

2007

Garth Lunt v. Harold Lance and Diane Lance : Brief of Appellant

Utah Court of Appeals

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Randy B. Birch; Bostwick & Price; Attorney for Appellee.

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

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IN THE UTAH COURT OF APPEALS

<p>GARTH LUNT, trustee of the GARTH O. LUNT REVOCABLE TRUST,</p> <p>Plaintiff/Appellee,</p> <p>v.</p> <p>HAROLD LANCE and DIANE LANCE Defendant/Appellant.</p>	<p>BRIEF OF THE APPELLANTS HARROLD 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

<p>Randy B. Birch Bostwick & Price 139 East South Temple #320 Salt Lake City, Utah 84111</p>	<p>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</p>
<p>Attorney for Plaintiffs-Appellees</p>	<p>Attorney for Defendant-Appellant</p>

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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 ISSUES

1. Should the Trial Court Judge have recused himself from hearing the case due to bias on the basis of his ruling in favor of Plaintiff on an issue involving the subject property while acting as chair of the Heber City Planning Commission?
2. Was there was sufficient evidence to support the Trial Court's finding of the scope, size dimensions, course, route, and location of a prescriptive easement?
3. Did the Trial Court properly find the existence of a prescriptive easement?
4. Did the Trial Court properly apply the clear and convincing standard of proof required for a finding of a prescriptive easement?
5. Did the Trial Court err in refusing to grant the motion for a new trial?
6. Did the Trial Court err in refusing to grant Plaintiff's motion to amend judgment or take additional testimony?

STANDARDS OF REVIEW

a. Issue: Whether the Trial Court Judge Should Have Recused Himself from Hearing the Case due to bias on the basis of his ruling in favor of Plaintiff on an issue involving the subject property while acting as chair of the Heber City Planning Commission.

Standard of review: Determining whether a trial judge committed error by failing to

recuse himself is a question of law, and is reviewed for correctness.” State v. Tueller, 37 P.3d 1180, 1183 (Utah App.,2001). See also, Orvis v. Johnson, 146 P.3d 886, 888 (Utah App., 2006).

Grounds for Review: Although the Trial Judge stated that he thought he had been involved in a boundary dispute over the Lunt’s property while he was the County Attorney, it was later determined that Trial Judge’s exposure to the property was in his role on the Planning Commission and had made specific zoning decisions favorable to Lunt’s property. No objection was made at trial because the extent of the Trial Judge’s relationship to the property and Lunt were not known at that time. As soon as Lance became aware of the Trial Judge’s previous involvement, and before judgment was final, Lance moved to disqualify the Trial Judge. (R. 761,783).

b. Issue: Whether there was sufficient evidence to support the Trial Court’s finding of the scope, size dimensions, course, route, and location of a prescriptive easement.

Standard of review: Errors in factual findings, are reviewed under a clearly erroneous standard. Nunley v. Westates Casing Servs., Inc., 989 P.2d 1077 (Utah, 1999) (citing Reliance Ins. Co. v. Utah Dep’t of Transp., 858 P.2d 1363, 1366 (Utah 1993)).

Grounds for Seeking Review: The Lances moved for directed verdict of Lunt’s claims at the close of Lunt’s case at trial (R. 958-page 188). The Lances objected to the proposed findings, order and judgment regarding the dimensions of easement. (R. 753-754, 960, page 3). Furthermore, it was plain error for the Trial Court to rule based on the paucity of evidence in the record.

c. Issue: Whether the Trial Court properly found a prescriptive easement.

Standard of review: The finding that an easement exists is a conclusion of law reviewed for correctness. Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

Grounds for Seeking Review: The Lances moved for directed verdict at the close of Lunt's case at trial on the basis that the elements for prescriptive easement had not been met, specifically that insufficient time of continuous use had passed. (R. 958 page 190-191). Furthermore, the Trial Court's conclusion was plain error in determining that there was an easement.

d. Issue: Whether the Trial Court properly applied the clear and convincing standard of proof.

Standard of Review: Whether a trial court applied the appropriate standard of proof is a question reviewed for correctness. Searle v. Milburn Irr. Co., 133 P.3d 382, 386 (Utah, 2006). In re R.N.J., 908 P.2d 345, 349 (Utah Ct.App.1995).

Grounds for Seeking Review: The Lances moved for new trial on the basis that "the evidence in support of the use necessary to establish a prescriptive easement is not clear and convincing." (R. 891). Furthermore, it was plain error for the court to determine that the evidence met the "clear and convincing" requirement.

e. Issue: Whether the Trial Court erred in refusing to grant the motion for a new trial.

Standard of Review: A denial of a motion for new trial is reviewed pursuant to an abuse of discretion standard. Alvey Development Corp. v. Mackelprang, 51 P.3d 45, 47 (Utah App., 2002). State v. Harmon, 956 P.2d 262, 266 (Utah 1998).

Grounds for Seeking Review: Lance preserved this issue by moving for new trial. (R. 761, 847, 961).

f. Issue: Whether the Trial Court erred in refusing to grant Plaintiff's motion to amend judgment or take additional testimony.

Standard of Review: Review of a district court's denial of a 60(b) motion is under an abuse of discretion standard of review. Russell, 681 P.2d 1193, 1194 (Utah, 1984).

Grounds for Seeking Review: Lance preserved this issue by moving for new trial or alternatively to take additional testimony. (R. 848, 961).

STATUTORY PROVISIONS

Canon 3 (b)

STATEMENT OF THE CASE

A. Nature of the Case

This case involves issues regarding the sufficiency of evidence and elements of law required to establish a prescriptive easement and whether the particular evidence received in the lower court met the clear and convincing standard of proof. This case also deals with the impartiality requirements for judges who have previously had dealings with the property, parties, and witnesses before them at trial. Where it was proper to assign the case to a new judge following trial, the case should have recognized that Judge Pullan should not have heard the matter at all and granted a new trial.

B. Course of the Proceedings & Disposition of the Case

1. In 2002, Garth Lunt, Trustee ("Lunt"), brought suit against Harold and Diane Lance ("the Lances"), in the Fourth District Court. The Lances also countersued,

asserting numerous causes of action. After motions for summary judgment, the parties stipulated to the dismissal of all claims with the exception of Lunt's boundary by acquiescence and prescriptive easement claims. (R. 621).

2. A Bench Trial was held on November 1-2, 2005, in Heber City. After trial, the Trial Court found that the Lunts had failed to establish a boundary by acquiescence but it did find that a prescriptive easement had been established. (R.729-730).

3. On March 24, 2006, the Lances timely moved to disqualify Judge Pullan and for a new trial on the basis of the impartiality caused by his former favorable rulings regarding Lunt and his property in his prior service as acting chair of the Heber City Planning Commission. During trial, Judge Pullan stated that he was familiar with the property having been involved in a "boundary dispute" while formerly serving as County Attorney. (R. 958, page 58) No objections were made to his continuing as judge. However, after trial, Defendants discovered that Judge Pullan's actual involvement with the property was in his previous service as acting chair of the Heber City planning commission where he had made certain favorable zoning determinations with regard to Lunt's property. Lunt's sister appeared before then Commissioner Pullan and she also testified on behalf of Lunt at trial. Judge Pullan's involvement with this witness in both arenas called his impartiality into question. On that basis, the Lances moved to disqualify Judge Pullan and for new trial (R. 761). The motion was heard by Judge James R. Taylor. Judge Taylor ruled "This Court concludes that there may at least be an appearance of impropriety should he [Judge Pullan] continue with the case under these circumstances" and he ordered that the remainder of the proceedings be heard by Judge

Anthony Schofield. (R. 838-840). But, Judge Taylor “declined to set aside the trial or ruling of Judge Pullan...” (R. 839).

4. On May 25, 2006, the Lances timely moved for new trial or in the alternative to amend judgment or take additional testimony on the basis of insufficiency of the evidence, particularly that the “clear and convincing” standard had not been met. This motion was denied by the newly assigned Judge Schofield.

5. The Court signed the final Judgment establishing the prescriptive easement and denying the boundary by acquiescence on December 27, 2006. This is an appeal from said Judgment and the orders.

C. Statement of the Facts

1. Testimony of Garth Lunt, Trustee of Plaintiff Lunt Trust. According to Garth Lunt, trustee of the Plaintiff trust, the width of the easement was either 34 feet, 35 feet or 10 feet wide. Garth Lunt stated it was approximately 34 feet from wooden fence northward toward the Lunt house. (R. 958 at 135). He also stated that there were approximately 35 feet between the Lunt House and the northern fence. (R. 958 at 136). The width of the gate entering into Lunt property from the Lane was 10 feet. (R. 958 at 186).
2. Regarding the length of the easement, Garth Lunt testified that it was 274 feet from 6th West to the gate entering the Lunt property from the Lane. (R. 958 at 186. 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 6th West to the gate's present location. (R. 958 at 183).

3. 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). 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).
4. Testimony of Jack Lunt, brother of Plaintiff trustee: According to Jack Lunt, brother of Plaintiff trustee, the Lane was approximately 35 feet wide. (R. 958 at 42). The 35 foot wide lane terminated about 3-4 feet from the Lunt house. (R. 958 at 43). 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).
5. 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). The gate to the Lunt barn is 10-12 feet wide. (R. 958 at 41).

6. Regarding the length of the easement, Jack Lunt testified that from 6th 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 6th West. (R. 958 at 27-28). The Lane terminated about 164 feet deep from the 6th West. (R. 958 at 27). It was about 240 feet to the barn from 6th 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).
7. 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.
8. Testimony of Moneves Boren, sister of Plaintiff Trustee. With regard to the width of the easement Moneves Boren testified that from the chimney on the apartment

over to the wooden fence on the other side of the Lane there was about 35 feet. (R. 958 at 66).

9. Regarding the length of the easement, Moneves Boren testified it was about 235 feet from the edge of the asphalt on 6th West to where the Lane would have gone across the barn onto the Lunt property. (R. 958 at 67).
10. 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).
11. Testimony Plaintiff Witness Eldon Carlisle. According to Eldon Carlisle, the length of the Lane was about ¼ to 1/3 of a block and where the Lunt predecessors would have turned North into the Lunt property. (R. 958 at 118).

12. Regarding the use of the easement, 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).
13. According to Defense witness Frankie Housel, length of the measurement from the grainery to the Witt Barn was approximately 200 feet. (R. 959 at 267).
14. Regarding use of the Lane, Frankie Housel testified the Lane was a driveway to the Witt's property. (R. 959 at 264). The wood fence was there for the purpose of keeping animals and machinery off the Witt's lawn. (R. 959 at 272).
15. According to defense witness Frank Pia, expert photogrammetrist, from 6th West to the Witt barn was approximately 150-175 feet. (R. 959 at 322).
16. According to Defense witness Duane Smith, the length of the easement was approximately 150-200 feet from 6th West to the barn.
17. Regarding width, Duane Smith testified that the Lane was about 40 feet wide. (R. 959 at 258).
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. According to Diana Lance, 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

The Trial Court erred when it found an all purpose year-round easement because the evidence at trial showed only that the Lunt use of the Lane was for occasional agricultural purposes over the years and that when the agricultural use had stopped, the easement use was abandoned. The court found that the agricultural use was abandoned. The use was clearly abandoned in 1991 when the Lunt barn was removed. Lunt did not begin to use the Lane for vehicular ingress and egress to the accessory apartment until 1988. The prescriptive period for such new use has not run. Because the time period for

vehicular ingress and egress had not run, the Trial Court should not have found a prescriptive easement for a driveway.

The Trial Court erred when it established the width of the prescriptive easement at 20 feet wide on the basis that 20 feet was the standard width for a driveway in Heber City Municipal Code. The dimensions of a prescriptive easement can only be established by historical use. The proper width should be ten to twelve feet wide –which is the width of the gate the Lunt’s testified as historically leading from the Lane onto the Lunt Property. This gate is no longer in existence. The Lane should also only reach a length of at most 150 feet. All testimony established that the ten-to twelve-foot-wide gate into the Lunt Property from the Lane stood between 150 feet West from 600 West street.

The Trial Court erred when it found that the Lane had been continuously used for 20 years. Lunt’s witnesses had lived on or worked on the property for no more than approximately a total of twelve years such that they lacked any basis for testifying of its continuing use for more than the requisite 20 years.

The evidence given did not reach the level of clear and convincing. Lunt’s witnesses included himself, his brother and his sister –all of whom are interested parties and whose testimony was self-serving. They each testified that they had made measurements on the property the day before trial, but such measurements were irrelevant because they merely measured to where they thought the barn had stood, where the gate had been, and where other landmarks used to be. Lunt’s only other witness was Eldon Carlile. Mr. Carlile testified against the continuous use of the Lane. None of The Lances’ witnesses were self-interested and testified from memory rather than testifying of

contemporary measurements. The Lances' photogrammetry expert testified that the use of the Lane was not continuous and that other access was used, which tends to show that the Lane was abandoned by the Lunt predecessors and used primarily by the Lance predecessors.

Judge Pullan should have been disqualified and a new trial granted. 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.

ARGUMENTS

A. THE TRIAL JUDGE WAS NOT IMPARTIAL AND A NEW TRIAL IS WARRANTED.

After the trial judge issued his Ruling in this case, the Presiding Judge of the Fourth District re-assigned the case to another judge in response to Defendants' Motion to Disqualify. The basis for the re-assignment was that Judge Pullan, prior to becoming a judge, had ruled in favor of Lunt on an issue involving the subject property while acting as chair of the Heber City Planning Commission. Further, Lunt's sister testified both at the Planning Commission and at trial with regard to the property. (R. 771).

The evidence in each party's favor in this case was squarely controverted by the other side. The decision in the case therefore rested solely in the discretion and impressions of the trial judge. It is true that a trial judge typically has wide discretion in

deciding disputed issues of fact and the credibility of witnesses. But in this case, not only was the trial judge held to the more rigorous standard of clear and convincing evidence, he also carried an inherent liability: his ability to rule impartially in the case was subject to question due to his prior involvement with Plaintiff, and Plaintiff's property, while on the planning commission.

As detailed in Defendants' Motion to Disqualify, the issue before the planning commission was the rezoning of Plaintiff's property, the same property at issue in this case. (R. 760-761). The planning commission, chaired by Derek P. Pullan, granted the rezoning request and made the boundary of the rezoned area the same boundary that separates the rear (or earlier) section of the prescriptive easement granted in this case from the front (or later) section of the easement. (R. 766). The rezoning decision reserved the rear portion of the property for agricultural use, while granting the front portion new residential rights, thereby splitting the zoning map of Heber City along the line dividing the old easement from the new easement in this case. (R. 766). Because a primary issue in this case was the extent of the rear agricultural use of the property versus the front accessory apartment use of the property, the impartiality of the judge, who had previously faced similar issues regarding this same property, can reasonably be questioned.

The matter should be retried, not only to ensure that the clear and convincing standard is met, but also to guarantee the Lances right to a decision by a factfinder free from any preconceptions or involvement with the issues being tried. The Lances made

this previous request under Rule 59, Motion for New Trial, and/or Rule 60, Relief from Judgment or Order.

B. THE TRIAL COURT FAILED TO APPLY THE PROPER TEST TO DETERMINE THE USE, LOCATION, AND DIMENSIONS OF A PRESCRIPTIVE EASEMENT.

(1). A Prescriptive Easement is Measured and Limited by its Historic Use.

“The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period. See McBride v. McBride, 581 P.2d 996, 997 (Utah 1978). ‘The right cannot be enlarged to place a greater burden or servitude on the property.’ Nielson v. Sandberg, 105 Utah 93, 141 P.2d 696, 701 (1943); see also Harvey, 318 P.2d at 349.” Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah, 1998). Lunt’s evidence shows that until 1987, Lunt’s use of the lane was limited to occasional agricultural use to bring in cows and agricultural equipment. There is no evidence that Lunt made daily use of the lane. Lunt and his predecessors did not use the lane to gain vehicular access to a garage, carport or other area to park their vehicles, but instead only for moving cattle and farming implements. It was improper for the trial court to award Lunt a prescriptive easement for all purposes where Plaintiff never used the lane for any purpose other than occasional agricultural use.

The Easement Cannot be 20 Feet Wide.

The Trial Court properly found that the agricultural use had been abandoned such that the Lane was just an ordinary driveway. Based on its conclusion that the Lane had

been abandoned to be an ordinary driveway, the Trial Court established the width of the Lane at 20 feet wide based on the standard driveway width in the Heber City code. In establishing prescriptive easements, only the historical use of the property is relevant. Garth Lunt and Jack Lunt both testified that the historical purpose of the Lane was for moving cattle and farming machinery and hay. They also both testified that the gate they used to access their property from the Lane was only 10-12 feet wide. A prescriptive easement can be no wider than the width of its use. There is no testimony that can show that the Lunt's or their predecessors ever used more than 10 to 12 feet to bring machinery and hay to their barn across the Lane. The proper width of the easement, if one is indeed found to exist, can be no more than 12 feet.

There was No Evidence Establishing the Length of the Easement.

The Trial Court properly found that the agricultural use had been abandoned such that the Lane did not extend all the way to the location of the barn, which was approximately 240 feet from 6th West as testified by Plaintiff witnesses. Plaintiff further testified that a new gate had been put up by somebody that was approximately 150 feet from 6th West. The Trial Court ruled that the length of the easement would extend only to that new gate. This was error. There was no evidence given regarding when the gate had been moved or by whom. Unless it can be shown that the gate in its current location has been used for the requisite twenty years, it was improper to find the length of the easement at any amount. The only proper ruling would have been that the easement was entirely abandoned.

C. The Elements for Prescriptive Easement Were Not Met.

Use of the lane for daily vehicular traffic is an additional burden beyond the historic use of occasional access for agricultural use. “The extent of a prescriptive easement is measured and limited by the historic use of the dominant estate owner during the prescriptive period. McBride v. McBride, 581 P.2d 996, 997 (Utah 1978). The trial court, in requiring Appellee to keep his gates closed, limited Appellee’s use of the easement based on equity and not on Appellee’s historical use of the easement. To this extent the trial court’s ruling was improper as a matter of law.” Kunzler v. O’Dell, 855 P.2d 270, 275 (Utah App., 1993). “while the owner of the dominant estate may enjoy to the fullest extent the rights conferred by his easement, he may not alter its character so as to further burden or increase the restriction upon the servient estate.” Mcbride v. McBride, at 997. Daily vehicular traffic is clearly a different character of use of the Lane than the occasional driving of cattle and farm equipment. In Mcbride, the trial court concluded and the Supreme Court confirmed, that merely placing locks on pre-existing gates over a prescriptive easement was “clearly an interference with the privilege to which the owners of the easement were entitled since it made their use less convenient and beneficial than before” McBride at 998. “It is essential that the use should relate strictly to the identical way over which the right is claimed. A way imports a right of passing in a particular line, and not everywhere, over the land upon which the right may be claimed. This does not mean that a person using the right of way may not deviate at all from the traveled rut or track, to the extent, at least, that this may become necessary in a reasonable use of the right of way; but it does mean that the claimant may not abandon

one track or right of way and adopt another. In Kurtz v. Hoke, 172 Pa. 165, 33 Atl. 549, it is held that a variation of 20 feet from the traveled road is fatal to continuity of use.”

Lund v. Wilcox, 34 Utah 205, 97 P. 33, 35 (Utah 1908). 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 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). The agricultural use of the Lane had been abandoned.

The Lunt predecessors built a cinder block building on the property in approximately 1950 (R. 958 at 87-88). The doors to that building opened to the North. (R. 959 at 219 and Trial Exhibit No. 17). If Lunt was coming into the property on a regular basis from the South across the Lane, it would make no sense to put the doors to the building on the North side of the Building.

Any “prescriptive right would be limited by the nature and extent of use during the prescriptive period. Richardson v. Pond, 15 Gray, Mass., 387, Jones on Easements, Sec. 292. “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; Ryan v. Mississippi Valley S. I. R. Co., 62 Miss. 162; 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. 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). If Lunt had acquired an easement, it was only for the occasional use of the Lane for cattle and movement of farm equipment into the barn that used to stand on the property. The only historical use testified to by Lunt and the Lunt witnesses was for the occasional movement of cattle and farming equipment. Moneves Boren presented conflicting testimony, she indicated that she parked cars on the Lane but then said that she couldn’t get cars back there, then she indicated that a fence precluded the tenants’ from placing cars on the Lane. (R. 958 at 64, 109-110). Only after 1988, when Lunt rented out the accessory apartment, did the Lane begin being used as a driveway to access the accessory apartment. The 20 year time period for use of the Lane as a driveway has not run and the Trial Court’s finding of a prescriptive easement should be reversed.

D. THE EVIDENCE OF ACQUISITION OF A PRESCRIPTIVE EASEMENT IS NOT CLEAR AND CONVINCING.

In order to acquire a prescriptive easement against Defendants, Plaintiff must have used the land in question in an open and continuous manner for a period of twenty years. Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998). The evidence presented to satisfy these elements must be clear and convincing. Marchant v. Park City, 771 P.2d 677, 682

(Utah Ct. App. 1989). “[I]t is the duty of the appellate court in reviewing the evidence to determine, not whether the trier of facts could reasonably conclude that it is more probably that the fact to be proved exists than that it does not, ... but *whether the trier of facts could reasonably conclude that it is **highly probable** that the fact exists.*” State ex rel. Z.D., 98 P.3d 40 (Utah App. 2004), citing *Lovett v. Continental Bank & Trust Co.*, 286 P.2d 1065, 1068 (Utah 1955). An appellate court does not give factual determinations made by a trial judge the same amount of deference ... an appellate court does not, as a matter of course resolve all conflicts in favor of the appellee.” Alta Indus. v. Hurst, 846 P.2d 1282, 1284 (Utah 1993). Emphasis in original. The Trial Court’s factual conclusions, are therefore open for review.

(1). The Testimony of Plaintiff’s Witnesses that Plaintiff Used Defendants’ Land Was Not Clear and Convincing.

Plaintiff called four witnesses to testify in support of Plaintiff’s claim that Plaintiff used Defendants’ land to access Plaintiff’s property. Three of these witnesses were effectively parties with the Plaintiff, inasmuch as they were the trustee and the brother and sister of the trustee of the Plaintiff trust. These three witnesses therefore were self-interested and their testimony self-serving. Furthermore, the knowledge of these three witnesses concerning use of Defendants’ land was extremely limited, because they never lived, or else very briefly lived, at the location in question. Moreover, the only disinterested witness called by Plaintiff, Eldon Carlisle, acknowledged that an alternate route other than the alleged easement was used to access Plaintiff’s property.

Jack Lunt, brother of Garth Lunt, trustee of the Plaintiff trust, initially testified that the lane was used continuously by Plaintiff from 1951 to the present. (R. 958 at 43, 46-47). On cross-examination, however, Jack Lunt admitted that the only time he lived at the property was for one year in 1951. (R. 958 at 48; see also page at 13). After 1951, Jack Lunt lived in Nevada for four years, California for four years, and Bingham, Utah for three years. (R958 at 48). The Court's finding that "Garth Lunt joined his brother" Jack at the home in 1954 therefore is not supported by the evidence. Jack Lunt also testified that Plaintiff's cattle permit was sold in the 1960s (R. 958 at 13), and that the lane was never used by Plaintiff for cattle purposes after the cattle permit was sold. (R. 958 at 43). Finally, Jack Lunt testified that he did not know about the uses of the property prior to 1951. (R. 958 at 13-14). Thus, even though Jack Lunt testified that the lane was used for many decades by Plaintiff, the actual details of his testimony are not clear and convincing in this regard. Jack Lunt testified that he saw the Lane but he does not testify that he continued to use the Lane.

Plaintiff's next witness was Moneves Boren. Ms. Boren lived at the property for only two years, in 1948 and 1949. (R. 958 at 60). Ms. Boren, like Jack Lunt, testified in general terms that the lane was used continuously by Plaintiff from 1948 to the present. (R. 958 at 64). On closer examination, however, this assertion is not well-supported by the details of the testimony of Ms. Boren and others. Ms. Boren testified that she did not work on the farm at the property in question. (R. 958 at 61). She did testify that she helped milk the cows (R. 958 at 61), but she also testified that she did not use the lane in the milking of the cows. (R. 958 at 90). Furthermore, Ms. Boren testified in her

deposition that at some point she used the northerly entrance on 600 West to access the property instead of the lane, a fact which is corroborated by Exhibit 43, an aerial photograph showing a road entering the property north of the McNaughten house. See Trial Exhibit 43. Finally, although Ms. Boren testified that the McNaughtens parked cars on the lane when the house was first constructed in 1948 (R. 958 at 64), she testified in that when the house was first constructed, there was no garage and the apartment wasn't built until approximately 1985. (R. 958 at 63, 91). Without the garage and apartment next to the property line, the parked cars would not have been occupying the lane, but instead would have been parked on the McNaughten's own property. For all of these reasons, Ms. Boren's testimony as to the required open, adverse and continuous use of the lane was not clear and convincing.

Plaintiff's third witness was Eldon Carlisle. Mr. Carlisle was Plaintiff's only witness who was not a relative of the trustee of the Lunt trust. Mr. Carlisle testified that the Lunt's predecessors (his parents) used the lane (R. 958 at 117-118), but he also testified that there was a separate gate on the Lunt property that cows may have been brought through as well. (R. 958 at 124-125). Most importantly, Mr. Carlisle's testimony was directly contradicted by two disinterested witnesses of Defendant, Duane Smith and Frankie Housel. For these reasons, Mr. Carlisle's testimony as to the existence of the easement was not clear and convincing.

Plaintiff's final witness was Garth Lunt, trustee and beneficiary of the Plaintiff trust. Garth Lunt testified that the only time he lived at the house was to help out during the summers of 1945 to 1950 with haying. (R. 958 at 133). Beginning in 1950, he was

away in the military. (R. 958 at 137). From 1954, when he returned from the service, until 1957, he lived in Salt Lake and would visit the property periodically. In 1957, he moved to California where he has lived to this day. (R. 958 at 137).

The above-described testimony offered by Plaintiff does not rise to the level of clear and convincing evidence sufficient to establish a prescriptive easement. All of Plaintiff's witnesses except Eldon Carlisle were interested witnesses. None of the witnesses lived at the property for more than two years out of the more than 60 years in question. The witnesses admitted that another more central access to the property existed. None of the witnesses had credible firsthand knowledge of the alleged continuous twenty-year use of the lane by the McNaughtens. Further, Garth Lunt (R. 958 at 135, 139, 170, 184), Jack Lunt (R. 958 at 28, 31, 40), and Moneves Boren (R. 958 at 64, 65, 67) had each visited the property on the day before trial for the purpose of making measurements. They each testified to the length of the Lane based on where they remembered the location of a gate to be. The gate is no longer there, but according to Garth Lunt was "moved up" by "somebody." (R. 958 at 148). All testimony with regard to measurements is unreliable, having not been based on historical use. Further, there was no agreement with regard to when the Lunt barn was built, Jack Lunt testified that he helped build it, after he returned from the service in 1951. Moneves Boren testified that she milked cows in it in 1948 and 1949. Frankie Housel testified that there was no barn in 1957. Plaintiffs' testimony is conflicting on key issues, not clear and convincing.

(2). The Lances' Witnesses Presented Controverting and Expert Testimony Which Prevents Plaintiff's Evidence from Meeting the Clear and Convincing Standard.

Where fact testimony and expert testimony conflict, it is probable that the clear and convincing standard has not been met. For example, in State ex rel Z.D., this Court stated "Because the explanations as to the cause of the injury provided by the parents [was] inconsistent with the medical testimony ... we cannot say that given the evidence presented, the trier of facts could reasonably conclude that it [was] highly probable that the fracture was the result of non accidental trauma." 98 P.3d 40, 46 (Utah App. 2004). Similar to the present case, Defendants introduced numerous aerial photographs showing that the McNaughtens and their heirs accessed their property from 600 West a few hundred feet north of the lane. Frank Pia, an expert photogrammatrist, testified that this northerly access was well-used and worn. (R. 959 at 299-308). The fact that Lunt's predecessor accessed the rear of the property from a separate way shows that the area of the prescriptive easement was no longer in use.

Defendants' witnesses were at least as credible as Plaintiff's witnesses, and arguably more so. At the very least, the disputed questions of fact raised by the testimony of Defendants' witnesses precludes Plaintiff's case from rising to the level of clear and convincing evidence.

Duane Smith testified that he has lived in Heber City all his life. (R. 959 at 247). He worked for the McNaughtens (the Lunt predecessors) in the 1930s and 1940s and would take cows and horses back and forth from the subject property for them. (R. 959 at 248, 255). He testified that he never used the lane for moving livestock. (R. 959 at

248). Instead, he used a gate on 600 West located north of the location of the McNaughten house to take the cows and horses to and from the property. (R. 959 at 251-252). He never saw the McNaughtens run livestock or drive machinery on the Lane. (R. 959 at 250, 255). This is a direct contradiction to the testimony of the Lunt family members during the time period in question.

Frankie Housel is a granddaughter of Frank Witt (the Lances' predecessor in interest), who owned the property south of the McNaughtens (Lunt's predecessor). (R. 959 at 263-264). She stayed with her grandparents at the property every weekend from 1945 to 1957. (R. 959 at 264). She testified that she never saw the McNaughtens drive cattle or equipment on the lane. (R. 959 at 269). She also testified that she used the lane to walk to go swimming and that there was no gate anywhere on the fence between the Witt and McNaughten properties that exited to the north to the McNaughten property. (R. 959 at 278). This is a direct contradiction to the testimony of

Finally, the trial judge cited Eldon Carlisle's testimony as particularly credible. See Ruling (R. 843-846). Mr. Carlisle's testimony, however, raises numerous unanswered questions. Mr. Carlisle testified that in 1930 through 1950, a fence bordered the lane approximately three or four feet from the Lunt house. (R. 959 at 121). But testimony by Moneves Boren established that when the house was constructed in 1948, the garage or carport was not in existence. (R. 958 at 91). If the fence adjoining the lane used by the McNaughtons was only three or four feet from the house, then the land used as the lane was not the easement area in question, but instead was the McNaughtons' own driveway on their own property. This most likely was the reason Frankie Witt Housel

testified, in contradiction to Mr. Carlisle, that she never saw the McNaughtons use her Grandfather Witt's lane. The McNaughtons, then, were most probably using land on their own property for their access.

In a traditional preponderance-of-the-evidence case, the trial judge may have had the discretion to side with Plaintiff's witnesses rather than Defendants' witnesses on the above-described evidentiary record. In a case such as this requiring clear and convincing evidence, however, the weaknesses of Plaintiff's evidence, especially when combined with the controverting testimony of Defendant's witnesses, preclude a finding that Plaintiff proved the existence of a prescriptive easement by clear and convincing evidence.

E. GIVEN THE CLOSENESS OF THIS CASE, THE TRIAL JUDGE'S DECISION IN FAVOR OF PLAINTIFF WHILE CHAIRING THE HEBER CITY PLANNING COMMISSION WARRANTS A NEW TRIAL.

In State v. Neeley, 748 P.2d 1091 (Utah), cert. denied, 487 U.S. 1220, 108 S.Ct. 2876, 101 L.Ed.2d 911 (1988), "the Utah Supreme Court set out the standard for whether a trial judge's failure to recuse himself or herself constitutes reversible error. In Neeley, the court stated that, under the Utah Code of Judicial Conduct, 'a judge should recuse himself when his 'impartiality' might reasonably be questioned.'" Id. at 1094. A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has personal knowledge of disputed evidentiary facts concerning the proceeding. Utah Code of Judicial Conduct, Canon 3(E)(1). "Scholars discussing this principle have described it as

the “reasonable person” test. This test ‘look[s] to see whether a reasonable person, knowing all the circumstances, would believe that the judge's impartiality could be questioned.” West Jordan City v. Goodman, 135 P.3d 874, 880 (Utah,2006). “[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.

There is a reasonable likelihood that absent Judge Pullan’s bias, the result would have been very different for the Lances. The nature of this litigation and the nature of the approval granted by the Planning Commission on which Judge Pullan sat in 1998, both dealt with similar issues involving the use of the Lunt property.

First, the property that was rezoned by the Planning Commission chaired by Judge Pullan in 1998 is the same property that is at issue in the current litigation before this court. (R. 762-773) Heber City Zoning Map showing front portion of the property in the R-2 Zone and rear portion of the property in the RA-2 Zone)).

Second, the property was owned in 1998 by the same party who owned it at the time of trial, Garth Lunt. R. 958 at131). Therefore, the landowner/applicant in whose favor the 1998 Planning Commission ruled is the same landowner/applicant who is now asking this court to grant an easement to access the rear of the subject property.

Third, Garth Lunt, the property owner, and Moneves Boren, the agent who appeared on behalf of Mr. Lunt at the Planning Commission meetings chaired by Judge Pullan, were the primary witnesses relied upon by Plaintiff at trial in this case. Furthermore, Ms. Boren is the sister of Mr. Lunt. (R. 958 at 60, 131).

Fourth, the Planning Commission ruled in Mr. Lunt's and Ms. Boren's favor. (R. 766, Planning Commission Minutes, September 24, 1998).

Each of the above facts calls into question the bias of Judge Pullan to rule in favor of Lunt in the instant case. Judge Pullan chaired the Planning Commission when the Planning Commission granted a favorable ruling to the identical parties involved in this case on a matter concerning the identical property involved in this case.

Fifth, Ms. Boren explained to the Planning Commission that she was seeking the zone change for only the front portion of the property so that she could continue using the rear portion of the property for agricultural purposes. (R. 771-772, Planning Commission Minutes, August 27, 1998). The use of the rear portion of the property for agricultural purposes, and the actual dates of that use, were two of the most hotly-contested issues at trial. Furthermore, the approximately 160-foot distance to the gate on the property, which gate was allegedly used by Plaintiff to access the rear portion for agricultural purposes and which distance was specifically mentioned by Ms. Boren at the Planning Commission meeting, is approximately the same distance which Judge Pullan used in his ruling to delineate the prescriptive easement, and is an issue still in dispute in this appeal to define the length of the easement. Judge Pullan therefore had "personal knowledge of disputed evidentiary facts concerning the proceeding" and therefore his "impartiality

might reasonably be questioned.” Utah Code of Judicial Conduct, Canon 3(E)(1). Judge Taylor agreed that the Lances had established “the appearance of partiality” and ordered Judge Schofield to hear the remaining issues. (R. 839, 842).

If it was necessary to appoint a separate judge for the remaining issues, it should be necessary to appoint a new judge for a new trial because under the circumstances it is reasonably likely that the result would have been more favorable to the Lances if the trial judge would have had no previous experience with the parties and property.

Sixth, Judge Pullan indicated to the parties at trial that he believed he may have had some prior involvement with this matter as Wasatch County Attorney prior to taking the bench. (R. 958 at 58). After consultation, the parties, including Defendants, then waived any objection. (R. 958 at 59). Judge Pullan failed, however, to indicate the full or correct nature of his prior involvement with the matter, namely, his service on the Planning Commission before which Ms. Boren appeared. If Defendants had known of this particular involvement by Judge Pullan, they would have asked him at that time to disqualify himself. (R.792-795 Affidavit of Diana Lance).

In summary, the facts that (1) these parties and this property appeared before the Planning Commission on which Judge Pullan sat and received a favorable ruling, and (2) the zone change request before the Planning Commission contained evidence of facts at issue in the instant trial, taken separately or together, warrant a finding that Judge Pullan’s impartiality in this matter was reasonably be questioned under Canon 3. Judge Taylor agreed that it was reasonable to question Judge Pullan’s impartiality. However, it should have been ordered at that time to grant a new trial on the basis of said impartiality

and the actual bias experienced by the Lances. The overlap between the zoning issues before Judge Pullan and the litigation is poignant: 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 no 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, the findings should be reversed and a new trial granted.

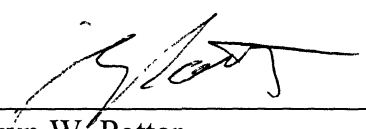
CONCLUSION

The judgment is inconsistent with the current case law regarding the establishment of a prescriptive easement. The scope and dimensions of the easement found by the Trial Court were erroneous. The evidence before the Trial Court regarding the establishment of a prescriptive easement was not clear and convincing.

WHEREFORE, Harold and Diana Lance pray 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.

DATED this 12th day of June, 2007.

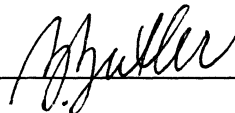
TESCH LAW OFFICES, P.C.


Shawn W. Potter
Attorneys for the Lances

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of the Appellants Harold and Diane Lance, to be sent by United States Mail, postage prepaid, on this 12th day of June, 2007, as follows:

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



ADDENDUM

EXHIBIT A

RECEIVED
MAY 11 2006

TESCH LAW OFFICES P.C.

FILED
Fourth Judicial District Court
Wasatch County State of Utah

G. J. Oke 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.

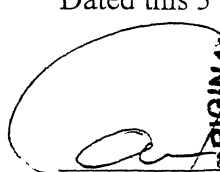

The unusual dilemma presented by this motion is that it does not seek to merely conclude the prospective involvement of Judge Pullan, the moving party seeks a determination that a trial already concluded was tainted and should be set aside. No specific references to the trial, written ruling or subsequent 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 3rd day of May, 2006

 ORIGINAL IN RED INK


Judge James R. Taylor
Fourth Judicial District
Salt Lake County, Utah

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.

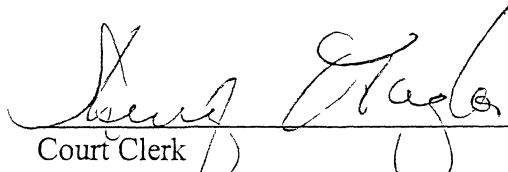

Court Clerk

EXHIBIT B

FILED
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.

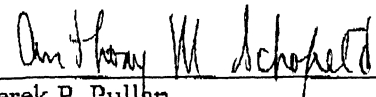
4. Whereas this is an easement that is confirmed in the Plaintiff, Plaintiff is entitled to use the easement as any party would normally use a driveway. Defendants shall not block access to the easement and shall remove forthwith any materials blocking or obstructing the easement.

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


☒ [X] mailed postage prepaid

☐ [] faxed to No. _____

☐ [] hand delivered

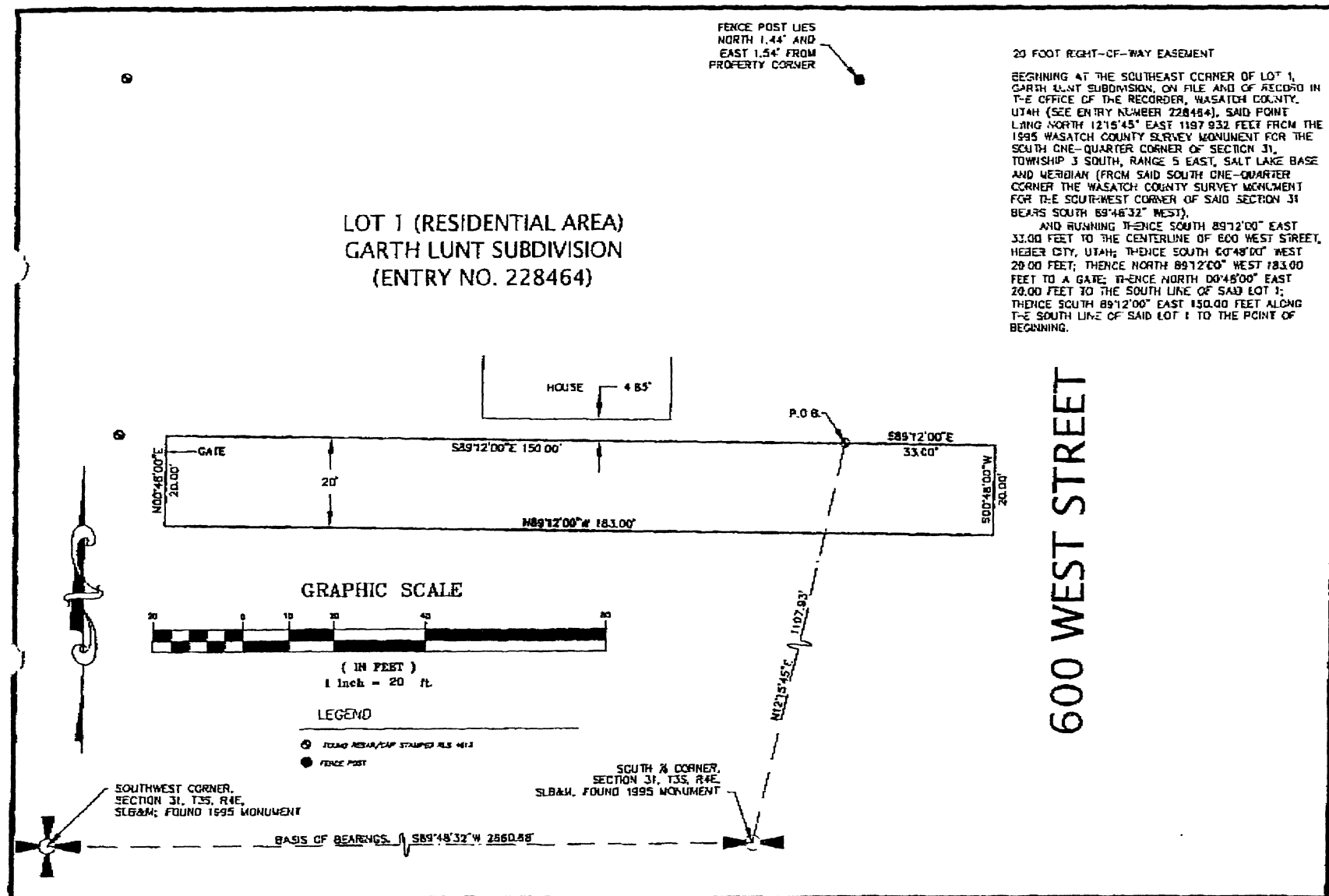
to:

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

A handwritten signature in black ink, appearing to read 'Kraig J. Powell', written over a horizontal line.

M:\1-B&P - Client Files\Lunt, Gardi - 5265.00\5265.01 - Lance\Pleadings\order 20 easement fnl.lunt.wpd

Exhibit A



33 WEST CENTER ST
PO BOX 178
HEARST CITY, UT 84037
PHONE: 435.654.9228
FAX: 435.654.9231
www.burrenllap.com

Summit
Engineering
Group, Inc.

DIANA LANCE

RIGHT-OF-WAY MAP

Q (ENT):

DATE

FILE NO.

L04-153

facsimile
TRANSMITTAL

Name: Kraig Powell

Fax: 435-654-1554

From: Jenny

Date: 5/23/04

Pages: 4

Comments:

**Fourth District Court
Phone 429-1000
Fax 429-1160
125 N 100 W
Provo UT 84604**

EXHIBIT C

RECEIVED
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.

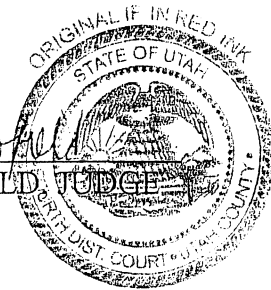
Conclusion

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 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 J. Christensen
Deputy Clerk