

2007

Wasatch County v. E. Ray Okelberry, Eric Okelberry, Utah Division of Wildlife Resources, West Daniels Land Association : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

<p>WASATCH COUNTY, a body politic of the State of Utah</p> <p>RESPONDENT,</p> <p>vs.</p> <p>E. RAY OKELBERRY, BRIAN OKELBERRY, ERIC OKELBERRY UTAH DIVISION OF WILDLIFE RESOURCES, WEST DANIELS LAND ASSOCIATION, and John Does 1-25</p> <p>PETITIONERS.</p>	<p>RESPONDENT'S BRIEF</p> <p>Case No. 20070011-SC</p>
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ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS
WASATCH COUNTY V. OKELBERRY, 2006 UT App 473, 153 P.3d 745

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JURISDICTION OF THE COURT

The Utah Supreme Court had jurisdiction of the initial appeal filed in this case pursuant to Utah Code Ann. §78-2-2(3)(j) (2006). It assigned the initial appeal to the Utah Court of Appeals, which had jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j) (2006). The Court of Appeals issued its decision on November 30, 2006. This Court granted the Okelberrys' petition for certiorari on March 15, 2007. Jurisdiction now lies with this Court under Utah Code Ann. 78-2-2(3)(a) (2006).

ISSUE PRESENTED

This Order granting certiorari review in this case characterized the issue on review as the following: "Whether the district court and court of appeals erred in their application of the standards for ascertaining a continuous use as a public thoroughfare pursuant to the Dedication Statute, Utah Code Ann. §72-5-104."

DETERMINATIVE STATUTES AND RULES

Utah Code Annotated 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."

STATEMENT OF THE CASE

1. Nature of the Proceedings

The Okelberrys are appealing the court of appeals decision upholding the trial court's determination that certain roads crossing the Okelberrys' property have been dedicated and abandoned to the public pursuant to Utah Code Ann. § 72-5-104 (1).

2. Course of Proceedings & Disposition Below

On August 24, 2001, Wasatch County filed its complaint in the Fourth District Court alleging that certain roads—located on property owned by the Okelberrys, West Daniels Land Association, and the Utah Department of Wildlife Resources—had become public by operation of law. (R. 10) Wasatch County reached a settlement with the Utah Department of Wildlife Resources on or about September 23, 2003. (R. 247) West Daniels Land Association defaulted on a motion for Summary Judgment, and its default was entered. (R. 419) After denying Wasatch County’s motion for summary judgment, the trial court held a bench trial between these two remaining parties on June 28, 29, and 30, 2003. (R. 357)

At the conclusion of trial, the court found that evidence of abandonment was clear and convincing as to four of the five roads across the Okelberry property that the County claimed to have been abandoned to public use. (R. 425) However, after making that finding, the court then determined that the doctrine of equitable estoppel prevented the County from enforcing the public nature of these roads because up to twelve years had passed between the time the Okelberrys began locking gates on these roads and the time the County filed its complaint. (R. 423) Contesting the ruling on equitable estoppel, Wasatch County filed a motion to alter or amend judgment or to amend the findings of fact and conclusions of law pursuant to Utah Rules of Civil Procedure 52(b) and 59(e). (R. 421) Subsequently, the trial court issued supplemental findings of fact (R. at 489) but denied the County’s motion to amend judgment. (R. 492)

Wasatch County appealed the trial court's decision regarding the application of equitable estoppel on April 22, 2005. (R. 495- 493) The Okelberrys cross-appealed the trial court's decision that the four roads had been abandoned and dedicated to the public. (R. 509-508) The Court of Appeals issued its decision on November 30, 2006, reversing the trial court's decision on equitable estoppel and upholding its decision on the dedication of the four roads. *Wasatch County v. Okelberry*, 2006 UT App 473, 153 P.3d 745.

The Okelberrys filed a petition for writ of certiorari on January 2, 2007. This Court granted the petition on March 15, 2007.

3. Statement of Relevant Facts

Defendants are owners of vast tracts of real property located in Wasatch County. (R. 419) The property is mountainous terrain separating Wallsburg valley from state-and federal-owned forested land. (R. 418-419) The property is traversed by several interconnecting dirt roads, some of which continue into United States Forest land. (R. 419-418) The public used these roads at will for at least 30 years. (R. 413) In the early 1990's the Okelberrys began restricting access to the roads. (R. 488) In 2001, the County filed an action in District Court to enforce the public's rights to use the roads. (R.10)

At trial, nine witnesses, a representative sampling of community users, testified that beginning in the 1950s they regularly and freely used the roads, typically for recreation and access to United States Forest Service property. They were never approached by the Okelberrys or their agents regarding their use of the roads. These

witnesses testified that although there were wire gates across the roads, they were typically closed only when livestock were present, and even then they were never locked. The witnesses testified that they were *always* able to use the roads; their collective uninterrupted use spanning over thirty years. (R. 413, 417)

In the late 1980s or early 1990s the Okelberrys began selling “trespass permits,” which allowed holders to use the Okelberry property for hunting. Later, in the early to mid-1990s, the Okelberrys placed their property into a Cooperative Wildlife Management Unit (CWMU), turning their property into an exclusive area for private hunting. (R. 416) In order to facilitate their trespass-permit policy, and later the CWMU, the Okelberrys began to lock the gates at the entrances to their property. It was at this time that the public first met with locked gates. (R. 413)

After a three-day bench trial, the district court found the evidence to be clear and convincing that four of the roads had become dedicated and abandoned to the public pursuant to state law. (R. 413) The trial court found that although the Okelberrys had at various times in the past locked the gates and that there were some no-trespassing signs alongside the roads, the Okelberrys had not restricted public access to the roads themselves until the early 1990’s, long after the roads had already been abandoned to the public. (R. 488)

SUMMARY OF ARGUMENT

The trial court conducted three days of trial in this case. It listened to the witnesses, studied the exhibits, and assessed the credibility, weight, and persuasiveness of each. In addition, prior to trial and at the parties’ request, the court personally toured the

roads together with counsel. Then, in light of all of the evidence, and applying the clear-and-convincing evidentiary standard, it made findings of fact. It found that the public used four of the five roads in question continuously as they thought it necessary or convenient. It further found that the use was as a “public thoroughfare,” with such use lasting for at least ten years if not multiple ten-year periods. The trial court then applied these clear and convincing facts to Utah’s statute, concluding that the four roads had been abandoned and dedicated to the public.

At the Okelberrys’ request, the court of appeals reviewed the trial court’s decision to determine whether there was sufficient evidence to support the factual findings and legal conclusions of the trial court. The court of appeals reviewed the sufficiency of the evidence under the clearly erroneous standard prescribed by this Court. After reviewing the entire record, it correctly determined that the trial court’s factual findings were not against the clear weight of the evidence, and it appropriately held that the Okelberrys’ arguments did not lead to a “firm and definite conclusion that the trial court had made a mistake.”

In reviewing the evidence in this case, the court of appeals indicated that, in a road-dedication case such as this, it sometimes becomes necessary to balance the frequency and duration of any road-closure against the amount and nature of the public use in order to determine whether the continuous use was disrupted. This is not a new standard. Utah’s appellate courts have been applying this standard for many years, and the facts of this case do not justify overturning this precedent.

The Okelberrys' claim—that the court of appeals has created a fuzzy standard where there used to be clarity—is not supported by the case law. Actually, the appellate court at most clarified the standard found in the various cases. If this Court would now like to clarify it even further, it can do so without disavowing the precedent upon which our citizens have grown to rely, and without making an already heavy burden of proof even more difficult for our state and local governments to meet.

Finally, the Okelberrys' issues that were not raised below—those arguing for a *de novo* review and for a constitutional taking based analysis—should not be considered and are not a basis for overturning the court of appeals decision in this case.

ARGUMENT

Introduction

The issue on which this Court granted certiorari is, “Whether the district court and court of appeals erred in their application of the standards for ascertaining a continuous use as a public thoroughfare pursuant to the Dedication Statute, Utah Code Ann. § 72-5-104.” Wasatch County will first analyze the trial court’s decision and then the court of appeals’ decision in light of the issue as framed by this Court.

I. The Trial Court Applied the Correct Standards to the Facts of the Case.

1. Legal Standard for a Road Dedication under 72-5-104.

The basis for a road dedication is found in Utah Code section 72-5-104(1), which states: “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.” This Court has identified the elements required to be met for a dedication under the statute to occur.

These are: (i) continuous use, (ii) as a public thoroughfare, (iii) for a period of ten years. *Heber City Corporation v. Simpson*, 942 P.2d 307, 310 (Utah 1997).

“Continuous use” is satisfied where the evidence demonstrates that the public “made a continuous and uninterrupted use of” the road “as often as they found it convenient or necessary.” *Id.* at 311 (quoting *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107, (1958)). Use as a “public thoroughfare” is established by evidence of the public’s passing or travel on the road other than by permission or private right. *Id.* at 311. To become a public road, it must be continuously used as a public thoroughfare for ten years. And in order for a road to be dedicated under the statute, each of these elements must be proven by clear and convincing evidence. *Id.* at 310. The trial court found by clear and convincing evidence that these elements had been met in the present case.

In order to show how the trial court applied the correct legal standard to its Findings of Fact, it is necessary to review briefly what the trial court found and what it did not find.

2. The Trial Court’s Findings of Fact

The trial court issued two sets of findings of fact. First it issued its initial Findings of Fact and Conclusions of Law. Later, in response to Wasatch County’s motion to alter or amend, it issued supplemental findings of fact. Logic would dictate that both sets should be considered as a whole and if there are any conflicts between the two, the supplemental findings should control as being responsive to the post-trial briefing and argument performed by the parties. Some of the supplemental findings clarify the initial findings.

In the initial findings, the trial court makes several typical findings. but then makes some findings which state only that certain evidence was presented or claims were made by each party. These “evidence presented” findings are contained in paragraphs 11-17 of the trial court’s initial findings of fact. (R. 416-417) These findings are presented without the trial court indicating which, if any, of the contradictory evidence in these “evidence presented” findings it believes.

Later, in the conclusions of law section, the trial court does make it clear which parts of the “evidence presented” findings are most credible and how those credible facts apply to the statute. (R. 413-416) In these conclusions the trial court explains that clear and convincing evidence established that all the elements required by the dedication statute had been met.

A. The Trial Court’s “Even If” Statement Was Not a Finding that the Court Accepted the Okelberrys’ Claims.

The Okelberrys argue that the trial court found, and that the court of appeals assumed as true, that the Okelberrys had locked the gates on the road, had placed no trespassing signs on the gates, and that they or their agents had at times in the past ejected people found using the roads. This representation of the findings is only partially correct, and to the extent the court of appeals assumed that this was the trial court’s finding or conclusion, it was mistaken.

The language of the trial court which is the basis for the argument and misunderstanding is found in paragraph 4 of the initial conclusions of law. (R. 415) In that paragraph, the trial court states, “Taking even the Defendants’ factual assertions as

true, it is 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.” (R. 415)

The Okelberrys argue that this means that the trial court accepted all of their claims and assertions as true. This is incorrect. A close review of the Findings of Fact and Conclusions of Law shows that the “factual assertions” that the trial court is considering in paragraph 4 are only those “factual assertions” of the Okelberrys which the court had just discussed in paragraph 3, which only included claims regarding locked gates and signs. (R. 415)

The trial court’s statement in paragraph 4 of its Conclusions of Law is an “even if for the sake of argument” legal analysis, and not a finding of fact. Not only does the language of the paragraph itself indicate that this so, but the context also supports this understanding: the court characterized the paragraph as a conclusion of law and not as a finding of fact. And as a legal conclusion, the court’s statement—far from giving credibility to the Okelberrys’ claims—actually recognizes the overwhelming strength of the County’s evidence. The trial court essentially observes that the County’s evidence was clear and convincing enough that, even if certain Okelberry claims were true, the evidence would still require a conclusion that the four roads were dedicated to the public. Again, the critical factual finding supporting this legal analysis and conclusion of law is, “it is 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.”¹ (R. 414-415)

However, even if this Court were to hold, as the Okelberrys argue and as the court of appeals may have assumed (*Wasatch County v. Okelberry*, 2006 UT App 473, ¶ 5, 153 P.3d 745), that the trial court meant it was actually taking the Okelberrys’ “factual assertions as true,” it still only refers to the assertions made in paragraph 3. These assertions were merely that the gates were periodically locked for several days at a time and that some no-trespassing signs were present. The assertions referred to did not include any finding that the Okelberrys or their agents ejected people found using only the roads.

To accept the Okelberrys’ argument that the trial court accepted *all* their assertions as true presents an insoluble dilemma: the Okelberrys themselves gave contradicting evidence. For example, although Ray Okelberry testified that he locked the gates at times but, his brother and long time partner in the sheep operation, Lee Okelberry, testified that the gates were never locked. *See infra*. pp. 11-12 (discussion on locked gates)

This analysis of the trial court’s language in the initial findings of fact is supported by the supplemental findings of fact issued after post-trial motions. The supplemental findings of fact clarify any ambiguity which may exist in the initial findings regarding these issues.

¹ While this statement is also located in the trial court’s conclusions of law, the context indicates that it is the court’s expression of the evidence that it believed. For further discussion of the trial court’s organization of its findings and conclusions, see note 8, *infra*.

Specifically, in paragraph 5 of the supplemental findings of fact, the trial court found that, “at various times in the past, the Okelberrys and their employees have locked these gates.” (R. 488) In paragraph 6 of the supplemental findings the trial court found, “The Okelberrys and their employees have posted “no trespassing” signs at various places along these roads.” (R. 488) Then in paragraph 7 of the supplemental findings the trial court found, “Testimony was presented at trial indicating that the Okelberrys and their employees have at various times asked persons to leave the property surrounding the roads. Beginning in the 1990’s, the Okelberrys began restricting access to the roads.” (R. 488) (emphasis added)

This shows a very clear picture of the trial court’s findings regarding the roads before the early 1990’s: first, that the Okelberrys had at various times in the past locked the gates;² and second that “no trespassing” signs had been placed “along the roads.” And most importantly that prior to the 1990s the Okelberrys had asked persons to leave “the property surrounding the roads,” but they did not restrict access to the roads themselves until the 1990’s.

3. The Findings Were Supported by the Clear Weight of the Evidence Presented at Trial.

The clear weight of the evidence was exactly as found by the trial court. None of the witnesses called by Wasatch County ever saw any locks on any gates until the late 1980s or early 1990s. *See, e.g.*, R. 520 at 111-112 (testimony of James Besendorfer that he never encountered a locked gate until recent times.); R. 520 at 271, 273, 275, 278

² Note that the court did not find that the gates were “periodically locked.” It only found that at various times, the gates were locked, but not enough to stop continuous use.

(testimony of Ed Sabey that he never encountered a locked gate); R. 521 at 104, 106, 107 (testimony of Mark Butter of not encountering locked gates). As noted by the trial court, not until the late 1980's or early 1990's did any County witnesses encounter locked gates. (R. 417)

Even many of the Okelberrys' witnesses testified that the gates were not locked prior to the "late 80's or early 90's." Lee Okelberry testified that locks were not put on the gates while he was involved with the property (1950's through mid-1990's) and that he had never locked a gate. (R. 521 at 187, 196, 201). When shown a photograph of the lock on one of the gates, Lee testified, "I never had to go through it. I don't remember seeing that there. That's been put there after I left." (R. 521 at 201) Brian Okelberry also testified that he believed the first locks were not placed on the gates until at least the 1980's. (R. 522 at 54)

None of the witnesses called by Wasatch County were ever asked not to use the roads prior to the 1990's. Although the Okelberrys testified in detail to some instances of ejecting people who were off the roads and on their land surrounding the roads, they had no specific, detailed recollection of ejecting people from the roads themselves.³

It seems that, at this stage of the case, the Okelberrys are trying to paint a picture of the evidence presented at trial as showing limited use by a few individuals. In fact the opposite was true. Wasatch County witnesses were a representative cross-section of the

³ There was one instance where an employee, Jeff Jefferson, testified that he asked Mark Butters and his brother to leave the roads. But he admitted that this happened in 2002 or 2003 long after the relevant time period. Even the County admitted that the Okelberrys had begun blocking these roads by this time. (R. 521 at 150)

many local residents who all used the roads. This is shown in the testimony of Glen Shepherd who, though a witness for the Okelberrys, admitted that he had attended a meeting in Wallsburg at which there were “quite a few people” who all claimed to use these roads and wanted them kept open.⁴ Mr. Shepherd also testified that traffic had significantly increased the last ten years of the public’s use. (R. 521 at 215) Mr. Shepherd, like many County witnesses, claimed to have used the roads for over 30 years. He actually testified that he used the roads “thousands of times,” but that he now realized it was always with permission. (R. 521 at 222-223)

Considerable insight is also gained from the testimony of Lee Okelberry that the last few years that he was involved with the property (the mid 1990’s) “[t]here was more people all the time” using the roads. (R. 520 at 186) Lee Okelberry also testified that when the land was leased to a hunting group, “a bunch of people” signed some sort of document at the post office, disputing the closing off of the roads. (R. 521 at 199) It was this type of public pressure that finally led to the filing of this case. Moreover, several of the County’s witnesses testified that when they used the roads they were often accompanied by others. *See, e.g.*, R. 521 at 102 (testimony of Mark Butters that he used the roads with his family); R. 520 at 157 (testimony of James Besendorfer that he used the roads with his father and two sons). The totality of this evidence clearly and convincingly demonstrated to the trial court that the four roads were used continuously as

⁴ It is instructive that Mr. Shepherd admitted that he had originally attended the meeting as a proponent to keep the roads open, but changed his mind between the meeting and the trial. It helps to point out that the only road the trial court found not to have been dedicated to the public, Maple Canyon Road, also crosses Mr. Shepherd’s property near his house. (R. 521 at 208-209)

a public thoroughfare for at least ten years both by the witnesses who testified at trial and by many others.

Also telling are the roads themselves. As part of this case the trial judge, along with counsel for the parties, visited the site and viewed these roads firsthand. (R. 522 at 123, 266, 284, and 285) Photos of portions of the roads do not show unused and unusable tracts, but rather well worn dirt roads that even after having been closed to public use for several years show clear evidence of high traffic use for a mountain road. *See, e.g.*, (Defendant's Exhibits 6, 8, 13, 14, 15, 35, 45, 47, 53, 54, and 55) These roads appear on several state and Forest Service maps dating as far back as 1947. (R. 520 at 15-18, and Exhibits 3, and 4) These roads are designated as U.S. Forest Service Roads on maps produced by the Forest Service and are shown as providing access to portions of Forest Service property. (R. 521 at 42-45; Plaintiff's Exhibit 17)

4. The Okelberrys Failed to Marshal All of the Evidence Which Supports the Trial Court's Decision.

In their brief before this Court, the Okelberrys have set out to marshal the evidence regarding the public's use of the road ostensibly to demonstrate its insufficiency in light of their "un-rebutted" evidence claims. (Petitioner's brief at 26-32) Although they marshal a great deal of evidence regarding the *frequency* of the public's use of the road, they marshal virtually none of the evidence that rebuts their assertions regarding so-called "interruptive acts," which they claim made the public's use of the roads non-continuous. To correctly marshal evidence, they should have, "present[ed], in comprehensive and fastidious order, *every scrap* of competent evidence introduced at

trial which supports the very findings the appellant resists.” *Oneida/SLIC v. Oneida Cold Storage*, 872 P.2d 1051, 1052-53 (Utah Ct. App. 1994) (citation omitted) (emphasis added).

The evidence supporting the trial court’s finding that the four roads were used continuously includes the evidence that rebuts the Okelberrys’ allegations of interruption. This evidence was not marshaled. The Okelberrys assertions regarding “interruptive acts” were plainly contradicted by the testimony of their own witnesses. For example, as discussed, Lee Okelberry testified that the gates were not locked from 1957 through the mid-1990s, and that signs were not posted. (R. 521 at 187, 196, 199-201) The testimony cited above, of Glen Shepherd and Brian Okelberry, was not marshaled.⁵ And the testimony of Don Wood that Forest Service maps indicated that the four disputed roads were designated and numbered Forest Service roads was not marshaled. (R. 521 at 42-45)

Not only do the Okelberrys fail to marshal all of the necessary evidence, they also fail to show how the evidence is legally insufficient to support the trial court’s finding; rather they simply present the evidence supporting their position and reargue its weight. Where evidence is inadequately marshaled, the court is to assume “that all findings are adequately supported by the evidence.” *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177.

II. The Trial Court Applied the Correct Legal Standards to Its Findings of Fact.

1. Locking of Gates

⁵ See *supra*. pp. 12-13

The evidence of locking the gates at various times prior to the 1990's was provided solely by Ray Okelberry, who testified that he locked the exterior gates in the late 1950's. (R. 522 at 135) He also testified that he locked the gates when moving the sheep.⁶ (R. 522 at 138-139) The trial court's finding on this issue, and the only evidence which supported it, shows that the placing of locks on the gates was not intended to interrupt the use of the road, but it was meant only to keep the sheep together; and it shows that any closure of the roads was an incidental effect of the occasional shepherding of sheep.

The trial court correctly applied the standard set forth in *Thurman v. Bryam*, 626 P.2d 447, 449 (Utah 1981), wherein this Court held that periodic closing of a road in order to help in the movement of sheep did not interrupt the continuous use of the road. This rationale is very appropriate when one considers the myriad ways a road can be temporarily blocked or closed to use. Climate conditions, natural disaster, road maintenance or repair, utility work, and other temporary interruptions can all cause short- or long-term temporary road closures. Other, much shorter road closures can be caused by fallen trees, downed power lines, parades, unloading of trucks, stop lights, or even a crossing guard or person in a crosswalk. All of these occurrences will temporarily close a

⁶ As discussed above, Ray Okelberry's testimony was contradicted by the testimony of his brother, Lee Okelberry and his son Brian Okelberry (*Supra* pg 11-12) Neither Lee nor Brian Okelberry testified to locking the gates while moving sheep. Nor did the Okelberrys' employee, Jeff Jefferson. Therefore, not only was Ray Okelberry's testimony self-serving, it was entirely uncorroborated even by those intimately involved in the sheep-raising operation, let alone by the public who used the road as a thoroughfare to gain access to Forest Service land.

road, sometimes for extended periods. Some of these even involve intentional interruption of the public's use of a road. However, in each of these instances, including the temporary blocking of roads to move sheep, the road closure is only incidental to a separate primary purpose: moving sheep, repairing a road, putting in a water line, facilitating a special event, or ensuring the safety of pedestrians.

Regardless of how the Okelberrys characterize it now, the purpose of any road closures found by the trial court to have occurred on the four roads at issue here was only to facilitate the movement of sheep. No finding supports the argument that the Okelberrys ever closed a road to interrupt its public nature or to foreclose the application of the road-dedication statute.

2. No Trespassing Signs

The trial court also found that “no trespassing” signs were placed along the roads. The court’s finding that no trespassing signs were so placed supports the court’s finding that the Okelberrys did not interrupt the use of the roads themselves until the early 1990’s. In order for such signs to have an audience at all, travelers must be traveling on the roads. The “no trespassing” signs conveyed, under those circumstances, a communication that such travelers should not depart the roads and travel on or occupy the land surrounding the road. The court’s finding on this issue was supported by ample evidence. Some witnesses testified to seeing “no trespassing” signs on the Okelberry property in more recent years. They testified that it was their understanding that the signs applied only to the surrounding property, not the roads. *See* (R. 521 at 14) (testimony of Brandon Richins that he assumed that the signs referred to the property and that the roads

could continue to be used to access public lands); (R. 521 at 72, 91) (testimony of Benny Gardner that he understood the signs to mean that he was not to get out of his truck and go onto the property); (R. 521 at 110) (testimony of Mark Buttars that he believed use of the roads was permissible as long as he stayed off the surrounding property). There was little evidence indicating that the signs referred to use of the road.⁷

The trial court found that “no trespassing” signs were placed “along these roads,” (R. at 488), indicating that the Court found the credible testimony to be that signs were posted on the property alongside the roads and were to warn passersby that use of the property, not the roads, was prohibited.

Again the trial court applied the correct standard. In *Thurman*, 626 P.2d 447, this Court noted that signs along a road indicating an effort to keep people off of the property surrounding the road were not interruptive acts which would avoid application of the dedication statute. *Thurman*, at 449.

3. The Trial Court Did Not Make a Finding that the Okelberrys Ejected People Found Using the Road Prior to the 1990s.

Most important is the finding that although the Okelberrys may have asked persons to leave the property surrounding the roads prior to the 1990’s, they did not begin

⁷ The testimony specifically addressing the presence of signage at the boundary gates came from Brian Okelberry and Jeff Jefferson. Brian Okelberry testified to the presence of signs on boundary gates from the 1970’s on. (R. 522 at 23-25) Again, such testimony is in conflict with the testimony of Lee Okelberry who testified that signs were not posted until after he had been phased of his involvement in the operation in the mid-1990’s, when the land was being leased to a hunters group. (R. 521 at 199-200) Jeff Jefferson, who began to work for the Okelberrys in 1977 at the age of fourteen, testified to the presence of signs on all entrances. (R. 521 at 135) He did not indicate when these signs first appeared, though perhaps representative, he testified that it was not until 1992 that a “no trespassing” sign was placed at the Circle Springs entrance. (R. 521 at 131)

to restrict access to the roads themselves until the 1990's. In other words, although the Okelberrys presented some evidence of some locked gates and some evidence of no-trespassing signs, the trial court found that these acts were not considered to be an attempt to restrict access to the roads, nor did they cause access to the roads to be restricted. It was the trial court's finding that access to the roads themselves only began to be restricted in the early 1990s. Under these circumstances the trial court again found that the standard found in *Boyer v. Clark*, 7 Utah 2d 395, 397, 326 P. 2d 107, 109 (Utah 1958), had been met: the public, "though not consisting of a great many persons," had used these roads "as often as they found it convenient or necessary." (R. 415)

III. The Court of Appeals Correctly Applied the Standards Required by this Court for Dedication of a Road to the Public under 72-2-104.

The Court of Appeals correctly applied the standards set by this Court in reviewing the Okelberrys' claims and in upholding the trial court's decision. The court of appeals considered two general claims made by the Okelberrys: first, that the trial court's Findings of Fact were not supported by sufficient evidence; and second, that the trial court incorrectly determined that the four roads had been abandoned and dedicated to the public pursuant to the dedication statute.

1. The Trial Court's Findings of Fact Were Properly Reviewed and Correctly Upheld.

The standard of review for a sufficiency of the evidence claim is based on Utah Rule of Civil Procedure 52(a) and *In re Z.D.* 2006 UT 54, ¶ 29, 147 P.3d 401. Rule 52(a) states in part, "Findings of fact, whether based on oral or documentary evidence, 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.” In order to conduct this analysis, a reviewing court must make a review of the entire record taking into consideration any heightened standard of review required by the case. *In re Z.D.*, at. ¶¶39-40. Then the factual findings should only be set aside if they are against the clear weight of the evidence or if the reviewing court reaches a firm and definite conviction that a mistake has been made. *Id.* (citing *State v. Walker*, 743 P.2d 191 (Utah 1987)); *See also*, *Western Kane County v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987).

This is exactly what the court of appeals did. As stated in its opinion, the court of appeals reviewed the record as a whole to see if the trial court’s findings of fact were clearly erroneous, taking into account the applicable burden of proof: clear and convincing evidence. *Wasatch County v. Okelberry*, 2006 UT App 473, ¶ 9, 153 P.3d 745. The court looked to determine whether the trial court’s findings were against the clear weight of the evidence and whether they were left with a definite and firm conviction that a mistake had been made. *Id.* at ¶ 9. The court of appeals noted that the trial court’s findings were not against the clear weight of the evidence and that they did not have a firm and definite conviction that a mistake had been made. *Id.* at ¶ ¶20, 24, 25. It further noted that the record contained sufficient evidence to support the trial court’s findings, *Id.* at ¶ 20, and identified some of the evidence that did so. *Id.* at ¶ 24. It used the correct standard to review the sufficiency-of-the-evidence claim and properly upheld the trial court’s findings of fact.

2. The Trial Court’s Ultimate Conclusion Was Properly Reviewed and Correctly Upheld.

The standard of review to determine whether a trial court's decision in a road-dedication case meets the requirements of the law was articulated by this Court in *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997). There it stated that the correct standard is to "review the decision for correctness but grant the court significant discretion in its application of the facts to the statute," and to "require proof of dedication by clear and convincing evidence." *Heber City*, at 310 (citing *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995); citing *Thomson v. Condas*, 27 Utah 2d 129, 130, 493 P.2d 639, 639 (1972)). This Court noted that granting this discretion to a trial court in a road dedication case is appropriate because, other than the ten year requirement, the road dedication statute's requirements "are highly fact dependent and somewhat amorphous" and the issues to be considered "do not lend themselves well to close review by this court, as we would be hard-pressed to establish a coherent and consistent statement of the law on a fact-intensive, case-by-case review of trial court rulings." *Id.* at 310.

The court of appeals performed the correct analysis on the Okelberrys' challenge to the trial court's ultimate determination that the roads had been dedicated to the public. The analysis of this issue is necessarily somewhat redundant. For example, a finding that "persons were able to use the road whenever they found it convenient or necessary...as a public thoroughfare" also can be a conclusion of law.⁸ There were, however, three purely legal issues argued to the court of appeals which should be discussed.

⁸ Both the trial court and the court of appeals seemed to deal with this redundancy in different ways. The trial court presented its findings and conclusions regarding

A. The Trial Court Is Not Required to Accept Any Evidence as True.

One of the Okelberrys' claims which was considered by the court of appeals and which they again make before this Court is that under the clear and convincing standard, the trial court was required to accept as true any evidence not specifically rebutted by Wasatch County.⁹ Stated another way, the Okelberrys argued that the trial court could not legally reach the conclusions it did, under the clear and convincing standard, in light of the Okelberrys' allegedly "un-rebutted" evidence.

The Okelberrys cite no legal authority for their proposition. And there are some very good reasons why it is not and should not be the law. First, it is virtually impossible to specifically rebut some types of evidence. Here, the Okelberrys presented some evidence that there were times they asked people using one of the four roads to leave. These witnesses did not give a date, time, or place to support their allegation; neither did they name a person or even a road that was involved.¹⁰ It is impossible to rebut such testimony directly. But that doesn't settle the issue. The trier of fact is responsible to sift through all the testimony and determine what is corroborated, credible, and persuasive.

"continuous use" and "public thoroughfare" by limiting itself to "evidence presented" findings in its Findings of Fact and then announcing in its Conclusions of Law those aspects of the presented evidence that it found to be true. The court of appeals analyzed these issues once and then in a blended sort of way showed that the trial court's determinations were proper both as factual findings and as legal conclusions.

⁹ The Okelberrys also make the same argument for disputed evidence on pages 38-39 of their brief to this Court. But, as the same analysis applies, we will only note it here.

¹⁰ One such example is Jeff Jefferson. Mr. Jefferson testified that he ejected persons using the road, but he could only remember two names and admitted that he encountered these persons in 2002 or 2003 long after the relevant time period and when everyone agrees that the Okelberrys had begun blocking these roads. (R. 521 at 150) Mr. Jefferson also admitted that most of the people were off the road on the Okelberry property. (R. 521 at 149)

He should not be required to ignore a great weight of evidence opposed only by vague, uncorroborated, and unpersuasive testimony simply because it was narrowly “unrebutted.”

Neither does the heightened burden of proof support the Okelberrys’ contention. If self-serving testimony that cannot be directly refuted were deemed legally impervious to corroborated, credible, and persuasive evidence to the contrary, then no criminal defendant could ever be convicted under the even-stricter burden of proof of “beyond a reasonable doubt.” The Okelberrys’ proposed rule would raise the burden of proof from “clear and convincing,” move it past “beyond a reasonable doubt,” and create a new, impossible-to-meet burden of proof called “all opposing testimony, even that which is unbelievable or unpersuasive, has been specifically rebutted.”

B. The Mere Presence of Gates on a Road Does Not Defeat the Dedication of That Road.

Another of the Okelberrys’ arguments which was considered by the court of appeals was whether the presence of gates alone would defeat the statute. The Okelberrys argue that the presence of gates where these roads enter their property should, as a matter of law, defeat the dedication statute. (Petitioner’s brief at 35) The court of appeals properly rejected this argument. The court of appeals found that although gates are a factor to be considered in a road dedication case, they have never been held by Utah courts to defeat the dedication statute by their mere presence. *Wasatch County v. Okelberry*, at ¶15. Wasatch County has been unable to find a case where this Court has held that the presence of a gate alone will defeat the dedication of a road. But it has

found cases where this Court discussed a gate as only one of several factors in making a determination. *See, e.g., Gillmor v. Carter*, 15 Utah 2d 280, 283, 391 P.2d 426. 428 (1964).

There are good reasons why the presence of a gate alone, especially in the present case, should not defeat application of the dedication statute. First, a gate alone does not interrupt use. The Okelberrys argue that the act of having to open and close a gate is an interruption which should defeat the statute. This is not logical. There are many things which may cause a delay in a person's use of a road, especially on mountain roads such as these. Trees can fall across a road causing a traveler to get out and move them. Animals or people may be walking in the road. The road may even be bumpy due to terrain, or slick due to rain or snow. A gate may need to be opened and closed. All of these may slow a person's travel, but none actually interrupts use.

In the present case the County's witnesses testified that if the gates were up, they opened and closed them. If they were down, they left them down. Martin Wall testified that "if there was no stock in there [the gates] would be down." (R. 520 at 189) Ed Sabey similarly testified that the gates are not always up and that "once the sheep and cattle is gone [the gates] were hardly put up, ever. . . ." (R. 520 at 271, 292) Ray Okelberry testified that the sheep would be on the property from May to June and would return at the end of September. (R. 522 at 69-70) Gerald Thompson testified that sometimes the gates were open, at other times they were closed. (R. 520 at 244) Brandon Richins similarly testified that sometimes the gates were up, sometimes they were not. (R. 521 at 12, 25) Shane Ford testified that the gates would be open or closed,

depending on which pasture the sheep were in. (R. 521 at 232) Lee Okelberry also testified that the gates were not up at all times during the summer. (R. 521 at 97) The County's witnesses all used the roads whenever they found it convenient or necessary, regardless of whether a gate happened to be up or down at the time.

Second, the type and use of a gate should be considered. There is a significant difference between a wire gate on a wire fence in rural sheep and cattle country and wrought-iron gates on a fence around a person's back yard. Each shows a completely different use. In this case the gates were clearly livestock gates on livestock fences. Testimony indicated that the primary purpose of the gates was to keep the livestock on Okelberry property, not to control use of the road by the public. (R. 522 at 25) (testimony of Brian Okelberry that "the purpose of the gates . . . is to keep the sheep in tack"). If sheep were to wander off the property the Okelberrys would be fined by the Forest Service. (R. 521 at 135) Lee Okelberry testified that cattle guards were put in because the wire gates would sometimes get cut off or rolled back, indicating that first and foremost, the purpose of the gates was livestock control. (R. 521 at 198)

Third, in the early years these roads were being used by the public many things were different from the way they are now. Wasatch County was much more agriculturally based than it is currently. There were fewer people, more farms, and more livestock. People, especially in outlying areas which are even now considered rural, were used to seeing and using livestock gates. Cattle guards were much less prevalent than in today's world. A gate simply did not have the same meaning it may have today. And it

was in this environment that these roads first took life, developing into well-used and necessary access to Forest Service and other public lands.

C. The “Balancing Test”: The Occasional Locking of a Gate Does Not Defeat the Dedication of a Road.

Also considered by the court of appeals is the Okelberrys’ argument that a single locking of a gate, or a single expulsion from a road precludes the application of the dedication statute. *Wasatch County v. Okelberry*, at ¶14. In properly rejecting this argument the court of appeals articulated, perhaps more specifically than it had been done in the past, the nature of weighing an occasional locked gate. This is the “balancing test” complained of by the Okelberrys as being a corruption of this Court’s precedent. This is simply not the case.

The court of appeals stated that the trial court should “weigh the evidence regarding the duration and frequency that a gate was locked against the frequency and volume of public use to determine if there was clear and convincing evidence that the use of the road was continuous.” The court of appeals also held that, in the present case, the trial court correctly balanced such evidence in finding continuous use. Inherent in this balancing test is the understanding that the locking of a gate or other blocking of a road, even though not intended to defeat the statute, if it occurs often and long enough may, on its own, interrupt continuous use.

The Okelberrys claim that the court of appeal’s “test” is a change in the law which will have far-reaching effects. As will be shown, this test is nothing new but rather implicit in any such consideration of locked gates or blocked roads. By necessity, it has

been used in prior cases, but perhaps was articulately described in this case for the first time.

This so-called “test” is derived from the tension embedded in the nature of these road-dedication cases. As discussed above, this Court’s holding in *Thurman v. Bryam*, 626 P.2d 447, established that a periodic blocking of the road to move sheep did not defeat the dedication statute. On the other side of such facts is the case of *Campbell v. Box Elder County*, 962, P.2d 806 (Utah App. 1998), where the court of appeals properly held that a road that was always blocked by a locked gate except for periodic temporary unlocking during hunting season would not establish continuous use.

Somewhere between these two cases is a tipping point where, under the clear and convincing standard, the road is or is not blocked often and long enough for the continuous use element to be met. Frankly there is really no other way to describe how to analyze this one factor than to characterize it as a balancing exercise. Depending on the other factors present in a case, the tipping point may not always be the same. This type of analysis is clearly part of the “highly fact dependent and somewhat amorphous” dedication requirements which necessitate that the trial courts be allowed significant discretion to apply the law to the facts of a particular case.

The court of appeals did not say that this was the only factor that the trial court considered in this case, or even that it was the most important factor. It really only stated that the trial court had properly considered this factor and still found continuous use by clear and convincing evidence. The “balancing test” is simply a description of what, by necessity, trial courts must perform any time they have a road-dedication case in which

the road may have been temporarily blocked. The helpful description, while not creating new law, may give useful guidance to trial courts in future cases.

Even if this Court is convinced that the language regarding a balancing test is problematic, it still should affirm the holding in this case. As shown above, the trial court listened to all of the evidence, grappled with the unique facts of this case, and considered the totality of the circumstances, having the opportunity to judge, first-hand, the relative credibility of the evidence presented. Having done so the trial court held that the evidence was both clear and convincing. It concluded that the requirements of the dedication statute had been met. Thus the trial court fulfilled the obligations placed upon it both by statute and case law.

D. Finding no Legally Conclusive Issue, the Court of Appeals Properly Considered the Trial Court's Discretion.

The court of appeals upheld the trial court's findings of fact. It also reviewed the conclusions of law under a correctness standard and rejected the Okelberrys' arguments that the trial court's holding in this case must be reversed as a matter of law. Finally the court of appeals considered whether the trial court's ultimate determination was correct in light of the "significant discretion" granted to a trial court to apply the facts to the law. The court of appeals noted that there was "clear and convincing evidence of the frequent and general use of the road without the defendants' permission" and held that the trial court's findings were sufficient to uphold its determination of dedication. *Wasatch County v. Okelberry*, at ¶¶24, 25.

IV. Any Other Standard is Unworkable.

The bright line standards urged by the Okelberrys are unworkable. If one single instance of a person being unable to use the road is sufficient to defeat the statute, the dedication statute would, as a practical matter, be entirely unenforceable. There would not be a single landowner who couldn't claim, and maybe legitimately so, that at least once during the relevant period someone was not able to use the road. Whether because a tree had fallen, there was deep snow or mud, the road looked too rugged, a gate was closed, or any number of other reasons, someone at some time will have been turned back from using *any* road.

Similarly, if the landowner's intent in attempting to close a road becomes entirely determinative, then the statute also becomes useless. A landowner could easily claim that he blocked the road for a week, a day, or an hour when nobody noticed. Or he could claim that he *intended* to block the road and keep people out to defeat the statute even if the means he used to do so failed to stop a single traveler.

When one considers the many different types of roads to which the statute may apply, it shows that the flexibility in the standard is there for good reason: it gives up very little in clarity but gains everything in adaptability. The court of appeal's articulation furthers both the standard's clarity and its adaptability. Weighing the durations and frequencies of road-closures against the frequency and volume of public use is an intuitive and effective way to apply Utah's statute to rural roads bordering remote Forest Service property and to busy metropolitan streets crisscrossing a private university. For example, a single hour of closure on a road that sees 60,000 cars a day may be sufficient to interrupt "continuous use"; but an entire week of closure on a remote road that sees

only a dozen or two travelers a month would probably *not* interrupt “continuous use.” The flexibility built into the standard has proven effective for many years and should probably not be disturbed now.

1. This Court Could Articulate a Safe-Harbor to Allow for Situations of Permissive Use.

Wasatch County recognizes that there are situations in which a landowner may want to allow permissive use of a private road but maintain certainty that the road will not become public under the dedication statute. Such a situation may be sufficiently beneficial to the public that it is generally in everyone’s best interest to encourage such permissive use and still provide the landowner with the certainty of a safe harbor. The standards already set by this Court under the dedication statute would clearly allow for the articulation of a safe harbor. And such a harbor may be articulated without overruling or disavowing any of this Court’s precedent and without reversing the court of appeals or trial court in this case.

An example of such a beneficial situation where a landowner has allowed permissive use while taking reasonable, necessary, and verifiable steps to defeat the dedication statute and maintain the private nature of the road is amicus curie Brigham Young University. As shown in its amicus briefs filed both in this case and in the case of *Town of Leads v. Prisby*, Docket No. 20061085, also currently pending in this Court, Brigham Young University has taken purposeful, reasonable, and verifiable actions to maintain the private nature of their roads. One would believe that a trial court presented with such facts would easily and swiftly find that the dedication statute had not been met.

For ease of application and certainty of result, a safe harbor would probably need to have the following elements. First the landowner would have to periodically close the road to public use for the primary purpose of disrupting the application of the dedication statute. Second the road closure should occur at an interval of less than ten years, and the road should remain closed at least for a minimum length of time, such as 24 hours. Third the landowner should be required to make reasonable efforts to put the highway authority, local government, and public at large on notice of the reason for, the time of, and the duration of such road closures. Fourth the landowner could create and preserve evidence of such interruptions and the notices given.

One obvious concern about judicially creating a safe harbor is that, due to their clarity and precedential authority, such harbors can sometimes evolve into a “fence”—i.e., *minimum* standards. Colloquially, this is described as “turning the floor into the ceiling.” However, where the standard is based on a statute, such as here, such an evolution is less likely. And clear language from this Court could also be used to prevent it. Consequently, it is possible that the benefits of a safe harbor may provide a reasonable judicial response to the concerns expressed by the Okelberrys and their amicus.

V. Issues Raised for the First Time before this Court Should Not be Considered.

1. De Novo Review on Appeal

The Okelberrys raise two other issues in their brief to this Court which should be rejected. Their first claim is that in light of the constitutional issues involved with private property, the Court of Appeals should have reviewed, *de novo*, the trial court’s

application of the law to the facts. Petitioner’s brief at page 8. There are two problems with this claim.

First, the Okelberrys make no showing of where they raised this issue to the court of appeals or how this issue arose from the court of appeals decision. Because they fail to make either of these showings, this issue should not be considered. *DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995). (Even issues raised in the petition for certiorari, will not be addressed unless first raised to court of appeals or if issue arose out of the court of appeals' decision.)

Second, the argument made by the Okelberrys would require this Court to rule against its own longstanding precedent giving trial courts “significant discretion in its application of the facts to the statute.” In effect the trial court would be given no discretion whatsoever in applying the facts to the law. The Okelberrys have not made the showing required to get this Court to overrule the standards set by years of case law. *Lany v. Fairview City*, 2002 UT 79, ¶45, 57 P.3d 1007. (To overturn precedent court must be clearly convinced that originally rule was wrong or is no longer sound due to changing conditions and that change will cause more good than harm)

2. Constitutional Taking

The second new claim is that a road dedication under the statute is a potential “constitutional taking” and therefore entitled to higher scrutiny. This claim was not raised to the court of appeals, nor have the Okelberrys made a showing of how the issue arose from the court of appeals decision.

The Okelberrys are also incorrect in their analysis of this issue. A constitutional taking occurs when the executive branch of the government takes official action which results in the loss of an individual's property. Abandonment occurs when a person fails to properly protect a property right, or potential property right, from loss to the public. The best example of this is in patent or copyright law. Patents or copyrights can be lost to the public domain if not properly protected as required by law. Road dedication cases, like patent litigation, involve the government only in determining whether the property right has been lost or abandoned.

One difference between patent or copyright litigation and road-dedication cases is that the executive branch, in this case the County, is given the responsibility to protect public roads, but the federal government has no duty to preserve patents or copyrights. However, the underlying issues are the same: in neither case is the government the entity *taking* the property right; it is preserved or lost by the individual.

CONCLUSION

The trial court applied the correct legal standards to the issue of whether the four roads had been abandoned and dedicated to the public. Its findings of fact and conclusions of law were supported by the clear weight of the evidence. The court of appeals applied the correct standards in reviewing the trial court's decision and properly upheld the dedication of the four roads.

The factors weighed by the court of appeals are intuitive, adaptable, and helpful in applying the statute. Its decision should also be affirmed. If this Court desires to further articulate the factors to weigh, or if it desires to create a safe harbor for owners of private

roads, it may do so without disturbing the public's right to access state- and federal-owned land lying behind the Okelberrys' property.

DATED this ^{2nd} day of July, 2007.

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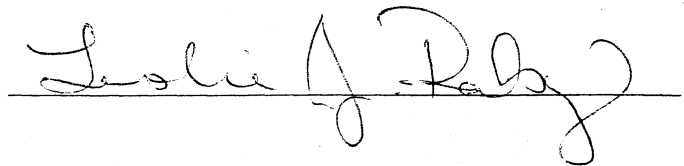
Corrected Version -- Prior Version was missing page seven

I hereby certify that I mailed a true and correct copy of the forgoing Respondents' Brief by first class postage prepaid, this 6th day of July 2007 to the following:

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A handwritten signature in cursive script, reading "Leslie W. Slauch", is written over a horizontal line.