

2007

Wasatch County v. E. Ray Okelberry, Brian Okelberry, Erick Okelberry, West Daniels Land : Amicus Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WASATCH COUNTY, a body politic of
the State of Utah,

Plaintiff and Respondent,

vs.

E. RAY OKELBERRY, BRIAN
OKELBERRY, ERIC OKELBERRY,
WEST DANIELS LAND
ASSOCIATION, UTAH DIVISION OF
WILDLIFE RESOURCES,

Defendants and Petitioners,

**BRIEF OF AMICUS CURIAE UTAH
ASSOCIATION OF COUNTIES IN
SUPPORT OF RESPONDENT
WASATCH COUNTY**

Case No. 20070011

On Writ of Certiorari from the Ruling of the Utah Court of Appeals in
Wasatch County v. Okelberry, 2006 UT App 473, 153 P.3d 745

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STATEMENT OF INTEREST

Amicus curiae Utah Association of Counties (“UAC”) is a voluntary non-profit organization whose directors are selected from the elected county officials of the 29 counties of Utah. Formed in 1924, UAC assists county commissioners, council members and other county officials by lobbying and advocating for federal and state legislative and administrative action and at times litigating for judicial decisions and outcomes that are beneficial to the counties of Utah and county residents. Counties in Utah are vitally interested in maintaining the public nature of the roads which comprise the inventory of each county’s public transportation system. UAC, on behalf of its member counties who maintain thousands of miles of rural county public roads like the one at issue in the present case, has a substantial interest in advising the Court as to the proper interpretation and application of public road dedication laws.

The issue framed in this Court’s March 15, 2007 Order granting 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(1).” This review will examine the public nature of a road in light of asserted periodic interruption of public use in decades past. That will bear on the validity of the many thousands of miles of county public land rural road claims with which UAC is involved statewide. UAC wishes to advise why the Court of Appeals holding presents a workable, practicable solution that best weighs public and private

interests, a solution that helps counties meet the challenge of maintaining rural public transportation systems in harmony with the interests of entities like amicus curiae Brigham Young University.

SUMMARY OF ARGUMENT

Competent evidence of record supports the trial court's findings and conclusions that the public continuously used the four subject roads as public thoroughfares for more than ten years. The trial court's findings of fact and conclusions of law properly resolved conflicting trial testimony by deciding who and what to believe and entering findings and conclusions accordingly. The trial court correctly applied the law to its findings to determine that the subject roads were public roads. The trial transcript demonstrates that sufficient competent evidence supports the trial court's findings. There was ample testimony showing the public used the subject roads as public thoroughfares continuously from the 1950s up to the late 1980s or early 1990s. There was also ample testimony showing that up until the late 1980s if not later, members of the public did not encounter any locked gates on the subject roads and could pass through those gates freely. The transcript shows that if the trial court erred at all, it did so by over-generously finding that prior to the 1990s the landowners locked the gates at various times in the past for several days at a time. Not that it much matters, however, since the trial court still correctly found that any such pattern of pre-1990s gate locking did not prevent the public from using the subject roads as often as they found it necessary and convenient.

However the controversy over the locked gates may be characterized, the transcript even more clearly supports the trial court's findings when read in light of established Utah Supreme Court precedent that grants trial courts wide discretion in public road dedication cases. Under this precedent the Court of Appeals correctly drew inferences in the light most favorable to the trial court findings, deferred to the trial court to resolve disputed facts, granted the trial court a fair degree of latitude to determine the legal consequences of the facts it did find, and considered all facts together, not in isolation.

The correct legal test to determine whether public use of the subject roads was continuous does not turn on the mere erection of gates, signs or locks. The correct standard focuses on the extent of public travel: did it occur as often as the public found it necessary or convenient. The Court of Appeals' balancing test is the best logical application of this "necessary and convenient" test. This Court should adopt that analysis and affirm.

ARGUMENT

A. Competent Evidence Of Record Supports the Trial Court's Findings and Conclusions That the Public Continuously Used the Four Subject Roads as Public Thoroughfares For More Than Ten Years

1. *The Trial Court's Findings of Fact and Conclusions of Law Properly Resolved Conflicting Trial Testimony*

Statements in the trial court's initial Findings of Fact and Conclusions of Law ("Initial Findings and Conclusions"), Record ("R.") at 409-420, and Supplemental Findings of Fact and Order on Motion to Amend Judgment ("Supplemental Findings"), R. 481-489, can be classified into the following four categories: the testimony and claims presented by defendant/petitioners ("the landowners"), the testimony and claims presented by plaintiff/respondent ("Wasatch County" or "the County"), the court's actual findings of fact, and the court's actual conclusions of law.¹

a. *The Landowners' Testimony Went One Direction*

The trial court acknowledged the following testimony as having been adduced by the landowners and received at trial:

- Ridge Line Road and Parker Canyon Road were never at any time open to public use. Initial Findings and Conclusions, at 4 ¶ 14. R. 417.

¹ Some of categories overlap and intermingle at times within a given paragraph of the Initial Findings and Conclusions and Supplemental Findings, which is understandable given the "highly fact dependent and somewhat amorphous" nature the factual and legal requirements at issue herein. *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (Utah 1997).

- Large numbers of people asked permission to use the subject roads. *Id.*, at 4 ¶ 15. R. 417.
- Landowners' employees asked people not to use the subject roads at various times. *Id.*, at 4-5 ¶¶ 16-17. R. 416-417. Supplemental Findings, at ¶ 7. R. 488.
- Gates on the subject roads were generally closed from the beginning of their ownership in order to control livestock and restrict travel on the roads. Initial Findings and Conclusions, at 5 ¶ 17. R. 416.
- Gates on the subject roads were in place as far back as 1957, but concededly they were not always locked and did not prevent travel. *Id.*, at 6 ¶ 3. R. 415.
- Beginning in the 1960s gates were "periodically locked for several days at a time" and "No Trespassing - Private Property" signs were posted on the gates." *Id.*, at 6 ¶ 3. R. 415.

b. The County's Testimony Went The Opposite Direction

The trial court acknowledged the following testimony as having been adduced by the County and received at trial:

- Although the subject roads had no trespassing signs and gates, the gates were not locked until the 1990s. Initial Findings and Conclusions, at 4 ¶ 11-12. R. 417.
- Despite the presence of no-trespassing markers and gates on the subject roads, the public was able to freely use those roads continuously for many more than ten years for recreational purposes until the gates were locked in the early 1990s. *Id.*

- Prior to their being locked, the existence of the gates on the subject roads did not interrupt the public's use of the roads. *Id.*, at 4 ¶ 12. R. 417.
- The persons who used the subject roads were members of the general public without any private right to use those roads. *Id.*, at 4 ¶ 11. R. 417.
- The landowners between the 1950s and late 1980s asked people not to go on their private property adjoining the subject roads, but not until the 1990s did the landowners impede traffic on the actual roads themselves. *Id.*, at 4 ¶ 13. R. 417.
- Any gates that existed on the subject roads were not locked until the 1990s, and once no trespassing signs were posted they seemed to refer only to property abutting the roads and not the roads themselves. *Id.*, at 6 ¶ 3. R. 415.

c. Out of This Pointed Factual Dispute, The Trial Court Decided Who and What To Believe and Made Findings and Conclusions Accordingly

The trial court found in relevant part:

- The four subject roads are Circle Springs Road, Thorton Hollow² Road, Parker Canyon Road and Ridge Line Road. Initial Findings and Conclusions, at 2 ¶ 3. R. 419.
- The four subject roads are mountainous roads typically accessed by pickup truck, snowmobiles and all-terrain vehicles, and they either begin and end at points outside the landowners' property or connect with roads that do. *Id.*, at 2 ¶¶ 4-6 and 3 ¶ 6. R. 418-

² Referenced often in the trial transcript as Thorton "Hallow" Road.

419.³

- In the early 1990s the landowners started selling “trespass permits” to allow persons to hunt, gather wood and camp on their property. *Id.*, at 4 ¶ 18. R. 416.
- In the mid 1990s up through the present, the landowners allowed their land to become a private hunting unit, *id.*, at ¶ 19, R. 416, allowing private hunters to access the land in return for a significant monetary payment. Supplemental Findings, at ¶ 9. R. 487.
- Beginning in the 1990s, landowners began restricting access to the roads. *Id.*, at ¶ 7. R. 488.
- At various times in the past (no specificity as to the dates or frequency), the landowners and their employees have locked these gates for several days at a time, but beginning in the 1990s the landowners began locking these gates on a more permanent basis. Initial Findings and Conclusions, at 6 ¶¶ 3-4, Supplemental Findings, at ¶ 5. R. 415, 488.
- The landowners posted “no trespassing signs” at various places along these roads. Supplemental Findings, at ¶ 6. R. 488.
- Nevertheless, the facts of the present case are “similar to the facts of *Boyer v. Clark*,⁴ where the public, though not consisting of a great many persons, made a continuous and uninterrupted use of the roads as often as they found it convenient and

³ There are duplicate numbered paragraphs 6 and 7 in the Initial Findings, one pair on page 2 and the other pair on page 3. R. 418-419.

⁴ 326 P. 2d 107 (Utah 1958).

necessary. Initial Findings and Conclusions, at 6-7 ¶ 4. R. 414-415.⁵

- Taking even the landowners' factual assertions as true concerning gates being locked "at various times in the past" "for several days at a time,"⁶ it is clear that

⁵ The relevant facts in *Boyer* are:

The use of the road was not great because comparatively few people had need to travel it, but those of the public who had such need, did so.

326 P.2d 107, 108 (Utah 1958).

Within the past few years prior to the trial of this action in 1956, both appellant and respondent have put no trespassing signs on their properties and have attempted to charge deer hunters who wanted to use their properties. However, no objection was made nor did any of the owners of property over which the trail traversed attempt to interfere in the public's use until respondent tried to prevent such use a short time before this action was commenced.

Id. at 108-109.

The uncontradicted evidence in the instant case disclosed that for a period exceeding 50 years, the public, even though not consisting of a great many persons, made a continuous and uninterrupted use of Middle Canyon Road, in traveling by wagon and other vehicles and by horse from Upton to Grass Creek and other points as often as they found it convenient or necessary.

Id. at 109.

⁶ Given the context of the trial court's statement, "Taking even the Defendants' factual assertions as true," Initial Findings and Conclusions, ¶ 4, R. 415, the only logical meaning of that statement is that the trial court takes as true the landowners' assertion that the gates have been locked "at various times in the past" "for several days at a time." The landowners' transparent suggestion that the trial court by this statement apparently swallowed as true every other item of testimony adduced by the landowners at trial, makes no sense. That suggestion conveniently ignores the overall findings themselves and ignores the subject statement's context in juxtaposition to the paragraph that preceded it. If the trial court had taken all testimony and claims adduced and asserted

individuals using the roads beginning in the late 1950s until the late 1980s or early 1990s used the road without interruption, they used the roads freely, and through not constantly, they used the roads as often as they needed. *Id.*, at 6 ¶ 4. R. 415.

- The individuals who have used the roads did so in their capacity as members of the general public, and used the roads as a thoroughfare to public lands and/or for recreation, prior to the landowners' locking of the gates in the early 1990s. *Id.*, at 7 ¶ 6. R. 414.

- Starting in 1960 until the early 1990s when the landowners began locking the gates and selling hunting permits, the subject roads were accessible and used by the general public as often as they found necessary and convenient. *Id.*, at 8 ¶ 7. R. 413.

d. The Trial Court Correctly Applied the Law to Its Findings To Determine that the Subject Roads Were Public Roads

The trial court made the following conclusions of law:

- There was non-permissive continuous public use of the subject roads as often as the public found it convenient and necessary. Initial Findings and Conclusions, at 6-7 ¶¶ 2-4. R. 414-415.

by the landowners as true, then the Court's actual written and signed Initial Findings and Conclusions and Supplemental Findings wherein the trial court took pains to expressly enter so many findings and conclusions in the County's favor, would be nonsensical. This Court should not countenance the landowner's suggestion. *See Bonner v. Sudbury*, 417 P. 2d 646, 647 (Utah 1966) (Appellate court when reviewing claims that public road dedication rulings lack evidentiary support, should "analyze the evidence and whatever reasonable inferences may be drawn therefrom in the light most favorable to the findings and judgment.") and *Bertagnole, Inc. v. Pine Meadow Ranches*, P. 2d 211, 213 (Utah 1981).

- Prior to the locking of the gates in the early 1990s, members of the general public as opposed to adjacent landowners or individuals with permission used the subject roads as public thoroughfares to public lands and/or recreation. *Id.*, at 7 ¶¶ 5-6. R. 414.
- The continuous use of the subject roads as public thoroughfares lasted more than a period of ten years, from 1960 until the early 1990s when the landowners began locking the gates and selling hunting permits. *Id.*, at 8 ¶ 7. R. 413.

2. *The Transcript Demonstrates That Sufficient Competent Evidence Supports the Trial Court's Findings*

Trial court findings are reviewed under the “clearly erroneous” standard set forth in Utah R. Civ. P. 52(a).⁷ *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). Given this standard, public road dedication trial court findings may not be overturned “unless the evidence clearly preponderates against them.” *Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981).⁸ No legal basis exists for overturning such findings unless they go “against the clear weight of evidence” or otherwise cause a reviewing

⁷ Rule 52(a) states in relevant 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.”

⁸ Moreover, an appellant who challenges trial court findings must marshal and recite all facts for the reviewing court, whether or not favorable to their position. *Thomson v. Condas*, 493 P.2d 639, 641 (Utah 1972) (In rejecting challenge to trial court’s determination that a road had not been subject to ten years continuous public use, Court noted that appellants “chose to recite evidence most favorable to its contention to the exclusion of other evidence favorable to [respondents], which is not permissible on appellate review[.]”). It is doubtful whether the landowners’ opening brief satisfies this duty.

court to “reach a definite and firm conviction that a mistake has been made.” *Western Kane County Special Service District No. 1 v. Jackson Cattle Company*, 744 P.2d 1376, 1377 (Utah 1987). Reading the testimony documented in the following pages of trial court transcripts produces a definite and firm conviction that the trial court’s findings are correct, they are just, they are right, they ferret out who is credible and who is not, and they go *with* the clear weight of evidence:

a. Testimony Showing The Public Used the Subject Roads As Public Thoroughfares Continuously from The 1950s up to The Late 1980s or Early 1990s.

Circle Springs Road: Trial Transcript of June 28, 2004 proceedings (“6-28-04 TR”) at 31:23 - 32:23; 33:3-9, 19-24, 34:13-15, 19-21, 100:1 - 104:14, 105:20-24, 148:6 - 149:6, 186:5 - 187:22, 190:3-20, 265:14 - 267:6, 268:12-25.

Ridge Line Road: 6-28-04 TR at 37:2-5, 37:22 - 38:1, 38:2-18, 38:24 - 39:6, 106:9 - 107:13, 111:17-22, 113:6-9. 119:11 - 121:8, 190:21 - 192:3, 269:1 - 271:1.

Thorton Hallow Road: 6-28-04 TR at 41:13 - 42:20, 42:21 - 43:9, 107:14 - 110:7, 116:9 - 117:6, 271:25 - 273:20.

Parker Canyon Road: 6-28-04 TR at 46:2 - 47:2, 121:13 - 125:12, 274:1 - 275:10, 277:12 - 278:11. Trial Transcript of June 29, 2004 proceedings (“6-29-04 TR”) at 74:10 - 76:11.

The four roads in general: 6-28-04 TR at 15-17.

b. Testimony Showing That Up Until The Late 1980s if Not Later, Members of the Public Did Not Encounter Any Locked Gates On The Subject Roads.

Circle Springs Road: 6-28-04 TR at 35:11-15, 81:7-12, 104:15-18, 187:23 - 188:1, 267:25 - 268:11, 287:15-21. 6-29-04 TR at 9:25 - 10:1, 63:18-20, 64:6 - 65:18, 101:13-16.

Ridge Line Road: 6-28-04 TR at 39:16-39, 40:4-6, 14-16, 81:13-16, 111:20 - 112:11; 113:20-22, 192:7-8, 271:2-4, cf 314:15 - 315:1 (there could have been locks in 1980's, but we just threw our bikes over the fence, climbed over and continued on). 6-29-04 TR at 11:10-14, 13:6-9, 104:14-16.

Thorton Hallow Road: 6-28-04 TR at 43:14-25, 118:23-24, 273:21-25. 6-29-04 TR 71:9-10, 76.

Parker Canyon Road: 6-28-04 TR at 47:19 - 48:4, 125:11-15, 275:11-12, 278:12-13. 6-29-04 TR at 76:12-14.

The four roads in general: 6-28-04 TR at 64:8-14, 83:20-25.

At issue is whether the Court of Appeals erred for not achieving a “definite and firm conviction” that the trial court made a mistake in finding they way it did. Given the foregoing testimony, that definite feeling was just not there for the Court of Appeals to experience.

3. *The Transcript Shows That If The Trial Court Erred at All, It Did So By Over-Generously Finding That Prior to the 1990s the Landowners Locked The Gates At Various Times In the Past For Several Days At A Time.*

This point may be academic as the trial court still correctly found that any such pattern of pre-1990s gate locking did not prevent the public from using the subject roads as often as they found it necessary and convenient. But this Court should be advised that the transcript shows evidentiary support is spare and stinting at best for the notion that the landowners before the 1990s locked the gates “at various times in the past” “for several days at a time.” Following is an analysis of the transcript:

a. *Circle Springs Road*

- A witness for landowners said a gate on the Circle Springs Road always had a chain and lock on it. 6-29-04 TR at 133:25 - 134:3. Yet he admitted that every week the gate itself was put up, it was ripped out the next day. 6-29-04 TR at 134:12-14.
- Another witness for landowners said gates on Circle Springs Road were locked, but he was never asked by landowners’ counsel to specify the dates, frequency and duration of such locking. 6-29 TR at 161:11-19.
- Lee Okelberry, who is not a party but is a brother and uncle to defendants and their long time business partner and co-landowner before selling out to them several years prior to the 2004 trial, said you could not keep a gate on the Circle Springs Road, that anybody was free to use that road whether they asked permission or not. 6-29-04 TR at 193:18 - 194:13, 204:16-22, 205:12-16.

b. Ridge Line Road

- A witness for landowners said gates on the Ridge Line Road were locked as far back as 20 years. 6-29-04 TR at 160:6-19. 20 years prior to the trial is 1984. That testimony does not contradict plaintiff's evidence that the gates were not locked during the 1950s, '60s, '70s and early '80s..
- A subsequently called witness for defendants said when he was on and around the subject roads from 1952 to 1957, he never saw locks on any of the seven gates along the Ridge Line Road. Trial Transcript of June 30, 2004 proceedings ("6-30-04 TR") at 10:3-10; 15:20 - 16:1.

c. Thorton Hallow Road

- The undersigned could be mistaken, but the undersigned represents to this Court that upon a careful review of the entire trial transcript he did not detect any testimony regarding locks on gates specific to the Thorton Hallow road.

d. Parker Canyon Road

- A witness for landowners was asked if gates in Parker Canyon Road had ever been locked and he said yes. But inexplicably the witness was never asked to state when that occurred. 6-29-04 TR at 162:4-9.

e. Four Roads in General

- Defendants' own counsel said in his opening statement that his clients began to lock the gates *in the late 1970's*. "The evidence will show that those fences and those

roads have been there continuously since 1957. Not only have there been gates there, but they - - Beginning in about the 19, late 1970's they *began* to lock those gates.” 6-28-04 TR at 8:7-9. (Emphasis added).⁹

- A current hunting guide on defendants’ property said the road gates are locked during the hunting season. But again he was never asked to state what years these locks were in place. Notably, the witness admitted he has been on and around the property only since 1994. 6-29-04 TR at 233:7-23, 237:11-25, 238:18-22.

- A former hunting guide on landowners’ property from the 1990s to 2001 referred to locks being blown off of gates during this time period. 6-29-04 TR at 256:24 - 257:5, 257:17-18; 260:19. In what is either a transcription error or a mis-speak by trial counsel, there is a question and answer exchange with this witness that refers to two locked gates, the location of which is not clear from the record, from “1996 to 1990.” 6-29 TR at 267:1-13. By the context of questions that follow, counsel and the witness may have been intending to focus on the 1966-1990 time period.

- Lee Okelberry, a brother and uncle of the petitioner/landowners and their long-time business partner and co-owner of the subject property before selling out to them several years prior to the trial, was called to testify for the landowners. Remarkably, Lee Okelberry was not asked once in direct examination if any of the gates on the subject

⁹ Granted this statement by counsel is not evidence, but it sure does not go very far to produce a definite and firm conviction that a mistake was made by the trial court for finding ten years continuous public use.

roads were ever locked. 6-29-04 TR at 172-187. On cross examination, Lee Okelberry testified that members of the public got to using the subject roads more and more over the years when he was there, to the point that the gates themselves were disappearing. 6-29-04 TR at 185:19 - 186:23. Lee Okelberry also testified on cross examination that the Okelberrys never did lock anybody out of there. 6-29 TR at 186:21-24, 195:24 - 196:2-3.

f. Petitioners Brian and Lee Okelberry Turned Out to Be Their Own Weakest Evidentiary Links For Establishing That Gates Were Locked Prior to the 1980s.

- Petitioner/landowner Brian Okelberry, son of co-petitioner/landowner Ray Okelberry and nephew to prior non-party witness Lee Okelberry, recalls putting one lock on a gate once, and that was not even for a boundary access gate to their property but rather for a gate in the interior of their property. What is worse, Brian was not asked to state when this occurred, i.e., when he put up the one lock on an interior gate. 6-30-04 TR at 47:8-21. But Brian does remember that he personally did not put up any no-trespassing signs until the late 1980s. 6-30-04 at TR 46:24 - 47:7. And when asked when to his recollection did anybody first place locks on any of the boundary gates, Brian first said it was the 1990s, 6-30-04 at TR 53:8-17, and a few minutes later said it was the 1980s to his recollection. 6-30-04 at TR 54:18-22.

- Then petitioner Ray Okelberry testified, the dad, the main man from the beginning in the Okelberry livestock and land operation. The only indication Ray Okelberry gave to suggest the placement of any locks before the 1990s is as follows: simply that he “started”

to lock two gates in 1957 or 1958, a gate on the Circle Springs Road and a gate called the 1080 gate on the Ridge Line Road. 6-30-04 TR at 98:8-18, 135:20 - 136:13. There are several astoundingly remarkable points about this testimony:

- First, Ray Okelberry's testimony conclusively and irrefutably excludes mention of any locks on the Thorton Hallow Road or the Parker Canyon Road, half of the roads even at issue in this appeal. It thus leaves open and unchallenged the notion that Parker Canyon Road and Thorton Hallow Road were never locked prior to the 1980's *at all*.¹⁰

- Next there is no evidence that the locking of these two gates, which "started" in 1957 or 1958, repeated, or endured. No testimony was adduced to indicate how many continuous years, or how many years at all, this practice continued.

- Next Ray Okelberry admitted that locking these two gates, for what ever years that this occurred, lasted for a week to 10 days while when he was getting ready to move the sheep out, as opposed to all summer. 6-30-04 TR at 138:18-20, 139:2-5.

- Finally, the locks were admittedly ineffective to prohibit travel on those roads, because Ray Okelberry freely admitted to always having trouble keeping the locks there. "They might cut the wire off or they might cut the – I don't know how they got

¹⁰ One would think that Ray Okelberry of all people would testify about locks on these roads if they existed.

these locks off, but they'd get through the gate.” 6-30-04 TR 138:20-24¹¹

The above-documented dearth of evidence shows the true colors of the trial court's charitable finding that the gates were locked “at various times in the past,”¹² and it strengthens one's conviction that whatever gate locking activities ensued prior to the 1980s or 1990s, they sure did not defeat ten or more years of public continuous use of the four subject roads as often as the public found it necessary and convenient to travel them. In the words of this Court: “We are at a loss to understand how it can reasonably be said that there is no substantial evidence to support the findings and judgment.” *Bonner v. Sudbury*, 417 P.2d 646, 648 (Utah 1966).

4. *However the Controversy Over the Locked Gates May Be Characterized, The Transcript Even More Clearly Supports The Trial Court's Findings When Read In Light of Established Utah Supreme Court Precedent That Grants Trial Courts Wide Discretion in Public Road Dedication Cases.*

The following established precedents of this Court disfavor landowners' request to upset and micro-manage the role of trial courts in resolving public road dedication disputes:

- a. *Draw Inferences in the Light Most Favorable to the Findings.*

In reviewing claims that public road dedication rulings lack evidentiary support, it is the appellate court's “duty to analyze the evidence and whatever reasonable inferences

¹¹ Petitioner Ray Okelberry's critical admission is embedded in the tail end of an answer that consumed 34 lines of transcript before his counsel interrupted to say: “Okay. Mr. Okelberry, I think you've answered the question.” 6-30-04 TR at 139:6-7.

¹² Like the Chicago Cubs winning the pennant.

may be drawn therefrom in the light most favorable to the findings and judgment.”

Bonner v. Sudbury, 417 P. 2d 646, 647 (Utah 1966); *Bertagnole, Inc. v. Pine Meadow Ranches*, P. 2d 211, 213 (Utah 1981). Before overturning trial court findings, the reviewing court must decide that the record does not adequately support the findings, “resolving all disputes in the evidence in a light most favorable to the trial court’s determination.” *State v. Pena*, 869 P. 2d 932, 935-36 (Utah 1994).

b. *Defer to the Trial Court to Resolve Disputed Facts.*

“[W]here there is dispute over 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, 417 P.2d 646, 648 (Utah 1966). “The testimony of one credible witness, if believed by the court or jury, is sufficient upon which to base a finding of fact.” *Id.* “[I]t is the prerogative of the arbiter of the facts in our judicial system to believe or disbelieve testimony of a controversial bent[.]” *Thomson v. Condas*, 493 P.2d 639, 640 (Utah 1972).

The Court of Appeals in *Campbell v. Box Elder County*, 962 P.2d 806 (Utah App. 1998), upheld the trial court’s determination that the subject road was not a public road, where the evidence supported a finding that the road was locked at all times as a general rule except for a brief period each hunting season where the landowner opened the gate for a brief period to let hunters access Forest Service ground. *Id.* at 807.

“Here, the trial court explicitly found the public had not been able to use Ridge Road as often as they found it necessary or convenient. On the contrary, the trial court found Ridge Road was generally barred by a locked gate[.]”

Id. at 809. Whereas the gate in *Campbell* was generally locked, by contrast the gates on the subject roads in the present case were generally *unlocked* for a number of decades (assuming the gates were even standing - which they often were not).

The Court of Appeals in *Utah County v. Butler*, 2006 Ut App 444 declined to overturn the trial court’s determination that the subject road had been used continuously by the public for at least ten years. The Court held it was within the discretion of the trial court to find that the gates in question were generally unlocked from about 1925 until 1980 and were used merely to restrict the travel of livestock, not people, *id.* at ¶ 15, even though there was conflicting trial court testimony regarding the status and purpose of gates along the subject road and whether and how often those gates made the road impassable. *Id.* at ¶ 12. “We are not in a position to closely scrutinize the factual findings of the trial court in public thoroughfare dedication cases. . . . Therefore, unless the findings of fact are clearly unsupported by the record, we will seek only to apply the trial court’s factual findings to the law of abandonment and public dedication.” *Id.* at ¶ 13.

c. Grant Trial Courts a Fair Degree of Latitude Even in Determining the Legal Consequences of the Facts They Do Find.

“Historically, we have given trial courts a fair degree of latitude in determining the legal consequences under [the public road dedication statute] of facts found by the court. . . . Granting [such] discretion to the trial court is appropriate under that section, as its legal requirements, other than the ten-year requirement, are highly fact dependent and somewhat amorphous.” *Heber City Corp. v. Simpson*, 942 P.2d 307, 309-10 (Utah 1997) (Citations omitted).

d. Consider All Facts Together, Not in Isolation.

“We have no doubt that each of those facts, if considered separately, could be rationalized as not proving a public street. But all of the facts should be considered together . . .” *Bonner v. Sudbury*, 417 P.2d 646, 648 (Utah 1966)

5. Instances Where This Court Has Reversed a Trial Court’s Public Road Determination Are Distinguishable and Go Both Ways.

In *Petersen v. Combe*, 438 P.2d 545 (Utah 1968) the Court reversed a trial court judgment declaring a road to be a public highway. But that decision rests on three factors that are distinguishable from the present case. First the plaintiffs in *Petersen* did not plead that the road was used as a public thoroughfare nor plead ten years of public continuous use. *Id.* at 546. Here Wasatch County has plainly and consistently throughout this litigation plead, litigated, adduced evidence and argued that the subject roads are a public thoroughfare that have undergone more than ten years of continuous public use.

Secondly, given that individuals who own property in the area of the subject road “cannot be considered members of the public generally, as that term generally is used in dedication by user statutes,” *id*, the *Petersen* Court had trouble with the plaintiffs’ failure to allege that members of the public other than property owners in the area even used the road. In the present case, several persons who are not adjacent landowners but general members of the public testified to decades of uninterrupted road use by themselves, their friends and family and other members of the public. Thirdly, the *Petersen* plaintiffs’ own witness agreed that the land at the end of the subject road had no allure for the public. *Id.* at 547-548. Yet in the present case it is undisputed that the subject roads lead to publicly open and accessible Forest Service property, publicly favored camping, hunting and sightseeing destinations, and work locations for Forest Service livestock permittees.

This Court has also reversed a trial court finding that a road is *not* a public highway. *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997). There the record of uncontroverted evidence satisfied the technical requirements of the public road statute. All the trial court in that case could do to try to get around that evidence is cite some general unspecified interest in “fairness and justice.” This Court rejected that analysis: “Once the technical provisions of that [public road dedication] section have been satisfied, the road is a public highway. The court has no discretion to ignore that fact.” *Id.* at 313.

Under the authority of *Heber City*, it is arguable that the trial court in the present case would have committed reversible error had it legally concluded that the subject roads were *not* dedicated to the public, given its explicit findings of continuous, decades-long uninterrupted non-permissive public use of the roads by non-landowners.

B. The Correct Legal Test To Determine Continuous Public Use Does Not Turn On the Mere Erection of Gates, Signs or Locks; The Correct Test Focuses on The Extent of Public Travel And Asks Was It As Often As the Public Found It Necessary or Convenient.

The focus is on the extent and continuity of public travel, not on some per se test for a gate, or a lock, or a sign that could produce a multiplicity of different effects and outcomes depending on the road case and fact pattern. Was there something the landowners did that interrupted the established flow of public travel, whatever that established flow was? If so who cares what that “something” is. No device is too small or demure to factor for its possible effects on the continuity of public travel; no device too big or intimidating to dispense the required examination of public travel. In all the fuss over the presence or absence of gates, locks and signs, we must take care not to look in the wrong end of the telescope.

That correct legal test is a fact intensive, case-by-case inquiry, incapable of one-line jurisprudential acid tests that make, for example, a road per se public if it has a gate but the gate is not locked, or per se private if it has merely an unlocked gate. Not that those items are not factors, but that they are only factors as opposed to per se legal standards in themselves on which the public or private nature of a road mechanically rises

or falls.

Thus the bottom line inquiry which amicus Brigham Young University should not try to evade, is a common sense everyday factual case-by-case inquiry into whether in fact on all the facts and circumstances, public passage and travel did or did not occur as often as the public found it necessary and convenient. The safe, easy-to-apply standard BYU is looking for, is to look through the right end of the telescope and record the impact of its actions on the established pattern of public travel. Consider the following authorities in support of this proposition:

1. Boyer v. Clark

The Court in *Boyer v. Clark* found it remarkable that while the land owner posted no trespassing signs, “no objection was made nor did any of the owners of property over which the trail traversed attempt to interfere with public use. *Boyer v. Clark*, 326 P.2d 107, 108-09 (Utah 1958).

2. Thurman v. Byrum

The admitted placement of no trespassing signs on the road does not compel reversal of the trial court’s public continuous public use determination, where “[t]he signs did not specifically refer to the use of the roadway . . . and their language was consistent with an intent to prevent the public from leaving the roadway and entering onto adjacent private properties.” *Thurman v. Byrum*, 626 P.2d 447, 449 (Utah 1981).

Moreover the Court in *Thurman* upheld the trial court's continuous public use determination despite testimony that some of the use by non-property owners was with permission, because "there was clear and convincing evidence of frequent and general use of the road without defendants' permission." *Id.*

3. *Draper City v. Estate of Bernardo*

The Court in *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995) distinguished *Thurman v. Byram*, 626 P.2d 447, 450 (1981) by noting that there the general public was never asked to stay off the road; whereas in *Draper City* the general public was directed to stay off and the police were often called in to prevent passage. *Id.*, at 1101.

4. *Gllmor v. Carter*

In *Gillmor v. Carter*, 391 P.2d 426 (Utah 1964), the Court placed importance on the placement of signs and gates, whether they actually prevented public passage or not. This is so because the Court still paid homage to the now-abandoned requirement that there must be evidence of landowner intent to dedicate the road to the public. *Id.* at 427-28.¹³ The Court, moreover, found equally important the undisputed fact that practically

¹³ There is no need to prove the landowner's intent to dedicate the road to the public. *Bertagnole, Inc. v. Pine Meadow Ranches*, 639 P.2d 211, 213 (Utah 1981), *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995), *Thurman v. Bryam*, 626 P.2d 447, 449 (Utah 1981). *Heber City Corp. v. Simpson*, 942 P. 2d 307, 311 (Utah 1997) ("We have subsequently abandoned interpreting into the language of the statute the requirement that the owner must consent to the dedication.")

since the road's inception the landowners had entered into formal agreements granting permissive use of the road to duck clubs and since then litigated a number of lawsuits to assert the private nature of the road. On these two considerations (the now defunct landowner intent requirement and the landowners' consistent behavior from the near inception of the road), the Court agreed on the undisputed facts that no evidence of landowner intent to dedicate a public road existed of record. *Id.*, at 428.

5. *AWINC Corp. v. Simonsen*

Despite 1996-97 era obstructions which the trial court found effectively prevented further public travel on a mountainous, unimproved road over private property near Forest Service ground, the trial court's determination that the road was dedicated to the public is supported by the testimony of four individuals who did not own land in the vicinity of the road and never asked or received permission, but who nevertheless seasonally used the road every year "significantly more than ten years before" those obstructions, and who commonly encountered other public users on the road during their time of use. *AWINC Corp. v. Simonsen*, 112 P. 3d 1228, 1230, 1231 (Utah App. 2005).

C. The Court of Appeals' Balancing Test Is The Best Logical Application of This Court's Definition of "Continuous Use," Which is As Often As Convenient and Necessary Or As Often As The Public Had Occasion or Chose to Pass.

The Court of Appeals balanced the duration and frequency of an road obstruction against the frequency and volume of public use. *Wasatch County v. Okelberry*, 2006 Utah App., 473 ¶ 18, 153 P.3d 745. This balancing fits well with this Court's "necessary

and convenient” test, defined as follows: For public use of a road to be continuous under Utah Code Ann. § 72-5-104(1) (2006), it need not consist of a great many persons or necessarily occur every day; rather, it should occur as often as the public finds it “necessary and convenient.” *Boyer v. Clark*, 326 P.2d 107, 109 (Utah 1958) (reversing trial court’s ruling that road was not public, because undisputed testimony showed that while public use of road “was not great because comparatively few people had need to travel over it, . . . those of the public who had such need, did so.” *Id.* at 108). An accepted variation on the “necessary and convenient” standard is to inquire whether the public used the road as often as it “had occasion or chose to pass. Mere intermission is not interruption.” *Richards v. Pines Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977).

The Court of Appeals’ balancing test naturally flows from this Court’s “convenient and necessary” standard, because the “as often as convenient and necessary” notion can only be gaged and understood against the established volume and nature of use on the subject road - whether it is a busy urban street traveled by a high volume of traffic daily as in BYU’s case, or a remote mountainous traveled infrequently and sporadically as in the present case. On the one hand, one day’s documented and carefully observed closure of BYU’s busy urban streets with their collective daily tally of 61,000 cars,¹⁴ will obviously show that the public did not use those roads as often as they chose or had occasion to pass. On the other hand, a several day locking of two gates on two of the four

¹⁴ BYU’s Amicus Curiae Brief herein at page 4.

lonely remote mountainous roads at issue in this case once each summer in order to move sheep, with no telling how long those locks even stay on there, would not, and on the record below did not, bar the public from using those roads from the 1950's to the late 1980's or early 1990's as often as the public found it convenient and necessary to pass.

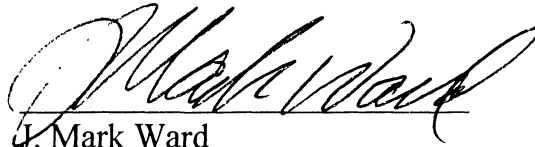
Thus the “convenient and necessary” test, applied as it was through the Court of Appeals’ balancing analysis, is inherently flexible enough to adapt to BYU’s situation or to that of a rural county. One must measure the “as often as convenient and necessary” test against the volume of use - whether it is busy urban or remote mountainous. That is not terribly difficult. BYU could easily meet that test with one day’s closure of its roads, just by statistically and scientifically deducing that because of that one day closure, 61,000 drivers suddenly had their routine interfered with, i.e, they “chose or had occasion” to travel the BYU roads but could not.

CONCLUSION

The key to resolving this case in a way that addresses all concerns is to key on the notion of *interference with the established pattern and history of public use*. Did Petitioner Okelberrys’ actions *interfere* with the public’s pattern and history of use of these four roads? The trial court was on solid footing in ruling no, not before the late 1980's or 1990's. Does BYU’s annual brief closure of its roads interfere with the established pattern of heavy urban traffic there. Clearly it would. For these reasons, the Court should adopt the Court of Appeals’ analysis, which is really a straightforward

application of this Court's established "necessary and convenient" test, and affirm.

DATED THIS 2nd day of July, 2007.

A handwritten signature in black ink, appearing to read "J. Mark Ward", written over a horizontal line.

J. Mark Ward
Attorney for Amicus Curiae
Utah Association of Counties

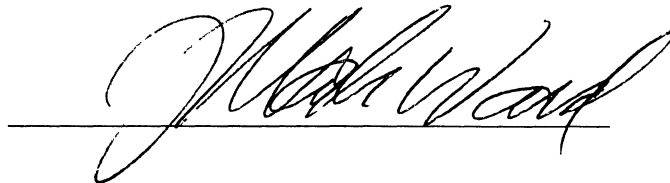
CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of July, 2007, true and correct copies of the above document were deposited in the U.S. Mail, 1st Class Postage Prepaid, addressed to the following:

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