

2007

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>GARTH LUNT, trustee of the GARTH O. LUNT REVOCABLE TRUST,</p> <p>Plaintiff/Lunt,</p> <p>v.</p> <p>HAROLD LANCE and DIANE LANCE</p> <p>Defendant/Lance.</p>	<p>REPLY BRIEF OF APPELLANTS AND BRIEF OF CROSS- APPELLEES HAROLD AND DIANE LANCE</p> <p>Appellate Court Docket No. 20070014</p>
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APPEAL FROM JUDGMENT OF  
THE FOURTH DISTRICT COURT, WASATCH COUNTY,  
THE HONORABLE DEREK PULLAN

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UTAH APPELLATE COURTS

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## **STATEMENT OF JURISDICTION**

Pursuant to RULE 3(a) of the Utah Rules of Appellate Procedure, a final order of a Utah District Court may be appealed. Appellate jurisdiction is conferred upon the Utah Court of Appeals pursuant to §78-2a-3(a) UTAH CODE ANNOTATED 1953 as amended.

## **STATEMENT OF RELEVANT FACTS**

1. According to Garth Lunt, trustee of the Plaintiff trust, the width of the gate entering into Lunt property from the Lane was 10 feet. (R. 958 at 186).
2. Moneves Boren (Garth Lunt's sister) testified that on the day before trial she measured the Lane and the length of the Lane "down to where I figured it went across to the barn." (R. 958 at 67-68). The barn had been removed 14 years prior in 1991. (R. 958 at 137).
3. Jack Lunt testified that on the day before trial he measured the Lane "to where [he] believe[d] the barn was located. (R. 958 at 28-29).
4. Garth Lunt testified that on the day before trial he measured the Lane to where he "believe[d] the Whitt barn and the gate was." (R. 958 at 186). The barn had been removed 14 years prior in 1991.

5. Garth Lunt testified that “someone” moved the gate 62 feet up [eastward] to its current location. (R. 958 at 148). The Lane is 150 feet from 6<sup>th</sup> West to the gate’s present location. (R. 958 at 183).
6. Regarding the type of historical use, Garth Lunt testified that the Lane was used to take cattle and teams of horses up it and hay back to the barn and machinery. (R. 958 at 134-135). The barn on the Lunt (McNaughten) property was used for milk cows and to store hay. (R. 958 at 160). The use of the Lane was not to access the back apartment but to access an acre of ground that goes west. (R. 958 at 182-183).
7. The Lunt property was subdivided such that the house is now on a 1.2 acre parcel. (R. 958 at 161). The McNaughton barn was removed in approximately 1991. (R. 958 at 137). Garth Lunt considered the Lane as mutual property with the Lance predecessors, the Witts. (R. 958 at 151).
8. According to Jack Lunt, the willow tree would be close to the boundary line on the McNaughton side. (R. 958 at 53). Originally only a “basement house” was located on the north side of the Lane.

(R. 958 at 26). The Witts had a shed, cellar and fence on the Lane's South boundary. (R. 958 at 31).

9. Jack Lunt remembered going through a gate that went down through the corral on the Lance (formerly Witt) property that he would go through the gate and back into the Lunt property. (R. 958 at 30).

10. The gate to the Lunt barn is 10-12 feet wide. (R. 958 at 41).

11. Regarding the length of the easement, Jack Lunt testified that from 6<sup>th</sup> West to the Witt barn was approximately 240-260 feet. A fence ran along the South side of the Lane about 151 feet. (R. 958 at 5). It was between 164-247 feet to the Witt barn from 6<sup>th</sup> West. (R. 958 at 27-28). The Lane terminated about 164 feet deep from the 6<sup>th</sup> West. (R. 958 at 27). It was about 240 feet to the barn from 6<sup>th</sup> West. (R. 958 at 28). The wooden fence from the Witt property corner would be about 160-162 feet (R. 958 at 38). The South side of the Lane is 175 feet back from asphalt to the fence. It would have been approximately 62 feet more to the Witt's barn. (R. 958 at 41).

12. Regarding the historical use of the easement, Jack Lunt testified the Lane was used for Lunt's predecessors and the Lances predecessors to move equipment, mowing machines, delivery rakes

from one place to another. (R. 958 at 14). Jack Lunt recalled going through the gate in the Lane to feed the calves he had weaned. He also took a bob sleigh and a wagon down the lane. (R. 958 at 30). There is no longer a gate to get through to go north from the Lane onto the Lunt property – “Somebody made that a fence.” (R. 958 at 44). There was no other use of the Lane by Jack Lunt other than to bring hay machinery, milk cows, and a sleigh. (R. 958 at 51). Jack Lunt saw the Witts (the Lances’ predecessors) taking their horses down the Lane to the Witts’ pasture.

13. With regard to the historical use, Moneves Boren testified:
- We used it down--- to go down through there to park – down the side of the law for we didn’t have room in the front. Well, and when the snow got deep in there we couldn’t get out anyway. We used it to park cars. In the summer we used it to take our hay back to the barn. We used it to put cattle down in there and take them out to take them to the north field, just the general use. (R. 958 at 64).
- The barn on the Lunt property was used only for cattle and to store hay. (R. 958 at 68). In the milk shed on the north side of the barn, Moneves Boren Last milked in 1950. (R. 958 at 79). Both the



Lance predecessors, the Witts and the Lunt predecessors, the McNaughtons used the Lane during hay season. (R. 958 at 90). The apartment was rented out after 1985. (R. 958 at 91). Tenants could not get to the apartment with cars because of the fence put up by Ms. Boren in the 2001. (R. 958 at 109-110).

14. According to Eldon Carlisle, the length of the Lane was about  $\frac{1}{4}$  to  $\frac{1}{3}$  of a block and where the Lunt predecessors would have turned North into the Lunt property. (R. 958 at 118).

15. Eldon Carlisle testified that both Lunt's predecessors and the Lances' predecessors used the Lane. (R. 958 at 117, 121). The Witts parked their car on the lane in the 20's and 30's. (R. 958 at 127). The McNaughtons (Lunt's predecessors) stopped running cattle in the late 80's or early 90's. (R. 958 at 128).

16. According to defense witness Frank Pia, expert photogrammetrist, from 6<sup>th</sup> West to the Witt barn was approximately 150-175 feet. (R. 959 at 322).

17. Defense witness Duane Smith testified that the length of the easement was approximately 150-200 feet from 6<sup>th</sup> West to where the barn was located.

18. Regarding use of the easement, Duane Smith testified that only the Witts (Lances' predecessors) used the lane. They had machinery parked on both sides of it. (R. 959 at 255). There's about an eight foot gate in between two big black willow trees north of the Lunt house there. Said gate was North of where the house is now. (R. 959 at 261). The access way to the garage behind the Lunt house was north of the house rather than south across the Lane. (R. 959 at 253).
19. The concrete block building on the Lunt property has the doors facing north. (R. 959 at 219).
20. In 1988, Lunt first rented out the apartment (Exhibit 41) usage changed from agricultural access to apartment access. (R. 959 at 242).
21. During trial Judge Pullan stated "when I was the County Attorney for Wasatch County I was consulted about a boundary line issue. My recollection is in this general area. I have no recollection with whom I talked." (R. 958). Counsel for Lances stated "My clients have not been involved with you, they don't recognize you. They don't recall anything like that." (R. 958). After the Bench

Trial, the Lances discovered that Judge Pullan had previously served on the Heber City Planning Commission, that he had dealt specifically with the property owned by Lunt, and that his previous involvement had been favorable to Lunt. (R. 771, 766).

## **SUMMARY OF THE ARGUMENTS**

- I. Summary of Arguments in Response to Cross-Appeal
  - a. The Trial Court Properly Considered the Issue of Abandonment but came to an improper conclusion.

It was proper for the trial court to apply the doctrine of abandonment of easement to the present case. In the present case, facts and evidence supporting abandonment were presented at trial and at no time did Lunt object to the evidence or to any argument discussed about abandonment. The issue was properly tried by consent of the parties. The trial court's only error with regard to abandonment was that it failed to recognize that Lunt had entirely abandoned the driveway when it abandoned agricultural use of the property. In establishing the width of the easement, Judge Pullan used 20 feet based on Heber City zoning code for the standard width of a driveway rather than the actual historic use of the Lane. The Lane was no longer used for agricultural purposes and had therefore been abandoned.

## II. Summary of Arguments in Reply to Appellee's Brief.

*The Lances were prejudiced by Judge Pullan's prior experience with the Lunt's and the Lunt's property while he served on the planning commission.* Judge Pullan should have been disqualified and a new trial granted. The Lances requested the new trial as soon as they discovered the conflict of interest. Fourth District Presiding Judge Taylor ruled that the facts established "the appearance of impartiality" and ordered the remainder of the case to be heard by Judge Schofield. It was improper to not order a new trial under the circumstances where there was the appearance of impartiality and actual prejudice resulted to the Lances.

*The current use of the Lane is not consistent with historic use of the Lane.* The trial court ruled "After the death of Mr. McNaughten in 1980, the McNaughtens' use of the lane for agricultural purposes declined precipitously. At the time of Ms. McNaughten's death in 1984, that use had ceased. From 1984 to the present, Plaintiff has used the lane only as a driveway to allow tenants to access the rear of the McNaughten home and its accessory apartment." (R. 726). The trial court erred by allowing continued access to the rental apartment. Lunt has no prescriptive right to

use the Lane to access this additional dwelling (that did not exist during the prescriptive period).

*The elements of prescriptive easement were not met, specifically with regard to the current use.* The trial court had found that Lunt began leasing the apartment since “sometime between 1986 and 1988.” (R. 732).

Insufficient time has passed to obtain a prescriptive easement with regard to the apartment use. Use of the Lane to access the apartment improperly increases the burden on servient estate thereby extinguishing or causing abandonment of the easement.

## **ARGUMENTS IN RESPONSE TO BRIEF OF CROSS APPELLEE**

### **INTRODUCTION**

Lunt appeals two issues: 1) the trial court’s application of abandonment doctrine, and 2) the trial court’s determination of the scope and measurement of the abandoned prescriptive easement. The trial court properly determined that the doctrine of abandonment applied to the case. Both parties submitted relevant evidence of and tried the matter, if not by express consent, by implied consent. The scope and measurement of the abandoned prescriptive easement was not properly found by the trial court. The trial court found that a prescriptive easement had existed for such use and also that Lunt had abandoned a portion of the Lane that ran on the

Lance property. The Lances maintain that the finding of prescriptive easement was error and alternatively that Lunt had abandoned all of the Lane on the Lance property. If a prescriptive easement was established, it was only established for the acquired agricultural use. Because Lunt abandoned the agricultural use of his property, on which the prescriptive right is based, he has also abandoned the right to use the Lane.

**I. Whether the Trial Court Erred in Ruling on the Issue of Abandonment.**

Lunt claims that the issue of abandonment was not properly before the trial court. The issue of abandonment was clearly within the framework of evidence presented. It was not necessary to even move to amend pleadings to conform to the evidence. “The parties' failure to move to amend the pleadings to conform to the evidence does not affect the fact that those issues were in fact tried by the consent of the parties and were therefore properly before the court. The rule is long-standing that the parties to a lawsuit are entitled to the relief the evidence shows they deserve regardless of whether they have requested such relief.” *Clark v. Second Circuit Court*, 741 P.2d 956, 957-958 (Utah, 1987). *Citing Mabey*

*v. Kay Peterson Construction Co.*, 682 P.2d 287, 289 (Utah 1984);  
*Poulsen v. Poulsen*, 672 P.2d 97, 99 (Utah 1983); *General Insurance Co.  
of America v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506 (Utah 1976);  
*Holdaway v. Hall*, 29 Utah 2d 77, 505 P.2d 295 (1973).

Lunt cites *Combe v. Warren's family Drive-Inns Inc.*, for the premise that it is error for a trial court to grant relief on issues not raised or tried before it. 680 P.2d 733, 735 (Utah 1984). The *Combe* decision is clearly distinguishable from the present case: In *Combe*, “The trial court fashioned its findings from whole cloth. He declared a corporation in good standing a partnership and then proceeded to dissolve it when neither party had sought that relief. He distributed the assets of that corporation without following the statutory procedure in cases of involuntary dissolution. The judgment rendered was captioned a declaratory judgment, but no declaratory relief had been sought.” *Id.* Here, clear evidence of abandonment was presented, much of it by Cross Appellant Lunt. *Combe* does not preclude the trial court’s use of abandonment.

Rule 54(c)(1) requires trial courts to be liberal in awarding appropriate relief justified by the facts developed at trial, as long as the failure to request a particular form of relief does not prejudice a party in the

preparation or trial of the case. If there is no prejudice, it is necessary only that the relief granted be supported by the evidence and be a permissible form of relief for the claims litigated. (Utah R. Civ. Proc. 54 (c) (1), *Cowley v. Porter*, 127 P.3d 1224, 1232 (Utah Ct. App.2005), citing *Henderson v. Fore-Shor Co.*, 757 P.2d 465, 472 Utah Ct. App. 1988).

Lunt was not prejudiced. Lunt made no objection at trial when the issue of abandonment was raised. Lunt made no objection at trial when evidence and testimony establishing abandonment was received. Lunt made no post-trial motion with regard to the issue. Although Lunt claims that he was “unable to address the legal issues of abandonment, actual relinquishment of the Lane and the intent to abandon,” evidence of all of these matters was heard by the trial court –much of it introduced by Lunt. Lunt introduced evidence regarding the time period of use, nature of use, and dimensions of the alleged prescriptive easement –all of which constitute defenses to the theory of abandonment of the easement. Garth Lunt specifically testified regarding abandonment --that the gate had been removed and the fence had been “moved up” leaving the lane 150 feet long. (R. 958 at 148, also at 183). Jack Lunt testified that no action had been taken re-install the gate or remove the fence or otherwise get through



it. (R. 958 at 44). These facts go beyond mere non-user. These facts are evidence of intent to abandon.

Here, where issues and defenses of abandonment were presented, the issues were tried by the implied consent of the parties. It is not error to grant relief where the issues are tried by the express or implied consent of the parties. *See Poulsen v. Poulsen*, 672 P.2d 97, 99 (Utah 1983). Only on appeal does Lunt claim to be surprised or prejudiced by the issue of abandonment. It was proper for the trial court to apply the doctrine of abandonment. Therefore, the Lances respectfully request that this Court affirm the trial court's application of the doctrine of abandonment.

**II. Whether the Trial Court Committed Clear Error regarding the Scope and Measurement of the Abandonment of the Prescriptive Easement.**

The trial court did not err in applying the doctrine of abandonment. The issue of abandonment was properly before the trial court. The trial court only erred when it found an all purpose year-round easement because the evidence at trial showed that the Lunt use of the Lane was only for occasional agricultural purposes over the years and that when the agricultural use had stopped, the easement use became abandoned.

Lunt cites numerous cases for the proposition “[A] right gained by conveyance may not be lost by non-use alone and that an actual intent to abandon be evident.” *Western Gateway Storage Co. v. Treseder*, 567 P.2d 181, 182 (Utah 1977). “Proof of abandonment of such an easement requires action releasing the ownership and the right to use with clear and convincing proof of an intentional abandonment. This requires that plaintiffs ceased to use this easement to irrigate their land with the intention to make no further use of it.” *Harmon v. Rasmussen*, 375 P.2d 762, 765 (Utah 1962). “[A] servitude easement is extinguished by any obstruction of a permanent nature by the party himself to whom the servitude is due (or by his consent), **or** by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise or enjoyment of it; and (2) that being once lost it is gone forever, and can never be revived but by a new grant.” *Brown v. Ore. Short Line R. Co.*, 102 P. 740, 743 (Utah 1909). (internal citations omitted). The *Brown* decision went on to explain that “that all the dwellings and other buildings, as well as the trees situated on the several parcels of land to which the easement was appurtenant, have been removed and that the several parcels of land as well as the strip are now being, and will continue to be, used for an entirely different purpose

which is incompatible with the original purpose for which the easement was created-we are of the opinion that the easement has been abandoned and has become extinguished...” In short, *Brown* establishes that where easement was originally granted for a certain use (in *Brown*, egress to residential dwellings), when a new use of the easement comes into being that is incompatible with the original easement, abandonment and extinguishment occurs. All witnesses testified that the use of the driveway was limited to agricultural use –and parking of cars appurtenant to the original dwelling. As in *Brown*, Lunt’s property was put to new use that extinguished the original easement. The only use of the driveway by Lunt since approximately 1988, was for access to a rental apartment in the rear of the dwelling. (R. 726, 732). The barn was entirely removed by 1991. Lunt further subdivided the original 5 acre parcel, leaving only a 1.2 acre parcel that is zoned for residential use. As the agricultural income from property declined, Lunt generated income from rents of the apartment and the original dwelling house.

The use of the easement for daily residential egress related to the apartment is distinct and incompatible with the occasional use for

movement of cattle, hay and farm equipment. Therefore the entire Lane was abandoned by Lunt.

Abandonment is also met where there is evidence of adverse use by the owner of the servient estate is acquiesced in by the owner of the dominant estate for a period of time sufficient to establish a prescriptive right. *See Id.* The evidence shows rather clearly that Lunt had no intent to continue the use of the Lane because he had no intent to continue the agricultural use of the Lunt property. All dairy operations stopped in 1980. The barn, that was used to store the hay in support of the dairy and cattle operations was completely removed in 1991. Lunt subdivided the original parcel and retains only 1.2 acres of it. On the remaining 1.2 acre parcel Lunt sought and obtained a zone change to residential use over the front portion. Fencing was placed and a gate removed without objection from Lunt. The Lances request this Court to grant relief by upholding the trial court's finding of abandonment and by recognizing that the entire driveway was abandoned.

### **III. Whether the Trial Court Erred by Limiting the Length and Width of the Easement.**

Although it was proper for the trial court to apply the doctrine of abandonment, it did not make a proper application. The trial court found abandonment of certain length and width of the Lane, but it should have found a complete abandonment based on a change in use of the Lane.

The measure and limit of a prescriptive easement is determined by the use made of it during the prescriptive period. *See McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978). The testimony regarding use of the Lane from all witnesses was that it was limited to agricultural uses – and the occasional parking of cars. Any change in the use of the dominant estate that increases the burden on the Lane causes an extinguishment or abandonment of the prescriptive easement. “[I]f the easement arises by prescription, a change in the dominant estate calling for a burden upon the servient land exceeding that devolving upon it by its customary use during the prescriptive period, if the increased use is inseparable from the former use, will operate an extinguishment of the easement.” *Ellis v. Simmons*, 619 S.E.2d 88, 91 (Va.,2005), *citing* Frederick D.G. Ribble, *Minor on Real Property* § 110, at 150 (2d ed.1928); *see also Wood v. Ashby*, 253 P.2d 351, 354 (Utah 1952), *citing* 28 C.J.S., Easements, § 65(b), p. 732. Here, Lunt created an additional dwelling on his property, an accessory

rental apartment. This increased the burden on the Lane as the apartment renters desired and did use it. This increased use and burden by the apartment “operate[d] an extinguishment of the easement.” *Id.* Merely placing a gate across an easement is an increased burden. *See McBride v. McBride*, 581 P.2d 996, 998 (Utah 1978), *see also Kunzler v. O’Dell*, 855 P.2d 270 (Utah Ct. App. 1993). The placement and use of an additional residence is an increased burden such that the easement has been extinguished.

## **CONCLUSION**

With regard to the Cross Appeal, the Lances request this Court to Deny Lunt’s Cross Appeal in its entirety and specifically, affirm the trial court’s conclusion that the easement, if such is found, was abandoned. The trial court’s conclusions regarding the limited scope of the abandonment should be reversed, and under the facts presented at trial, it should be found that the entire easement was abandoned and extinguished.

## **ARGUMENTS IN REPLY**

**The Lances Were Prejudiced and Moved to Disqualify the Trial Judge at the Earliest Opportunity.**

As soon as the Lances discovered Judge Pullan's prior experience with the Lunt property and some of the Lunt witnesses, the Lances moved for new trial and to disqualify Judge Pullan. Judge Pullan's statement, "when I was the County Attorney for Wasatch County I was consulted about a boundary line issue. My recollection is in this general area. I have no recollection with whom I talked." (R. 958). on the morning of the trial, was too vague to raise any concerns about Judge Pullan's bias. He did not state that the exact property was involved in trial. He did not state that the same owners of the property were involved in trial. Unfortunately it was not until after trial that the Lances discovered Judge Pullan's actual involvement with the Lunt property in favorably passing a zone change from Residential Agricultural to Residential. Moneves Boren, Lunt's sister, testified before the Heber City Planning Commission and again at trial. Judge Pullan's prior dealings with the Lunt property and Moneves Boren form the basis for Judge Pullan's bias against the Lances.

The appearance of bias is grounds for reversal where actual prejudice is shown. "[A] trial judge's failure to recuse based on the appearance of bias may be grounds for reversal if actual prejudice is shown." *State v. Alonzo*, 973 P.2d 975, 979 (Utah, 1998). citing *State v.*

*Gardner*, 789 P.2d 273, 278 (Utah 1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1837, 108 L.Ed.2d 965 (1990). “Actual prejudice can be shown when there exists a reasonable likelihood that the result would have been more favorable for the defendants absent the trial judge's appearance of bias.” *Id.* The Lances were actually prejudiced based on Judge Pullan’s bias from his prior experience with the property. The connection between the zoning issues before Judge Pullan and the litigation shows bias: Lunt stated, for zoning purposes that the Lane ran 150 feet from the road to a gate. At trial, Judge Pullan ruled that the easement was 150 feet long, based on the location of the alleged gate. There was minimal testimony given regarding when this new gate was established or how long it had been used. In establishing the width of the easement, Judge Pullan used 20 feet based on Heber City zoning code for the standard width of a driveway rather than the actual historic use of the Lane. Based on this showing of bias and actual prejudice, the findings should be reversed and a new trial granted.

**The Elements for a Prescriptive Easement Were Not Met For the Current Use.**

Lunt’s property is no longer used as an agricultural enterprise. The trial court found “After the death of Mr. McNaughten in 1980, the



McNaughtens' use of the lane for agricultural purposes declined precipitously. At the time of Ms. McNaughten's death in 1984, that use had ceased." (R. 726). The front portion of the property was rezoned to a residential use –a matter in which Judge Pullan was directly involved. (R. 762-773). Lunt does not seek to continue to use the Lane to reach its barn (which was removed in 1991), or to move cattle or hay or agricultural equipment. Rather, Lunt seeks an easement to allow the daily use of the Lane for ingress and egress to a rental apartment that never existed as a separate dwelling during the prescriptive period, and potentially the further subdivision and development of his property. Ingress and egress to the rental apartment has resulted in a drastic change in the use of the easement as well as a drastic increase in the burden on the servient estate. The servient estate can only be subjected to the easement to the extent to which the easement was acquired, and the easement owner cannot change this use so as to put any greater burden upon the servient estate." *Nielson v. Sandberg*, 105 Utah 93, 141 P.2d 696, 701 (Utah 1943). "A right of way for one purpose gained by user cannot be turned into a right of way for another purpose if the latter adds materially to the burden of the servient estate; and the right derived from user can never outrun or exceed the user

in which it had its origin.” *American Bank-Note Co. v. New York El. R. Co.*, 129 N.Y. 252, 29 N.E. 302, 305 (N.Y. 1891); *Ryan v. Mississippi Valley S. I. R. Co.*, 62 Miss. 162 (1884); *Richardson v. Pond*, *supra*; Jones on Easements, Sec. 291. The use during the prescriptive period is the only indication of the nature and extent of the right acquired. *Turner v. Hart*, 71 Mich. 128, 38 N.W. 890, 15 Am.St.Rep. 243 (Mich. 1888). There was no rental apartment on the property during the prescriptive period. The rental apartment use began “between 1986 and 1988.” (R. 732). Having an additional dwelling on the property materially increases, doubles, the use of the Lane. Because such a material increase in the burden on the easement is improper, and because the prescriptive period for use with regard to the rental apartment has not run, the elements for prescriptive easement with regard to ingress and egress to the rental apartment have not been met and the trial court should be reversed in this regard.

#### **The Current Use of the Easement Is Not Consistent with Historic Use.**

Lunt claims that the evidence established that during the prescriptive period the Lane was used for “residential and agricultural purposes.” Cross Appeal p. 25. There is no mention in the record of the words

“residential purposes.” And, if there was a “residential” use, it would necessarily be limited to the only residences that existed during the prescriptive period. The residence that stood on the Lance property no longer exists. The residence that stood on the Lunt property remains, but the original Lunt parcel has been subdivided and an accessory rental apartment added. There can be no proper use of the prescriptive easement area to serve any other dwelling than existed during the prescriptive period. It must follow that there is no prescriptive right for Lunt to use the Lane to access the rental apartment he built in the back of the original dwelling.

The trial court found that the parties “jointly used the Lane to access their acreage, run cattle, haul hay, move farm equipment and park cars as often as either found it necessary and convenient.” R. at 728. The trial court found that the Lane was not used to access Lunt’s rental apartment until “between 1986 and 1988.” (R. 732). The trial court did not find that Lunt could allow his renters to use the Lane. Access to this additional dwelling would “place a greater burden or servitude on the [Lance] property” than allowed. *Nielson v. Sandberg*, 141 P.2d 696, 701 (Utah 1943). Any use of the Lane to access any other dwelling is an additional

burden and is beyond the scope of the alleged prescriptive easement. It is further improper to allow placement of any utilities in the Lane as there have never been utilities in the Lane at any time. The trial court's statement that the driveway could potentially be used for "utility easements" was improper and must be specifically reversed because such use is clearly outside the scope of the prescriptive easement. *See* R. 960 at 8.

Lunt claims that the case "was brought before the trial court as Mr. Lunt sought to continue to use the Lane to access the rear portion of his acreage, that can only be accessed by traversing the Lane." Appellee's Brief, p. 27. Lunt's claim mischaracterizes and misstates the record. The Lunt property allegedly served by the Lane was a five acre parcel with one dwelling. (R. 958 at 161). At trial, testimony was given by Duane Smith, that there was no use of the Lane by Lunt's predecessors for the 2-3 year period of time during which he worked for Lunt's predecessors and the access he used to the property was on the North side of the Lunt property, not the South side where the Lane is. (R. 259 at 249-250). Frank Pia, the photogrammetry expert, further testified that based on the aerial photographs of the Lane and the Lunt property show the increasing use of the North

side of the Lunt property to access the barn in the back. R. 259 at 308).

There was about an eight foot gate in between two big black willow trees north of the Lunt dwelling. (R. 959 at 261). The access way to the garage behind the Lunt house was north of the house rather than south across the Lane. (R. 959 at 253). The trial court found "The 1979 aerial photograph shows a large access road to the McNaughten property. Mr. Pia testified that the photograph depicted regular use of this road. The road commences at a point approximately 150 feet north of the lane. It runs west from 600 West, then cuts southwest to the McNaughten barn." (R. 733). In short, the record shows that Lunt could, and did, access the rear portion of his property by means other than the Lane. Lunt had, and continues to have, ample means of access to the rear portion of his parcel across his own land. If Lunt has an access problem, he created it himself by his method of subdividing his property. The original dwelling is now on a 1.2 acre parcel. (R. 958 at 161). After subdividing the original parcel, a separate dwelling was constructed directly north of the original dwelling on another portion of the original parcel.

## **CONCLUSION**

In light of the facts and arguments set forth, Appellants the Lances continue to request that this Court reverse the judgment and order of the trial court herein and find that a prescriptive easement was not established over the Lances' property, or otherwise remand this for new trial or further proceedings before a new judge consistent with Utah law. With regard to the Cross Appeal, the Lances request this Court to deny the Cross Appeal in its entirety, or alternatively to affirm the trial court's conclusion that the easement was abandoned but reverse the trial court's conclusions regarding the limited scope of the abandonment and find, under the facts presented at trial, that the entire easement has been abandoned and extinguished.

DATED this 15th day of August, 2007.

TESCH LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read 'Shawn W. Potter', written over a horizontal line.

Shawn W. Potter  
Attorneys for the Lances

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing  
Reply Brief and Brief of Cross Appellees Harold and Diane Lance, to be  
sent by United States Mail, postage prepaid, on this 15<sup>th</sup> day of  
August, 2007, as follows:

Randy B. Birch  
BOSTWICK & PRICE  
139 East South Temple # 320  
Salt Lake City, UT 84111

\_\_\_\_\_

# **ATTACHMENT A**



Fourth Judicial District Court  
Wasatch County, State of Utah  
2:24pm 5/11/06 JPC Deputy

Randy B. Birch #04197  
BOSTWICK & PRICE, P.C.  
One Thirty Nine East  
South Temple St., Suite 320  
Salt Lake City, Utah 84111  
Telephone: 801-961-7400  
Facsimile: 801-961-7406

*Attorneys for Plaintiff Garth Lunt, Trustee of the Garth O. Lunt Revocable Trust*

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

**GARTH LUNT, trustee of the GARTH  
O. LUNT REVOCABLE TRUST,**

Plaintiff,

VS.

**HAROLD LANCE, and DIANE LANCE  
and Does 1-10,**

Defendants.

**FINDINGS,  
ORDER AND JUDGMENT**

Civil No. 020500612

Judge: DEREK P. PULLAN

The above captioned matter came before the court for trial on November 1, and 2, 2005. The Plaintiff was present by and through its trustee Garth Lunt and represented by its attorneys of record, BOSTWICK & PRICE, P.C., the Defendants were present and represented by Chris Greenwood. The Court having previously made its findings and conclusions in its Memorandum Decision dated November 23, 2005, the same are incorporated herein.

Based thereon, the Court orders as follows:

1. A prescriptive easement for a driveway is confirmed in the Plaintiff which easement is twenty (20) feet wide and One Hundred and approximately eighty three (183) feet long. The same extending from the center of 600 West street in Heber in a westerly direction along the south side of a home located at 205 N. 600 West, Heber City, Utah, and going

approximately 183 feet to the current location of the fence which was formerly a gate and which runs north and south at approximately 183 feet west of the center of 600 West street in Heber City, Utah. The easement is more particularly described as follows:

See the attached Exhibit "A".

2. A certified copy of this Order shall be recorded with the Wasatch County Recorder's office.

3. The Plaintiff's claims of boundary by acquiescence are dismissed.

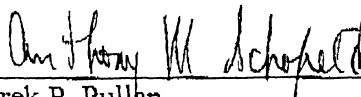
4. Whereas this is an easement that is confirmed in the Plaintiff, Plaintiff is entitled to use the easement as any party would normally use a driveway. Defendants shall not block access to the easement and shall remove forthwith any materials blocking or obstructing the easement.

5. Plaintiff shall pay the costs of preparing a legal description as necessitated by the Court's ruling.

6. Each party to pay their own attorney's fees.

7. Plaintiff is awarded costs against the Defendant in the amount of \$2,332.20.

DATED this 11 day of May 2006.

  
\_\_\_\_\_  
Derek P. Pullan  
District Court Judge

\_\_\_\_\_  
Kraig J. Powell  
Attorney for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on April 26, 2006, I caused a true and correct copy of the foregoing document to be

☒ mailed postage prepaid

☐ faxed to No. \_\_\_\_\_

☐ hand delivered

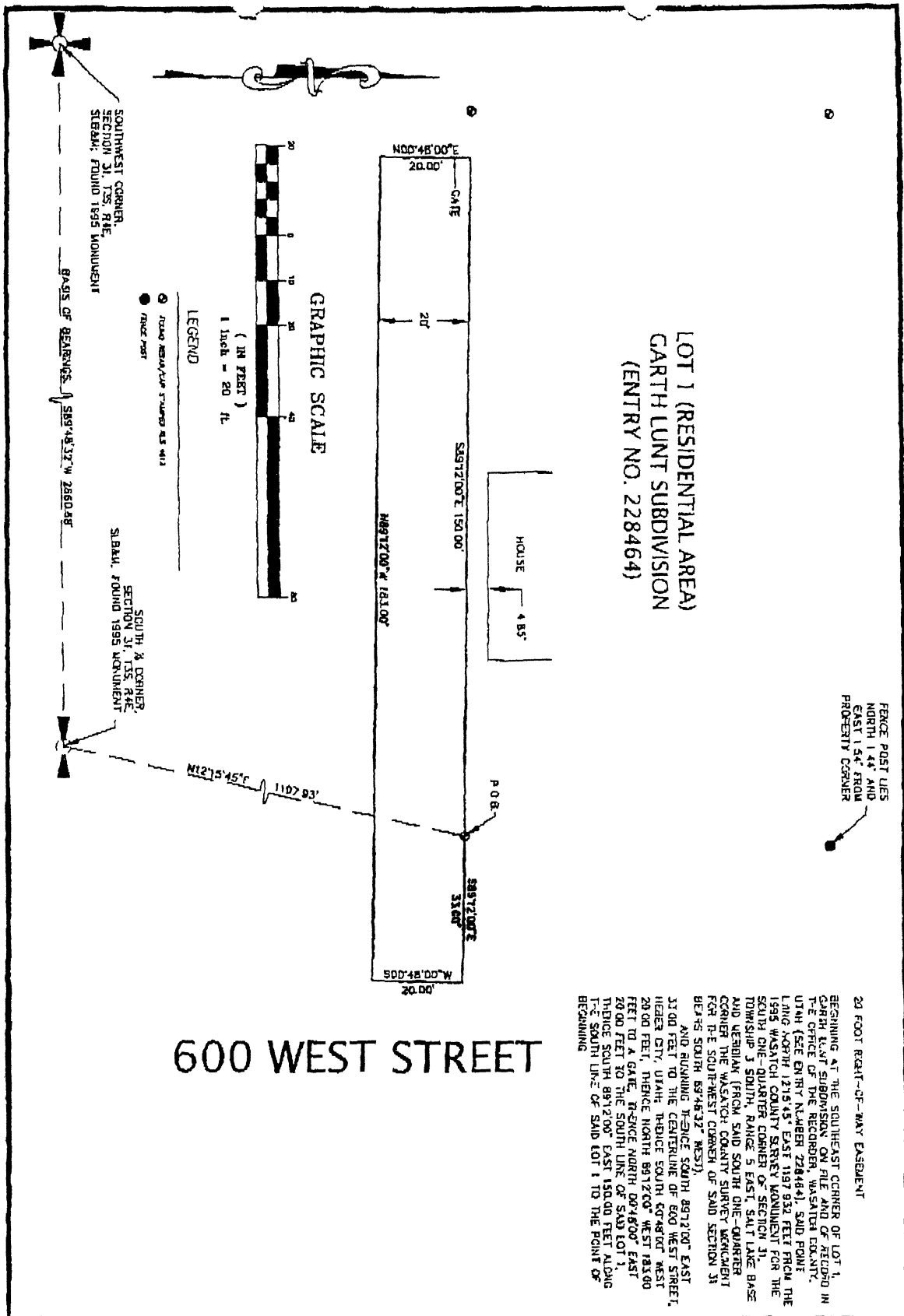
to:

Kraig J. Powell  
TESCH LAW OFFICES  
2 South Main Street, Suite 2-D  
Heber City, UT 84032



M:\1-B&T - Client Files\Lunt, Garth - 5265.00\5265.01 - Lance\Plawings\order 20 easement fn\Lunt.wpd

Exhibit A



PROJECT NO. <b>104-153</b>	DATE: 07/09/2004	CLIENT	 <b>Summit Engineering Group, Inc.</b>	35 WEST CENTER ST PO BOX 178 HERRN CITY, UT 84012 PHONE 435.654.8224 FAX 435.654.8221 www.summiteng.com
	DRAWN BY: REC	REVIEWED BY: REC		
	FILE NAME: 104-100	MAP NAME: RIGHT-OF-WAY MAP		

# **ATTACHMENT B**

Randy B. Birch #04197  
BOSTWICK & PRICE, P.C.  
One Thirty Nine East  
South Temple St., Suite 320  
Salt Lake City, Utah 84111  
Telephone: 801-961-7400  
Facsimile: 801-961-7406

*Attorneys for Plaintiff Garth Lunt, Trustee of the Garth O. Lunt Revocable Trust*

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

**GARTH LUNT, trustee of the GARTH  
O. LUNT REVOCABLE TRUST,**

Plaintiff,

vs.

**HAROLD LANCE, and DIANE LANCE  
and Does 1-10,**

Defendants.

**Order Denying Motion for New Trial or  
in the Alternative to Amend Judgment  
And/or Take Additional Testimony**

Civil No. 020500612

Judge: ANTHONY W. SCHOFIELD

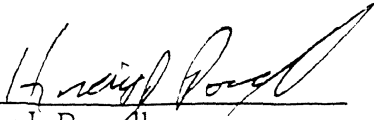
The Defendants' Motion for New Trial or in the Alternative to Amend Judgment and/or Take Additional Testimony came before the court for hearing on October 27, 2006, at 9:30 a.m. The Plaintiff was present by and through its attorneys of record, BOSTWICK & PRICE, P.C., the Defendants were represented by Kraig Powell.

The Court having heard the argument of counsel, having reviewed the pleadings and the file herein, and having issued its Ruling on November 15, 2006, for the reasons set forth therein, it is ordered that the Defendants' motion is denied.

DATED this \_\_\_\_\_ day of December, 2006.

---

Anthony W. Schofield  
District Court Judge

  
Kraig J. Powell  
Attorney for Defendants


CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2006, I caused a true and correct copy of the foregoing document to be

☒ mailed postage prepaid  
☐ faxed to No. \_\_\_\_\_  
☒ hand delivered

to:

Kraig J. Powell  
TESCH LAW OFFICES  
2 South Main Street, Suite 2-D  
Heber City, UT 84032



RECEIVED  
MAY 05 2006

TESCH LAW OFFICES P.C.

FILED  
Fourth Judicial District Court  
of Utah County, State of Utah

5-5-06 Deputy

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

Garth Lunt,

:

Petitioner

:

Ruling

vs.

:

Date: May 3, 2006

Harold Lance,

:

Case Number: 020500612

Respondent

:

Presiding Judge James R. Taylor

-----  
This matter comes before the Court, sitting as a "reviewing judge" by certification from the Honorable Derek Pullan as required by Rule 63(b)(2) following the receipt of an "Affidavit for Rule 63 Removal of Judge" filed by the Petitioner.

Rule 63(b)(3)(A) requires this Court to determine if the motion and affidavit are timely filed, filed in good faith and legally sufficient. Each requirement will be discussed.

Rule 63(b)(1)(A) states:

"A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest."

Rule 63(b)(1) (B) states further that the motion must be filed not later than 20 days after the moving party discovered the grounds for the motion.

This case was tried before Judge Pullan on November 1-2, 2005. Judge Pullan entered a Ruling on November 23, 2005. Oral argument on objections to a proposed order from that ruling



was heard on February 16, 2006. In the middle of the first day of trial, November 1, 2005, Judge Pullan noted, on the record, that “[i]n chambers I indicated that when I was the County Attorney for Wasatch County, I was consulted about the boundary line issue. My recollection is in this general area. I have no recollection with whom I talked.” The parties made an affirmative determination at that time that they had no concerns about a possible conflict of interest. The Judge’s ruling was that although the Plaintiff had failed to establish a boundary by acquiescence the claim for a prescriptive easement had been established, in part. The Plaintiff was ordered to obtain and pay the costs of a survey to identify the prescriptive easement. After oral argument on February 16, 2006 the Court stated, further, that the easement was to be 20 feet in width and measured from the center line of the street, east to 600 West. In early March, 2006, while doing research to prepare the required easement on of the Defendants discovered that when Judge Pullan was the Wasatch County Attorney in 1998 the property considered in this case was before the Heber City Planning Commission for a requested zone change. Judge Pullan was the acting chair of the commission when the commission recommended a zone change as requested by Moneves Boren. Ms. Boren subsequently testified in the trial of this case.

This Court has carefully reviewed Judge Pullan’s Ruling. He necessarily made extensive findings of fact about the historic use and condition of the property from the late 1920's through the present. The past, present or future zoning classification of the area was not considered or relevant to his conclusion that from the 1930's through at least the mid-1970's there was open,

notorious, continuous and adverse use of the subject lane for more than 20 years to establish a prescriptive right in favor of the Plaintiff.

The first question raised by this motion is whether the requisite 20 day period began with Judge Pullan's disclosure during the first day of trial or whether the period should begin when Ms. Lance discovered that Judge Pullan served as acting chair of the Planning Commission when a request to re-zone the property was recommended in 1998. The focus of the Defendant's complaint is not upon the substance of Judge Pullan's ruling but questions whether there is an appearance of impropriety because he was called upon to impartially consider the testimony of Ms. Boren, the applicant in the zone change and a witness during this trial. There is no suggestion that Judge Pullan was other than candid and forthright when he declared at the time of the trial that he had no recollection of any other involvement with the property. The zoning hearing preceded the trial by more than seven years. Nevertheless, because the question relates to the common participation of Ms. Boren in both instances it is reasonable that the 20 day period commence from when it was discovered that Judge Pullan was involved in both proceedings. This motion was filed on March 24, 2006 just nine days after Ms. Lance received the documentation from Heber City that indicated Judge Pullan's participation. The motion is, therefore, timely.

This motion is accompanied by the affidavit of Diana Lance. In paragraph 13 she states "I am filing the accompanying Motion to Disqualify based on a good-faith belief that the judge's

impartiality in this matter can reasonably be questioned ” The Court will accept this portion of the affidavit as the requisite certification under the rule.

The unusual dilemma presented by this motion is that it does not seek to merely conclude the prospective involvement of Judge Pullan, the moving party seeks a determination that a trial already concluded was tainted and should be set aside. No specific references to the trial, written ruling or subsequent proceedings have been made to demonstrate actual bias or prejudice. Rule 63 addresses the prospective involvement of a judge and is not intended to determine proceedings already concluded. Questions about a trial already conducted and a ruling already rendered must be determined by either the appellate process or through Rule 60, Utah Rules of Civil Procedure.

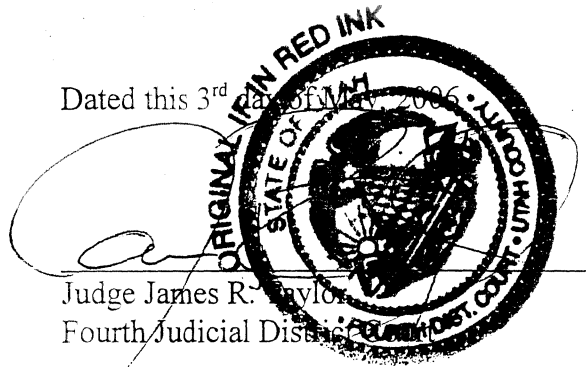
The moving party addresses only the appearance of impropriety. The available record is that Judge Pullan had no recollection of the previous proceeding involving the same witness. Nevertheless, this motion would, at the least, remind him of those proceedings. This Court concludes that there may at least be an appearance of impropriety should he continue with the case under these circumstances.

Accordingly, while this Court declines to set aside the trial or ruling of Judge Pullan, this

matter will be reassigned to Judge Anthony W. Schofield for such other proceedings as shall be appropriate.

Dated this 3<sup>rd</sup> day of May, 2006

Judge James R. Taylor  
Fourth Judicial District



Copies of this Order mailed to:

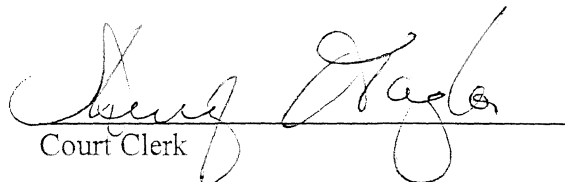
Counsel for the Plaintiff:

Randy B. Birch  
139 E. South Temple, Suite 320  
Salt Lake City, Utah 84111

Counsel for the Defendants:

Kraig J. Powell  
2 South Main Street, Suite 2-D  
Heber City, Utah 84032

Mailed this 3 day of May, 2006, postage pre-paid as noted above.

  
Court Clerk

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NOV 20 2006

TESCH LAW OFFICES P.C.

FILED

NOV 15 2006

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY  
WASATCH

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

GARTH LUNT, Trustee of the GARTH O.  
LUNT REVOCABLE TRUST,

Plaintiff

vs.

HAROLD LANCE and DIANA LANCE,

Defendants.

CASE NUMBER. 020500612

DATED. NOVEMBER 15, 2006

**RULING**

ANTHONY W. SCHOFIELD, JUDGE

This matter comes before the court on defendants' motion for new trial, or in the alternative to amend the judgment and/or take additional testimony. I have carefully read all motions and memoranda and have considered the oral arguments presented in this matter. I now deny defendants' motion

**RULING**

**1. Defendants Do Not Warrant a New Trial Under Rule 59 of the Utah Rules of Civil Procedure.**

The Utah Supreme Court has stated that "both the granting of, and the refusing to grant, a new trial is a matter left to the discretion of the trial judge . . ." *Christenson v. Jewkes*, 761 P 2d 1375, 1377 (Utah 1988). However, before a court may exercise its discretion in granting a new trial, the moving party must present "a showing of one of the grounds specified in Rule 59 of the

Utah Rules of Civil Procedure.” *Tangaro v. Marrero*, 13 Utah 2d 290, 292 n.2 (Utah 1962).

Rule 59 of the Utah Rules of Civil Procedure provides generally that a trial judge may grant a new trial for any of the following causes: (1) irregularity in the proceedings of the court; (2) misconduct of the jury; (3) accident or surprise; (4) newly discovered evidence; (5) excessive or inadequate damages; (6) insufficiency of the evidence to justify the verdict; or (7) error in law.

UTAH R. CIV. P. 59(a). While defendants have not specifically stated the grounds under Rule 59(a) for which they seek a new trial, it appears from their arguments that they believe the evidence provided in the original trial was insufficient to justify the verdict.

There is no question that it is the responsibility of the trial judge to determine the credibility of the witnesses and the facts provided by them. *State ex rel B.G.*, 2006 UT App 227 (2006); *see also State v. Robins*, 142 P.3d 589, 593 (citing *People v. Mayberry*, 542 P.2d 1337, 1342 (Cal. 1975) (“[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness.”)). Additionally, the Utah Supreme Court has held that the finding of whether an easement exists is “the type of highly fact-dependent question, with numerous potential fact patterns, which accords the trial judge a broad measure of discretion when applying the correct legal standard to the given set of facts.” *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). Though defendants claim that the testimony of plaintiff’s witnesses is insufficient to satisfy the “clear and convincing” evidence standard necessary to grant a prescriptive easement, *Marchant v. Park City*, 771 P.2d 677, 682 (Utah Ct. App. 1989), Judge Pullan was in the best position to make that determination.

In Judge Pullan’s November 28, 2005, ruling (hereinafter the “ruling”), he acknowledges that the testimony of defendants’ witnesses was directly contradicted by testimony from plaintiff’s witnesses. Ruling, pp. 3–10. Said differently, Judge Pullan was not able to harmonize

the testimony of the various witnesses of the parties. However, after weighing the evidence and credibility of the witnesses, Judge Pullan concluded that plaintiff had successfully proven the elements of a prescriptive easement by “clear and convincing evidence.” Ruling, p. 12.

Referring to one of plaintiff’s witnesses, Judge Pullan noted that “the testimony of Mr. Eldon Carlisle . . . was particularly credible.” Ruling, p. 13. However, referring to the testimony of one of defendants’ witnesses, Judge Pullan stated, “the weight of the evidence demonstrates clearly and convincingly otherwise.” Ruling, p. 12.

That contradictory evidence was presented throughout the trial does not mean that the evidence in favor of granting the prescriptive easement was not clear and convincing. Every trial contains contradictory evidence. That is the nature of the adversarial legal system. It is the primary responsibility of the trial judge to weigh and judge the credibility of competing witness testimony and to make decisions thereon. Defendants’ “sincere and compelling belief” that the trial judge made an incorrect ruling does not warrant a new trial.

Defendants’ second challenge is that Judge Pullan’s involvement with the Heber City Planning Commission with respect to this property warrants a new trial. Though neither party addressed Judge Pullan’s involvement with the Heber City Planning Commission in great detail in their memoranda, it appears from oral argument that his involvement as a member of the planning commission did not create a bias or prejudice which justifies a new trial in this matter. As Chairman of the planning commission, Judge Pullan was one of several members of that body who dealt with the issue of plaintiff’s property. He did not act alone. Additionally, at the beginning of the trial Judge Pullan remembered his previous involvement with plaintiff’s property and asked the parties if they objected to his trying the case. At that time, neither party objected. Having failed to object at that time, when the issue was squarely addressed to the

parties by Judge Pullan, plaintiff cannot now be heard to complain. Judge Pullan's previous involvement with plaintiff's property does not warrant a new trial.

**2. Defendants Are Not Entitled To Be Relieved From or Amend the Judgment Based on Rule 60 of the Utah Rules of Civil Procedure .**

Rule 60(b) of the Utah Rules of Civil Procedure states six reasons for which a party may be relieved from judgment. While the first five reasons deal with specific circumstances and events, the sixth reason serves as a residuary clause, stating that a party may be relieved from judgment for "any other reason justifying relief from the operation of the judgment." UTAH R. CIV. P. 60(b)(6). Since defendants have not alleged any of the first five clauses of Rule 60(b), the court must assume that they intend to gain relief from the judgment based on the residuary clause of Rule 60(b)(6).

The Utah Supreme Court has held that the residuary clause found in Rule 60(b)(6) "embodies three requirements: First, that the reason be one *other* than those listed in subdivisions (1) through [(5)]; second, that the reason justify relief; and third, that the motion be made within a reasonable time." *Laub v. South Central Utah Telephone Ass'n*, 657 P.2d 1304, 1307.

Defendants clearly have complied with the first and third requirements established by the Utah Supreme Court. However, defendants have not complied with the second requirement because their Rule 60(b)(6) motion fails to state a reason that justifies relief. Defendants' "sincere and compelling belief that plaintiff in fact did not use the lane in the manner asserted by plaintiff's witnesses and found by the Court" is insufficient to justify relief. Instead, it appears that defendants are attempting to use Rule 60(b) as an appeal to the trial court from the court's own ruling and judgment. Defendants had their opportunity at trial to show that plaintiff did not use the lane in the manner asserted by plaintiff's witnesses, but failed satisfactorily to do so. After



both parties presented their case, Judge Pullan found in plaintiff's favor with regard to the prescriptive easement. Defendants simply have no reason which justifies amending or relieving them from the judgment.

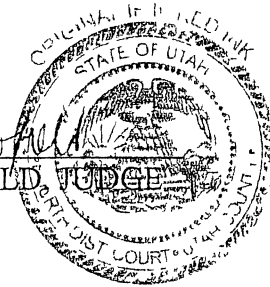
**Conclusion**

I deny defendants' motion. Pursuant to Rule 7(f)(2), Utah Rules of Civil Procedure, plaintiff's counsel is directed to prepare an appropriate order.

Dated this 15 day of November, 2006.

BY THE COURT:

Anthony W. Schofield  
ANTHONY W. SCHOFIELD, JUDGE



### MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 16<sup>th</sup> day of November, 2006:

Randy B. Birch  
Attorney for Plaintiff  
139 East South Temple Street, Suite 320  
Salt Lake City, Utah 84111

Kraig J. Powell  
Attorney for Defendants  
2 South Main Street, Suite 2-D  
Heber City, Utah 84032

LORI WOFFINDEN  
CLERK OF THE COURT

By *H Christensen*  
Deputy Clerk

RECEIVED  
APR 28 2006

TESCH LAW OFFICES P.C.

4TH DISTRICT COURT - HEBER COURT  
WASATCH COUNTY, STATE OF UTAH

---

GARTH LUNT,	:	
Plaintiff,	:	RULING
	:	
	:	
vs.	:	Case No: 020500612
	:	
HAROLD LANCE,	:	Judge: DEREK P PULLAN
Defendant.	:	Date: 04/27/2006

---

Clerk: diannb

This matter comes before the Court on Defendants Harold and Diana Lance's Motion to Disqualify Judge and for New Trial. Pursuant to Rule 63, the Motion to Disqualify and supporting affidavit are certified to the presiding judge for review or assignment to a reviewing judge. The motion for new trial is stayed.



  
\_\_\_\_\_  
Judge DEREK P PULLAN

*W. H. Hargison*

Case No: 020500612  
Date: Apr 27, 2006

---

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020500612 by the method and on the date specified.

METHOD	NAME
Mail	RANDY B BIRCH ATTORNEY PLA 139 E S TEMPLE STE 320 SALT LAKE CITY, UT 84111
Mail	KRAIG J POWELL ATTORNEY DEF 2 S MAIN ST STE 2-D HEBER CITY UT 84032

Dated this 27 day of April, 2006.

  
Deputy Court Clerk

# **ATTACHMENT C**

4TH DISTRICT  
ST. JAMES  
WASATCH COUNTY

2006 DEC 29 PM 4:44

RMB

Kraig J. Powell (8929)  
Shawn W. Potter (9551)  
TESCH LAW OFFICES, P.C.  
314 Main Street, Suite 200  
P.O. Box 3390  
Park City, Utah 84060  
Telephone: (435) 649-0077  
Facsimile: (435) 649-2561

*Attorneys for Defendant/Appellant*

---

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

---

GARTH LUNT, trustee of the GARTH O.  
LUNT REVOCABLE TRUST,

Plaintiff/Appellee,

v.

HAROLD LANCE and DIANE LANCE

Defendant/Appellant.

**NOTICE OF APPEAL**

Civil No.: 020500612

Judge: Derek P. Pullan

Notice is hereby given that Defendants/Appellants, Harold and Diane Lance, by and through their counsel, Tesch Law Offices, P.C., appeal to the Utah Supreme Court the final judgment in the above-captioned matter, entered May 11, 2006. The time for appeal was extended by Defendants' timely filing of their motion for new trial or in the alternative to amend judgment or take additional testimony. Defendants also appeal the trial court's

Order denying Defendants' Motion for New Trial or in the Alternative to Amend Judgment and/or Take Additional Testimony, entered December 18, 2006.

This Appeal is made by the above-named Defendants/Appellants who are represented by:


Kraig J. Powell  
Shawn W. Potter  
Tesch Law Offices, P.C.  
314 Main Street, #200  
P.O. Box 3390  
Park City, UT 84060-3390

The Plaintiff/Appellee, Garth Lunt, is represented by:

Randy B. Birch  
Bostwick & Price  
139 East South Temple #320  
Salt Lake City, Utah 84111

DATED this 21<sup>st</sup> day of December, 2006.

Respectfully Submitted,  
TESCH LAW OFFICES, P.C.




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Kraig J. Powell  
Shawn W. Potter  
Attorneys for Defendants/Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of December, 2006, I caused to be mailed in the U.S. Mail, postage prepaid, a true and correct copy of the Notice of Appeal to the following:

Randy Birch  
Bostwick & Price  
139 East South Temple St #320  
Salt Lake City, UT 84111



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4TH JUDICIAL DISTRICT  
STATE OF UTAH  
WASATCH COUNTY

2007 JAN -8 PM11:10

Kraig J. Powell (8929)  
Shawn W. Potter (9551)  
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Park City, Utah 84060  
Telephone: (435) 649-0077  
Facsimile: (435) 649-2561

*Attorneys for Defendant/Appellant*

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

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GARTH LUNT, trustee of the GARTH O.  
LUNT REVOCABLE TRUST,

Plaintiff/Appellee,

v.

HAROLD LANCE and DIANE LANCE

Defendant/Appellant.

**AMENDED NOTICE OF APPEAL**

Civil No.: 020500612

Judge: Derek P. Pullan

Notice is hereby given that Defendants/Appellants, Harold and Diane Lance, by and through their counsel, Tesch Law Offices, P.C., appeal to the Utah Supreme Court the final judgment in the above-captioned matter, entered May 11, 2006. The time for appeal was extended by Defendants' timely filing of their motion for new trial or in the alternative to amend judgment or take additional testimony. Defendants appeal the trial court's Order denying Defendants' Motion for New Trial or in the Alternative to Amend Judgment

and/or Take Additional Testimony, entered December 18, 2006. The Plaintiffs also appeal the trial court's order denying Plaintiff's Motion to Disqualify Judge and for New Trial, entered April 27, 2006.

This Appeal is made by the above-named Defendants/Appellants who are represented by:

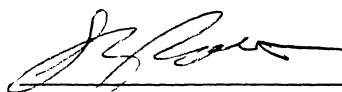
Kraig J. Powell  
Shawn W. Potter  
Tesch Law Offices, P.C.  
314 Main Street, #200  
P.O. Box 3390  
Park City, UT 84060-3390

The Plaintiff/Appellee, Garth Lunt, is represented by:

Randy B. Birch  
Bostwick & Price  
139 East South Temple #320  
Salt Lake City, Utah 84111

DATED this 8th day of January, 2007.

Respectfully Submitted,  
TESCH LAW OFFICES, P.C.



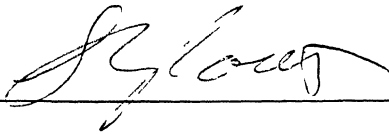
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Kraig J. Powell  
Shawn W. Potter  
Attorneys for Defendants/Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of January, 2007, I caused to be mailed in the U.S. Mail, postage prepaid, a true and correct copy of the Notice of Appeal to the following:

Randy Birch  
Bostwick & Price  
139 East South Temple St #320  
Salt Lake City, UT 84111

  
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