff, by "specific facts showing that there is a genuine issue of material fact" as Defendant is required to do under the rules. Utah R. Civ. P. 56(e). Defendant cannot simply rely on its pleadings but has an affirmative duty to controvert Plaintiffs' alleged facts. Smith v. Four Corners Mental Health Center, Inc., 2003 UT 23 ¶ 50, 70 P.3d 904; Rawson v. Conover, 2001 UT 24 ¶ 25, 20 P.3d 876; R&R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068, 1078 (Utah 1997); Jones v. Hinkle, 611 P.2d 733, 736 (Utah 1980). Moreover, Defendant failed to separately state each fact in support of its motion, numbering those facts and supporting them by citation to relevant materials such as affidavits or discovery materials, as required by Utah R. Civ. P. 7(c)(3)(A and B). The facts alleged by Plaintiffs are therefore deemed admitted. Utah R. Civ. P. 7(c)(A). Moreover, because Plaintiffs' facts are properly supported as required by Utah R. Civ. P. 7(c)(3)(A) and 56(e), and are not properly contested by Defendant, the Court finds the following material facts by clear and convincing evidence, there being no competent evidence against Plaintiffs' alleged facts and the same being deemed admitted pursuant to Utah R. Civ. P. 7(c)(A).

2. The property that is the subject matter of this dispute was originally owned by the Washington County Sheriff's Posse and established as a race track and stables for horses roughly 50 years ago. Affidavit of Conrad Bowler, ¶ 2. As shown on Exhibit E of Plaintiffs' Memorandum in Support, which is a copy of Defendant's Answers to Discovery, and Exhibit A thereto, which is a copy of the owners' dedication plat, (hereinafter "the Owners' Dedication Plat"), the road that is the subject of this dispute surrounds the race track and arena, and is

located in Washington County, State of Utah and is more particularly legally described in the Owners' Dedication Plat as follows:

> Beginning at a point North 0°36'20" West 515.18 feet along the Section Line from the Southeast Corner of Section 14, Township 42 South, Range 16 West, Salt Lake Base and Meridian; and running thence South 89°33' West 425.44 feet to a point of curvature of a 20.00 foot radius curve to the left; thence along the arc of said curve 31.47 feet to a point on 1100 West Street; thence along said city street North 0°36'20" West 90.24 feet to a point on a 20.245 foot radius curve to the left (center bears North 89°23'40" East); thence Southeasterly along the arc of said curve 31.75 feet to a point of a tangency; thence North 89°33' East 345.22 feet to a point of curvature of a 30.00 foot radius curve to the left; thence Northeasterly along the arc of said curve 47.205 feet to a point of tangency; thence North 0°36'20" West 1148.73 feet to a point of curvature of a 20.245 foot radius curve to the left; thence North westerly along the arc of said curve 31.75 feet to a point on a county road; thence along said county road North 89°33' East 24.19 feet to the point of a 209.40 foot radius curve to the right (center bears S 0°27'00" E); thence Southeasterly along the arc of said curve 78.39 feet to a point on a 22.316 foot radius curve to the left (center bears S 21°00' W); thence along the arc of said curve 43.47 feet to a point of tangency, said point being on the Section Line; thence along said Section Line South 0°36'20" East 1213.67 feet to the point of beginning Containing 1.901 Acres.

For convenience hereinafter, the road more particularly described above shall be referred to as the "1020 West X 1050 North Street" or "the subject road" or "the subject roadway."

3. Plaintiffs Jennings Investment, LC, H. Val Hafen, Lewis and Dorcus Bowler, Randy and Gale Bowler, Troy and Carry Bowler, and John Bowler own property that abuts the subject roadway. Plaintiffs Gilbert Jennings, Mansfield Jennings and Conrad Bowler, however, do not own property that abuts the 1020 West X 1050 North Street. See Affidavit of Gilbert Jennings, ¶ 2; Affidavit of Mansfield Jennings, ¶ 2; and Affidavit of Conrad Bowler, ¶ 3. Indeed, Conrad Bowler was one of the original members of the Sheriff's Posse who got together and purchased the subject property in approximately 1955. Affidavit of Conrad Bowler, ¶ 2.

4. From the time the Sheriff's Posse built the arena until shortly after Washington County built the arena neighboring the Purgatory Correctional Facility, the posse arena was the location of numerous rodeos for children and high school rodeos, horse racing and barrel racing, amateur rodeos including rodeos on New Year's Day, and other similar events to which the general public was invited. Affidavit of Conrad Bowler, ¶ 4; Affidavit of Ethan Bundy, ¶ 3; Affidavit of Gilbert Jennings, ¶ 3; and Affidavit of Mansfield Jennings, ¶ 3.

5. Notwithstanding, after these public events, Defendant's permission to use the 1020 West X 1050 North Street was withdrawn. "The Defendants [sic] concede that members of the public have been invited to attend different rodeo type advents [sic], such as calf roping, etc., to which their permission ceased after the event was concluded." Defendant's Memorandum in Support, page 4 (emphasis added). See also Affidavit of Charles Welch, ¶¶ 8, 9 and 10. Indeed, sometime roughly between 1985 and 1990, Defendant began constructing a gate across 1020 West X 1050 North Street to prevent the general public's access through the road, but following some dispute, the gate was never completed and public access remained unimpeded. Affidavit of Val Hafen, ¶ 6. The public rodeo events to which the general public was invited occurred approximately between four to six times a year. Affidavit of Conrad Bowler, ¶ 4.

6. Much of the property in the Bowler, Ence and Marsh subdivision which was west of the Posse arena was used by the owners as horse property. This was the primary purpose of the Bowler Ence Subdivision. Affidavit of Conrad Bower, ¶ 2. The Bowler Ence Subdivision along with the Posse property "was horse country. Numerous people stabled horses, sold horses, bred horses, and people drove vehicles, rode horses and walked on the subject road to do their business." Affidavit of Conrad Bowler, ¶ 7.

7. Although Defendant's implied permission to use 1020 West X 1050 North Street was withdrawn, Property owners who owned horses west of the arena frequently rode their horses through the 1020 West X 1050 North Street because that road was not paved and was easier on their horses' hooves and safer for the riders. Affidavit of Conrad Bowler, ¶ 5. The 1020 West X 1050 North Street was frequently used by horse owners to ride their horses from one part of the neighborhood to another part of the neighborhood. On the north end of the 1020 West X 1050 North Street was a trail head. Horse riders would go from the Bowler Ence Subdivision through the 1020 West X 1050 North Street and ride up in the north country, sometimes to the area now known as Winchester Hills or to Snow Canyon. Affidavit of Conrad Bowler, ¶ 5; Affidavit of Ethan Bundy, ¶ 4; Affidavit of Val Hafen, ¶ 4 Affidavit of Gilbert Jennings, ¶ 4; Affidavit of Mansfield Jennings, ¶ 4; Affidavit of Lewis Bowler, ¶ 4. A road went on up to the old turkey farm north of the Posse arena and was straight up the 1100 West Street. See Owners' Dedication Plat. Instead of riding up 1100 West, people often rode their horses up the 1020 West X 1050 North Street to get to the old turkey farm. The subject road was open, and access was open and unimpeded. The subject road did not dead end in any fashion and was continually used by the general public to ride their horses as described above from about 1972 until 2002. Affidavit of Conrad Bowler, ¶ 5; Affidavit of Ethan Bundy, ¶ 4; Affidavit of Gilbert Jennings, ¶ 4; Affidavit of Mansfield Jennings, ¶ 4; and Affidavit of Lewis Bowler, ¶ 4.

8. In addition, people frequently walked through the 1020 West X 1050 North Street or drove cars though it to get from one part of the neighborhood to the next. This occurred almost on a daily basis. Numerous people stabled their horses, sold horses and bred horses in the area, and the general public drove vehicles, rode horses, and walked on and through the 1020

West X 1050 North Street to do their business and to cross from 1100 West Street in St. George to get to the 1230 North Street. The Ence brothers had a feed store and mill just west of 1100 West Street for about ten years, and many people used the subject road to get to the feed mill from the 1230 North Street. Further, just south of the arena, for three or four years in the 1980s, a tack and saddle shop operated selling saddles and tack to the general public. The general public gained access to this tack shop by traveling through the 1020 West X 1050 North Street. The subject road was well traveled and continuously traveled by the public in general from about 1972 until roughly 2002. No gates limited access to the subject road or through the subject road in any fashion. Affidavit of Conrad Bowler, ¶¶ 7, 10, 11; Affidavit of Ethan Bundy, ¶¶ 5, 8, 11; Affidavit of Val Hafen, ¶ 5; Affidavit of Gilbert Jennings, ¶ 6; Affidavit of Mansfield Jennings, ¶ 5; Affidavit of Lewis Bowler, ¶ 5.

9. Moreover, people frequently practiced rodeo events at the arena or simply in general practiced to improve their roping, barrel racing, etc., and these practices were not public events. Notwithstanding, often times the general public came to watch these practices. Affidavit of Conrad Bowler, ¶ 9; Affidavit of Ethan Bundy, ¶ 7; Affidavit of Gilbert Jennings, ¶ 8; Affidavit of Mansfield Jennings, ¶ 7.

10. There were never any restrictions for use of the 1020 West X 1050 North Street until about three years ago. The general public drove through it to get from one end of the neighborhood to the next, rode horses on it to get from one part of the neighborhood to the other, drove on it to watch friends practice rodeo events, drove on it to take horses to be bred or stabled, drove on it to buy horses and sell horses, and drove on it to buy or fix saddles and tack. This occurred continuously and almost on a daily basis from about 1972 until approximately two

years ago when the Defendant put up gates across the subject road. Affidavit of Conrad Bowler, ¶ 8; Affidavit of Ethan Bundy, ¶ 10; Affidavit of Val Hafen, ¶ 6; Affidavit of Gilbert Jennings, ¶ 9; Affidavit of Mansfield Jennings, ¶ 8; Affidavit of Lewis Bowler, ¶ 6.

11. Notwithstanding this access by the general public, Defendant and its predecessors in title did not give any specific permission to use the subject road. Rather permission was implied to use the road but only during scheduled public events. Affidavit of Charles Welch, ¶¶ 8, 9 and 10; Affidavit of Conrad Bowler, ¶ 8; Affidavit of Gilbert Jennings, ¶ 6.

12. During the last 30 years, from about 1972 until roughly 2002, the 1020 West X 1050 North Street was graveled and graded occasionally by both St. George City and Washington County. Affidavit of Conrad Bowler, ¶ 12; Affidavit of Ethan Bundy, ¶ 6; Affidavit of Gilbert Jennings, ¶ 7; Affidavit of Mansfield Jennings, ¶ 6.

13. Moreover, from 1982 until 2002, the subject road was specifically omitted by legal description from the tax rolls of property that was assessed for property tax in Washington County. Affidavit of David Elweese, ¶¶ 19 and 20.

14. The photograph identified in the Affidavit of Charles Welch filed in support of Defendant's motion is misleading. As stated in that affidavit, the photograph was recently taken. Affidavit of Charles Welch, ¶ 11. Because of the gate across the 1020 West X 1050 North Street the dispute between the parties, the City of St. George has discontinued grading the subject road, and the subject road has fallen into disrepair. Indeed, Charles Welch dug the trench where the weeds are growing and then placed telephone poles as shown in the photograph, along the side so people could not go around the poles and drive on the subject road. Affidavit of Conrad Bowler, ¶ 13; Affidavit of Val Hafen, ¶ 7; Affidavit of Lewis Bowler, ¶ 7. Defendant has

harassed those who attempt to use the 1020 West X 1050 North Street. Affidavit of Val Hafen, ¶ 10; Affidavit of Lewis Bowler, ¶ 9.

15. Defendant itself admits that the public has had open and free access on the subject road and that only when Plaintiff Jennings Investment built the shopping center complex was access restricted. In relevant part, Defendant states in response to Plaintiffs' discovery requests as follows:

> Admission No. 14. Please admit that the general public would watch both Dixie Riding Club members or Posse members and non members alike as they practiced calf roping, bull dogging, barrel racing and other rodeo related events, in preparation for public events to be held both at the Dixie Riding Club arena and elsewhere, or as they practice just for fun, and that the general public used the 1020 West X 1050 North Road in doing so, and that this took place for a continuous period in excess of ten years sometime between 1967 and the present.
>
> Answer to Admission No. 14. As it hereto has been articulated in other admissions, any and all access to the property in question was, in fact, done with the implied or express permission of the general leadership, or membership of the Dixie Riding Club, Inc. There has never been a time since 1967 up until approximately two (2) years ago, there was any necessity of blocking any traffic of any persons not specifically members of the Dixie Riding Club, Inc., because open and free access existed to the south, to the west and to the north. Only when the Plaintiffs, Jennings built a shopping center complex, did the restriction of access to the areas, having heretofore been articulated, was [sic] cut off by the fabrication of the shopping center complex. Therefore, Admission No. 14 is not admitted.

Plaintiffs' Memorandum in Support, Exhibit E, page 6 (emphasis added).

16. In addition, Defendant attempted to dedicate this road formally to the City of St. George in May, 1987. See Owners' Dedication Plat. This plat has never been recorded, but

again evidences the "open and free access" Defendant referred to in responding to Request for Admission No. 14.

17. Moreover, numerous deeds and documents recorded with the Washington County Recorder signed by Defendant, its predecessors and other property owners evidence the Defendant's understanding and the public's practice that the 1020 West X 1050 North Street was a public thoroughfare.

a. On May 30, 1974, Defendant deeded a four foot easement to the City of St. George which was added to an existing 46 foot right-of-way easement the City held, making a total 50 foot easement. The May 30, 1974 warranty deed specifically refers to the subject road and states that: "[t]he following described property to be added to and be part of an existing roadway, to be used by the grantee as and for a public roadway and easement for utilities." (emphasis added). The grantee on the deed was the City of St. George. The "existing roadway" referred to was the 1020 West X 1050 North Street. See Affidavit of David Elweese, ¶ 6 and A.4.1 attached which is a certified copy of the subject deed. A certified copy of the original 46 foot Right-of-Way Easement is attached as Exhibit A.4.2 thereto.

b. Defendant incorporated in its right-of-way easement to the City of St. George, see copy attached as Exhibit A.4.2, the 1020 West X 1050 North Street, specifically granting the easement within the road by describing the easement as going up "to the west line of a 46 foot road; thence south 0° 36'20" east 1199.00 feet along said west line of road." And further describing the east

and west portion of the 1020 West X 1050 North Street by stating that the easement was within the 50 feet "to the south line of a 50 foot road" and continuing "East 445.50 feet along said South line of road." See Affidavit of David Elweese and Exhibit A.4.2 thereto. This road described in the legal description as referenced above is the 1020 West X 1050 North Street. See Affidavit of David Elweese, ¶ 7, and Exhibit A.4.2 thereto.

c. Similarly, on May 30, 1974, the then owners of the property shown as "SG-6-2-14-2217," Jerry, Carolyn and Brent Atkin, deeded the east four feet of their property to the City of St. George, "to be used by the grantee as and for a public roadway and easement for utilities." See Affidavit of David Elweese, ¶ 8, and Exhibits A.2.1, A.2.2 and A.4.3 thereto.

d. Again on May 30, 1974, then owners of the property shown as "SG-6-2-14-2218," Anthony and Nina Atkin, deeded the east four feet of their property to the City of St. George "to be used by the grantee as and for a public roadway and easement for utilities." See Affidavit of David Elweese, ¶ 9, and Exhibits A.2.1, A.2.2, and A.4.4 thereto.

e. On May 30, 1974, then owners of the property identified as "SG-6-2-14-2219," LaVar and Leah Bracken, likewise deeded the east four feet of their property to the City of St. George "to be used by the grantee as and for a public roadway and easement for utilities." See Affidavit of David Elweese, ¶ 10, and Exhibits A.2.1, A.2.2, and A.4.5 thereto.

f. Again on May 30, 1974, then owners of the property identified as "SG-6-2-14-2220," Sherrell and Jeri Newby and Kenneth and Sherrell Newby, deeded the east four feet of their property to the City of St. George "to be used by the grantee as and for a public roadway and easement for utilities." See Affidavit of David Elweese, ¶ 11, and Exhibits A.2.1, A.2.2, and A.4.6 thereto.

g. When Defendant sold the property identified in the Affidavit of David Elweese in Exhibit A.2.2 as "SG-6-2-14-2317," they specifically incorporated the 1020 West X 1050 North Street into the legal description of the property and referred to it as a road, not an easement, by stating that the southeast corner of that lot starts "on the west line of a 46 foot road," and then runs north "100 feet along said West line of road" to the south line of 1230 North Street in St. George. See Affidavit of David Elweese, ¶ 12, and Exhibits A.2.1, A.2.2, and A.4.7 thereto.

h. When Defendant deeded the property identified by tax serial number in the Affidavit of David Elweese in Exhibit A.2.2 as "SG-6-2-14-2218," they again incorporated the subject road as part of the legal description and referred to it as a road, not an easement, by stating that the northeast corner of that lot lies "on the West line of a 46 foot road," and that the east boundary of the lot runs "100.00 feet along said West line of road." Affidavit of David Elweese, ¶ 13, and Exhibits A.2.1, A.2.2, and A.4.8 thereto.

i. Again, when Defendant deeded the property identified in the Affidavit of David Elweese in Exhibit A.2.2 by tax serial number "SG-6-2-14-2219," it

identified that property by specifically referring to the 1020 West X 1050 North Street as a road. The southeast corner of that property begins "at a point on the West line of a 46.00 foot road," and the east boundary of that property runs north from that point "100 feet along said West line of road." See Affidavit of David Elweese, ¶ 14, and Exhibits A.2.1, A.2.2, and A.4.9 thereto.

j. When Defendant deeded the property identified in the Affidavit of David Elweese in Exhibit A.2.2 by tax serial number "SG-6-2-14-2220," it once again incorporated the 1020 West X 1050 North Street as a road not an easement. The northeast corner of that lot begins "at a point on the West line of a 46.00 foot Road," and runs south "100 feet along said West line of road." See Affidavit of David Elweese, ¶ 15, and Exhibits A.2.1, A.2.2, and A.4.10 thereto.

k. On the south end of the 1020 West X 1050 North road, when Defendant deeded the property identified in the Affidavit of David Elweese in Exhibit A.2.1 by tax serial number "SG-6-2-14-2221," Defendant identified that property by referring to the 1020 West X 1050 North Street as a road. The northeast corner of that property begins on the "South line of a 50.00 foot Road, and then runs west "205.50 feet along said South line of Road." See Affidavit of David Elweese, ¶ 16, and Exhibits A.2.1, A.2.2 and A.4.11 thereto.

l. When Defendant deeded the property identified in the Affidavit of David Elweese in Exhibit A.2.1 by tax serial number "SG-6-2-14-2213," it again identified the 1020 West X 1050 North Street as a road, not as an easement. The northwest corner of that property begins at "the south line of a 50 foot road," and then runs east "178.00 feet along said South line of Road." See Affidavit of David Elweese, ¶ 17, and Exhibits A.2.1, A.2.2 and A.4.12 thereto.

m. Finally, when Defendant deeded the property identified in the Affidavit of David Elweese in Exhibit A.2.1 by tax serial number "SG-6-2-14-2212," it identified the south boundary of that property as beginning on "the North line of a 50 foot road," which is the 1020 West X 1050 North Street, and continuing "East 178.00 feet along said North line of Road." See Affidavit of David Elweese, ¶ 18, and Exhibits A.2.1, A.2.2 and A.4.13 thereto.

These facts set out above and supported by the Affidavit of David Elweese are essentially admitted by Defendant. See Second Affidavit of Charles Welch, ¶ 4.

18. Defendant has refused to remove the gates blocking access to the 1020 West X 1050 North Street although Plaintiffs have made written demand to remove this gate and keep it open. See Affidavit of Val Hafen, ¶¶ 9 and 10, and Exhibits A and B thereto.

From the foregoing Findings of Fact, this Court now enters its Conclusions of Law.

CONCLUSIONS OF LAW

1. Plaintiffs have standing to bring this action and pursue a public dedication under Utah Code Ann. § 72-5-104. The vast majority, if not all of the cases addressing Utah Code

Ann. § 72-5-104, or its predecessor, involve private parties as the proponent of the public thoroughfare. None of the parties, including Defendant, have brought to this Court's attention any case that dismisses a public dedication suit because the moving party was not a municipality or dismisses the suit because a municipality or governmental agency was not made party to the suit. Moreover, the plain language of Utah Code Ann. § 72-5-104 does not limit its use to municipalities, the state or some other governmental agency and does not require that any of the latter be joined as a party to the suit.

2. The testimony in the Affidavits of Conrad Bowler, Val Hafen, Ethan Bundy, Gilbert Jennings, Mansfield Jennings and Lewis Bowler is not incompetent or lacking in foundation merely because Defendant alleges these parties have owned or presently own property that abuts the 1020 West X 1050 North Street. Further, Plaintiffs do not lack standing to sue for a public dedication based upon Defendant's claim that Plaintiffs have owned or presently own property abutting the 1020 West X 1050 North Street. First, as discussed more specifically in this Court's Findings above, ¶ 1, the facts as alleged by Plaintiffs are deemed admitted. Plaintiffs are correct that "[i]t is not for the Court to ferret out Defendant's attempts to controvert Plaintiffs' facts by a careful winnowing of Defendant's evidence." Plaintiffs' Reply at 4. Second, the only evidence the Court can find to rebut the clear statement by Conrad Bowler for example, one of the plaintiffs, in paragraph 3 of his Affidavit that he does not presently own property that abuts the 1020 West X 1050 North Street, is a vague reference in paragraph 3 of the Second Affidavit of Charles Welch, wherein he states: "I know that each one of them [the Plaintiffs] has been, or in fact, is presently an adjacent property owner." That vague statement does not provide evidence contrary to the clear statement by Conrad Bowler that he presently

does not own property that abuts the 1020 West X 1050 North Street. Moreover, the Court does not believe the case law should be construed to limit parties owning land that abuts a claimed dedicated road from filing suit to establish the dedication. Rather the testimony relied on must establish use by the public, not use by some private right which is precisely the case here. The testimony is undisputed that the general public used the 1020 West X 1050 North Street. Accordingly, this Court concludes that Plaintiffs have standing to bring this suit and that the evidence is clear under the law to render judgment in Plaintiffs' favor.

3. To establish a public dedication within the meaning of Utah Code Ann. § 72-5-104, the testimony must clearly establish that there was (1) continuous use of the 1020 West X 1050 North Street, (2) as a public thoroughfare, namely, (i) that there was passing or travel, (ii) by the public, and (iii) the use was not by permission, and (3) that this use must have been for at least a ten year period. See Heber City Corp. v. Simpson, 942 P.2d 307, 310, 311 (Utah 1997). This Court will address each of those elements in turn.

4. The evidence is clear that use of the 1020 West X 1050 North Street was continuous. The testimony presented by affidavit and unrebutted by Defendant establishes that from approximately 1972 or 1973 until approximately two years ago, a period in excess of 30 years, the general public used the 1020 West X 1050 North Street without interruption. The evidence clearly establishes that no gates limited access to the subject road or through the subject road in any fashion. There appears to be from the evidence a short period of time sometime during 1985 and 1990, when Defendant put up posts in an attempt to build a gate across the 1020 West X 1050 North Street, but Defendant did not proceed with the gate following a "brief legal

dispute," and "[a]ccess through the subject road remained unimpeded." Affidavit of Val Hafen, ¶ 6; see also Findings, ¶ 5 above.

5. The evidence is further clear that use of the 1020 West X 1050 North Street was by the public during this period of time and that the public used the 1020 West X 1050 North Street for passing or travel, namely, as a public thoroughfare. See Findings, ¶¶ 4 through 10, 12 and 13. The public had a "general right of passage" through the 1020 West X 1050 North Street. Heber City, 942 P.2d at 311. The street was not laid out or used as a private way, but as a public way. Id. The general public used the 1020 West X 1050 North Street as often as "they deemed 'convenient or necessary.'" AWINC Corp. v. Simonsen, 2005 UT App. 168, ¶ 11. The 1020 West X 1050 North Street was not used as the road was used in Morris v. Blunt. In Morris, the property owner, "plowed the road," rolled boulders from adjoining plowed land "into the road," closed the road for five years before the action was commenced, and otherwise evidenced that he had no intent to dedicate the road as a public thoroughfare. Morris v. Blunt, 49 Utah 243, 250, 161 P. 1127 (1916). While the land owner's intent or consent is no longer an element under Utah law, Heber City, 942 P.2d at 311, still the use of the road in Morris was not at the public's convenience as use of the road clearly was in this case. Moreover, in Morris, the evidence did not disclose how many public users there even were, nor "how frequently they used the road, by what right they traveled the road, nor the circumstances of their use" or really anything about the public's use of the road. Morris, 49 Utah at 251. The same is not true in this case as demonstrated by the Findings above. Accordingly, this Court concludes that the general public used the 1020 West X 1050 North Street as a thoroughfare in that there was passing or travel by the public.

6. Moreover, use of the 1020 West X 1050 North Street was not with Defendant's permission as Defendant now conveniently argues. The facts speak differently. Though Defendant gave implied permission for the public to travel on the 1020 West X 1050 North Street during public events, Defendant withdrew that permission after the public events concluded. These public events occurred only four to six times a year. Findings, ¶ 5 above. Yet, the evidence is clear that the general public used the 1020 West X 1050 North Street on almost a daily basis. Findings, ¶¶ 4 through 10. Clearly the general public used the 1020 West X 1050 North Street at their convenience as opposed to Defendant's convenience. Defendant points to no evidence whatsoever, other than its present argument of implied or express permission, that use of the 1020 West X 1050 North Street was with its permission. Defendant points to no signs or other indicia that the public had permission to use the 1020 West X 1050 North Street, and indeed stated that: "There has never been a time since 1967 up until approximately two (2) years ago, [that] there was any necessity of blocking any traffic of any persons not specifically members of the Dixie Riding Club, Inc., because open and free access existed to the south, to the west and to the north." See Findings, ¶ 15 above, and Defendant's Answer to Request for Admission No. 14 (emphasis supplied). Defendant cannot reasonably argue that the public had implied permission to use the 1020 West X 1050 North Street simply because the public had "open and free access" through the street. Such open and free access alone is not legally sufficient to grant the public permission to use the subject road, foreclosing Plaintiffs' claim of public dedication. To the contrary, such "open and free access" is the epitome of evidence that the general public used the 1020 West X 1050 North Street as a public thoroughfare.

7. Finally, the evidence is clear that the general public's use was for at least ten years.

8. Accordingly, this Court concludes that the 1020 West X 1050 North Street "is dedicated and abandoned to the use of the public" within the meaning of Utah Code Ann. § 72-5-104, and a Decree of Dedication should issue consistent with these Findings and Conclusions.

DATED this 7 day of ~~February~~ March, 2006.

FIFTH DISTRICT COURT

G. Rand Beacham
District Judge

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 22nd day of February, 2006, I caused a true and correct copy of the unsigned FINDINGS OF FACT AND CONCLUSIONS OF LAW to be hand delivered to the following:

Alan Boyack, Esq. 463301
205 E. Tabernacle
St. George, UT 84770

Secretary

ADDENDUM NO. 3

SNOW JENSEN & REECE
V. Lowry Snow [3030]
Lewis P. Reece [5785]
Counsel for Plaintiffs
134 North 200 East, Suite 302
St. George, Utah 84771-2747
Telephone: (435) 628-3688
Telecopier: (435) 628-3275

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JENNINGS INVESTMENT, LC, GILBERT JENNINGS, MANSFIELD JENNINGS, CONRAD BOWLER, LEWIS J. AND DORCUS N. BOWLER, H. VAL HAFEN, RANDY AND GAI BOWLER, TROY AND KERRIE BOWLER, JOHN BOWLER, Plaintiffs, v. DIXIE RIDING CLUB, INC., a Utah Corporation, and JOHN DOES 1 THROUGH 20, Defendants.	**DECREE OF DEDICATION** Civil No. 030500781 Judge: G. Rand Beacham

This Court having previously entered its Findings of Fact and Conclusions of Law, and finding good cause therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following real property to the extent owned by Dixie Riding Club, Inc., is dedicated and abandoned to the use of the public within the meaning of Utah Code Ann. § 72-5-104, which property is located in Washington County, State of Utah, and is more particularly described as follows:

Beginning at a point North 0°36'20" West 515.18 feet along the Section Line from the Southeast Corner of Section 14, Township 42 South, Range 16 West, Salt Lake Base and Meridian; and running thence South 89°33' West 425.44 feet to a point of curvature of a 20.00 foot radius curve to the left; thence along the arc of said curve 31.47 feet to a point on 1100 West Street; thence along said city street North 0°36'20" West 90.24 feet to a point on a 20.245 foot radius curve to the left (center bears North 89°23'40" East); thence Southeasterly along the arc of said curve 31.75 feet to a point of a tangency; thence North 89°33' East 345.22 feet to a point of curvature of a 30.00 foot radius curve to the left; thence Northeasterly along the arc of said curve 47.205 feet to a point of tangency; thence North 0°36'20" West 1148.73 feet to a point of curvature of a 20.245 foot radius curve to the left; thence North westerly along the arc of said curve 31.75 feet to a point on a county road; thence along said county road North 89°33' East 24.19 feet to the point of a 209.40 foot radius curve to the right (center bears S 0°27'00" E); thence Southeasterly along the arc of said curve 78.39 feet to a point on a 22.316 foot radius curve to the left (center bears S 21°00' W); thence along the arc of said curve 43.47 feet to a point of tangency, said point being on the Section Line; thence along said Section Line South 0°36'20" East 1213.67 feet to the point of beginning Containing 1.901 Acres.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this dedication and abandonment to the public is effective immediately upon entry of this Decree of Dedication with the clerk of this Court.

DATED this 7 day of March, 2006.

FIFTH DISTRICT COURT

G. Rand Beacham
District Judge

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 22nd day of February, 2006, I caused a true and correct copy of the unsigned DECREE OF DEDICATION to be hand delivered to the following:

Alan Boyack, Esq.
205 E. Tabernacle
St. George, UT 84770

Secretary

ADDENDUM NO. 4

Slip Copy, 2006 WL 3254509 (D.Utah)
(Cite as: Slip Copy)

H

Briefs and Other Related Documents
Renfro v. mcCowanD.Utah,2006.Only the Westlaw citation is currently available.

United States District Court,D. Utah,Central Division.

Hal D. RENFRO, Trustee of the Renfro Family Trust, Plaintiff,
v.
Milo McCOWAN, et al., Defendants.

No. 2:05-CV-00498.

Nov. 9, 2006.

E. Craig Smay, Salt Lake City, UT, for Plaintiff.
Gary G. Kuhlmann, St. George, UT, for Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PAUL G. CASSELL, District Judge.

***1** This case requires the court to determine whether an informal road that traverses through both defendants' and plaintiff's land has been dedicated and abandoned to the use of the public. Plaintiff Hal D. Renfro ("Renfro") believes that he has presented clear and convincing evidence that the informal road in issue (the "Road") has been continuously used as a public thoroughfare for a period of ten years, and has thus been abandoned and dedicated to the use of the public. Defendants argue that Renfro has failed to meet this burden because of an alleged lack of evidence showing that the Road has been used continuously for ten years, and an alleged dispute as to whether it is, in deed, the "public" that has used the Road. The court agrees with Renfro that he has presented clear and convincing evidence that the Road has been dedicated to the public. Consequently, the court GRANTS his motion for summary judgment (# 53) in so far as the court finds that the Road has been abandoned and dedicated to the use of the public.

Also before the court is a motion for partial summary judgment filed by defendants (# 61). In addition to addressing the Road issue in their brief, defendants argue that some of the named parties have been wrongfully named as defendants in this action. The court finds that all of the named defendants have an interest in the Road, either as owners of the land directly affected by the Road or simply as potential future users of the Road. The court's holding on the Road issue does not involve damages. Moreover, the named defendant responsible for the alleged trespass and grading of Renfro's property, the only issue in this case that may result in damages, has offered to restore the Renfro land to its original condition. Consequently, the court DENIES defendants' motion for partial summary judgment (# 61). The court's granting of Renfro's motion for summary judgment effectively closes this case. All claims having been resolved, the court directs the Clerk's Office to close this case.

BACKGROUND

When considering a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party.[FN1] Viewed in this light, the record reflects the following facts.

FN1. *Cortez v. McCauley,* 438 F.3d 980, 988 (10th Cir.2006).

A. The Renfro Property

Renfro is the owner in trust of a parcel of land (the " Point") on the top of a ridge that overlooks the Green Valley Golf Course in St. George, Utah. It may go without stating that the Point is located on the point of the ridge. On June 28, 2005, Renfro deeded property working down the "back" and " sides" of the Point to a real estate development firm not currently involved in this case. Although no access right-of-way was retained by Renfro with regard to the transfer of land to the real estate

development firm, Renfro contends that access to the Point from this transferred land is impractical due to the steep terrain. The "frontside" of the Point currently borders land owned by Defendant QRS, Inc. ("QRS"). Renfro believes that the Point could be developed within the requirements of local laws and regulations for one or two residential lots worth several hundred thousand dollars each.

B. The QRS Property

***2** QRS is an owner or developer of the Highlands Green Valley subdivision (the "Highlands") in St. George, Utah. Defendant Milo McCowan (" McCowan") is a partner in both QRS and Castle Rock Development of Southern Utah, LLC, (" Castle Rock") two companies that consist of the same members. In the Fall of 2003, Castle Rock purchased the parcel of land currently being developed as the Highlands from the Kay Traveller Development Company. Kay Traveller owned this property for at least ten years prior to the conveyance to Castle Rock. Shortly after the acquisition, Castle Rock deeded the land to QRS.

The QRS property borders the Renfro property at the southeast corner of the Highlands. The southeast quadrant of the Highlands is a steep, southeast-trending ridge that leads to the Point. QRS has platted three lots that would come within about 120 feet of the Renfro property. More importantly, these three platted lots are located over the Road where it reaches the Point.

C. The Road

In the vicinity of the Highlands and the Point are a number of informal, unpaved roads that connect to various public ways. The informal road at issue-the Road-extends along the ridge of the Highlands and ends in a loop around the perimeter of the Point. The loop is formed around the outer limits of the flat surface of the Point, and reconnects with the Road of which it is a part.

QRS has platted the Highlands to utilize the Road as an access to many of the lots. The improved Road ends in a cul-de-sac at the lots bordering the Renfro property, and has been labeled Pike Circle. The cul-de-sac destroys the bottom part of the loop at the end of the Road, disconnecting the remainder of the loop from the rest of the Road of which it is a part. In the course of construction of the Highlands, Quality Excavation, under contract to QRS, entered the Point and graded and removed a portion of the Point's surface. Quality Excavation subsequently offered to restore the Point to its original condition.

Renfro has provided aerial photographs from 1978, 1985, and 2004, which show the existence of the Road. The Road can be plainly seen in all three photographs. Gary Esplin and McCowan, two long-time residents of St. George, both confirmed that the 1985 and 2004 photographs accurately depict the Road and its surrounding area. As a long-time resident of St. George, McCowan also noted that the area around the Road has been notorious for four-wheelers and motorcycles to ride. Having raised his kids in that area from 1980 through 1988, McCowan referred to the area of the Road as "four-wheeler heaven for the kids." [FN2] Mr. Esplin is also aware that the area has been used for such purposes.

FN2. McCowan Dep. 15:2-3, Apr. 18, 2006.

Speaking specifically about the Road, McCowan testified that "it's a place where people used to drive out and drive to the end, and once they got to the end, they had no place to go but turn around and come back out. It's a view spot." [FN3] McCowan noted that people would go and look off that point much like they would look off other points. Jack Willis, another long-time resident/visitor of the area, is the owner of an interest in a Sports Village condominium located in the general vicinity of the Road. He has observed that the Road has been used frequently over the past twenty-one years by all types of outdoor vehicles. Mr. Willis, himself, has often used the Road over this twenty-one year period.

FN3. *Id.* 18:1-5.

*3 Mr. Traveller, in his affidavit, states that neither he nor his company ever permitted the public to come onto his property, or attempted to deter anyone from use of the Road. Moreover, McCowan was unaware of any barriers or blockage to use of the trails in the area of the Road for the entire time that he has been familiar with the area.

Based upon these facts, Renfro argues that he has satisfied his burden to prove by clear and convincing evidence that the Road has been dedicated to public use. QRS contends that Renfro has failed to establish undisputed facts which would support summary judgment on this issue. In addition to the Road dispute, Renfro argues that defendants have graded and removed soil from its property without permission and in trespass. Because Quality Excavation has offered to restore the land affected by its trespass and grading of the Point, [FN4] the court will limit its discussion to the issue of the potential public thoroughfare.

FN4. Tomaiko Dep. 37:17-25; 38:21-39:6, Apr. 18, 2006; Def.'s Status Report, Aug. 21, 2006 (Docket No. 66); Pl.'s Mem. Supp. Summ. J. 7 (Docket No. 56).

STANDARDS OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [FN5] In evaluating a motion for summary judgment, the evidence and reasonable inferences drawn therefrom should be viewed in the light most favorable to the nonmoving party, in this case the defendants.[FN6] Utah law requires that dedication of a road as a public road must be proven by clear and convincing evidence. [FN7] The "burden of establishing public use for the required period of time is on those claiming it." [FN8]

FN5. Fed.R.Civ.P. Rule 56(c).

FN6. *Byers v. City of Albuquerque,* 150 F.3d 1271, 1274 (10th Cir .1998).

FN7. *Draper City v. Estate of Bernardo,* 888 P.2d 1097, 1099 (Utah 1995) (citing *Thomson v. Condas,* 493 P.2d 639, 639 (Utah 1972)).

FN8. *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches,* 639 P.2d 211, 213 (Utah 1981).

DISCUSSION

Renfro seeks summary judgment on the grounds that QRS has platted a portion of the Highlands over, and otherwise destroyed an established public thoroughfare-the Road-leading to the Renfro property. McCowan contends that the Road is not a public thoroughfare because Renfro has failed to show that the Road has been used continuously by the public for a ten year period. The court is persuaded that Renfro has met his burden and that summary judgment in his favor is proper.

Under Utah law, "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." [FN9] Accordingly, courts interpreting this statute (or its similar predecessor) require proof of the following three elements before finding that a road has been abandoned to the public: there must be (1) continuous use, (2) as a public thoroughfare, (3) for a period of ten years. [FN10] The definition of public thoroughfare consists of the following: "(i) [t]here must be 'passing or travel,' (ii) the 'use must be by the public,' (iii) use by permission does not constitute use as a public thoroughfare ..." [FN11] As noted above, Utah law requires that dedication of a public road be proven by clear and convincing evidence.[FN12] Consequently, Renfro has the burden to prove by clear and convincing evidence that the Road has been abandoned to the public. The court is persuaded that Renfro has met this burden.

FN9. Utah Code Ann. § 72-5-104(1) (2001).

FN10. *Heber City Corp. v. Simpson,* 942 P.2d 307, 310 (Utah 1997).

FN11. *Id.* at 311 (quoting *Morris v. Blunt,* 161 P. 1127, 1131 (Utah 1916)).

FN12. *Draper City,* 888 P.2d at 1099 (citing *Thomson,* 493 P.2d at 639).

A. Continuous Use for Ten Years

*4 The first and third elements of the test require Renfro to provide clear and convincing evidence that the Road has been used continuously for a period of ten years. "[C]ontinuous use of a road exists when 'the public ... made a continuous and uninterrupted use' not necessarily every day, but ' as often as they found it convenient or necessary.' " [FN13] Furthermore, "use may be continuous though not constant ... provided it occurred as often as the claimant had occasion or chose to pass. Mere intermission is not interruption." [FN14]

FN13. *AWINC Corp. v. Simonsen,* 112 P.3d 1228, 1230 (Utah Ct.App.2005) (quoting *Boyer v. Clark,* 326 P.2d 107, 109 (Utah 1958)).

FN14. *Campbell v. Box Elder County,* 962 P.2d 806, 809 (Utah Ct.App.1998) (citation omitted).

Renfro has provided aerial photographs from 1978, 1985, and 2004, which show the existence of the Road. The Road is plainly visible in all three photographs. McCowan and Esplin both confirmed that the 1985 and 2004 photographs accurately depict the Road and the area surrounding the Road. While this evidence might not be enough by itself to show continuous use, Renfro has produced affidavit and deposition testimony supporting what the photographs plainly suggest. In addition to confirming the accurateness of the photographs, McCowan also testified that "this [area] has been a notorious area for four-wheelers and motorcycles to ride." [FN15] McCowan, having raised his kids in that area from 1980 through 1988, referred to the area of the Road as "four-wheeler heaven for the kids." [FN16] Speaking specifically about the Road, McCowan testified that "it's a place where people used to drive out and drive to the end, and once they got to the end, they had no place to go but turn around and come back out. It's a view spot." [FN17] Renfro also supplied the court with an affidavit from Jack Willis, in which he states: "In the twenty-one years that I have owned property nearby, I have observed that this loop has been used continuously and frequently by all types of outdoor vehicles approaching from the northwest to exploit the view from the end of the point. I have often used the Road and the loop as described over this period. " [FN18]

FN15. McCowan Dep. 14:21-22.

FN16. *Id.* 15:2-3.

FN17. *Id.* 18:1-5.

FN18. Willis Aff. ¶ 7.

The aerial photographs, coupled with the affidavit of Jack E. Willis and depositions of McCowan and Esplin, provide clear and convincing evidence that the Road has been used continuously for at least ten years.

B. Use as a Public Thoroughfare

The next element for discussion is whether the Road has been used as a public thoroughfare. The Utah Supreme Court has established three requirements that must be satisfied before a road qualifies as a public thoroughfare: "(i) [t]here must be 'passing or travel,' (ii) the 'use must be by the public,' (iii) use *by permission does not constitute use as a public* thoroughfare...." As displayed above, Renfro has submitted clear and convincing evidence that there has been "travel" on the Road. The court, as more fully discussed below, is also persuaded that Renfro has produced clear and convincing evidence showing that the Road was used by the public, without the permission of the private landowners.

When determining whether it is the public that has

used a potential public thoroughfare, it is necessary to first define "public." The Utah Court of Appeals has noted the importance to distinguish "between use of a road by owners of adjoining property and by the general public. 'Such property owners cannot be considered members of the public generally, as that term generally is used in dedication by user statutes.' " [FN19] The reasoning behind this distinction "is because adjoining owners may have documentary or prescriptive rights to use the road or their use may be by permission of the owners of the fee of the road." [FN20] Consequently, the "public" includes those normally recognized as being the public, with the exception of owners of adjoining property and those using the road by permission.

FN19. *Kohler v. Martin,* 916 P.2d 910, 913 (Utah Ct.App.1996) (quoting *Peterson v. Combe,* 438 P.2d 545, 546 (Utah 1968)).

FN20. *Id.*

***5** The record provides clear and convincing evidence that the continuous use of the Road has been by members of the public. In his affidavit, Jack Willis states that the Road has been used "by all types of outdoor vehicles approaching from the northwest to exploit the view from the end of the point." [FN21] In addition to observing this traffic, Mr. Willis states that he has often used the Road over the twenty-one years that he has resided in the area. [FN22] Mr. Willis clearly does not qualify as an adjacent landowner. [FN23] McCowan admitted that individuals used the Road to find a view spot, noting that "it's a place where people used to drive out and drive to the end, and once they got to the end, they had no place to go but turn around and come back out." [FN24] He states that "people would go out and look off that point as they would other points." [FN25] Additionally, McCowan testified that the area around the Road "has been a notorious area for four-wheelers and motorcycles to ride" [FN26] and that the area was "four-wheeler heaven" for his own kids.[FN27]

FN21. Willis Aff. ¶ 7.

FN22. *Id.*

FN23. *See Kohler,* 916 P.2d at 913.

FN24. McCowan Dep. 18:1-4.

FN25. *Id.* 23:9-10.

FN26. *Id.* 14:21-22.

FN27. *Id.* 15:2-3.

Commingled with the second prong involving use by the public, is the third prong regarding permissive use. Under Utah law, "permissive use cannot result in either adverse possession or dedication of private property to the public." [FN28] Renfro has produced clear and convincing evidence to show that the individuals using the Road did not have permission. In his affidavit, Mr. Traveller states: "Neither I nor my company ever permitted or attempted to deter anyone from [use of the Road]. I never observed anyone else attempt to deter such use." [FN29] Mr. Traveller states further that to the best of his knowledge, "the public would have had unobstructed use of this road throughout the period the Highlands property was owned by [his] company." [FN30] Moreover, McCowan was unaware of any barriers or blockage to use of the trails in the area of the Road for the entire time that he has been familiar with the area.

FN28. *Campbell,* 962 P.2d at 809.

FN29. Traveller Aff. ¶ 5.

FN30. *Id.* ¶ 4.

Accordingly, the unobstructed use of the Road by Mr. Willis, coupled with the evidence of unobstructed and constant use by numerous recreationists and sightseers, provides clear and convincing evidence that the users were not adjacent landowners, but members of the public enjoying the outdoors. Renfro, therefore, has provided clear and convincing evidence that the Road was a public thoroughfare for the purposes of Utah Code § 72-5-104.

The court finds that Renfro has shown by clear and convincing evidence that the Road has been continuously used as a public thoroughfare for a period of ten years.

C. Other Issues

Defendants point to case law in which the court gives considerable weight to the issue of how a potential public thoroughfare was created. Defendants argue that under Utah law, if a trail was created by a past property owner as a private way, " it's use, however long, as a private way, does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change." [FN31] Defendants' reliance on this case law is unhelpful for two reasons. First, defendants admit that the " trails at issue in this case were not established to access any specific portions of property for the benefit of any property owner." [FN32] Second, and more conclusive, this rule of law has been overruled in a subsequent Utah Supreme Court decision.[FN33]

FN31. *Morris v. Blunt,* 161 P. 1127, 1131 (Utah 1916) (quoting Byron K. Elliott & William F. Elliott, A Treatise on the Law of Roads and Streets § 5 (1890)).

FN32. Def.'s Mem. Opp. Summ. J. 3.

FN33. *Draper City,* 888 P.2d at 1099.

CONCLUSION

***6** Because Mr. Renfro has provided clear and convincing evidence that the Road has been continuously used as a public thoroughfare for a period of ten years, Renfro's motion for summary judgment is GRANTED (# 53) in so far as the court declares that the Road has been abandoned and dedicated to the use of the public. As mentioned above, QRS has motioned the court for partial summary judgment to remove some of the named parties that have allegedly been wrongfully named as defendants in this action (# 61). The court's holding on the Road issue affected each of the named defendants, and because there are no damages involved in light of Quality Excavation's offer to restore the Renfro property to its original condition, the court finds it unnecessary to address defendants' jurisdictional issues in their motion for partial summary judgment. Consequently, the court DENIES defendants' motion for partial summary judgment (# 61). All claims having been resolved, the court directs the Clerk's Office to close this case.

SO ORDERED.

D.Utah,2006.
Renfro v. mcCowan
Slip Copy, 2006 WL 3254509 (D.Utah)

Briefs and Other Related Documents (Back to top)

- 2005 WL 3198219 (Trial Motion, Memorandum and Affidavit) Reply to Opposition to Motion for Summary Judgment (Nov. 7, 2005) Original Image of this Document (PDF)
- 2005 WL 3198217 (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (Oct. 17, 2005) Original Image of this Document (PDF)
- 2:05cv00498 (Docket) (Jun. 14, 2005)

END OF DOCUMENT

ADDENDUM NO. 5

IN THE UTAH COURT OF APPEALS

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Wasatch County, a body politic of the State of Utah, Plaintiff, Appellant, and Cross-appellee, v. E. Ray Okelberry, Brian Okelberry, Eric Okelberry, Utah Division of Wildlife Resources, West Daniels Land Association, and John Does 1-25, Defendants, Appellees, and Cross-appellants.	OPINION (For Official Publication) Case No. 20050389-CA F I L E D (November 30, 2006) 2006 UT App 473

Fourth District, Heber Department, 010500388
The Honorable Donald J. Eyre Jr.

Attorneys: Thomas L. Low and Scott H. Sweat, Heber City, for Appellant and Cross-appellee
Ryan D. Tenney, Provo, for Appellees and Cross-appellants

Before Judges Bench, McHugh, and Orme.

McHUGH, Judge:

¶1 Wasatch County (Wasatch) appeals the trial court's ruling that principles of estoppel prevent it from exercising control over roads, located on land owned by West Daniels Land Association (the Association) and E. Ray Okelberry, Brian Okelberry, and Eric Okelberry (collectively, the Okelberrys),[1]

---

1. The Association owns property immediately adjacent to property owned by the Okelberrys. As members and shareholders in the Association, the Okelberrys used the Association's land in

(continued...)

that were adjudicated abandoned and dedicated to the public. The Okelberrys cross-appeal the trial court's determination that the roads were dedicated to the public under Utah Code section 72-5-104(1). See Utah Code Ann. § 72-5-104(1) (2001). We affirm in part and reverse and remand in part.

BACKGROUND

¶2 In 1957, the Okelberrys[2] purchased a tract of rural, undeveloped property in Wasatch County. The property is criss-

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1. (...continued)
conjunction with their own for grazing livestock. The Association was initially included in the suit as a defendant. However, for reasons not clear from the record, it withdrew from the litigation. After the Association failed to appoint successor counsel, Wasatch sought default judgment against the Association. The Okelberrys opposed the motion and argued that as members of the Association they had the right to represent its interests at trial. The trial court did not directly enter a ruling on Wasatch's default judgment motion. Later, the court noted that default judgment had been entered against the Association in its Findings of Fact and Conclusions of Law. However, the trial court had allowed the Okelberrys to submit evidence with respect to the roads located on both the Okelberrys' and the Association's properties at trial. Additionally, the trial court adjudicated the status of the roads located on the Association's property, implicitly rejecting Wasatch's argument that the Okelberrys lacked standing to represent the Association's interests. See Zions First Nat. Bank v. C'Est Bon Venture, 613 P.2d 515, 517 (Utah 1980) (recognizing that trial courts implicitly deny motions where later judgment is in conflict with and fails to give effect to the motions). Because Wasatch has not appealed the issue of the Okelberrys' standing to represent the interests of the Association, this court addresses the merits without distinguishing between the Okelberrys' and the Association's properties. See Whitmer v. City of Lindon, 943 P.2d 226, 228 n.1 (Utah 1997) (declining to address issue not appealed).

2. The tract was initially purchased by E. Ray Okelberry, his brother, Lee Okelberry, and their father, Roy Okelberry. Sometime after 1957, Ray and Lee Okelberry bought their father's interest in the property. And later, when Lee decided to retire, Ray's sons, Eric and Brian Okelberry, bought Lee's interest. At the present time, Ray, Eric, and Brian Okelberry own the property and continue to use it for their livestock operation.

crossed by a series of unimproved dirt roads including the four roads at issue in this appeal: the Thorton Hollow Road, Ridge Line Road, Parker Canyon Road, and Circle Springs Road (the Four Roads).[3] The Four Roads begin and end at points outside the Okelberrys' property or are connected to roads that begin and end outside the property. At the time the property was purchased, it was bordered on the east and south by fences, separating the Okelberrys' property from United States Forest Service property. There were also multiple wire gates along the Four Roads such that persons traveling on the Four Roads generally had to open the gates before proceeding within the boundaries of the Okelberrys' property.

¶3 Sometime in 1989, the Okelberrys started barring public use of the Four Roads by constantly locking the gates and posting no trespassing signs. In the mid-1990s, the Okelberrys placed their property into a Cooperative Wildlife Management Unit (CWMU) that allowed them to realize a profit from exclusive hunting activities on the property. In 2001, twelve years after the Okelberrys began permanently locking the gates, Wasatch initiated suit to have the Four Roads declared public highways under Utah Code section 72-5-104. See Utah Code Ann. § 72-5-104.[4] Under that provision, "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Id. § 72-5-104(1).

¶4 After a three-day bench trial, the court entered findings of fact and conclusions of law. First, the court "specifically found that there was not public use of the [Four Roads] in the 1940s or before and also . . . no evidence of vehicular use prior to the 1950s." The court also specifically found that Wasatch had never performed any maintenance on the Four Roads.

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3. The initial suit included a fifth road, Maple Canyon Road, which the trial court determined had not been abandoned to the public. Because neither party appeals the trial court's decision with respect to Maple Canyon Road, it is not addressed here.

4. An earlier version of this provision, see Utah Code Ann. § 27-12-89 (1995), was in effect at the time Wasatch claims dedication or abandonment of the Four Roads occurred. However, the current version, see id. § 72-5-104(1) (2001), is "substantively identical" to the earlier version. State v. Six Mile Ranch Co., 2006 UT App 104,¶4 n.3, 132 P.3d 687. Therefore, in the interests of convenience, all references and citations will be to the current version. See id.

¶5 Turning to the evidence and testimony presented at trial, the court noted that Wasatch had presented witnesses, members of the general public, who testified that for different periods of time between 1957 and 1989 they freely used the Four Roads. The court noted that the Okelberrys' witnesses alternatively testified that beginning in the 1960s, the gates on the Four Roads were generally kept closed and "periodically locked for several days at a time and that signs were also posted on the gates and property which stated 'No Trespassing--Private Property.'" Additionally, employees of the Okelberrys testified that they had, at times, asked people trespassing on the property or the roads to leave. After weighing the evidence, the court assumed the truth of the Okelberrys' factual assertions and nonetheless determined that it was "clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, they used the roads freely, and though not constantly, they used the roads continuously as they needed."

¶6 The court also found that the majority of users were members of the general public, traveling without permission, and therefore used the Four Roads as a public thoroughfare. Finally, without defining exactly which ten years the Four Roads were used continuously as public thoroughfares, the court determined that between 1960 and 1990, public use "continued for at least ten years, if not much longer, or for multiple periods of ten years." Thus, the court concluded that the Four Roads had been dedicated to public use "well over ten years prior to 1989 when the Okelberrys began [permanently] locking the gates."

¶7 Although determining that the roads had been abandoned and dedicated to the public, the court found that Wasatch was equitably estopped from enforcing the dedication on behalf of the public. The court supported the estoppel determination with two findings. First, that "for a period of twelve years [the Okelberrys] exerted control and used the roads in an openly hostile manner to the public use of the streets." And second, although "little improvements have been made to the roads themselves," the Okelberrys had expended "large amounts of time and money" on their sheep and cattle operations as well as cultivated their business relationship with the CWMU. Wasatch appeals the trial court's judgment that it is equitably estopped from opening the Four Roads to public use, and the Okelberrys cross-appeal the trial court's ruling that the Four Roads are public roads by dedication.

ISSUES AND STANDARDS OF REVIEW

¶8 The Okelberrys challenge the trial court's determination that the Four Roads were abandoned and dedicated to the public under Utah Code section 72-5-104(1). See Utah Code Ann. § 72-5-104(1). "The trial court's ultimate conclusion that the facts of this case either satisfy or do not satisfy the requirements of section 72-5-104(1) is a mixed question of fact and law, which we review for correctness." State v. Six Mile Ranch Co., 2006 UT App 104,¶9, 132 P.3d 687 (citing Heber City Corp. v. Simpson, 942 P.2d 307, 309 (Utah 1997)). However, because the legal requirements of a public highway determination under section 72-5-104(1) are "highly fact dependent and somewhat amorphous," we "give[] trial courts a fair degree of latitude in determining the legal consequences . . . of facts found by the court." Id. (quotations and citation omitted); accord Heber City Corp., 942 P.2d at 309-10. "'Therefore, when reviewing a trial court's decision regarding whether a public highway has been established under section [72-5-104(1)], we review the decision for correctness but grant the court significant discretion in its application of the facts to the statute.'" Six Mile Ranch Co., 2006 UT App 104 at ¶9 (alteration in original) (quoting Heber City Corp., 942 P.2d at 310).

¶9 The Okelberrys also challenge the sufficiency of the evidence, arguing that Wasatch has not provided clear and convincing evidence of continuous use as a public thoroughfare. See Utah Code Ann. § 72-5-104(1). "To establish the dedication of a public road, we require clear and convincing evidence." AWINC Corp. v. Simonsen, 2005 UT App 168,¶7, 112 P.3d 1228 (citing Thomson v. Condas, 27 Utah 2d 129, 493 P.2d 639, 639 (1972)). Where a party challenges the sufficiency of the evidence, "[a]n appellate court must launch any review of factual findings from rule 52(a) of the Utah Rules of Civil Procedure and its clearly erroneous test . . . ." In re Z.D., 2006 UT 54,¶¶28-29, 561 Utah Adv. Rep. 10 (quotations omitted); see also Utah R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Although it is appropriate for a "reviewing court to consider the standard of proof the prevailing party below was required to meet," the trial court's findings of fact will only be reversed under the clearly erroneous standard embodied in rule 52(a) where a review of the record as a whole demonstrates the result is "against the clear weight of the evidence or leave[s] the appellate court with a definite and firm conviction that a mistake has been made." In re Z.D., 2006 UT 54 at ¶40; see also Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987).

¶10 Alternatively, Wasatch argues that the trial court erred when it applied equitable estoppel to bar its future attempts to open the Four Roads to public use. "[W]hether the trial court committed reversible error in applying the doctrine of equitable estoppel" to a public road determination is a question of law, which is "reviewed for correctness without any special deference." Western Kane County, 744 P.2d at 1377-78.

ANALYSIS

I. Dedication to the Public

¶11 Under Utah Code section 72-5-104(1), "[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Utah Code Ann. § 72-5-104(1). Thus, for a road to become a public highway under the statute, three elements must be met, "there must be (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of ten years." Heber City Corp., 942 P.2d at 310, quoted in Six Mile Ranch Co., 2006 UT App 104 at ¶11.

¶12 The Okelberrys argue that the trial court's findings of fact were not supported by clear and convincing evidence; therefore, its conclusions that the Four Roads had been used continuously as public thoroughfares were in error. We will address each of these elements in turn, noting, however, that although each element "embodies a logically distinct requirement that must be satisfied, the elements are so intertwined that they are not readily susceptible to separate discussion." Id. at 310 n.6.

A. Continuous Use

¶13 Under Utah law, continuous use of a road exists when "'the public, even though not consisting of a great many persons, made a continuous and uninterrupted use' not necessarily every day, but 'as often as they found it convenient or necessary.'" AWINC Corp., 2005 UT App 168 at ¶11 (quoting Boyer v. Clark, 7 Utah 2d 395, 326 P.2d 107, 109 (1958)). It is not required that public use be constant, rather it need only to have "'occurred as often as the claimant had occasion or chose to pass. . . . Mere intermission is not interruption.'" Id. (omission in original) (quoting Richards v. Pines Ranch, Inc., 559 P.2d 948, 949 (Utah 1977)).

¶14 The Okelberrys argue that the evidence of continuous use of the Four Roads was not clear and convincing because, at trial, they presented unrebutted evidence showing that the Okelberrys had expelled persons who lacked permission to use the roads and controlled access to the roads through closed gates that were

periodically locked. At the heart of the Okelberrys' argument is the proposition that uncontested evidence of a closed or locked gate across a road, or a single instance where a party is ejected from the road, is an interruptive event sufficient to defeat any claim of continuous use by the public as a matter of law. While acknowledging the ease of application of such a bright-line test, we disagree.

¶15 In making public road determinations, the Utah Supreme Court has stated that "all of the facts should be considered together, and where there is dispute about whether a public use is established, determination of the facts and resolution of the issue is primarily the responsibility of the trial court." Bonner v. Sudbury, 18 Utah 2d 140, 417 P.2d 646, 648 (1966) (emphasis added). Prior cases have recognized that the presence of gates, including the frequencies with which they are closed or locked, is a factor to be weighed heavily in making the continuous use determination. See, e.g., Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998) (taking into account that road had been "generally barred by a locked gate," as well as testimony that the public "had been unable to use the road because of the gate"). Nonetheless, the presence of obstructions or gates, open or closed, unlocked or locked, has been treated as only one of the many factors a trial court may consider when determining if the public use was continuous. See Thurman v. Byram, 626 P.2d 447, 449 (Utah 1981) (affirming trial court's determination of public road despite finding that road was "periodically block[ed]" during the relevant time). Indeed, the Utah Supreme Court has declined opportunities to rely solely on the presence of a gate, locked or unlocked, to affirm trial courts' determinations that roads have not been dedicated to the public. See Thomson v. Condas, 27 Utah 2d 129, 493 P.2d 639, 640-41 (1972) (weighing presence of gates, locked and unlocked, along with signage, lack of governmental maintenance, nature of use, and character of users in finding road was not abandoned); Gillmor v. Carter, 15 Utah 2d 280, 391 P.2d 426, 427 (1964) (relying on evidence of gates, as well as signs, grants of permission, past litigation initiated by the property owners alleging private road, and contracts for exclusive use); cf. Wilhelm v. Pine Meadows Estates, Inc., 2001 UT App 285U, No. 20000559-CA, 2001 Utah App. LEXIS 131, at *3-*4 (Oct. 4, 2001) (per curiam) (noting that the owners had blocked access to the road several times but also weighing character of users and nature of use); Campbell, 962 P.2d at 809 (examining evidence of locked gate and testimony by members of the public who had been unable to use the road because of the gate). While we leave open the possibility that evidence that a road was blocked by a locked gate may weigh heavily enough, given the other facts and circumstances, to be dispositive of the question of continuous

use, we do not accept the Okelberrys' argument that any evidence of a locked gate, no matter how brief, is conclusive evidence of interrupted use.

¶16 Strong policy considerations underlie public highway determinations governed by Utah Code section 72-5-104. Utah appellate courts have noted that because "the ownership of property should be granted a high degree of sanctity and respect," Draper City v. Bernardo, 888 P.2d 1097, 1099 (Utah 1995), "dedication of property to public use should not be lightly presumed," Thurman, 626 P.2d at 448. In consideration of this policy, the Utah Supreme Court has placed the burden of proving the existence of a public road by clear and convincing evidence on the party seeking the dedication. See Draper City, 888 P.2d at 1099 ("This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect.").

¶17 However, adopting the test urged by the Okelberrys would disrupt the delicate balance embodied in the clear and convincing standard. If a property owner was able to defeat a dedication claim by simply providing self-serving testimony that at some point she interrupted use of a road by locking a gate for a single short period of time within a ten-year period or ejecting a single person from the road, the dedication statute would be eviscerated. Cf. Petersen v. Combe, 20 Utah 2d 376, 438 P.2d 545, 546-47 (1968) (reversing trial court's determination of dedication where evidence was almost exclusively provided by self-serving witnesses "having their own special and private interests in the road"); Bonner, 417 P.2d at 648 ("Resolution of [a dedication] issue cannot rest entirely upon what the owner says was his intent. In case controversy arises he can always avow that his intent was in accord with his interest." (footnote omitted)). At the same time, we note the difficulty property owners face in locating disinterested witnesses to testify that they were prevented from using the roads at their convenience or the time of their choosing because they met with a locked gate or were turned away.[5] It is precisely for these reasons that a trial court is given great latitude in weighing the facts in light of the credibility and motivation of witnesses when determining if use of a road by the public was continuous. See Petersen, 438 P.2d at 549 (Crockett, C.J., dissenting) (noting

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5. These failed attempts to use the road may be unknown to the property owners. Even in cases where the property owner ejected a member of the public, he is unlikely to retain identification or contact information that could be used to subpoena the member of the public for trial.

that "it is the prerogative of the trial judge to determine whether the tests [for dedication] have been met" including a weighing of interested witness's testimony).

¶18 Thus, the question of continuous use should be approached as a multi-faceted inquiry that requires a trial court to weigh all the evidence presented in light of the credibility of witnesses. We recognize that evidence of gates, and in particular locked gates, during the relevant period is strong evidence of interrupted use. See, e.g., Campbell, 962 P.2d at 809 (noting that trial court's determination that there was not continuous use was permissibly premised on finding that road was "generally barred by a locked gate"); Cox v. Cox, 373 P.2d 929, 933 (Idaho 1962) ("Where gates are in existence across a road barring the passage and making it necessary to open them in order to use the road, the existence of such gates is considered as strong evidence that the road was not a public road."); cf. Thomson, 493 P.2d at 640-41 (discussing gates, chains, and padlocks across road in affirming trial court's determination that dedication had not occurred). Nonetheless, in some instances, evidence of a gate, even a locked gate, may not weigh heavily enough to establish that there was an interruption of continuous use. See, e.g., Utah County v. Butler, 2006 UT App 444,¶¶12-15 (affirming trial court's determination of dedication even where property owners presented evidence that gate across road had at one time been locked). In deciding whether a locked gate acted as an interruptive force sufficient to restart the running of the statutory ten-year period, the trial court should weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing evidence that public use of the road was continuous.

¶19 In this case, the trial court balanced the frequency and duration that the gates were locked against the frequency and volume of public use. The trial court found that even were it to accept as true "that beginning in the 1960s the gates were periodically locked for several days at a time," it was nonetheless "clear that individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the roads without interruption, . . . and though not constantly, they used the roads continuously as they needed."

¶20 The trial court's conclusion is supported in the record. Several witnesses testified that they used the Four Roads during the relevant period and were never asked to leave and never encountered a locked gate. "[W]e do not set aside the trial court's factual findings unless they are against the clear weight of the evidence or we otherwise reach a definite and firm

conviction that a mistake has been made." Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987). No such conviction is held here. Clear and convincing evidence may be premised on "[t]he testimony of one credible witness[] if believed by the court or jury." Bonner v. Sudbury, 18 Utah 2d 140, 417 P.2d 646, 648 (1966). Here, the trial court may have relied on any one of many witnesses. We do not, therefore, disturb the trial court's conclusion that there was continuous use.

B. Public Thoroughfare

¶21 Three general requirements must be met to demonstrate that the road at issue was used as a public thoroughfare: "(i) [t]here must be passing or travel, (ii) the use must be by the public, [and] (iii) use by permission does not constitute use as a public thoroughfare." Heber City Corp. v. Simpson, 942 P.2d 307, 311 (Utah 1997) (quotations omitted). The Okelberrys do not challenge the trial court's findings that there was passing or travel nor do they challenge that the travel was engaged in by members of the public. Rather, the Okelberrys assert that it was error for the trial court to find that there was clear and convincing evidence of use as a public thoroughfare because they presented uncontested evidence that gates were maintained on the Four Roads throughout the relevant period. More simply, the Okelberrys argue that the mere presence of a gate, locked or unlocked, is conclusive proof of permissive use and therefore may, as a single inquiry, defeat a finding of public thoroughfare. This court has rejected such a construction of Utah law.

¶22 "It is firmly established under Utah law that permissive use cannot result in either adverse possession or dedication of private property to the public." Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998) (citing Heber City Corp., 942 P.2d at 311-12; Thurman v. Byram, 626 P.2d 447, 449-50 (Utah 1981)). In Campbell v. Box Elder County, we recognized that a property owner's use of a gate was strong evidence, but not conclusive proof, of permissive use. See 962 P.2d at 809. There, we affirmed the trial court's determination that use was permissive where it was supported by evidence showing "the Campbells had unlocked the gate every year except 1994 for deer hunting season and had relocked it at the end of each hunting season." Id. However, we have since clarified the treatment of gates in Campbell by explaining that it is not the presence of the gate, alone, that indicates permissive use. See State v. Six Mile Ranch Co., 2006 UT App 104,¶23, 132 P.3d 687. Instead, Campbell stood "for the proposition that an overt act, such as locking and unlocking a gate, provides evidence of permissive

use." Id. While the overt act of locking and unlocking the gate under the facts and circumstances in Campbell was an indication of permissive use, the erection of a gate by a property owner does not conclusively establish the character of the public use as permissive because a gate "may be erected for purposes other than obstruction of public travel." McIntyre v. Board of County Comm'rs, 86 P.3d 402, 409-10 (Colo. 2004) (quotations and citation omitted). For example, because a gate may be erected across a public road for the purpose of controlling livestock, see Utah Code Ann. § 72-7-106 (2001), gates across roads do not always carry an inference of permissive use. See, e.g., Lemont Land Corp. v. Rogers, 887 P.2d 724, 728 (Mont. 1994) (noting that where "the gate was used to control livestock, not travel," it was insufficient evidence to support a conclusion of permissive use).

¶23 Therefore, "[w]hile evidence of a fence or gate on the road gives rise to a strong indication that any public use of the road is permissive, their existence does not provide the landowner with a conclusive presumption that the use is permissive." McIntyre, 86 P.3d at 412; see also Tomlin Enters., Inc. v. Althoff, 2004 MT 383,¶19, 103 P.3d 1069 ("[T]he fact that the passage of a road has been for years barred by gates or other obstructions to be opened and closed by the parties passing over the land, has always been considered as strong evidence in support of a mere license to the public . . . ." (quotations and citation omitted)). Instead, trial courts are given wide latitude to determine if use is permissive because the "legal requirements [of section 72-5-104], other than the ten-year requirement, are highly fact dependent and somewhat amorphous." Heber City Corp., 942 P.2d at 310.

¶24 The Utah Supreme Court has warned that in public road dedication cases, appellate courts should not attempt to "establish a coherent and consistent statement of the law on a fact-intensive, case-by-case review of trial court rulings." Id. Thus, under Utah law, trial courts are "permitted some reign to grapple with the multitude of fact patterns that may constitute a . . . [public thoroughfare] determination." Kohler v. Martin, 916 P.2d 910, 913 (Utah Ct. App. 1996) (alteration and omission in original) (quotations and citation omitted). Because the trial court has significant discretion to weigh the myriad facts that provide evidence of non-permissive use, the trial court's determination that travel on the Four Roads was without permission is adequately supported by the record as is its determination that the Four Roads were used as public thoroughfares. Several witnesses testified to using the Four Roads for decades without seeking or obtaining permission and without encountering locked gates. Additionally, testimony from

both parti s tended to support the trial court's conclusion that the gates ere primarily in place as a method of controlling the Okelberry' livestock operations, not for the purpose of controlli public use. Both of these findings are sufficient to sustain t trial court's conclusion that the Four Roads were used witho permission as public thoroughfares. See Thurman, 626 P.2d a 449 (affirming finding of public thoroughfare and noting tha "[a]lthough testimony in the instant case indicated some of t use . . . was with permission, there was clear and convincin vidence of frequent and general use of the road without d ndants' permissi n").

¶25 Beca we do not have a firm conviction that the trial court was staken, we do not disturb the trial court's findings that the r Roads were used continuously as public thoroughfa s for a period of at least ten years. We affirm the trial cou s determination that the Four Roads were dedicated to the publi y action of Utah Code section 72-5-104. See Utah Code Ann. 72-5-104(1). Upon affirming the trial court's judgment t t the Four Roads were public roads, it is necessary to address he issue of equitable estoppel raised by Wasatch on appeal.

II. Equitable Estoppel

¶26 Wasat challenges the trial court's determination that Wasatch is quitably estopped from asserting the public's rights in the Fou Roads because it had failed to do so for a period of twelve yea . As a general rule, once a road is dedicated and abandoned the public under section 72-5-104(1), subsequent acts by th property owner to limit the public's use cannot change its tatus as a public highway. See Utah Code Ann. § 72-5-105 (Sup 2006); Heber City Corp. v. Simpson, 942 P.2d 307, 313 n.12 (ah 1997) (noting that the fact that the road had not been used the public for several years "d[id] not change its status as public highway"); Western Kane County Special Serv. Dist. No. v. Jackson Cattle Co., 744 P.2d 1376, 1377-78 (Utah 1987) (hol ng road was still a public highway although fifty years had ssed since the road was used by the public); Clark v. Erekson, 9 Utah 2d 212, 341 P.2d 424, 425-26 (1959) (requiring landowner o remove encroachments on public highway even though some of th structures had been in place more than thirty years). Instead, u der Utah Code section 72-5-105, "all public highways . . . once established shall continue to be highways . . . until abandoned c vacated by order." Utah Code Ann. § 72-5-105(1). The Utah S preme Court has interpreted the language of this section to equire strict compliance with statutory procedures to effect an bandonment or vacation of a public road by the

government. See Ercanbrack v. Judd, 524 P.2d 595, 597 (Utah 1974).

¶27 There is no dispute that the Four Roads have not been abandoned or vacated by order under section 72-5-105(1). Despite the requirements of that section, "there may be circumstances so extreme that" the doctrine of equitable estoppel may be applied against the government "to prevent the assertion of rights in a public highway." Western Kane County, 744 P.2d at 1378. However, to remain "in harmony with the expressed will of the legislature, which requires that a strict statutory procedure be followed for the vacation of a public road," courts should be "extremely reluctant to apply the doctrine of estoppel against the assertion of rights in a public highway by a government entity." Id.

¶28 To prevail on their claim of equitable estoppel, the Okelberrys were required to show three elements:

> (1) an admission, statement, or act inconsistent with the claim afterward asserted,
> (2) action by the other party on the faith of such admission, statement, or act, and
> (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Celebrity Club, Inc. v. Liquor Control Comm'n, 602 P.2d 689, 694 (Utah 1979). Additionally, when estoppel is asserted against the government, the admission, statement, or act relied upon must amount to a "very clear, well-substantiated representation[] by [the] government entit[y]." Anderson v. Public Serv. Comm'n, 839 P.2d 822, 828 (Utah 1992). More specifically, in public roads cases, the Utah Supreme Court has indicated that the admission, statement, or act by the government must be an affirmative representation. See Wall v. Salt Lake City, 50 Utah 593, 168 P. 766, 769 (1917) (noting that case was uncommon and suitable for the application of estoppel because "the municipality by its own affirmative acts, declarations, and conduct, misled the [property owner]" (emphasis added)).

¶29 The Okelberrys argue that Premium Oil Co. v. Cedar City, 112 Utah 324, 187 P.2d 199 (1947), set out a special test for estoppel against the government in public roads cases whereby estoppel may be premised on the government's acquiescence in the private party asserting exclusive control over the roads. We disagree. The Okelberrys rely on the language in Premium Oil that states:

> [W]here the public have long withheld the assertion of control over streets, and private parties have been . . . induced to believe the streets abandoned by the public, . . . with the acquiescence of those representing the public . . . the doctrine of equitable estoppel may be applied.

Id. at 204 (emphasis added) (quotations omitted). However, any exception created by Premium Oil allowing the assertion of estoppel against the government in public roads cases, where reliance is premised on government inaction or acquiescence, was abrogated by subsequent legislation and case law. Cf. Western Kane County, 744 P.2d at 1378 ("We are extremely reluctant to apply the doctrine of estoppel against the assertion of rights in a public highway by a government entity. This reluctance is in harmony with the expressed will of the legislature, which requires that a strict statutory procedure be followed for the vacation of a public road." (citation omitted)).

¶30 At the time Premium Oil was decided in 1947, the law governing abandonment of a public road was found in Utah Code section 36-1-3 and stated: "All highways once established must continue to be highways until abandoned by order of . . . competent authority." Utah Code Ann. § 36-1-3 (1943) (emphasis added). Thus, the statute only required that the highway be "abandoned," and it may have been possible for a private property owner to reasonably rely on the government's "abandonment" or acquiescence in private control as an element of an estoppel claim. See Premium Oil, 187 P.2d at 204. However, in 1963, the Utah Legislature amended the language of section 36-1-3[6] by enactment of Utah Code section 27-12-90, which stated: "All public highways once established shall continue to be highways until abandoned or vacated by order of . . . competent authority." Act of 1963, ch. 39, § 90, 1963 Utah Laws 114, 141; Utah Code Ann. § 27-12-90 (1969) (emphasis added). In addition to the "abandoned or vacated" language of the 1963 amendment, the highway code was also amended in 1965, creating a strict statutory procedure for "abandon[ing] or vacat[ing]" a public highway. See Act of 1965, ch. 52, §§ 1-5, 1965 Utah Laws 154, 154-56; Utah Code Ann. §§ 27-12-102.1 to -102.5 (Supp. 1969). Decisions of the Utah Supreme Court following enactment of these statutory procedures make it clear that a public highway may only

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6. Utah Code section 36-1-3 was renumbered in 1953 to section 27-1-3 without changing the language. See Utah Code Ann. § 27-1-3 (1953) (amended 1963).

be abandoned or vacated when there has been strict statutory compliance. See Western Kane County, 744 P.2d at 1378; Henderson v. Osguthorpe, 657 P.2d 1268, 1270 (Utah 1982); Ercanbrack, 524 P.2d at 597.

¶31 Thus, under the modern statutes[7] and case law, a private property owner would no longer be able to reasonably rely on the government's acquiescence in private control to establish a claim of estoppel. See Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987) ("[E]stoppel should not be available to circumvent the statutory process."). Instead, a property owner can only claim reasonable reliance where the governmental entity has made some affirmative representation that it intended to abandon or vacate the road in compliance with the statutory procedure. To hold otherwise would come dangerously close to recognizing a form of adverse possession against the government whereby a private party could obtain equitable rights in a public road merely by exercising adverse control for a period of time. Utah law expressly prohibits any person from acquiring rights in a public road by adverse possession. See Utah Code Ann. § 78-12-13 (2002).

¶32 In this case, there was no evidence that Wasatch made any representation with respect to the Four Roads, let alone a representation that the statutory procedures had been or would be followed to abandon or vacate the Four Roads.[8] Instead, the trial court based its estoppel determination on the fact that Wasatch acquiesced in the private control by "failing to bring an action for twelve years." Therefore, we reverse the trial court's judgment preventing Wasatch from enforcing the public's rights in the Four Roads.[9]

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7. Utah Code section 27-12-90 was renumbered in 1998 to section 72-5-105(1) and remains substantively unchanged. See Act of 1998, ch. 270, § 133, 1998 Utah Laws 806, 861; Utah Code Ann. § 72-5-105 (Supp. 2005). The current statutory procedure for abandoning or vacating a public road can be found at Utah Code section 72-3-108. See Utah Code Ann. § 72-3-108 (2001).

8. Because we hold that the Okelberrys have not met the first element of a claim for equitable estoppel, we need not address the remaining elements.

9. Although our holding allows Wasatch to enforce the public's rights to access the Four Roads, nothing in this opinion should be read to suggest that the public has obtained any rights, hunting or otherwise, with respect to the Okelberrys' private

(continued...)

CONCLUSION

¶33 We do not have a firm conviction that the trial court erred when it determined that the Four Roads were dedicated and abandoned to the public pursuant to Utah Code section 72-5-104(1) after having been continuously used as public thoroughfares for a period of at least ten years. We also conclude that it was reversible error for the trial court to apply the doctrine of equitable estoppel against Wasatch's attempts to enforce the public's rights to use the Four Roads. We therefore affirm in part and reverse and remand in part for entry of judgment consistent with this decision.

_____
Carolyn B. McHugh, Judge

¶34 WE CONCUR:

_____
Russell W. Bench,
Presiding Judge

_____
Gregory K. Orme, Judge

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9. (...continued)
property abutting the roads. On the contrary, members of the public are only free to travel over the Four Roads and have no rights, absent permission from the Okelberrys, to enter onto their land, which remains private.