

2007

# Garth Lunt v. Harold Lance and Diane Lance : Brief of Appellee

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

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

Plaintiff/Appellee/Cross Appellant

v.

HAROLD LANCE and DIANA LANCE,

Defendants/Appellants

**BRIEFS OF APPELLEE AND CROSS-  
APPELLANT MR. GARTH LUNT**

Civil No. 020500612

Appellate No. 20070014-CA

APPEAL AND CROSS APPEAL FROM JUDGMENT OF  
THE FOURTH DISTRICT COURT, WASATCH COUNTY,  
THE HONORABLE DEREK PULLAN

Shawn W. Potter

Kraig J. Powell

**TESCH LAW OFFICES**

314 Main St. Ste 200

P.O. Box 3390

Park City, Utah 84060-3390

*Attorneys for Defendant-Appellant*

Randy B. Birch

Corey S. Zachman

**BOSTWICK & PRICE, P.C.**

139 E. South Temple, #320

Salt Lake City, UT 84111

*Attorneys for Plaintiff/Cross-Appellant*

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UTAH APPELLATE COURTS

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Shawn W. Potter  
Kraig J. Powell  
**TESCH LAW OFFICES**  
314 Main St. Ste 200  
P.O. Box 3390  
Park City, Utah 84060-3390  
*Attorneys for Defendant-Appellant*

Randy B. Birch  
Corey S. Zachman  
**BOSTWICK & PRICE, P.C.**  
139 E. South Temple, #320  
Salt Lake City, UT 84111  
*Attorneys for Plaintiff/Cross-Appellant*

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this appeal and cross-appeal from the final order in *Lunt v. Lance*, Civil No. 020500612 dated May 11, 2006 pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure and Utah Code section 78-2a-3(2).

## **STATEMENT OF ISSUES ON CROSS-APPEAL**

1. Did the trial court error by ruling sua sponte on the issue of abandonment despite the fact that the issue was not raised by either party or tried before the court?
2. Did the trial court error by limiting the prescriptive easement to twenty feet in width when its findings of fact specifically state the width of the Lane is 34 feet across and when it limited the length of the Lane to 180 feet when the testimony of the parties indicated the length of the Lane was between 235 and 247 feet.

## **STANDARDS OF REVIEW**

### **I. Issues on Appeal:**

Issue 1: Whether Judge Schofield erred by not granting a new trial because of alleged bias by the trial judge is an issue Utah appellate courts review only for abuse of discretion. *State v. Loose*, 2000 UT 11, ¶ 8 (Utah 2000) (we review decision to grant or deny motion for new trial only for abuse of discretion).

Issue 2: The question of whether the elements of a prescriptive easement were met by clear and convincing evidence is a highly fact-intensive issue for which trial courts are granted broad discretion. An appellate court will overturn the trial courts findings only if

there is an abuse of this broad discretion. *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998).

Issue 3: A trial court is given broad discretion in making factual findings based on the witness testimony. As such, these findings will only be reversed if they are found to be “clearly erroneous.” *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 49 (Utah 2004).

## **II. Issues on Cross-Appeal:**

Issue 1: The issues of whether the trial court erred when it ruled on the issue of abandonment and if its application of abandonment was correct are questions of law, which are reviewed for correctness. *Green River Canal Co. v. Olds (In re Gen. Determination of Rights to the Use of Water)*, 2004 UT 106 ¶ 16 (UT 2004).

Issue 2: The issue of limiting an easement is a question of the scope of the easement, a finding of fact for which great deference is given to the trial court in its findings. *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978). Therefore, a trial court will be overturned only if it exceeds its broad discretion. *Id.*

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## STATEMENT OF THE CASE

1. In 2002, Garth Lunt, Trustee (“Mr. Lunt”) brought suit against Harold and Diane Lance (“the Lances”), in the Fourth District Court. The Lances countersued asserting numerous causes of action. The only issues remaining at trial were claims for boundary by acquiescence and prescriptive easement. (R. at 621).

2. These two issues were heard by the Fourth Judicial District Court Wasatch County, State of Utah during bench trial held on November 1-2, 2005. (R. at 729-730). The Trial Court found that Mr. Lunt established a prescriptive easement by clear and convincing evidence. (R. at 729-30.) The boundary by acquiescence claims were dismissed. *Id.*

3. On March 24, 2006, nearly five (5) months after the trial, the Lances filed a Motion and Affidavit for a Rule 63(b) Removal of Judge. (R. at 791). On the first day of trial, Judge Pullan noted that he was consulted about a boundary line issue in his capacity as the County Attorney and that he had no recollection with whom he’d spoken. (R. at 841.) Both parties “made an affirmative determination at that time that they had no concerns about a possible conflict of interest.” *Id.* Through subsequent research, the Lances discovered that the property came before the Heber City Planning Commission for a requested zone change and that Judge Pullan was the acting chair of the commission that recommended a zone change requested by Moneves Boren. *Id.* Ms. Boren subsequently testified as a witness during the bench trial. *Id.* Judge Taylor ruled that

Rule 63 was not appropriate and declined to set aside the Judge Pullan's ruling or the trial, but provided that Judge Schofield should handle further proceedings as necessary in order to avoid the appearance of impropriety. (*Id.* at 839-40).

4. On May 25, 2006, the Lances moved for new trial or in the alternative to amend judgment or take additional testimony based on Rule 59 and Rule 60, Utah Rules of Civil Procedure. (R. at 892). Judge Schofield denied the motion under Rule 59 stating that Judge Pullan had the responsibility to "judge the credibility of competing witness testimony" and then make decisions. (R. at 932). Judge Schofield further determined that Judge Pullan's involvement with the planning commission "did not create a bias or prejudice which justifies a new trial in this matter." *Id.* Judge Schofield further denied relief to the Lances under Rule 60(b) for failing "to state a reason that justifies relief" and ruling that the Lances' "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." *Id.*

5. The final judgment which established a prescriptive easement and denied the boundary by acquiescence was signed by the Court on May 11, 2006. (R. 846-843).

6. On January 8, 2007, the Lances filed their Amended Notice of Appeal from the judgment and orders entered by the Court on May 11, 2006. (R. 946).

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### STATEMENT OF RELEVANT FACTS

1. Mr. Garth Lunt (Mr. Lunt) owns property at 205 North 600 West. (R. 958 at 131).
2. Mr. Lunt is successor in interest to Lincoln McNaughten and his family (the “McNaughtens”). Lincoln McNaughten was the step-father of Jack Lunt, Monaves Boren, and Garth Lunt (trustee of the Plaintiff trust). (R. 958 at 131-132).
3. The Lances own the property immediately south of the Mr. Lunt’s property. They acquired it in 1991. (R. 959 at 205).
4. The Lances are successors in interest to Frank Witt and his Family (“the Witts”). (R. 958).
5. Between these two properties is the Lane which gives rise to this dispute. (R. 958).
6. Mr. Eldon Carlisle testified that in the 1920's and 1930's, the McNaughtens, used the Lane to drive their cattle to and access their back acreage. Mr. Carlisle testified that he helped the McNaughten’s run cows down the Lane during the 1930's. R. 958 at 126-127.
7. Mr. Carlisle testified that the Lane was used as a driveway as early as the late 1920's. (R. 958 at 127).
8. Mr. Carlisle testified that after he returned from military service in 1946,

the McNaughtens continued to run cattle down the Lane as they had previously. He recalled seeing the McNaughtens use the Lane in this manner through the 1950's and up until the early 1990's. (R. 958 at 119, 128).

9. Mr. Carlisle testified that neither the Witts nor the McNaughtens ever objected to the use of the Lane by the other. (R. 958 at 118, 121).

10. The Lances' witness Mr. Duane C. Smith, who testified he drove cattle for the McNaughtens as a child in the late 1930's and worked for them during the 1940's stated he never took the McNaughten's cows down the Lane. (R. 959 at 248).

11. The Lances' witness Mr. Duane Smith testified that at one time the Lunts used a different access to their property other than just the Lane. (R. 959 at 253).

12. After weighing the testimony, the trial court found that "Mr. Eldon Carlisle's testimony concerning use of the Lane from the 1930's to the 1950's was particularly credible." (R. 728).

13. Ms. Monaves Boren testified that from the late 1940's the Lane was used by her parents, the McNaughtens, to park cars and move cows and equipment up and down the Lane. (R. 958 at 64).

14. From 1950 to 1955 Ms. Boren assisted her parents in milking and driving the cows and harvesting hay. (R. 958 at 62). Both families continued to use the Lane and park their cars on the Lane throughout that time. Ms. Boren also testified that use of the

Lane to put cattle in the rear pastures of the Lunt property has not stopped to her knowledge. (R. 958 at 64).

15. Jack Lunt testified that the McNaughtens and Witts used the Lane without permission from each other, to move equipment, mowing machines, and delivery rakes to and from the rear acreage of the property. (R. 958 at 14).

16. Jack Lunt also testified that the McNaughtens and Lunts moved cattle back and forth on the Lane and took bob sleighs and wagons down the Lane. (R. 958 at 30).

17. The Lances' witness, Ms. Frankie Housel testified that the Lane was used as a driveway to the Witt's property. (R. 959 at 264).

18. Garth Lunt testified that the Lane had existed "forever, as far as [he] knew." (R. 958 at 134). He testified that after 1954, he observed the Lane being used by the Witt's and himself for hauling hay to their respective barns, moving farm equipment, moving cattle, and recalls the Lane was used for these and other ingress/egress purposes. (R. 958 at 138). He testified that these uses were made of the property until the early 1990's. *Id.*

19. Mr. Garth Lunt testified that the Lane provided agricultural and residential access the McNaughten's, and subsequently Mr. Lunt's property and was mutually used by the Witts, McNaughtens, and Mr. Lunt and his siblings to access the property through at least the 1990's. (R. 958 at 68-70).

20. Sometime in the mid to late 1980's, Mr. Lunt began leasing the McNaughten home and accessory apartment to tenants. From that time to the present, the tenants leasing the property have continually used the Lane as a driveway to access the back apartment. (R. 958 at 91, 182-183). Mr. Lunt also testified that the Lane has been used to put cattle on the back property "to this day." (R. 958 at 182).

21. Ms. Boren testified the Lane was 35 feet in width. (R. 958 at 66).

22. Mr. Garth Lunt testified the Lane was 34 to 35 feet in width.  
(R. 958 at 135-136).

23. The Lances' witness Mr. Duane Smith testified the Lane was about 40 feet in width. (R. 959 at 258).

24. The Lances' witness, Ms. Frankie Housel (the Witt's granddaughter), who did not physically measure the Lane testified the length of the Lane was approximately 200 feet from the grainery, which was located a distance up the Lane next to the Witt home. (R. 959 at 264-267).

25. According to Lance's witness Frank Pia, who did not physically measure the easement, it appeared to him from photographs that the length of the Lane was approximately 150-175 feet. (R. 959 at 322).

26. According to Lances' witness Duane Smith, who was basing the length of the Lane from his memory, the length of the easement was approximately 150-200 feet from 6<sup>th</sup> West to the barn. (R. 959 at 258).

27. Ms. Boren testified that she personally measured the Lane and the length of the Lane was approximately **235** feet from the edge of the asphalt on 6th West to the end of the Lane where the McNaughtens and the Lunts accessed the rear acreage of their property. (R. 958 at 67-68).

28. Jack Lunt testified that he personally measured the Lane and the length of the Lane was approximately **247** feet from the road back to the barn and access to the rear acreage of the property. (R. 958 at 29).

29. Garth Lunt testified that a fence ran alongside the Lane and a 10 foot gate at the end of the fence allowed them to enter the Lunt barn and property. He testified that the Lane terminated at the old Witt barn at the end of the Lane. (R. 958 at 136, 186.)

30. Garth Lunt testified that he personally measured the Lane from the road to the end of the Lane and the length of the Lane equaled **247** feet (160 ft+15 ft+62 ft+10 ft). (R. 958 at 185-186).

### **SUMMARY OF THE ARGUMENTS**

#### **I. Summary of Arguments In Response to Appeal**

The Lances allegations of perceived bias are insufficient to warrant a new trial in this case. Judge Pullan's involvement as vice-chair of the Heber City Planning Commission prior to admittance to the bench is by itself not evidence of actual prejudice and thus demonstrative of bias sufficient for a new trial. *See State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998). The Lances fail to demonstrate that Judge Pullan took any

“extreme” actions or exhibited a “deep-seated antagonism” toward them, and therefore fail to allege bias sufficient to warrant a new trial. *See State Interest of M.L.*, 965 P.2d 551, 556 (Utah Ct.App. 1998).

The trial courts finding that Mr. Lunt holds a prescriptive easement cannot be overturned. Trial courts are granted broad discretion to in easement cases because they are fact intensive decisions and trial courts are in the best decision to hear, weigh, and determine whether testimony is clear and convincing. *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). They can only be overturned if they exceed this broad discretion. *Id.* The trial court did not exceed its broad discretion in this case. The testimony of the witnesses was clear and convincing that Mr. Lunt and his predecessors openly, notoriously, and adversely used the Lane for more than twenty years. *Marchant v. Park City*, 788 P.2d 520, 524 (Utah 1990). The Lances fail to marshal evidence that proves otherwise. *See Hogle v. Zinetics Med., Inc.*, 2002 UT 121, ¶ 16 (Utah 2002).

## **II. Summary of Arguments on Cross-Appeal**

The trial court erred by ruling on the issue of abandonment when that issue was not raised or tried before the court. In *Combe v. Warren’s Family Drive-Inns Inc.*, the Supreme Court precludes trial court’s from “granting of relief on issues neither raised nor tried.” 680 P.2d 733, 735 (Utah 1984). In this case, the issue of abandonment was not raised in the pleadings or the trial court, the Lances failed to raise the issue, and the Mr.

Lunt did not have sufficient notice for the trial court to rule on this issue. *See Cowley v. Porter*, 2005 UT App 518 (UT Ct.App. 2005).

Even if this Court were to find the trial court was within its authority to rule on the issue of abandonment, the elements of abandonment were not met. While an easement may be abandoned in Utah, *Western Gateway Storage Co. v. Treseder*, 567 P.2d 181, 182 (Utah 1977), an intent to abandon and actual abandonment of an easement must be demonstrated by clear, convincing, and unequivocal evidence for the trial court to declare an easement abandoned. *State v. Rynhart*, 2005 UT 84 ¶ 14 (Utah 2005) (citing *Linscomb v. Goodyear Tire & Rubber*, 199 F.2d 431, 435 (8th Cir. 1952)); *see also Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 753 (UT App. 1988). The Lances failed to raise, let alone prove by clear, convincing, and unequivocal evidence that Mr. Lunt (1) demonstrated an intent to abandon his easement in the Lane; and (2) actually abandoned the Lane.

**ARGUMENT**  
**(RESPONSE TO APPELLANT'S BRIEF)**

The Lances appeal three issues: (1) The denial of their motion for a new trial based on grounds that the trial judge was not impartial because he acted as chair of the Heber City Planning Commission when the commission changed the zoning on the subject property in 1998; (2) the trial court did not apply the proper test for prescriptive easements; and (3) the Lances' witnesses were more credible than the Plaintiff Mr. Lunt's

and therefore the trial court's decision that Mr. Lunt's witnesses established an easement by clear and convincing evidence was wrong.

The trial judge was an impartial finder of facts in this case. Near the beginning of trial, Judge Pullan raised the issue of his recollection of prior experience with the property with the Lances and Mr. Lunt. Neither party objected to his continued presence on the case or sought to disqualify him at that time. In regards to the second issue, the record supports the trial court's finding that a prescriptive easement existed by clear and convincing evidence. Finally, in response to the last issue, a trial judge is granted broad discretion in determining the credibility of witnesses. Simply because the Lances disagree with the trial court's determination of credibility does not make Lunt's witnesses less credible or the findings of fact less clear and convincing.

Mr. Lunt on cross-appeal also requests review of the trial court's finding of abandonment and of the final length and width of the prescriptive easement ordered by the trial court.

**I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANTS MOTION FOR A NEW TRIAL AND TO DISQUALIFY JUDGE PULLAN.**

The Utah Supreme Court will not find a trial court has abused its discretion and grant a new trial based on allegations of perceived bias alone. *See Edgell v. Canning*, 1999 UT 21, ¶ 12 (Utah 1999). In Utah, judges are presumed to be qualified. *In re Affidavit of Bias*, 947 P.2d 1152, 1153 (Utah 1997) (citing 46 Am.Jur.2d Judges § 218



(1994)). They also are not required to hear a case with no existing personal biases or opinions. As stated by the Utah Supreme Court, “[a]lthough litigants are entitled to a judge who will hear both sides and decide an issue on the merits of the law and the evidence presented, they are not entitled to a judge whose mind is a clean slate.” *Madsen v. Prudential Fed. Sav. & Loan*, 767 P.2d 538, 542 (Utah 1988). In other words, it is neither possible nor recommended for a judge leave a “lifetime of experiences” and the opinions and attitudes generated therefrom in his or her chambers before taking the bench. *Id.* at 546.

One party’s alleged bias by the trial court cannot be based solely on the fact that a judge has issued prior rulings adverse to the party making the allegation. *See In re Affidavit of Bias*, 947 P.2d at 1154 (stating “no deduction of bias and prejudice may be made from adverse rulings by a judge.”) (quoting 46 Am.Jur.2d Judges § 219 (1994)). Instead, such bias can be shown to exist only if “apart from [the judge’s] analysis of the issues of fact or law [in those prior proceedings], he had such a bias in favor of one party or prejudice against the other that he could not fairly and impartially determine the issues.” *See State Interest of M.L.*, 965 P.2d 551, 556 (Utah Ct.App. 1998)(quoting *Poulsen v. Frear*, 946 P.2d 738, 742 (Utah Ct.App. 1997). Indeed, for assertions of bias to meet the standard warranting a new trial, the asserting party must demonstrate that the judge demonstrated “extreme” actions and a “deep-seated antagonism” against them in the prior proceedings such that he or she cannot “fairly and impartially determine the

issues. *Id.* The Supreme Court held in the *Edgell v. Canning* case, a case with a similar fact pattern, that error based on the trial court's perceived bias will not be presumed. *Edgell v. Canning*, 1999 UT 21, ¶ 12 (Utah 1999).

Finally, it is a well-recognized rule that an application for the disqualification of a trial judge must be filed at the earliest opportunity. *Madsen*, 756 P.2d at 543. Therefore, when a trial judge discloses personal experience with or participation in previous proceedings involving the parties, any affected party, if they so desire, should immediately object to continuing the proceedings, or at the very least ask for a continuance to consider disqualification. *Id.*

**A. The Lances' Allegations Fail to Demonstrate Facts that Any Bias or Actual Prejudice Was Shown. In Addition, the Lances Made No Objection To Judge Pullan Staying on the Case.**

The Lances' allegations of bias are based solely on a previous decision made by the Heber City Planning Commission that affected the zoning on the subject property. Judge Pullan was a member of this commission prior to being admitted to the bench. However, prior experience with the subject property as the acting chair of a seven-member planning commission is insufficient for the Lances' allegations of bias to warrant a new trial. The zoning decision was made on September 24, 1998 and does not demonstrate any hint of bias. R. 767. The minutes of the meeting reveal that Monaves Moren requested to change the zoning on the property from RA-2 to R-2 zoning. R. 766. No one attended to speak against her request. *Id.* Commission member Harry Zane made

a motion to approve the zone change, the motion was seconded by Sherman Christen, another Commission member, and the motion carried unanimously. *Id.* The fact that Judge Pullan was a member of this seven-member committee before he was even admitted to the bench does not demonstrate any bias toward the Lances.

The Lances have not alleged or raised any facts to demonstrate that Judge Pullan engaged in any “extreme” actions or demonstrated “deep-seated antagonism” toward them in this previous interaction. *See State Interest of M.L.*, 965 P.2d at 556 (Utah Ct.App. 1998). To the contrary, the only allegation maintained by the Lances is that Judge Pullan was acting chairman<sup>1</sup> of the commission that made a zoning decision regarding the property. The Lances cite to *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998) in support of the proposition that appearance of bias may be grounds for reversal if actual prejudice is shown.” However, as previously stated, the Lances fail to allege actual prejudice. Mere involvement on a seven-member planning commission eight years prior to trial is not actual prejudice. They have presented no evidence of bias. On its own, this involvement fails to demonstrate the seven-member commission’s unanimous decision creates some sort of judicial bias in the underlying dispute.

In addition, no objection was raised by the Lances when informed of this prior experience. When Judge Pullan, on his own accord, noted to the parties that he recalled

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<sup>1</sup> Judge Pullan was the vice-chairman of the commission. He conducted the vote in this case because the Chairman did not arrive until a few minutes after the vote had been taken after which time the chairman took over the meeting. *See R. 766.*

dealing with a boundary line issue on the subject property in the past (R. 958 58:17-21), the Lances neither objected to continuing the proceedings nor requested a continuance to consider disqualifying Judge Pullan.<sup>2</sup> *See Madsen* at 543. Instead, Lances' counsel, who conferred with his clients prior to speaking, stated "My clients have not been involved with you. They don't recognize you. They don't recall anything like that. All their property is in Heber City, so I don't know if you had jurisdiction (inaudible)." R. 958 at 59:9-12. The Lances should have objected against proceeding with trial or requested a continuance to consider disqualification at that time. Apparently it was not an issue then and because they have failed to demonstrate any actual bias, the Lances' mere allegations of bias at this late juncture are insufficient to warrant a new trial.

**B. The Lances Allegations of Bias Were Heard By Both Judge Taylor and Judge Schofield, Who Both Denied the Allegations and Refused to Overturn Judge Pullan's Findings of Fact and Conclusions of Law.**

Regardless, the Lances were able to address their concern of bias to different judges on two separate occasions: (1) in their rule 63(b)(2) Motion to Disqualify Judge Pullan which was heard by Judge Taylor; and (2) in their Rule 59 Motion for a New Trial heard by Judge Schofield. Judge Taylor, while accepting Mrs. Lances' affidavit alleging bias as requisite certification under rule 63, refused to overturn the findings and turned

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<sup>2</sup> In their statement of the case paragraph 3, the Lances on appeal cite to the record at 958 p. 58 and assert that Judge Pullan stated he was familiar with the property, having been involved in a "boundary dispute" while serving as county attorney. This misstates the record. Judge Pullan never stated he was party to a "boundary dispute." It was his recollection that he "was consulted about a boundary line issue," something far different from a "boundary dispute."

the case over to Judge Schofield simply to avoid “the appearance of impropriety” that could remotely be inferred if Judge Pullan continued with the trial. *See R.* at 839.

However, when the issue of bias sufficient to warrant a new trial was heard by Judge Schofield, he firmly denied the Lances’ allegations of bias on the following grounds:

[Judge Pullan’s] 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 [the] property. He did not act alone. Additionally, at the beginning of the trial Judge Pullan remembered his previous involvement with [the] 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, [the Lances] cannot now be heard to complain. Judge Pullan’s involvement with the plaintiff’s property does not warrant a new trial.

R. 932-31. In their Rule 59 motion, the Lances could not cite to any clear or convincing evidence that any hint of bias existed and their request for a new trial was properly denied. Their argument on appeal remains unchanged. They are unable to produce any facts sufficient to demonstrate any actual or implied bias in this case and their request on appeal for a new trial is not warranted and should be denied.

The Lances’ unchanged allegations of bias based solely on the fact that Judge Pullan served as acting chairman of the Heber City Planning Commission prior to his appointment to the bench are insufficient to warrant a new trial. The fact that the trial court issued a ruling adverse to the Lances interests does not show “deep-seated

antagonism” or even prejudice. *See State Interest of M.L.*, 965 P.2d 551, 556 (Utah Ct.App. 1998).

**II. WHETHER THE TRIAL COURT ACTED WITHIN IT’S BROAD DISCRETION IN FINDING THAT THE EVIDENCE CLEARLY AND CONVINCINGLY DEMONSTRATED THE EXISTENCE OF A PRESCRIPTIVE EASEMENT.**

**A. Standard of Review**

The finding of a prescriptive easement is a conclusion of law in which a trial court is granted broad discretion. *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). While typically courts of appeal review a trial court’s legal conclusions for correctness, according the trial court no legal deference, the standard of review for a prescriptive easement is different. The Utah Supreme Court has held that “such a finding is the type of highly fact-dependant 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*, 970 P.2d at 1256. Therefore, the finding of an easement will only be overturned if the appellate court finds that the trial judge’s decision exceeded the broad discretion granted. *Id.* (emphasis added). Great deference is granted in the easement context because trial judges have close proximity to the parties, the witnesses, the exhibits and the trial. *Id.* In addition, trial judges are better able to weigh conflicting evidence and decide what weight is to be given to the testimony of those witnesses that testify at trial. *See Pollesche v. TransAmerican Insurance Co.*, 497 P.2d 236, 238 (Utah 1972). The trial court, having reviewed the testimony of the witnesses and the exhibits

produced at trial, correctly ruled that the evidence clearly and convincingly demonstrated the existence of a prescriptive easement in the Lane.

**B. The Elements for a Prescriptive Easement Were Met by the Testimony of the Witnesses and the Exhibits Entered Into Evidence.**

The elements of a prescriptive easement are met when the party claiming a prescriptive easement can prove that use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years. *Marchant v. Park City*, 788 P.2d 520, 524 (Utah 1990) (citing *Crane v. Crane*, 683 P.2d 1062 (Utah 1984)). The evidence to establish a prescriptive easement must be clear and convincing. *Marchant v. Park City*, 771 P.2d 677, 682 (Utah Ct.App. 1989). In this case, the trial court correctly found that the evidence was clear and convincing that use of the Lane was open, notorious, and adverse for over twenty years, thus meeting this standard. Therefore, the trial court's decision regarding the existence of a prescriptive easement should be affirmed.

Where adjoining property owners, or their predecessors, jointly establish and use a Lane or driveway, this use meets the requirement of being open, notorious, adverse and continuous if done for a period of 20 years and establishes a prescriptive right to its continued use. *Orton v. Carter*, 920 P.2d 1254, 1259 (Utah 1998). Testimony presented by the witnesses shows the open, notorious and adverse use of the Lane by the McNaughtens and Lunts for at least twenty years. In fact, the testimony from Plaintiff's witnesses and the property pictures entered into evidence as exhibits, demonstrate open,

notorious and adverse use of the Lane in its current location for over eighty (80) years, from the late 1920's to the present. Testimony from Mr. Eldon Carlisle, which the trial court noted was “was particularly credible,” established that the Lane existed and was in use by Mr. Lunt’s predecessors the McNaughtens and the Lances’ predecessors in interest, the Witts, from the 1920's and 1930's through the 1950's. *See* R. 958 at 114-127; *see also* R. 728. As the testimony of Monaves Boren shows, the Lane was used as a driveway for agricultural and residential purposes from the 1940's to the present. R. 59-112; *see also* R. 737-732. The trial judge listened to the testimony of the witnesses, reviewed the pictures of the Lane over the years, evaluated and weighed the evidence, and found that there was clear and convincing of the existence of a prescriptive easement. Mr. Lunt and his predecessors have openly, notoriously, and adversely used the Lane for at least eighty years.

As in the *Orton* case where the Utah Supreme Court found the existence of a prescriptive easement, the facts presented at trial in this case showed a common use of the road by the parties predecessors starting in the 1920's. In his findings, Judge Pullan wrote:

The Defendant’s contend that use of the Lane by the McNaughtens was by permission, and therefore not adverse to Witts’ interests. Ms. Housel testified that her Grandfather Witt was “particular about protecting the Lane.” However, the weight of the evidence demonstrates clearly and convincingly otherwise.

R. at 729. The trial court correctly found that the evidence presented before it clearly and convincingly demonstrated that Mr. Lunt and his predecessors’ the McNaughtens use of



the Lane was open, continuous, and adverse under a claim of right for a period of at least twenty years. *See Marchant v. Park City*, 788 P.2d 520, 524 (Utah 1990).

**C. Conflicting Evidence Does Not Prevent the Trial Court From Finding That The Existence of a Prescriptive Easement Was Clear and Convincing.**

While the Lances are correct that conflicting evidence was presented before the trial court, this is the nature of the judicial system, and conflicting evidence alone is insufficient grounds for dismissal. *See State v. Robbins*, 142 P.3d 589 (Utah App. 2006). Conflicting evidence and even witness testimony which is subject to justifiable suspicion does not justify the reversal of judgement because it is the “exclusive province of the trial judge...to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” *Id.* (citing *People v. Mayberry*, 542 P.2d 1337, 1342 (1975)) (emphasis added).

The assertion by the Lances that the contradictory evidence presented by their witnesses proves the evidence for a prescriptive easement could not be clear and convincing is without merit. It undermines the broad discretion granted to a trial court in weighing the testimony, exhibits, and other evidence accordingly. It also fails to recognize that every trial has contradictory evidence by the very nature of the judicial system. The Lances’ argument for the granting of a new trial is that contradictory evidence was presented and therefore the trial court could not satisfy the clear and convincing standard necessary to show the existence of a prescriptive easement. Without

a showing that the trial court abused its broad discretion, conflicting evidence is not grounds for reversal, therefore this argument fails to meet the standard of reversal. *See Orton*, 970 P.2d at 1256; *see also State v. Robbins*, 142 P.3d 589 (Utah App. 2006).

In addition, their reliance on the record to support their arguments is misplaced . The record is clear and convincing that a prescriptive easement exists. For example, the Lances cite the record at page 61 stating “Ms. Boren testified that she did not work on the farm at the property in question” and page 90, that Ms. Boren “did not use the Lane in the milking of cows” as evidence that her testimony is contradictory and self-serving, and as evidence that the Lane was not used as she testified. *See Appellant’s Brief* at 21. The Lances’ misinterpret the record. Ms. Boren did not testify she “did not work on the farm,” she stated “I did not work the farm.” R. at 61. This statement is true but irrelevant. Ms. Boren did not “work the farm.” As she later testifies, the farm belonged to her step-father Link McNaughten, who worked his own farm. She does testify that she worked on the farm. She milked cows on the land (R. at 61), lived at the property (R. at 60), she and her husband helped Link gather his hay (R. at 61), she was very familiar with the subject property (R. at 63), and she was familiar with the Lane at the heart of this dispute (R. at 63:24-64:1). The fact that she did not plow the fields, plant the seeds, irrigate the hay, and run the hay rake herself, or in other words “work the farm,” fails to demonstrate that her testimony is self-serving. This testimony does not deal with the time

of use, method of use, or scope of the Lane and does not support the Lances' argument that the evidence is not clear and convincing .

Disturbingly, the Lances also try to paint Mr. Carlisle as an interested party to this case by stating the Lunt's predecessors were his parents. *See* Appellant's Brief at p. 22. This assertion is unsubstantiated by the record and is completely irrelevant to this appeal. In addition, the Lances' testimony that Mr. Carlisle's testimony was "directly contradicted by two disinterested witnesses of Defendant, Duane Smith and Frankie Housel" and as such cannot be "clear and convincing" is unsupported. It is a trial court's province to weigh the conflicting evidence and decide whether it is clear and convincing. *See Pollesche v. TransAmerican Insurance Co.*, 497 P.2d 236, 238 (Utah 1972).

As further evidence that the testimony was not clear and convincing, the Lances claim that the McNaughtens could not have parked their cars on the Lane because there was no garage and the apartment wasn't built until 1985, meaning the McNaughtens and Lunts would have parked on their own property. *See* Appellant's Brief p. 22. This argument is irrelevant. It assumes that the McNaughtens parked their car where the existing garage is and not on the Lane. This was not established and therefore is irrelevant to this appeal. In a similar vein, the Lances argue that testimony of a fence three to four feet from the edge of the McNaughten house demonstrates the McNaughtens and Lunts accessed their property not by the Lane, but on their own property. Therefore, evidence asserting otherwise cannot be "clear and convincing." *See* Appellant's brief at

25-26. This too is an irrelevant argument. The trial court heard the testimony of use of the Lane, saw exhibits of photographs of the Lane being used in its current location, and weighed the evidence accordingly. In addition, the Lance's remaining arguments that testimony showed other access to the property at one time and "defendant's witnesses were at least as credible as Plaintiff's witnesses, and arguably more so" are equally unsupported and irrelevant. The trial court is granted great discretion in those findings and the weight of the evidence was in favor of Mr. Lunt. Contradictory testimony does not preclude a trial court from making a finding of an easement that is clear and convincing.

Both Judge Pullan and Judge Schofield addressed the Lances' argument that the trial court was precluded from making a clear and convincing finding of an easement because this finding was "directly contradicted" by the evidence presented by their witnesses. Judge Schofield was more specific in addressing the Lances argument that conflicting evidence precludes the clear and convincing standard from being met. After citing to Judge Pullan's findings of fact and conclusion of law discussing the credibility of Mr. Carlisle and the aforementioned quote, he stated:

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 make decisions thereon. Defendant's "sincere and compelling belief" that the trial judge made an incorrect ruling does not warrant a new trial.

R. at 932. In addition, the argument that the testimony is self-serving is not demonstrated by the record as the Lances contend. Mr. Carlisle, who the trial court found “particularly credible” (R. at 728) has no interest in the property and the Lances can point to nothing which demonstrates the testimony of Ms. Boren, Jack Lunt, and Garth Lunt was completely self-serving.

### **III. WHETHER THE COURT ACTED WITHIN ITS DISCRETION IN FINDING THAT CURRENT USE OF THE EASEMENT WAS CONSISTENT WITH HISTORIC USE.**

The Utah Supreme Court has held that the extent of any prescriptive easement is “measured and limited by its historic use during the prescriptive period.” *McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978). The Utah Supreme Court has also held that “[T]he owner of the dominant estate may enjoy to the fullest extent the rights conferred by his easement [as long as he does not] alter its character so as to further burden or increase the restriction upon the servient estate.” *Id.* The evidence clearly and convincingly demonstrated that the Lane during the prescriptive period was used for residential and agricultural purposes. These purposes for the Lane’s use included accessing the rear portion of both the Witt and McNaughten properties.

The evidence presented before the court indicated that during the prescriptive period, the Witts, McNaughtens, and the Lunts used the Lane for both residential and agricultural uses. The Plaintiff’s witness testified both the Witts and the McNaughtens used the Lane to access their respective acreage, drive cattle, move farm equipment, as

well as using the Lane as a driveway. The trial court found this evidence to be clear and convincing. Reflecting the testimony of the parties, the trial court found that both 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. This finding by the trial court is supported by the testimony of witnesses for both sides.

Mr. Carlisle stated that in the 1920's and 1930's the Witts used the Lane for vehicular traffic and parked their car on the Lane and later just south of the Lane when a garage was built. R. 958 at 127:20-25. He also testified that the Lane was used for driving cattle, and accessing the canal for swimming. R. 958 at 117-119. Evidence was presented by Ms. Boren that the Lane was used for a driveway during the late 1940's. R. 958 at 64:7-17. Jack Lunt testified that at one point they took “a bob sleigh and wagons” and other haying equipment down the Lane. R. 958 at 30:10-13. Garth Lunt testified that the Lane or driveway had existed “forever, as far as I know” (R. 958 at 134:10-11), that they used the Lane to take cattle and teams of horses up it and hay back to the barn and machinery (R. 958 at 134-135), and that during the wintertime they would bring machinery from the north fields and park it on the Lane (R. 958 at 135). He later testified that from 1954 to the early 1990's that he and the Witts used the Lane to haul hay to their respective barns, move equipment up and down the Lane, move horses and cattle up and down the Lane, and the county would use the Lane to access the property to spray thistles, clean the canal and remove snow. R. 958 at 138.

This 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. This use is consistent with the historic use during the prescriptive period. During the prescriptive period farm equipment and livestock were driven down the Lane to the back of the McNaughten/Lunt property. Today vehicles are still driven to the back of the property. The type of vehicle used does not automatically lead to the conclusion that the historic use of the Lane has changed in such a way that the burden or restriction has increased on the servient estate.

The evidence presented is clear and convincing that the uses during the prescriptive period were both agricultural and residential, but more importantly that the main use of the easement was to access the rear portions of the property. The trial court's final order states "Plaintiff is entitled to use the easement as any party would normally use a driveway." R. at 843. This use is exactly what the Lane was used for historically and during the prescriptive period: a driveway used in for both agricultural (farm equipment, cattle, etc.) and residential (vehicles, walking) use. These rights of use have not "enlarged [or] place[d] a greater burden or servitude on the property" as alleged by the Lances. *Nielson v. Sandberg*, 141 P.2d 696, 701 (Utah 1943). As such, the use of the easement as defined in the trial courts final order must be upheld.

#### **IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THE WEIGHT AND CREDIBILITY OF THE EVIDENCE PRESENTED.**

The correctness of the trial court's factual findings based on the witness testimony will only be reversed if they are found to be "clearly erroneous." *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 49 (Utah 2004). The Utah Supreme Court has held that "Evaluating conflicting testimony is the proper role of the finder of fact." *Hogle v. Zinetics Med., Inc.*, 2002 UT 121, ¶ 16 (Utah 2002). "When an appellant asserts that the evidence is insufficient to support the lower court's findings of fact, 'we do not weigh the evidence de novo.' Rather, we accord great deference to the lower court's findings, 'especially when they are based on an evaluation of conflicting live testimony.'" *Id.* (quoting *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989)). "Moreover, 'to mount a successful challenge to the correctness of a trial court's findings of fact, an appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even viewing it in light most favorable to the court below.'" *Id.* (quoting *Alta Indus. Limited v. Hurst*, 846 P.2d 1282, 1284 (Utah 1993)). The Lances have failed to marshal all the evidence that supports the trial court's findings. The testimony of the witnesses established, and the trial court found, that the width of the Lane during the prescriptive period was 34-35 feet in width. This was the testimony of both Jack and Garth Lunt. R. 958 at 42, 135-136. There is no testimony to support the Lances assertion that the Lane was 10-12 feet in width. In



addition to this testimony, the trial court was able to go to the property to inspect the Lane visually. R. 958 at 129-130. In its findings of fact, the trial court stated that “the Lane commences at 600 West and is 34 feet wide.” R. 739.

The Lances argue the Lane was only 10-12 feet in width. They base this argument on a statement made by Garth Lunt who said “there was about a 10 feet wire gate” (R. 958 at 186). Appellant’s Brief at 6. This gate, the same 10-12 foot gate that Jack Lunt discussed in his testimony (R. 958 at 41), was not located at the across the beginning of the Lane along 600 West. Rather, this gate was part of the fence which ran alongside the Lane. The gate was at the end of the Lane where it turned and allowed access from the Lane to the Lunt’s rear acreage. This 10-12 foot gate was not set across the Lane and did not limit the use of the Lane to 10-12 feet in width. The record does not support the argument that the use of the Lane could only be 10-12 feet in width due to this gate. While the issue of the final width of the Lane will be addressed in greater detail in the cross-appeal, the Lances’ assertion that the width of the Lane should be limited to 10-12 feet is unsupported after viewing the evidence in the light most favorable to the trial court.

The challenge by the Lances as to the size of the easement has not shown the trial court’s findings to be legally insufficient. *See Hogle*, 2002 UT at ¶ 16. Especially, when those findings are viewed in the light most favorable to the court below. *See Id.* Therefore, this Court should deny the Lance’s appeal.

## **CONCLUSION**

In view of the facts and arguments set forth above, Appellee Garth Lunt requests this Court to deny the Lances appeal in its entirety, and together with all further relief the Court deems just and appropriate under the circumstances.

## **CROSS-APPEAL OF GARTH LUNT**

### **INTRODUCTION**

The issues of abandonment and the limitation of a prescriptive easement are before this Court on cross-appeal. The trial court ruled that the Lunts abandoned the 14 feet in the width of their prescriptive easement and abandoned the prescriptive easement west of the gate that ran across the Lane approximately 180 feet from the road. By so doing, Mr. Lunt's prescriptive easement and his ability to access the rear acreage of the property was severely limited.

### **ARGUMENT**

The trial court erred by ruling sua sponte on the issue of abandonment, an issue that was not before the court. Even if the trial court had the authority to rule on the issue of abandonment, it misapplied the doctrine of abandonment when it held as a matter of law that Mr. Lunt intentionally abandoned portions of the prescriptive easement.

Mr. Lunt appeals the trial court's ruling on abandonment for two reasons. First, the trial court reached beyond the scope of Utah Rule of Civil Procedure 54(c)(1) by ruling on abandonment when it was not an issue raised or tried before the court. Second,

the Lances failed to prove abandonment by clear, unequivocal, and decisive evidence. In addition, Mr. Lunt also appeals the limitation of the width and length of the easement. The limitation of the width to 20 feet is inconsistent with evidence presented at trial and the trial court's finding of fact that the Lane was 34 feet during the time the prescriptive easement was created. The trial court also limited the length of the easement to 180 feet instead of the 235 feet that is supported by the record.

The trial court found that Mr. Lunt has a prescriptive easement in the Lane, but severely limited this easement with its sua sponte ruling on the issue of abandonment and the limitation on the width and length of the easement. Therefore, Mr. Lunt requests this Court to grant relief by reversing the trial court's finding of abandonment and its limitation of the easement by restoring the length and width of the prescriptive easement in full.

**I. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR BY RULING SUA SPONTE ON THE ISSUE OF ABANDONMENT WHEN THIS ISSUE WAS NOT RAISED OR TRIED BEFORE IT.**

The issue that the trial court entered judgment on a theory that was not raised by the pleadings or tried before the court is a conclusion of law that is reviewed under the correction of error standard. *See Cowley v. Porter*, 2005 App 518, ¶ 31 (UT App. 2005). The trial court erred by ruling on the issue of abandonment because abandonment was neither raised nor tried before the court by either party. Utah Rule of Civil Procedure 54(c)(1) as interpreted by Utah case law bars trial courts from granting relief on issues

that parties do not raise or try. Ut. R. Civ. P. 54(c)(1). While Rule 54(c)(1) permits courts to grant relief on grounds not pleaded, “that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried.” *Combe v. Warren’s Family Drive-Inns Inc*, 680 P.2d 733, 735 (Utah 1984). It is error for a trial court to grant relief on issues not raised or tried before it. *Combe*, 680 P.2d at 736 (citing *Curran v. Mount*, 657 P.2d 389 (Ala. 1980)). In reversing the *Combe* trial court’s sua sponte ruling in that case, the Utah Supreme Court stated, “It is error to adjudicate issues not raised before or during trial and unsupported by the record.” *Id.*, citing *Curran v. Mount*, 657 P.2d 389 (Ala. 1980).

When trial courts make findings and determinations on matters outside of the issues of the case presented, it is not only clear error, but such findings “will have no force or effect.” *Id.* (citing *Brantley v. Carlsbad Irr. Dist.*, 587 P.2d 427 (N.M. 1978)). Moreover, “in law or in equity, a judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for determination. Any findings rendered outside the issues are a nullity.” *Id.* (citing *Estate of Hurlbutt*, 585 P.2d 724 (Ore. 1978); *Credit Investment and Loan Co. v. Guaranty Bank & Trust Co.*, 444 P.2d 633 (Colo. 1968)). Parties have the power to choose the specific issues it raises before the court and a trial court cannot enter findings on those issues parties choose not to raise. *Id.* The *Combe* court further clarified, “[p]arties may limit the scope of litigation if they choose, and if an issue is clearly

withheld, the court cannot nevertheless adjudicate it and grant corresponding relief.” *Id.* (citing *Wineglass Ranches, Inc. v. Campell*, 473 P.2d 496 (Az. 1970)).

The Utah Court of Appeals clarified *Combe* by recognizing that trial courts have authority to rule on issues so long as the parties have sufficient notice of issues through the pleadings. See *Cowley v. Porter*, 2005 UT App 518 (Utah Ct.App. 2005). The Court of Appeals distinguished the appeal in *Porter*, where Porter appealed that the trial court’s ruling was not based on claims raised in the complaint or tried before the court, from *Combe*. The Court of Appeals in *Porter* held that courts can rule on issues so long as the parties have sufficient notice of issues from the pleadings and are not adversely prejudiced by the court ruling on those issues. The Court stated:

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.

*Cowley* at ¶ 38, citing *Henderson v. For-Shor Co.*, 757 P.2d 465 (UT Ct.App. 1988). In *Porter*, the Court of Appeals noted that Porter not only had sufficient notice of the buyout contract issues in Cowley’s initial complaint, but Porter’s own memorandum in opposition to Cowley’s motion for summary judgment addressed the issue that the existence and terms of the buyout agreement were contested, and arguments related to whether a binding buyout agreement was reached were raised and litigated during the first phase of the trial. *Id.*, at ¶¶ 40-41.

Unlike *Cowley*, in this case the trial court's sua sponte abandonment ruling prejudiced Lunt because it was not raised or tried before the trial court and Lunt was unable to address the legal issues of abandonment, actual relinquishment of the Lane and the intent to abandon. No where in the pleadings do the Lances raise the issue of abandonment as a defense in their answer to the complaint or in answer to the amended complaint. However, both the complaint and amended complaint alleged boundary by acquiescence and prescriptive easement which were subsequently argued by both Parties at trial.

During the actual trial phase of this case, the issue of abandonment was not raised or tried before the court. In fact, the only place where abandonment was even raised at the trial occurs at the last few pages of the trial transcript when the trial court briefly discussed the issue with Lances' counsel during his closing arguments. The Lances' counsel asserted that over time, because the Lunts used different access to their property contemporaneous to the Lane at issue, they had no prescriptive easement in the Lane. This prompted the court to ask counsel, "is it your position that the Lunts, if they did have a prescriptive easement, abandoned it in favor of that other use or other access?" R. 959 at 357:21-23. Lances' counsel responded:

I wish I had a case to quote to you because I haven't looked at that particular issue, but there is under Powell on real property a section, talks about abandonment, that you can't abandon the – you can abandon the use. If that's the case I think it's been abandoned, I think, for at least 20 years, because if we show '79 up to '99 it's been 20 years since it's been abandoned. I don't know the answer to that. Of

course, I could argue and say, “Well of course, Your Honor, of course it’s been abandoned.”

R. 959 at 358:2-9 (emphasis added). Lances’ counsel, however never raised the issue of abandonment before or after this exchange. Lances failed to raise abandonment as a defense to Lunt’s claims for a boundary by acquiescence and prescriptive easement, and never sought to establish the theory of abandonment during the questioning of witnesses at trial.

Mr. Lunt was prejudiced by not being able to develop an argument and present evidence that the elements of abandonment had not been met. Testimony during trial was not sought on actual abandonment or intent to abandon, legal issues which have to be proven for a finding of abandonment to be made. Furthermore, Mr. Lunt was unable to properly respond to this issue because this exchange occurred during closing arguments and the issue was not raised or tried prior to this exchange. The Lances were not concerned with abandonment. Their belief maintained from opening arguments to the sounding of the closing bell was that Mr. Lunt could not produce clear and convincing evidence of a boundary by acquiescence or a prescriptive easement. *See* R. 959 at 358:14-21. Because abandonment was not raised or tried, the court erred in ruling sua sponte on the issue.

The limitation on the easement due to the trial courts ruling on abandonment is not “supported by the evidence [or] a permissible form of relief for the claims litigated” because abandonment was never raised or tried before the trial court. *Cowley* at ¶ 38.

The trial court found in its conclusions of law that a prescriptive easement existed on the full length of the Lane. Judge Pullan wrote:

In the instant case, from the 1930's and continuing through at least the mid-1970's, the McNaughtens have continuously used the Lane to transport cattle, haul hay, move agricultural equipment, and park cars. During this time, each family relied on the Lane to access the rear of their respective acreage. The Court concludes that the Plaintiff proved these elements by clear and convincing evidence.

R. 729. However, the court then found, without the legal question being raised or tried, that a portions of the length and width of the prescriptive easement was abandoned by Lunt. R. 727. By addressing this issue sua sponte, the trial court acted beyond the scope of Rule 54(c)(1). Therefore, Lunt respectfully requests that this Court reverse the trial court's ruling on abandonment and restore the prescriptive easement in whole in accordance with the trial court's finding of law.

**II. IF THE TRIAL COURT WAS JUSTIFIED IN RULING ON  
ABANDONMENT, IT STILL ERRED IN ITS APPLICATION OF  
THE DOCTRINE OF ABANDONMENT TO THIS CASE.**

In the alternative, even if this Court finds that the trial court was justified to rule sua sponte on the issue of abandonment, the standard of proof for abandonment was not met and the doctrine of abandonment was misapplied to this case. The finding by the trial court is in error and contrary to law as the evidence does not support a finding of Mr. Lunt's intent to abandon the easement. In Utah, "it is well-recognized that an easement or right of way may be abandoned." *Western Gateway Storage Co. v. Treseder*, 567 P.2d 181, 182 (Utah 1977). However, the party asserting abandonment has to meet a high



standard to prove abandonment. A mere preponderance of the evidence is insufficient to show actual intent to abandon one's right in a prescriptive easement. *Western Gateway*, 567 P.2d at 182 (citing *Harmon v. Rasmussen*, 375 P.2d 763, 765 (Utah 1962) ("Proof of abandonment of such an easement requires action releasing ownership the right to use with clear and convincing proof of intentional abandonment.")). Instead, a party seeking to nullify another's easement or property interest on the grounds of abandonment must establish such abandonment by "clear, unequivocal, and decisive evidence." *State v. Rynhart*, 2005 UT 84 ¶ 14 (Utah 2005) (citing *Linscomb v. Goodyear Tire & Rubber*, 199 F.2d 431, 435 (8th Cir. 1952)); see also *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 753 (Utah Ct.App. 1988). This standard of proof is at least a standard of proof as high as that of "beyond a reasonable doubt" if not higher. *Hudson v. Pillow*, 541 S.E.2d 556, 562 (citing *Addington v. Texas*, 441 U.S. 418, 432 (1979)). Therefore, a "clear, unequivocal and decisive" showing of abandonment can only be met where the "acts of the owner clearly show that such was his purpose." *Tuttle v. Sowadski*, 126 P. 959, 965 (Utah 1912).

In addition, the doctrine of abandonment is uniform in all states, including Utah, in that non-use of a prescriptive easement alone, regardless of the length of the period of non-use, is insufficient to prove abandonment. See *Western Gateway*, 567 P.2d at 182. Rather, a prescriptive easement is only considered abandoned when the dominant estate holder demonstrates an actual intent to abandon it. *Johnson v. Higley*, 1999 UT App. 278

¶ 16 fn 6 (Utah Ct.App. 1999). Therefore, the primary elements of abandonment are actual relinquishment and intent to abandon, or in other words, “the intention to abandon and the external act by which that intention is carried into effect.” *Botkin v. Kickapoo, Inc.*, 505 P.2d 749, 752 (Kan. 1973); *see also Harmon v. Rasmussen*, 375 P.2d 762, 764-66 (Utah 1962) (stating that overt act is needed to prove intent to abandon and proof of abandonment requires action releasing ownership and right to use with clear and convincing proof of intentional abandonment). While Utah case law does not explicitly state an “affirmative act” is needed, the requirement for an “overt act” is similar to some states’ requirement that an affirmative act is needed to prove abandonment. *See e.g. Sabados v. Kiraly*, 393 A.2d 486 (Pa.Super. 1978) (Abandonment requires a showing that a party intended to abandon and give up permanently his right to use an easement. Such conduct must consist of some affirmative act which renders use of the easement impossible, or of some physical obstruction of it in a manner that is inconsistent with its further use.)

In this case, the evidence failed to meet the strict standard of proof that there was both actual relinquishment of the easement and an intent to abandon the easement. As such, the trial court did not correctly apply the law of abandonment to this case.

**A. The Lane Was Never Actually Abandoned And Use of the Lane, Compatible With Its Historical Uses, Has Continued to the Present.**

The abandonment standard is met when clear, unequivocal, and decisive evidence demonstrates the prescriptive easement was actually relinquished and abandoned. The

burden is on the person asserting abandonment to prove it. *Provo River Water Users Ass'n v. Lambert*, 642 P.2d 1219, 1221 (Utah 1982). One way to prove actual relinquishment or abandonment of an easement is for the party asserting abandonment to produce clear, unequivocal, and decisive evidence that use of the easement has changed and its current use is for "an entirely different purpose which is incompatible with the original purpose for which the easement was created." *Brown v. Oregon Short Line R. Co.*, 102 P. 740, 743 (Utah 1909).

The standard for abandonment is also met where the evidence presented at trial is clear, unequivocal, and decisive that 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 Brown*, 102 P. 740, 742-3; *see also Hudson v. Pillow*, 541 S.E. 2d 556, 560 (Va. 2001).

In *Brown*, clear, unequivocal, and decisive evidence demonstrated that an easement for the purposes of ingress/egress to a residential neighborhood was actually abandoned. The evidence produced at trial was clear, unequivocal, and decisive that the residences formerly the reason for the ingress/egress were torn down and the land was used to construct and operate a permanent railroad, switch, spur and other tracks. Therefore it was impossible to use the easement for its original purpose of ingress/egress to residences. *Id.* Because the new use was incompatible with the original easement, there was actual abandonment of the easement.

*Hudson v. Pillow* is an example of a servient estate retaking a prescriptive easement by open, notorious, and adverse use for twenty years. In *Hudson*, the party asserting abandonment was able to produce evidence that while another party held a prescriptive easement, the servient estate holder placed gates over the road and only allowed individuals to use the road with their permission. The servient estate granted this required permission for use for more than twenty years. Therefore, the court was justified in finding that non-use of the easement coupled with the open, notorious, and adverse acts of the servient owners for a period sufficient to create a prescriptive right, was clear, unequivocal, and decisive proof of actual relinquishment and abandonment.

In this case, there was no actual relinquishment or abandonment of the easement. While the findings of fact indicate that agricultural use of the rear portion of the Lane west of the gate has dwindled and there is currently a gate across the Lane, these facts do not prove actual relinquishment of the Lane west of the gate. Unlike *Brown*, the use of the Lane has not changed such that it is incompatible with its original use. In fact, the Lane west of the gate is accessible for use completely compatible with its original purpose, which the evidence presented at trial, includes using the Lane for “access [to] the rear of their respective acreage.” R. 728.

In addition, the record does not support a *Hudson*-like retaking of the easement by open, notorious and adverse use by the servient estate (the Whitts/Lances). In fact, the record demonstrates otherwise, that neither the servient or dominant estate holders asked

permission of each other to use the Lane. The testimony at trial reflects that the Witts and the McNaughtens used the Lane to access their acreage, move farm equipment and livestock, and to park cars. *See e.g.* R. 958 at 14, 64, 127, 182, 264. In the trial court's ruling of abandonment, there is no discussion of actual abandonment by either change of use incompatible with the historical use or adverse possession by the servient estate. While the trial court's abandonment ruling does state that a gate blocking the Lane was constructed in the early 1980's, the record is not clear about who installed the gate, for what purpose the gate was installed, whether the servient estate was asserting a right or simply placing a gate over the Lane, and whether the gate restricted Mr. Lunt's access. Furthermore, the record does demonstrate that permission was granted by Mr. Lunt's dominant estate to use the Lane to access the back pasture land. R. 752 ¶¶ 52-53. This supports the conclusion that the ability to use the Lane was never relinquished or abandoned. Accordingly, there was no actual abandonment of the Lane west of the gate.

**B. The Clear, Unequivocal, and Decisive Standard Was Not Met Because Lunt Did Not Intend to Abandon the Lane.**

It is difficult to establish clear, unequivocal, and decisive proof of intent to abandon. In Utah, an overt act proving intent to abandon, coupled with non-use or actual abandonment is required to prove abandonment by clear, unequivocal, and decisive evidence. *See Harmon v. Rasmussen*, 375 P.2d 762, 764 (Utah 1962). However, "the holder of an easement does not forfeit a part of it because he has no present need for it or because he is unlikely to exercise the whole of it." *Downing House Realty v. Hampe*, 497

A.2d 862, 864 (N.H. 1985). It is well-established previously that non-use alone is insufficient to prove abandonment. Even extended non-use “is not of itself an abandonment of it, but, at most, in connection with other facts, may be evidence of an intention to abandon or of actual abandonment. *Brown v. Oregon Short Line R. Co.* 102 P. 740, 742 (Utah 1909) (emphasis added).

Utah courts have determined that non-use of an easement coupled with a fence across it and the way covered with undergrowth and debris is insufficient to prove intent to abandon. *Western Gateway Storage v. Treseder*, 567 P.2d 181, 182 (Utah 1977). Filling dirt around a headgate to prevent its use, coupled with several years of actual non-use of the easement to move water is also insufficient to prove intent to abandon. *Harmon v. Rasmussen*, 375 P.2d 762, 765 (Utah 1962).

In other states, courts have found that evidence of non-use coupled with an easement holder allowing a fence to block access to portions of an easement or acquiesce in the easement being overgrown with small and large trees, thus blocking use of the Lane, is insufficient to demonstrate an actual intent to abandon. *See Chickamanga Properties, Inc. v. Barnard*, 853 N.E.2d 148 (Ind. 2006); *Strahin v. Lantz*, 456 S.E.2d 12 (W.Va. 1995); *Downing House Realty v. Hampe*, 497 A.2d 862 (N.H. 1985).

The record fails to support any evidence that Mr. Lunt actually intended to abandon his easement. Furthermore, the Lances failed to raise the issue of intent to abandon, therefore making it impossible to prove intent to abandon by clear, unequivocal,

and decisive evidence. While the record indicates there may have been periods of non-use on Mr. Lunt's easement west of the gate of the prescriptive easement, the record fails provide any overt act in connection with non-use that could be considered evidence of an intention to abandon the prescriptive easement. *See Harmon v. Rasmussen*, 375 P.2d 762, 764 (Utah 1962). As previously discussed, the record shows that the issue of abandonment was not raised at all during trial. Opposing counsel did not ask any of the witnesses questions regarding non-use, who put the gate across the Lane, whether any parties contested the gate installation, or whether the Lane was used after the gate was placed across the Lane. Lance also failed to explore this issue during pre-trial proceedings.

**C. The Trial Court's Finding of Abandonment is Clear Error Because An Implied Intent to Abandon Does Not Meet the Clear, Unequivocal, and Decisive Standard Necessary to Prove Abandonment.**

Implication of intent to abandon is not clear, unequivocal, or decisive proof of abandonment or intent thereof. While the statement in the court's ruling originating in 25 Am. Jur. 2d § 112 stating "an easement is considered abandoned when there is a history of non-use coupled with an act or omission showing clear intent to abandon" is well-founded, it is not dispositive that mere implied acquiescence in a gate being placed across a Lane is clear, unequivocal and decisive evidence of an intent to abandon. *See R. 726*.<sup>3</sup>

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<sup>3</sup> "In the instant case, the gate blocking the Lane was constructed in the early 1980's. From that date, Plaintiff ceased to use the Lane west of the gate. For more than 20 years, Plaintiff has acquiesced in the closure, never taking any action to object. This history of non-use and inaction show a clear intent on the part of Plaintiff to abandon the

Neither Utah law nor cases from other jurisdictions support the conclusion that mere acquiescence in placing a “gate” across a Lane coupled with non-use is sufficient to prove intent to abandon. *See Western Gateway Storage v. Treseder*, 567 P.2d 181, 182 (Utah 1977); *see also Chickamanga Properties, Inc. v. Barnard*, 853 N.E.2d 148 (Ind. 2006); *Strahin v. Lantz*, 456 S.E.2d 12 (W.Va. 1995); *Downing House Realty v. Hampe*, 497 A.2d 862 (N.H. 1985). Instead, the law requires that there must be some factual finding that demonstrates Lunt acquiesced because he intended to abandon the Lane. While the findings of fact only indicate that the gate was constructed across the Lane in the early 1980's and was moved forward at one period of time. There is no testimony or factual findings informing who installed the gate, why access to the Lane west of the gate was discontinued, whether Lunt intended to give up use of the Lane, or whether he simply currently had no present need to use the gate.

To the contrary, a gate across the Lane did not give Mr. Lunt any indication that he could not use the Lane if he so desired. The evidence clearly and convincingly supported the trial court’s conclusion of law that “neither the Witts nor the McNaughtens ever asked permission of the other to use the Lane.” Instead, both parties used the Lane for agricultural and residential purposes as often as they found convenient. There is no evidence in the record that the gate was intended to block Mr. Lunt’s use of the Lane west

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Lane west of the gate.



of the gate. He could have used the rear portion of Lane west of the gate at any time if he so desired.

This is similar to a previously referenced case from New Hampshire, in which a fence was erected over a portion of an easement and remained in place for approximately thirty years. In addition to extended non-use of the easement and the fence across the easement, large trees also grew over the easement. Despite this, the court found the evidence insufficient to establish abandonment because of the lack of permanency of the non-use. The court held “had the owner of the easement chosen to exercise control of the land, the fence and trees could easily have been removed at any time.” *Downing House Realty v. Hampe*, 497 A.2d 862, 864 (N.H. 1985). Likewise, had Mr. Lunt chosen to exercise control over his easement, the Lane was still accessible for use as it had been in the past.

However, neither the issue of abandonment nor the issue of whether Lunt acquiesced in the closure were explored by either party during the trial – thus there was no notice that this was an issue before the court. The issue of abandonment was raised only by the court during closing arguments for the defense. The question of whether the Lunts acted to oppose the gate, or even if the gate prevented them from accessing the western portion of the Lane was not even discussed by the parties at any time during these proceedings. Therefore, there can be no “clear, unequivocal, and decisive showing” of intent to abandon. *State v. Rynhart*, 2005 UT 84 ¶ 14 (Utah 2005).

Similar to cases from Utah and many other jurisdictions, the record in this case fails to support a finding that the evidence before the trial court of both actual relinquishment and intent to abandon was clear, unequivocal and decisive.

### **III. THE TRIAL COURT ERRED BY LIMITING THE EASEMENT TO 20 FEET IN WIDTH AND 183 FEET IN LENGTH.**

The trial court erred in limiting Mr. Lunt's prescriptive easement to 20 feet in width and 183 feet in length when its findings of facts expressly stated the Lane was 34 feet in width and its conclusions of law found the prescriptive easement was for the entire length of the Lane. The measure and limit of this prescriptive easement is determined by the use made of the Lane during the prescriptive period from the late 1920's to the present. *See McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978) ( "It has long been the law of this jurisdiction, and elsewhere that the extent of an easement acquired by prescription is measured and limited by the use made during the prescriptive period."); *see also Dansie v. Hi-Country Estates HOA*, 2004 UT App. 149, ¶ 14 (Utah Ct.App. 2004) (the court looked to prior use of easement to determine current scope.) In addition, courts are forbidden from limiting an easement based on equity and must strictly enforce the well-established law that the measure and limit of an easement is the use made of it during the prescriptive period. *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct.App. 1993). In this case, the trial court held that the Lane during the prescriptive period was 34 feet in width and extended to the end of the Lane. R. 728. However, witness testimony stated that the length of the easement was between 235-247 feet in length. *See* R. 735, 737.

Therefore, the court's order limiting the scope of the easement to 20 feet in width and 180 feet in length must be overturned and returned to 34 feet in width and no less than 235 feet in length.

The trial court found that an easement was created in the Lane, that the Lane was 34 feet in width, and its use extended from the road to the back of the properties, which several witnesses testified was at least 235 feet in length. This, therefore, is the measure and limit of the easement. Other than abandonment, the only explanation for the trial court's limitation on the width and length of the Lane is that the limitation is based in equity. Utah courts have held that a trial court cannot limit a prescriptive easement based on equity. *Id.*

The trial court in this case limited the historical use of Lunt's prescriptive easement to 20 feet in width and 183 feet in length based on equity. In finding that Mr. Lunt has a prescriptive easement over the Lances property, the court indicated the measure and limit of the use of the easement. "From the 1930's and continuing through at least the mid-1970s, the McNaughtens have continuously used the Lane to transport cattle, haul hay, move agricultural equipment, and park cars. During this time, each family relied on the Lane to access the rear of their respective acreage." R. 729. The court concludes that the Plaintiff proved these elements by clear and convincing evidence." *Id.* This language makes clear that the Lane, all 34 feet in width, and extending from the road to the rear portions of the property, was acquired by prescriptive

easement. Therefore, the trial court erred when it limited the scope of the easement to 20 feet in width extending only to the gate across the easement.

In a post-trial hearing to address concerns arising out of preparing the order, Lunt's counsel raised the issue of the limitation of the easement in preparing the order. He stated to the trial court that the width of the easement was not disputed at trial, nor was abandonment of the width of the Lane discussed at trial, and therefore the origin of the 20 foot limitation of the easement was unclear. *See* R. 960 at 3-4. The trial court responded:

It was my intent when I issued that decision that the width of the easement was at one period of time the broader width, but that it had been abandoned, and what was – what remained was a 20-foot width for the purposes of a driveway is essentially what they had used it for in the mid '80's.

*Id.* at 3. This is inconsistent with comments later in the hearing and findings of fact in the ruling. At the hearing, the court stated that “driveways are used for a host of reasons” including livestock and utility easements. *Id.* at 8:12-16. In addition, the trial court's findings of fact in the ruling indicate that the width of the Lane was never in dispute, only the length thereof:

Between these two properties is the Lane which gives rise to this dispute. The land commences at 600 West and is 34 feet wide. The Lane runs west between the properties. The length of the Lane is in dispute.

R. 739.

The trial court found that Mr. Lunt holds a prescriptive easement, 34 feet in width and extending from the road to the rear of the property, approximately 235-247 feet. The


trial court erred when it limited the easement created during the prescriptive period as described by *McBride*. Therefore, Lunt requests that the scope of the easement be returned to its original form, which is 34 feet in width and not less than 235 feet in length.

### CONCLUSION

In view of the facts and arguments set forth above, Cross-Appellant Garth Lunt requests this Court to reverse the judgment of the court below in regards to the issue of abandonment and to issue an order finding the easement to be at least 235 feet in length by 34 feet in width as supported by the record, and together with all further relief the Court deems just and appropriate under the circumstances.

Dated this 13 day of July, 2007.

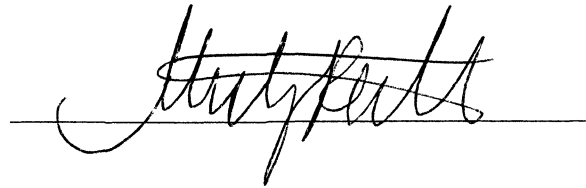
BOSTWICK & PRICE P.C.

  
\_\_\_\_\_  
Randy B. Birch  
Corey S. Zachman

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **BRIEFS OF APPELLEE AND CROSS-APPELLANT MR. GARTH LUNT** to be sent by United States Mail, postage prepaid, on this 13<sup>th</sup> day of July, 2007, as follows:

Kraig J. Powell, Esq.  
Shawn W. Potter, Esq.  
TESCH LAW OFFICES PC  
314 Main Street, Suite 200  
P.O. Box 3390  
Park City, Utah 84060

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

Tab A

# **Judge Pullen's Ruling**



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

CMB

<p>GARTH LUNT, trustee of the GARTH O. LUNT REVOCABLE TRUST,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>HAROLD LANCE and DIANE LANCE, and Does 1-10,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><b>RULING</b></p> <p style="text-align: center;">Case No. 020500612</p> <p style="text-align: center;">Judge Derek P. Pullan</p>
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This matter came before the Court for bench trial on November 1-2, 2005. The Plaintiff was represented by attorneys Mr. Randy B. Birch and Mr. Jason Hadley. The Defendants were represented by attorney Mr. Chris D. Greenwood.

The parties claim conflicting interests in a lane between their adjoining properties. Plaintiff asserts claims for boundary by acquiescence and prescriptive easement. After careful consideration of the testimony and evidence presented, the Court now enters the following:

**FINDINGS OF FACT**

**General Description of  
The Adjoining Parcels and The Disputed Lane**

1. Plaintiff owns property located at 205 North 600 West. The parcel is located on the west side of 600 West. The home on the lot faces 600 West.
2. Plaintiff is the successor in interest to Lincoln McNaughten ("Mr. McNaughten"), and his

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family. Mr. McNaughten was the step-father of Jack Lunt, Moneves Boren, and Garth Lunt (trustee of the Plaintiff Trust).

3. Defendants own the parcel of property immediately south of the Plaintiff's property. They acquired it in August 1991.
4. Defendants are successors in interest to the Frank Witt and his family.
5. Between these two properties is the lane which gives rise to this dispute. The lane commences at 600 West and is 34 feet wide. The lane runs west between the properties. The length of the lane is in dispute.
6. Running along the south side of the lane is a wooden fence ("the wooden fence"), which has been overgrown by trees. Commencing at 600 West, the wooden fence runs west for approximately 175 feet where it terminates at a gate ("the gate") crossing the lane. Backing to the wooden fence are outbuildings located on the Witt property.
7. Commencing near 600 West and running west, the north side of the lane is bordered by (1) the south wall of the home on Plaintiff's property; (2) a large willow tree; and (3) a fence (the old Witt fence) which runs for a substantial distance through open fields to a canal. The old Witt Fence commences at the north end of the gate which crosses the lane.
8. The lane appears on aerial photographs in 1946, 1962, 1978, 1979, 1985, 1993, 1997, and 2001.

#### **Use and Condition of the Lane**

##### ***Late 1920's***

9. Eldon Carlisle was born in 1917 and is 88 years old. Except for his military service which occurred between 1941 and 1946, he has lived in Heber City his entire life.

10. In the late 1920's, Mr. Carlisle recalls the Witts owning an automobile. The Witts parked the car in a garage which backed against the south side of the lane. The garage was accessed by way of the lane.

*1930 through 1950*

11. Mr. Carlisle was a childhood friend of Mr. McNaughten. As a boy in the 1930's he helped the McNaughtens run cows down the lane.
12. At that time, the lane continued beyond the gate which exists today. At the far west end of the lane, there was a gate in the old Witt fence ("the far west gate"). Through the far west gate, the McNaughtens would access their pasture and barn to the north.
13. At that time, the old Witt fence ran east along the north side of the lane all the way to 600 West.
14. After returning from his military service in 1946, Mr. Carlisle observed the McNaughtens run cows down the lane just as they had done before. Mr. Carlisle recalls seeing the McNaughtens using the lane in this way in the 1950's.
15. Mr. Carlisle testified that neither the Witts nor the McNaughtens ever objected to use of the lane by the other.
16. Mr. Duane C. Smith is 73 years old and has lived in Heber City his entire life. As early as 1938, when he was 8 years of age, Mr. Smith drove cattle for the McNaughtens. Mr. Smith never took the McNaughtens' cows down the lane.
17. From 1930 and continuing into the 1940's, Mr. Smith saw stackers, bull-rakes, and other farm equipment belonging to the Witts stored on the lane. At this time, the lane was fenced on both sides. On the south side of the lane, the wooden fence ran 150 to 200 feet

where it terminated at the Witt's barn. On the north side of the lane, the old Witt Fence ran all the way to 600 West.

18. Between 1945 and 1950, Mr. Smith worked for the McNaughtens harvesting hay and driving cows. During this time, he was at the McNaughten property at least two times per day and only observed the Witts using the lane. He drove the McNaughten cattle through a wire gate stretched between two willow trees approximately 150 feet north of the lane. He did not use the lane to drive the cattle onto the McNaughten property.
19. Between 1945 and 1947, Mr. McNaughten constructed a "basement home" on his property. The lane ran east and west along the south wall of this house. The old Witt fence was partially removed to accommodate the home. The old Witt fence ran almost to the southwest corner of the home. There a small gate was maintained. It was only wide enough for a person to walk through. It permitted access to the McNaughten property from the lane.
20. Between 1948 and 1949, Ms. Boren moved in with her mother and her father, Mr. McNaughten. During this time she helped with the McNaughtens' milk cows. She observed both the Witts and the McNaughtens park cars in the lane. Both families used the lane to transport hay and to move dairy cows to their respective barns.
21. Ms. Boren testified that the lane continued west beyond the gate that exists today. At the end of the lane, the McNaughtens used the far west gate in the old Witt fence to access the McNaughten barn. Ms. Boren testified that from 600 West to the terminus of the lane, was 235 feet.
22. Between 1945 and 1950, Ms. Frankie Witt Housel lived with her grandparents, Frank and

Maud Witt on the Witt property.

23. She testified that the purpose of the wooden fence was to enclose the Witt home. According to Ms. Housel, the wooden fence commenced at 600 West and ran west to the corner of the first outbuilding (a tool shed) where it terminated.
24. According to Ms. Housel, her grandfather was "definite about protecting the lane." She never saw the McNaughtens run cows, wagons, or farm equipment on the lane. She walked the old Witt fence regularly on her way to go swimming in the canal. Ms. Housel testified that there was no far west gate in the old Witt fence permitting access to the McNaughten barn.
25. The 1946 aerial photograph clearly shows the lane running west from 600 West for some distance. Thereafter, it is obscured by trees.

***1950 through 1965***

26. From 1950 to 1955, Ms. Boren (who had moved to Wallsburg) continued to assist her parents milking and driving the cows and harvesting hay. During this time, she observed both the Witts and the McNaughtens park cars in the lane. Both families used the lane to transport hay to the barn and to move cows as described above. According to Ms. Boren, the lane was the only available access to the McNaughten barn.
27. Ms. Boren never observed Mr. McNaughten or Mr. Witt argue about or ask permission of each other to use the lane.
28. From 1950 to 1957, Ms. Housel continued to reside with her grandparents, the Witts. She never observed the McNaughtens use the lane for any purpose and maintains that her Grandfather did not approve of their doing so.

29. For some period of time between 1951 and the early 1960's, Jack Lunt lived at the McNaughten house. He ran cattle and helped cut and haul hay. During this period of time, he and others drove cows over the lane, as well as wagons, a bobsleigh, and farm machinery.
30. According to Jack Lunt, neither the McNaughtens nor the Witts ever asked permission of the other to use the lane, they "just used it."
31. Jack Lunt testified that during this time the lane continued west past the gate that exists today. It was fenced on both sides. The lane terminated some 62 feet west of the gate at the Witt barn. At the terminus, the McNaughtens would turn their cows to the north through the far west gate to access the McNaughten pasture and barn. The McNaughtens never used any land west of the Witt Barn.
32. Jack Lunt testified that the total length of the common lane from 600 West to its terminus was 247 feet.
33. After being released from military service in 1954, Garth Lunt joined his brother at the McNaughten home. Between 1954 and 1957, he helped haul hay and run cattle from the north fields. He too observed the lane being used by both the McNaughtens and Witts to haul hay, store equipment, and run cattle.
34. Garth Lunt testified that the lane continued west beyond the gate that exists today. The lane terminated at the Witt Barn, where the far west gate was used to access the McNaughten pasture and barn. From 600 West to the terminus of the lane was 247 feet.
35. Garth Lunt testified that both the McNaughten barn and the Witt barn were constructed after 1946.

36. Garth Lunt testified that the McNaughtens maintained the lane by periodically filling holes with gravel. He did not say when or how often this maintenance occurred.
37. Garth Lunt testified that occasionally county employees used the lane to access areas where thistles needed to be sprayed.
38. According to Garth Lunt, the McNaughtens and the Witts never asked permission of each other to use the lane. Rather, the families considered the lane mutual property. Likewise, the Plaintiff has never asked permission of any successor in interest to the Witts (including the Lances) to use the lane.
39. In 1957, Garth Lunt moved to California and has resided there ever since.
40. In the early 1960's, the McNaughtens sold their grazing permit to Ott Sweat. At this time, the McNaughten's range cattle enterprise ceased, but the dairy operation continued. After the permit was sold, Jack Lunt obtained employment as a coal miner. Thereafter, he returned to the property periodically; however, his visits were sporadic.
41. A photograph taken some time between 1962 and 1965 was received into evidence. It shows Mr. McNaughten's 1962 pickup parked in the lane adjacent to his home.
42. The 1962 aerial photograph clearly shows the lane running west from 600 West past the McNaughten residence for some distance. The lane is then obscured by trees, but reappears and continues past the Witt Barn. The McNaughten barn is also visible. Mr. Maurice Pia, the Defendant's expert photogrammetrist, could not ascertain with certainty the existence of any other access to the McNaughten barn.

***1965 through 1985***

43. The evidence as to use of the lane during this period of time is limited.

44. According to Ms. Boren, the McNaughtens continued to have cows and other animals on their property and used the lane for these purposes. However, the scope of these activities appears to have been in decline.
45. Jack and Garth Lunt occasionally visited the property during this period, but have limited knowledge of the use of the lane.
46. In 1980, Mr. McNaughten died. Some animals were maintained on the property after his death, but Ms. McNaughten's health was failing. Ms. Boren moved into the family home to care for her mother who died in 1984.
47. The 1978 and 1979 aerial photographs show the lane. However, some vegetation is growing on the south side of the McNaughten home. The Witt barn is gone. In the 1979 photograph, some kind of shrubbery and vegetation appear on the south wall of the McNaughten home.
48. 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.
49. The 1985 aerial photograph depicts this same access to the McNaughten barn and vehicles parked past the barn. The lane is visible. It runs west from 600 West for a distance only to again be obscured by trees. Vegetation is visible on the south side of the McNaughten house. Shrubby and vegetation on the south side of the McNaughten home persist.



*1985 to Present*

50. In the early 1980's, the gate was constructed across the lane.
51. Sometime between 1986 and 1988, the Plaintiff began leasing the McNaughten home and an accessory apartment to tenants. From that time until the present, tenants leasing the property have used the lane to access the back apartment.
52. One of these tenants was Robert Williams. Ms. Boren testified that Mr. Williams used the common lane to move his horses.
53. Sometime after 1984, Ms. Boren gave permission to her grandson Trent Boren to use the lane to access the back pasture land. Other tenants of the property were not given permission to do so.
54. In 1991, the McNaughten barn was sold and removed from the premises.
55. The Defendants purchased the Witt parcel in 1991.
56. In 1996, the Lances first informed Garth Lunt that they believed they were the owners of the common lane.
57. In 1999, Ms. Boren obtained a survey from Lord Engineering, and the Defendants obtained a survey from Thompson-Hysell Engineers. The surveys conflict as to the boundary line between the two properties.
58. Sometime in the late 1990's, the Defendants deposited large piles of fill dirt on the lane, partially blocking it. About the same time, Ms. Boren permitted her son to deposit large landscaping rocks on part of the lane.
59. Early in 2001, the Lances notified the Plaintiff that vehicles were not to be parked on the lane.

60. In the 1993 aerial photograph, the lane is markedly less visible. Vegetation can be seen on the south side of the McNaughten home. What can be seen of the lane runs from 600 West to the rear of the home. The lane is then obscured by trees and does not reappear west of those trees. The large access road to the north of the McNaughten home is readily apparent.
61. The 1997 and 2001 aerial photographs are generally consistent with the 1993 photograph.

## **CONCLUSIONS OF LAW**

### **Boundary by Acquiescence**

To prove boundary by acquiescence, Plaintiff must prove by a preponderance of the evidence four elements: “(1) occupation up to a visible line marked by monuments, fences, or buildings, (2) mutual acquiescence in the line as the boundary, (3) for a long period of time, and (4) by adjoining property owners.” RHN Corp. v. Veibell, 2004 UT 60, ¶22 (2004), quoting, Jacobs v. Hafen, 917 P.2d 1078, 1080 (Utah 1996).

Plaintiff has failed to prove by a preponderance of the evidence “occupation” of the lane up to a visible line. From the 1930's through 1945, the old Witt fence marked the northern boundary of lane from 600 West to the far west gate. A part of the old Witt fence was removed to accommodate construction of the McNaughten home in 1945, but that fence together with the south wall of that home continued to mark the northern boundary of the lane until the late 1970's. The southern boundary of the lane has been marked by the wood fence, and various outbuildings on the Witt property from the 1930's to the present. From the 1930's through 1960, the wooden fence continued beyond the gate to the McNaughten barn, further extending the southern boundary of the lane.

Beginning in the 1930's and continuing through at least the mid 1970's, both the McNaughtens and the Witts used the lane to access their respective barns. However, this joint use does not amount to "occupation" by either party for purposes of boundary by acquiescence. Under that doctrine, "property rights are determined by actual possession of land." Gillmor v. Cummings, 904 P.2d 703, 707 (Utah Ct. App. 1995), citing, Carter v. Hanrath, 885 P.2d 801, 804 (Utah Ct. App. 1994). In this case, neither the McNaughten nor the Witt family possessed the lane to the exclusion of the other. Rather, both families desired that the lane be unobstructed so that it could be jointly used for agricultural purposes. On these facts, the Court cannot conclude by a preponderance of the evidence that either family occupied the lane up to a visible line.

Plaintiff has also failed to prove by a preponderance of the evidence that the parties mutually acquiesced in a particular line separating the properties. "To acquiesce means to 'recognize and treat an observable line, such as a fence, as the boundary dividing the owner's property from the adjacent landowner's property.'" RHN Corp., 2004 UT 60, ¶24, 96 P.3d 935, citing Ault v. Holden, 2002 UT 33, ¶18, 44 P.3d 781. "Acquiescence, or recognition, may be tacit and inferred evidence." Ault, 2004 UT 60, ¶18. Acquiescence may be shown by "occupation up to, but never over" a visible line, as well as by silence or the failure of a party to object to a line as a boundary." RHN Corp., 2004 UT 60, ¶25.

In the instant case, the Witts never acquiesced in the wood fence as the northern boundary of their property. Likewise, the McNaughtens never acquiesced in the old Witt fence as the southern boundary of their property. Rather, both families occupied the lane over these purported boundary lines. Both families routinely used the entire lane between the fences for agricultural purposes, as if the lane belonged to them. Neither family recognized either fence as

a boundary between their respective properties.

For these reasons, Plaintiff's claim for boundary by acquiescence fails.

### **Prescriptive Easement**

"A prescriptive easement is created when the party claiming the prescriptive easement can prove that 'use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years.'" Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998), quoting, Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998). These elements must be proved by clear and convincing evidence. Marchant v. Park City, 771 P.2d 677, 682 (Utah Ct. App. 1989), citing, Garmond v. Kinney, 91 N.M. 646, 579 P.2d 178 (1978). Whether an easement exists is a question of law. Orton, 920 P.2d at 1256. However, "such a finding is the type of highly fact-dependent question, with numerous potential fact patterns, which accords the trial judge broad discretion when applying the correct legal standard to the given set of facts." Id.

In the instant case, from the 1930's and continuing through at least the mid-1970's, the McNaughtens have continuously used the lane to transport cattle, haul hay, move agricultural equipment, and park cars. During this time, each family relied on the lane to access the rear of their respective acreage. The Court concludes that the Plaintiff proved these elements by clear and convincing evidence.

The Defendants contend that use of the lane by the McNaughtens was by permission, and therefore not adverse to Witts' interests. Ms. Housel testified that her Grandfather Witt was "particular about protecting the lane." However, the weight of the evidence demonstrates clearly and convincingly otherwise. Multiple witnesses testified that neither the Witts nor the McNaughtens ever asked permission of the other to use the lane. Rather, the respective families

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. In so finding, the Court notes that the testimony of Mr. Eldon Carlisle concerning use of the lane from the 1930's through the 1950's was particularly credible.

The facts of this case are strikingly similar to those presented in Richins v. Struhs, 17 Utah 2d 356, 412 P.2d 314 (1966). In that case, the parties owned adjoining properties on Emigration Creek. The creek separated both properties from the road. In 1918, their predecessors in interest “jointly constructed [a] bridge and roadway and so maintained and used it so long as they owned the properties (until the 1950's).” Id., 412 P.2d at 315. The bridge and driveway were constructed “between the two properties on what was assumed to be the boundary.” Id., 412 P.2d at 316. In 1960, the Struhs purchased one of the properties. After obtaining a survey, they “erected a fence in the driveway on what they assert [was] the true boundary.” Id. That fence blocked the driveway, and the adjoining property owner’s access.

The trial court held that because the predecessors in interest had “used the driveway harmoniously and without conflict . . . the use was permissive and . . . therefore no prescriptive right to use the driveway arose.” Id. The Utah Supreme Court reversed, holding that the trial court’s conclusion did not “give effect to fundamental principles applicable to prescriptive rights.” Id. The Court explained:

In order for the use to have been permissive it would have to appear that the parties understood that the driveway was upon the Whipple’s (defendant’s predecessors) property; that it was with this understanding that they gave their consent to its use; and similarly that the Joneses (plaintiffs’ predecessors) so understood and accepted and used it. No such view of the facts is warranted by the evidence. . . . [I]t is our opinion that the reasonable

conclusion to be drawn from the facts here shown, where the parties (predecessors) jointly established and used a driveway on what they thought their common boundary, is that the use meets the requirement of being open, notorious, continuous, and adverse for more than 20 years and therefore has established a prescriptive right to continue to so use it.

Id., 412 P.2d at 316-17. See, Green v. Stansfield, 886 P.2d 117, 121 (Utah Ct App. 1994)

(explaining that use of the common driveway in Struhs was always adverse because “defendant’s predecessor did not know that the bridge was on his property [and] . . . could not have granted permission”).

Here, there is no evidence that the Witts understood that the lane was on their property. The first efforts to ascertain the true boundary line were not pursued until 1999 when the Plaintiff and Defendants each obtained conflicting surveys. Like the adjoining property owners in Struhs, the Witts and McNaughtens established and harmoniously used a common lane from the 1930's through at least the mid-1970's. That use is as a matter of law open, notorious, continuous and adverse for more than 20 years and establishes a prescriptive right in favor of Plaintiff.

### **Abandonment**

“It is well-recognized that an easement or right of way may be abandoned.” 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.” Harmon v. Rasmussen, 375 P.2d 762, 765 (Utah 1962).

In determining the issue of abandonment, courts should consider “whether or not the right was acquired by prescription or grant, the extent of its use, and the actual intent of the owner.”

Western Gateway Storage, 567 P.2d at 182. As to the issue of intent, abandonment requires the owner to “cease[] to use the easement . . . with the intention to make no further use of it.”

Harmon, 375 P.2d at 765. “An easement is considered abandoned when there is a history of non-use coupled with an act or omission showing clear intent to abandon.” Easements & Licenses In Real Property, 25 Am. Jur. 2d § 112. Adverse use by the owner of the servient estate, acquiesced in by the owner of the dominant estate, may constitute abandonment. Hudson v. Pillow, 261 Va. 296, 541 S.E. 2d. 556 (2001).

In the instant case, the gate blocking the lane was constructed in the early 1980's. From that date, Plaintiff ceased to use the lane west of the gate. For more than 20 years, Plaintiff has acquiesced in the closure, never taking any action to object. This history of non-use and inaction show a clear intent on the part of Plaintiff to abandon the lane west of the gate.

#### **Scope of the Remaining Prescriptive Easement**

From the 1930's through at least the mid-1960's, the McNaughtens used the lane in connection with a large dairy and range cattle operation. During this period, use of the lane to run cattle, haul hay, move equipment, and park cars was common. The operation declined in scope from 1965 to 1980. However, use of the lane for these purposes continued, although to a lesser degree. By 1979, the McNaughtens had established the large access road north of their home and routinely used it to access their acreage and barn.

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 and continuing 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.

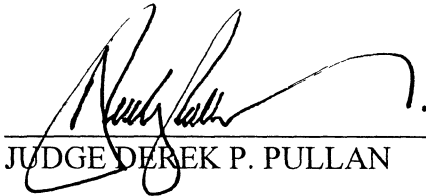
The Court concludes that from 600 West to the gate, the Plaintiffs have a prescriptive easement for a driveway. The width of the driveway shall be commensurate with the width required by Heber City ordinances to accommodate one residence used for multi-family purposes.

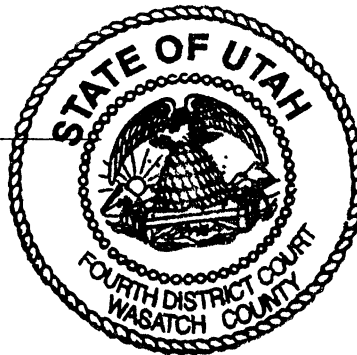
### CONCLUSION

Plaintiff failed to prove boundary by acquiescence. The Court grants judgment in favor of Defendants on this cause of action. Plaintiff prevails in part on the claim for prescriptive easement. The length, width, and scope of the easement are set forth in this ruling.

The Court requests that counsel for Plaintiff prepare an order and judgment consistent with this ruling. The order shall contain a legal description of the easement granted herein. As stipulated by the parties, the Court orders Plaintiff to obtain and pay the costs of a survey identifying the prescriptive easement.

DATED this 23 day of November, 2005.

  
\_\_\_\_\_  
JUDGE DEREK P. PULLAN





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	CHRISTOPHER D GREENWOOD ATTORNEY DEF 1840 N STATE ST STE 200 PROVO UT 84604

Dated this 23<sup>rd</sup> day of November, 2005.

Ros Marie Bouma  
Deputy Court Clerk

Tab B

# **Judge Taylor's Ruling**

**FILED**  
NOV 15 2006  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY  
WASATCH

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

<p>GARTH LUNT, Trustee of the GARTH O. LUNT REVOCABLE TRUST,</p> <p>Plaintiff,</p> <p><b>vs.</b></p> <p>HAROLD LANCE and DIANA LANCE,</p> <p>Defendants.</p>	<p>CASE NUMBER: 020500612</p> <p>DATED: NOVEMBER 15, 2006</p> <p><b>RULING</b></p> <p>ANTHONY W. SCHOFIELD, JUDGE</p>
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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.

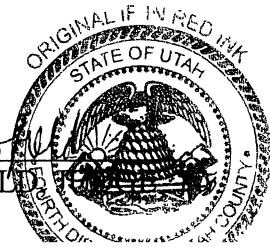
**Conclusion**

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





### 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

Tab C

# **Judge Scofield's Ruling**

5-3-06 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

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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.

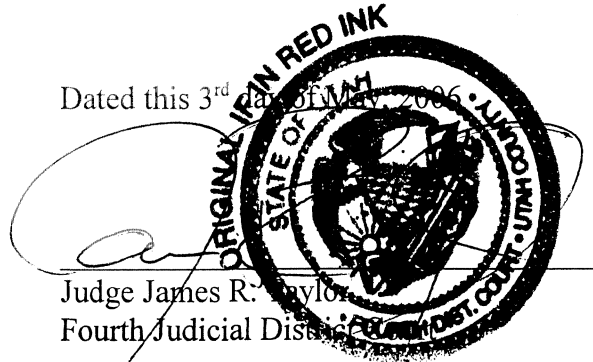
The unusual dilemma presented by this motion is that it does not seek to merely conclude the prospective involvement of Judge Pullan, the moving party seeks a determination that a trial already concluded was tainted and should be set aside. No specific references to the trial, written ruling or subsequent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



Judge James R. Taylor  
Fourth Judicial District

Copies of this Order mailed to:

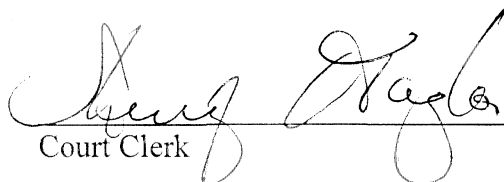
Counsel for the Plaintiff:

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



Tab 1

# **Testimony of Elden Carlisle**

1 MR. GREENWOOD: Well, I'll probably take 10, 15 minutes  
2 just on cross examination.

3 THE COURT: And you'll be five minutes?

4 MR. GREENWOOD: Five or ten.

5 THE COURT: Okay. We'll break at 12:30 for lunch.

6 Mr. Carlisle, if you'll come forward.

7 MR. BIRCH: Or earlier if were done that, I hope.

8 THE COURT: You'll need to come right here first, sir.

9 Raise your right hand and take an oath.

10 COURT CLERK: You do solemnly swear that the testimony  
11 you shall give in the matter now before this Court shall be the  
12 truth, the whole truth, and nothing but the truth, so help you  
13 God?

14 THE WITNESS: Yes.

15 THE COURT: Thank you, Mr. Carlisle. If you'll take the  
16 witness stand.

17 ELDON CARLISLE

18 having been first duly sworn,

19 testifies as follows:

20 DIRECT EXAMINATION

21 BY: MR. BIRCH:

22 Q. Mr. Carlisle, I appreciate you being here today. I know  
23 it's probably not what you do for a fun time. On the other hand,  
24 it's interesting. I hope you've enjoyed at least in part. Could  
25 you tell the Court your name, please?

1 A. Eldon Carlisle.

2 Q. How old are you, Mr. Carlisle?

3 A. I'm 88.

4 Q. How long have you lived in Heber?

5 A. Most all the time. I was away three-and-a-half years in  
6 the Army.

7 Q. Okay. When were you in the military?

8 A. From '41 to '96.

9 Q. From '41 to how long?

10 A. From '41 to '46.

11 Q. Oh, '46, okay. That was the longest stint I had ever  
12 heard of for a minute.

13 A. Yeah, longest years.

14 Q. Seemed like that long maybe. All right. Did you know  
15 the McNaughtons?

16 A. Yeah.

17 Q. Link McNaughton in particular?

18 A. Yes.

19 Q. How did you know Link?

20 A. We were neighbors.

21 Q. Okay. Where did you live back then?

22 A. At 218 West Center.

23 Q. Not too far from where you live now, is it?

24 A. That's right.

25 Q. Okay. When you -- how old -- were you and Link the same

1 age in school?

2 A. No, Lincoln was about a year, a year-and-a-half older  
3 than I was.

4 Q. Okay. So did you guys -- were you friends?

5 A. Yes.

6 Q. Okay.

7 MR. BIRCH: I just noticed we're missing a photograph,  
8 your Honor. I don't know --

9 MR. GREENWOOD: Does the Court have it?

10 THE COURT: I don't, Counsel.

11 MR. BIRCH: Did it fall? I don't see it fallen.

12 MR. GREENWOOD: Which one is it?

13 MR. BIRCH: It's 5-B.

14 THE COURT: It's 5-B.

15 MR. GREENWOOD: We will look diligently and see if we've  
16 got 5-B. Your Honor, my mistake. I had it (inaudible). Sorry,  
17 Randy.

18 MR. BIRCH: Just trying to keep track of things, your  
19 Honor.

20 THE COURT: Thank you.

21 Q. BY MR. BIRCH: Okay. I've got these photographs over  
22 here, if you want to pull them off and bring them over. Are you  
23 familiar with this lane that we're talking about here today? I'm  
24 handing you Exhibit 5-A. Do you recognize that property?

25 A. Yes.

1 Q. What is that?

2 A. That's on the south side of the McNaughton house.

3 Q. Is that where Link lived?

4 A. Yes.

5 Q. Okay. Do you see a lane in that picture?

6 A. Yes.

7 Q. Did you ever have occasion to go travel that lane?

8 A. I used to go down there occasionally with Lincoln when  
9 he drove his cows down there.

10 Q. So you --

11 A. When we were boys.

12 Q. When you were boys. So that would have been --

13 A. Several years ago.

14 Q. -- a few years ago, okay. You drove cattle down that --  
15 this is like periodically, daily, how often did you do that? Do  
16 you recall?

17 A. Well, I can't tell you how often, but occasionally  
18 during the summer we did.

19 Q. Okay. Do you remember how many years you did that for?

20 A. No, I can't remember how many years, but it was several  
21 years.

22 Q. Okay. Did you see anybody else ever use that lane?

23 A. The Whitts did.

24 Q. Okay. What did you see them do with it?

25 A. When we were boys and after we grew up, then as long as

1 the Whitts lived there.

2 Q. Okay. What did they do on that lane -- along that lane?

3 A. They had access to their barn that was down at the end  
4 of the lane.

5 Q. Okay. When the McNaughtons took their cows down it, how  
6 far down the lane did they go?

7 A. Oh, it was probably approximately a fourth of a block,  
8 maybe a third of a block.

9 Q. Then where did the McNaughtons go?

10 A. Then they went in the gate on the north side of the lane  
11 into their property.

12 Q. Okay. So they went down the lane and turned to the  
13 north into their own property?

14 A. Right.

15 Q. Okay. Did you ever hear anyone object to either the  
16 Whitts or the McNaughtons using that lane?

17 A. No, I didn't.

18 Q. Did you ever hear anyone -- well, strike that. Any  
19 other use of that property? Did you ever see any hunters,  
20 fisherman, rocket scientists go up and down that lane? Any other  
21 purpose?

22 A. Well, we probably did when we were children. We'd go  
23 down that lane and climb over the fence and go swimming in the  
24 canal.

25 Q. Okay.

1       A.   Then there was probably some fisherman, but I couldn't  
2 tell you whether there was or wasn't.

3       Q.   And I'm just asking what you recall, okay? How about --  
4 since you got back from the mil -- since you were released from  
5 the military, have you had occasion to go out to this property?

6       A.   Yes, occasionally when the McNaughtons would bring their  
7 cattle from the north field down there for fall or some such  
8 thing as for feed it off.

9       Q.   Okay. Bear with me here. You said when you were a kid,  
10 so this would have been before 1941; is that correct?

11      A.   Yeah, I think so.

12      Q.   Okay. Then in 1941 you were in the military?

13      A.   That's right.

14      Q.   Through '46, and subsequent to that you -- what have you  
15 observed along that lane? So say since the '50's what have you  
16 observed along the lane?

17      A.   Well, just the lane was there and McNaughtons went back  
18 and forth on it probably and probably the Whitts. I don't  
19 remember when the Whitts died.

20      Q.   Okay. As long as they were alive you remember seeing  
21 them on the lane?

22      A.   Yes.

23           MR. BIRCH: Okay. I have no further questions, your  
24 Honor.

25      ///



CROSS EXAMINATION

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BY MR. GREENWOOD:

Q. Eldon, you remember seeing any willow trees next to that common lane?

A. Yes.

Q. Describe to the Court the willow trees.

A. Well, a tree that was up closer to the house was on the north side of the lane. I'd say these willow trees down here on the bottom was down by the canal at the end of the lane.

Q. All right. Were there any willow trees --

A. Not at the end of the lane, but at the end of Whitts' property.

Q. So it wasn't the end of the lane, but the end of the property?

A. Right.

Q. Were there any willow trees next to the house, closer to the house?

A. To the McNaughton house?

Q. Yes.

A. Well, there's one not too far from the west corner of the McNaughton house. I don't see it in here, unless this is the branches of it come over here.

Q. How old are you? Are you 86?

A. I'm 88.

Q. Oh, 88. So you worked for the Whitts, right?

1       A.    No, I didn't work for the Whitts.

2       Q.    Did you -- tell me again how you lived. Did you -- you  
3 knew -- you worked for the McNaughtons, then?

4       A.    I was -- the McNaughtons.

5       Q.    Okay. You worked for the McNaughtons, right?

6       A.    As far as being an enemy of the Whitts, I wasn't an  
7 enemy of the Whitts. I was friendly with everybody.

8       Q.    Did you ever have a chance to see Mr. Whitt and  
9 Mr. McNaughton interact?

10      A.    Yes, I seen them together, but I never did see them  
11 arguing or anything.

12      Q.    Did you ever see them using the lane together?

13      A.    Well, I don't remember seeing them passing each other at  
14 the lane, but they both used the lane.

15      Q.    Who do you think owned the lane?

16      A.    Well, I imagine it come off --

17           MR. BIRCH: Objection, foundation.

18           THE COURT: Sustained.

19      Q.    BY MR. GREENWOOD: Who do you think spent more time in  
20 the lane, the Whitts or the McNaughtons?

21      A.    Well, probably the Whitts. They lived closer.

22      Q.    What makes you say the Whitts spent more time in the  
23 lane?

24      A.    Sir?

25      Q.    They spent -- they lived closer?

1       A.    Yeah, the Whitts lived -- they had -- their house was  
2 just on the south side of the lane.  McNaughtons' house, when we  
3 were boys, wasn't there.  They lived in town.

4       Q.    This was in 19 -- give me the year.

5       A.    Oh, I don't -- Lincoln built that house probably in '46  
6 or 7.

7       Q.    Do you recall the property in 1930?

8       A.    Yes.

9       Q.    Before the basement was built?

10      A.    That's right.

11      Q.    Was there a fence that extended all the way to 6<sup>th</sup> West?

12      A.    There was, except there was a gate in it.  As far as the  
13 fence, I guess you would call the gate part of the fence.

14      Q.    But it extended all the way from the canal all the way  
15 up to 6<sup>th</sup> West -- 6<sup>th</sup> North?

16      A.    That's right.

17      Q.    That fence was taken down when they built the basement  
18 house, right?

19      A.    I don't remember.

20      Q.    We're talking about Exhibit 5-A, this picture.  Do you  
21 recognize the house there?

22      A.    I -- the property would run west of here.

23      Q.    But picture in your mind 1930.  Would there have been a  
24 fence that ran all the way down to the road?

25      A.    There would have been a fence that would have come from

1 here up to here.

2 Q. Show the Court.

3 A. It would --

4 MR. BIRCH: If I may, your Honor.

5 THE COURT: You may.

6 THE WITNESS: -- have been -- run up to the -- it would  
7 run up clear to the road.

8 THE COURT: And how far would that fence have been from  
9 the house?

10 THE WITNESS: Well, I --

11 MR. GREENWOOD: In terms of (inaudible) size distance.

12 THE COURT: Size. I know the house wasn't there, but --

13 THE WITNESS: Well, I've never paid any attention how  
14 close the house was built to the fence.

15 THE COURT: Would the fence have been on the north side  
16 of that lane, then?

17 THE WITNESS: That fence would have been on the north  
18 side of this lane, but it would have been on the south side of  
19 the house.

20 THE COURT: Okay. Thank you.

21 Q. BY MR. GREENWOOD: And it would have been, would you  
22 say, three or four feet from the house?

23 A. I would say so.

24 Q. You wouldn't say 10 or 15, would you?

25 A. -- No, I wouldn't think that would be that far.

1 Q. Now along that line there were some willow trees. Were  
2 there some willow trees along that fence line behind the house?

3 A. Yes.

4 Q. Do you remember how big they were back in --

5 A. They was pretty big trees.

6 Q. Okay. They have been there for awhile?

7 A. Yes, they've been there as far back as I can remember.

8 Q. Did you ever see the trees trimmed?

9 A. No.

10 Q. Who was it that -- you ever see anyone hang things on  
11 the trees?

12 A. No, I never seen anything hanging on the trees.

13 Q. Which side of the fence were the trees growing on?

14 A. Well, I'd say they was pretty close to the fence line,  
15 but they might have been just slightly on the north side of the  
16 fence.

17 Q. North side of the fence, which would be the McNaughton  
18 side?

19 A. On the McNaughton side.

20 Q. You think that the McNaughtons consider that a boundary?

21 A. I don't know whether they considered it a boundary or  
22 not.

23 Q. Now in 1950 do you remember seeing this gate between the  
24 willow trees?

25 MR. BIRCH: If I may, your Honor.

1 THE COURT: You may.

2 THE WITNESS: Well, I don't remember whether it was  
3 there or not. It probably was. As far as I remember the gate  
4 was there forever.

5 Q. BY MR. GREENWOOD: Okay. Describe the use of that gate  
6 when you saw it being used.

7 A. Well, the McNaughtons drove cattle through it and they  
8 drove their wagon through it. In the winter the Whitts would  
9 open the gate and let their stock through to get water in the  
10 canal.

11 Q. Now let's talk about this use. Are we talking going  
12 north and south --

13 A. Right.

14 Q. -- taking the cattle through?

15 A. Right.

16 Q. Did you ever see the McNaughtons bring cattle on their  
17 property by any other way?

18 A. Yes, there was a gate over on the south side of their  
19 property, which would be west where the -- this is the one. Down  
20 by these trees the Whitt property cornered and went south, and  
21 the McNaughton property still joined (inaudible). There was a  
22 little gate over on the south side of the McNaughton property  
23 that they could get their cows through, but they couldn't get a  
24 wagon through.

25 Q. Okay. This was 19 -- what years?

1       A.   Well, it's been forever.

2       Q.   Forever. Did you ever see the cows being brought onto  
3 the McNaughton property from 6<sup>th</sup> West?

4       A.   Yes. I even helped do them.

5       Q.   Other than through this common lane, maybe further to  
6 the north?

7       A.   No, I don't remember. There may have been a little wire  
8 gate there, but I don't remember using it.

9       Q.   Now there were some willow trees out front on 6<sup>th</sup> West,  
10 weren't there?

11      A.   That's true. That's true.

12      Q.   There was a gate between those two willow trees; isn't  
13 that true?

14      A.   It could have been between the trees.

15      Q.   And that the cows were led through that gate between the  
16 two willow trees in the front on 6<sup>th</sup> West?

17      A.   They could have been, but they was also brought through  
18 the wooden gate down the lane.

19           MR. GREENWOOD: Just one minute. Just one moment, your  
20 Honor. Could I have just a moment?

21           THE COURT: You may.

22           (Counsel confers with client)

23           MR. GREENWOOD: That's all I have, your Honor.

24           MR. BIRCH: Thank you, your Honor. You can leave it  
25 there if you want. I'm not going to look at it.

REDIRECT EXAMINATION

BY MR. BIRCH:

Q. Mr. Carlisle, for me it's almost enjoyable to do some of these kinds of cases because I get to talk to people who are -- who have experienced things I've only read about. I appreciate your time here today. You indicated you were born in what year?

A. In 1917.

Q. Okay, 1917. So when you said you were running cows up and down this lane as a kid, we were talking in the 1920's and '30's?

A. Yes.

Q. So that lane existed clear back in the '20's and '30's?

A. It was there as far back as I can remember.

MR. BIRCH: Okay. Thank you. No further questions.

MR. GREENWOOD: Redirect?

THE COURT: Briefly.

MR. BIRCH: I'm just going to fix the pictures.

RE CROSS EXAMINATION

BY MR. GREENWOOD:

Q. In the '20's and '30's were there cars parked on that lane?

A. I think Whitts had a car.

Q. The Whitts parked a car on that lane?

A. I think though, and then I think they parked it in the garage that was on the south side of the lane. It was an old



1 wooden structure.

2 Q. Were they milking cows in the '20's and '30's on the  
3 McNaughton property?

4 A. Yes, and that's when they milked cows by hand, not with  
5 a machine.

6 Q. Do you remember when that stopped happening?

7 A. No, I don't.

8 Q. Do you remember when the barn was taken down?

9 A. I have no idea.

10 MR. GREENWOOD: Okay. Thank you.

11 MR. BIRCH: May this witness be excused, your Honor?

12 THE COURT: (inaudible) question for him. I think I do  
13 have one question for Mr. Carlisle, and I'll allow both of you to  
14 follow up on it. Do you know when the McNaughtons stopped  
15 running cattle on the lane, or if they ever did?

16 THE WITNESS: I don't remember when they stopped, but it  
17 would probably be either in the late '80's or '90's, early '90's.

18 THE COURT: Okay.

19 THE WITNESS: I can't remember when Lincoln died, but we  
20 were good friends up until he died, and he still had stock at  
21 that time.

22 THE COURT: All right. Thank you.

23 MR. BIRCH: No questions.

24 THE COURT: Anything further, Mr. Greenwood?

25 Q. BY MR. GREENWOOD: Just -- the cattle was ran into the

Tab 2

# **Testimony of Moneves Boren**

1 property?

2 A. We would go down there if -- like I said, I had younger  
3 brothers and sisters down there, and my parents were there and we  
4 would come over here to do shopping and that and we would call on  
5 them.

6 Q. Okay. Did you ever visit -- when you say call on them,  
7 you mean visit your parents?

8 A. Pardon?

9 Q. When you say call on them, do you mean visit them?

10 A. Visit them.

11 Q. Okay. Did you ever help with the -- any of the chores  
12 that needed to be done?

13 A. Just milking the cows. When Link would -- was working  
14 over to the mines and it was cold in the morning and snowing and  
15 he had to leave so early, that when the sun come out I would go  
16 out and milk.

17 Q. Do you remember what years that was?

18 A. That was in the '48 and '49's.

19 Q. But subsequent to 1955 how often have you visited the  
20 site? After 1955 how often did you go by?

21 A. Often. I don't know.

22 Q. Okay.

23 A. We -- our children was here in school, and then they  
24 took the school out of Wallsburg and we moved over here, and --

25 Q. Do you recall --

1       A.    I am.

2       Q.    How long do you -- do you recall when you first observed  
3 that lane?

4       A.    When I went there in '48.

5       Q.    Okay. Was it being used on a regular basis?

6       A.    Yes.

7       Q.    Can you tell me what you observed in 1948 its use --  
8 well, I'm talking like a lawyer. Let me take a deep breath and  
9 I'll fix that. What did they use the lane for back in 1948?

10      A.    The Whitts used it to travel down to their -- the back  
11 of their house to the garage to park their car. We used it  
12 down -- to go down through there to park -- down the side of the  
13 lane for we didn't have room in the front. Well, and when the  
14 snow got deep in there we couldn't get out anyway. We used it to  
15 park cars. In the summer we used it to take our hay back to the  
16 barn. We used it to put cattle down in there and take them out  
17 to take them to the north field, just the general use.

18      Q.    Okay. How long did they use that property to, as you  
19 put, to put cattle down in there?

20      A.    I don't know that they've ever stopped.

21      Q.    Okay. When was the last time you visited the property?

22      A.    Yesterday.

23      Q.    Okay. Did you have an opportunity to walk that lane and  
24 refresh your memory?

25      A.    I did.

1 went from north to south?

2 A. I did.

3 Q. And how far was that?

4 A. From the chimney back there on the apartment over to the  
5 wooden fence there was 35 feet.

6 Q. Okay. How about from 6<sup>th</sup> West where the asphalt is, how  
7 far back do you believe the ext -- well, let me ask you this.  
8 You've talked about a barn. You've talked about taking hay back  
9 there. How far back -- to what monument or what existed -- how  
10 far back did that lane go? To what did it stop or where did it  
11 stop?

12 A. Do you mean where it stopped that we used it, or where  
13 the lane stopped?

14 Q. No, where you've used it. Was there a --

15 A. As I --

16 Q. -- building or something?

17 A. Pardon?

18 Q. Was there a building or something?

19 A. No. There was all the buildings over on the Whitt side  
20 went clear back down in there. We had the fence down on our  
21 side, and there was a gate in there.

22 Q. Okay. Bear with me. When you say our side, let me show  
23 you on Exhibit 5-D, when you say there was a fence down there,  
24 are you referring to this fence here?

25 A. Bring it up, I --

1 Q. Let me get it closer. Sorry about that.

2 A. Yes.

3 Q. Okay. There was a gate in that, you say?

4 A. There was a gate down in this fence that went down here  
5 below that tree.

6 Q. Okay. Do you recall how far from the road approximately  
7 that fence was -- or excuse me, the gate, the gate was?

8 A. Yesterday I tried to line it up with where we went in to  
9 where -- the barn, and it was 235 feet from the edge of the  
10 asphalt down to where I figured it went across to the barn.

11 Q. Okay. Do you recall -- would that have been at the east  
12 or the west side of the fence -- the gate; do you recall, just  
13 about there?

14 A. Of the gate that's in the fence line?

15 Q. The gate that isn't there anymore, the one that used to  
16 be there, do you recall whether -- you said 235 feet, right?

17 A. Right.

18 Q. Would that have been which side of the gate?

19 A. It -- we were -- I was over on the --

20 Q. The gate ran --

21 A. -- north -- or the south side --

22 Q. -- east and west.

23 A. -- of the fence line.

24 Q. Right.

25 A. I was on the north side of the fence line.

1 Q. Right.

2 A. It runs east and west.

3 Q. Right.

4 A. And I was over on the north side of the fence line.

5 Q. Okay. So at 235 feet there was a gate?

6 A. Right.

7 Q. All right. Very good. Now after 1955 you say -- what  
8 use of that lane did you observe?

9 A. That was where we took the cattle and the hay and what  
10 we needed to do out in back that we got in.

11 Q. Did that continue every year?

12 A. Yes, and we had no other way to get onto the property.

13 Q. Okay. Is there a barn there now?

14 A. No.

15 Q. Excuse me, is there a McNaughton barn there now?

16 A. No.

17 Q. Okay. Do you recall when that was destroyed or  
18 demolished?

19 A. I think that was moved in the early 1990's. Bliss  
20 Taylor took it, and it is out to the north fields.

21 Q. Okay. So up until the 1990's how did they access that  
22 barn?

23 A. Who?

24 Q. Anyone.

25 A. We came down the lane and went through the gate over to



1 the barn.

2 Q. Okay. Do you recall the Whitts having a barn out there  
3 towards the end of the lane?

4 A. Yes.

5 Q. Okay. Do you recall where it was located?

6 A. I just remember it was out in the field. I don't know  
7 how far it was or anything about it because we turned off and  
8 went in to our barn.

9 Q. Okay. So you went towards the Whitt barn and turned off  
10 into your barn?

11 A. Right.

12 Q. Okay. Again, that use continued until the 1990's  
13 sometime; is that correct?

14 A. Right.

15 Q. Do you recall anyone else ever using that lane? School  
16 children, swimming?

17 A. No, I don't.

18 Q. Okay.

19 A. I did witness the -- hmm, the -- go down that lane one  
20 time --

21 Q. The Lances?

22 A. The Lances, thank you. Go down that lane one time with  
23 the trailer and a horse, and they didn't go in. They just went  
24 down to the gate and then came back.

25 Q. Okay.

1       A.    Took their horses out.

2       Q.    Let me show you Exhibit 5-C -- well, 5-B, how's that?  
3   It might be a little easier.  In that photograph can you see a  
4   pile of dirt?

5       A.    Yes.

6       Q.    Do you know when that was put there?

7       A.    No, I don't.  I was there when it was put there.

8       Q.    Okay.  Approximately when was it?

9       A.    Don't know.

10      Q.    Five years ago, 20 years ago?

11      A.    No, it wasn't 20 years ago.

12      Q.    Okay.  Do you recall who put it there?

13      A.    The Lances.

14      Q.    Okay.  Is it within the area that you have described as  
15   the lane?  Did they put the dirt in the lane?

16      A.    Yes.

17      Q.    Okay.

18      A.    Well, partially.

19      Q.    Okay.

20      A.    We had a white van out in the lane, and they dumped the  
21   rocks and the dirt, and we had to move them before we could get  
22   the van around so Trent could get out.

23      Q.    Okay.  So you believe that was in the 1990's after  
24   Lances bought the property that that happened?

25      A.    Right.

Tab 3

# **Testimony of Garth Lunt**

1 pasture and was put in the barn?

2 A. Well, the cattle weren't put in the barn, but the milk  
3 cows were.

4 Q. Okay. Milk cows in the barn?

5 A. That's right.

6 Q. When was the last time he was milking cows?

7 A. I don't remember.

8 MR. GREENWOOD: Okay. Thank you.

9 THE COURT: Mr. Carlisle, thank you very much, sir. You  
10 are free to go.

11 THE WITNESS: Thank you.

12 MR. BIRCH: We can take that lunch break at this time,  
13 your Honor.

14 THE COURT: Yeah.

15 MR. BIRCH: It would be a natural time.

16 THE COURT: The Court will be in recess. Counsel,  
17 let's -- what I'd like to do is go out and see the property right  
18 now, if we can, and then we'll reconvene at 1:30 for further  
19 testimony. By way of direction to clients or the Lunts -- any  
20 representatives of the Lunts here?

21 MR. BIRCH: Yes, Garth is here.

22 THE COURT: Okay. Mr. Lunt, you can travel with your  
23 attorney out to the property. I'll follow behind in my vehicle.  
24 Mr. Greenwood, if you'll take your clients. I would like to go  
25 out and see the property so that I have a better understanding of

1 how it's situated. I understand that I'm seeing it as it exists  
2 today; it's not what it looked like in the '40's or '30's or  
3 later. There's a tendency when we go out to do this that you'll  
4 want to tell me what I'm looking at, but I'm not going to hear  
5 any of that. It would be inappropriate for me to do that. If I  
6 do have questions I'll pose them to your Counsel, but I can't  
7 have you speak to me out there about this case. So I'll follow  
8 behind. Mr. Birch, if you can lead the way and we'll take a few  
9 minutes out there. We'll then take a lunch break and reconvene  
10 at 1:30.

11 MR. BIRCH: Thank you, your Honor.

12 MR. GREENWOOD: Can we leave our items in the courtroom?

13 THE COURT: You may.

14 MR. BIRCH: Can we lock -- make sure it gets locked?

15 THE COURT: We'll lock it up.

16 MR. BIRCH: Thanks.

17 COURT BAILIFF: All rise.

18 (Noon recess)

19 THE COURT: We're back in the matter of Garth Lunt vs.  
20 Harold Lance. The record should reflect that the parties are  
21 present together with their respective Counsel. Mr. Birch, you  
22 may continue.

23 MR. BIRCH: Your Honor, we'd call Garth Lunt.

24 THE COURT: Mr. Lunt, if you'll come forward, sir, to  
25 the desk. Raise your right hand and take an oath.

1 COURT CLERK: You do solemnly swear that the testimony  
2 you shall give in the matter now before this Court shall be the  
3 truth, the whole truth, and nothing but the truth, so help you  
4 God?

5 THE WITNESS: I do.

6 THE COURT: Thank you, sir. Please take the witness  
7 stand.

8 GARTH LUNT

9 having been first duly sworn,

10 testifies as follows:

11 DIRECT EXAMINATION

12 BY MR. BIRCH:

13 Q. Garth, could you tell the Court your name and where it  
14 is you currently reside?

15 A. My name is Garth Lunt. I reside at 4090 Branch Street,  
16 No. 2, San Diego, California, 92103.

17 Q. Okay. Mr. Lunt, are -- do -- what's your relationship  
18 to the Garth Lunt Family Trust or living trust?

19 A. It's a private trust that I have set up.

20 Q. Okay. Does it own any property here in Heber City?

21 A. Yes.

22 Q. Okay. Where is that property located?

23 A. At 205 North, 6<sup>th</sup> West.

24 Q. Okay. So when we refer to the Lunt property, we're  
25 referring to the property owned by the trust; is that correct?

1       A.    That's correct.

2       Q.    Okay.  When did you obtain title to that property?

3       A.    In 1977.

4       Q.    Okay.  Who did you buy that property from?

5       A.    That property was bequeathed to me by my deceased  
6 brother.

7       Q.    Excuse me.  So it was given to you by your deceased  
8 brother?

9       A.    Correct.

10      Q.    And before -- how -- and before he had it, who owned the  
11 property, if you know?

12      A.    Well, actually my parents lived there, but I think it  
13 was in 1972, my parents put it -- all the property in my name.

14      Q.    Okay.  So how long had your parents owned this property?

15      A.    Oh, gee, before 1947.

16      Q.    Okay.  What happened in 1947?  What caused you to recall  
17 that?

18      A.    In 1947 my father already owned it and they were going  
19 to build a house.

20      Q.    Okay.  So in 1947 they were going to or they did start  
21 to build?

22      A.    They did between 1945 and 1947.

23      Q.    Okay.  So during '45 to '47 they built a house?

24      A.    Correct.

25      Q.    Were you living at home at that time?  Excuse me.  Were



1 Q. Okay. Is that the house that was built in '45?

2 A. Between '45 and '47. We built a basement first and then  
3 went up.

4 Q. Okay. So '45 to '47 a basement was built in this house,  
5 but it was in that same location?

6 A. Exactly.

7 Q. Okay. Just to the south of the house do you see a lane  
8 or a driveway, however you describe it?

9 A. Yes.

10 Q. Okay. How long has that lane or driveway been there?

11 A. Forever, as far as I know.

12 Q. Okay. When do you first recall seeing this property?

13 A. When the house was being built.

14 Q. Okay. That would be 1945, then?

15 A. Correct.

16 Q. How old are you, Garth?

17 A. I'm 74.

18 Q. Okay. Did you work on the house at all?

19 A. Yes, I would say I was because we kept having a problem  
20 with water seeping in the basement, so we had to dig out around  
21 the basement and put pipes in to drain it.

22 Q. And you helped with that?

23 A. Yes.

24 Q. Okay. What was that lane used for in 1945 through 1950?

25 A. Well, we used to take cattle and teams of horses up it

1 and hay back to the barn and machinery. In the wintertime the  
2 machinery would have to come in from the north fields, and we'd  
3 park it down there.

4 Q. Okay. When was the most recent time that you saw this  
5 lane or this property?

6 A. Yesterday.

7 Q. Okay. At that time did you have occasion to measure the  
8 width of the lane?

9 A. I did.

10 Q. Okay. Now what divides the lane from the Whitt  
11 property?

12 A. There's a fence and a line of locust trees.

13 Q. Okay. Is that the wooden fence that we've talked about?

14 A. Yes.

15 Q. Okay. So how wide was the lane from the wooden fence  
16 over towards the house?

17 A. It's 34 feet.

18 Q. So 34 feet. Okay. Do you recall on the westerly end of  
19 that lane there are some -- are there buildings built along that  
20 wooden fence?

21 A. Correct.

22 Q. Okay. There is also another fence that runs parallel to  
23 the wooden fence, but picks up at about where the end -- building  
24 ends and goes further west; is that correct?

25 A. Correct.

1 Q. Okay. Did you have an opportunity to measure the  
2 distance between that building and that northern fence?

3 A. Yes, I did.

4 Q. Okay. Do you recall how wide that was?

5 A. The total down to that fence was --

6 Q. No, I'm trying to go width still. I'm just measuring  
7 the --

8 A. Oh, the width.

9 Q. -- width at the western end.

10 A. It's 35 feet.

11 Q. Okay. Now is that lane different today than it was back  
12 in 1945, to the best of your recollection?

13 A. It's different because now there's all kind of debris in  
14 it.

15 Q. Okay. Back in 1945 through '47 how far back did the  
16 lane go?

17 A. Total to where the old -- like out the old gate was.

18 Q. Well, tell me this. Was there some structure back there  
19 to which the lane ended?

20 A. Went back to Whitt's barn.

21 Q. Okay. Now the Whitt barn is no longer there, is it?

22 A. Correct.

23 Q. Do you recall when that was removed or demolished?

24 A. No, it just fell down for years and years and years and  
25 finally just --

1 A. Just worked around the house and visited family.

2 Q. Okay. Did you have occasion to see the use of that --  
3 the area that we're calling the lane?

4 A. Oh, of course.

5 Q. Okay. What was the lane used for?

6 THE COURT: I'm sorry, Counsel, this is after 1954?

7 MR. BIRCH: Correct.

8 THE COURT: Okay.

9 THE WITNESS: It was used for -- again, the Whitts  
10 hauling hay to their barn, me hauling hay to let's say my barn,  
11 equipment going up and down there. We had horses. We had range  
12 cattle that sometimes had to be brought in from the north fields  
13 to pasture it down.

14 Q. BY MR. BIRCH: And you were active in helping move that  
15 cattle and --

16 A. Yes.

17 Q. Okay. Did that type of activity continue until the barn  
18 was removed in 1991?

19 A. Yes.

20 Q. Okay. What other uses was that lane -- what other  
21 things was that lane used for?

22 A. Well, the other things it was used for, if the county  
23 had to go back there and spray thistles, which they often had to  
24 do, and there were times when the canal needed cleaning, they  
25 would go back and clean it and throw all the dirt up on the

1 was hunters or something going up and down there -- fisherman. I  
2 don't know. I don't see them all. I wasn't here.

3 MR. GREENWOOD: Okay. But you wouldn't call it a public  
4 easement, that's all I'm looking for. You'll stipulate it's not  
5 a public easement (inaudible) claiming for.

6 MR. BIRCH: Maybe. I'll have to think about that.

7 MR. GREENWOOD: Well, you think about it. He's  
8 testified that --

9 THE COURT: Anything further?

10 MR. GREENWOOD: Just a few more, your Honor. Would you  
11 like to take a break?

12 THE COURT: No. Let's finish up with Mr. Lunt if we  
13 can.

14 MR. GREENWOOD: Your Honor, when I use the word  
15 "easement," I'm using his --

16 THE COURT: Understood.

17 MR. GREENWOOD: His words.

18 Q. BY MR. GREENWOOD: All right. Garth, you testified in  
19 your deposition that this use of the land now is no longer being  
20 used for milk -- milking cows, correct?

21 A. Correct, not milking cows, but if you go down there a  
22 current day you'll see cows and horses in there, calves being  
23 pastured. They came down the lane.

24 Q. You testified that the real use of this is access to a  
25 back apartment; is that right?

1       A.   No, that is incorrect. The use of it is to get back to  
2 an acre of ground that goes west.

3       Q.   Well, you called this access a driveway for your  
4 tenants; isn't that true?

5       A.   Part of it.

6       Q.   If you would describe it, you would describe it as a  
7 driveway, not a pathway.

8       A.   I'd describe it as a lane.

9       Q.   A lane. You testified previously that it extends only  
10 150 feet from 600 West.

11      A.   That figure is just down to where that -- where the gate  
12 got moved up to.

13      Q.   Okay. You've testified that the use was just egress and  
14 ingress into the property.

15      A.   Yes, but with cattle and horses and hay and whatever.

16      Q.   All right. You're aware that in November of '88 is when  
17 you obtained an electrical permit for an apartment on the back of  
18 the home; isn't that true?

19      A.   When the home was built -- all right. The home was  
20 built in about '47. I'll say the apartment was put in on the --  
21 in the '60's. At that time the electricity naturally and all  
22 the utilities were put in the apartment. They were not cut off  
23 because my sister was living there taking care of my mother. So  
24 I -- we weren't getting like two electricity bills and that.

25      Q.   Your mother -- you didn't rent out the apartment until

1 we've got here in the courtroom, didn't you?

2 A. Correct.

3 Q. And do you recall how far it is from the highway back to  
4 this gate where the no trespassing sign is put? Or is there a  
5 post? What were you measuring to; do you recall?

6 A. I was measuring to a survey peg.

7 Q. Okay.

8 A. At 160 feet.

9 Q. Okay. That was between -- there was a survey peg you  
10 measured to? How far was the survey peg off the highway, the  
11 asphalt?

12 A. Oh, 15 feet.

13 Q. Okay. So we've got the asphalt, we've got 15 feet to  
14 the survey peg, and then you measured to another survey peg --

15 A. Yeah, 160.

16 Q. -- 160 -- was 160, 162. Where is that second survey peg  
17 located at approximately?

18 A. About --

19 Q. Do you need a picture? I can --

20 A. -- nine feet down from where that -- the gate is, call  
21 it a gate. The boards that go across.

22 Q. All right. Let me hand you -- whoops -- Exhibit 5-C.  
23 You can see the gate with the no trespassing sign on it. Is that  
24 the one you're referring to?

25 A. Yes.

1 Q. Okay. So you went to that peg and it was 15 plus 162 to  
2 that next peg?

3 A. Well, 160.

4 Q. Okay, 160. Then from that peg to where you believe the  
5 Whitt barn and the gate was?

6 A. It was 62 feet further west.

7 Q. Okay, further west. Okay. So we're going down this  
8 lane even further. Do you recall -- what's your recollection or  
9 your testimony to where the gate that went to the north, where  
10 that gate was?

11 A. That was at the end of the figures we just went through.  
12 There was about a 10 feet wire gate.

13 Q. So it was approximately 10 feet past the 62 you  
14 testified?

15 A. Yes.

16 Q. So if I added those numbers up I'd come with how far off  
17 the highway you believe that gate was; is that correct?

18 A. About 274 feet.

19 MR. BIRCH: Okay. I'll add those up again. All right.  
20 No further questions, your Honor.

21 THE COURT: Thank you. You may step down.

22 THE WITNESS: Thank you, your Honor.

23 THE COURT: You are free to remain or go.

24 MR. BIRCH: He'll be here.

25 THE COURT: All right.



Tab 4

# **Testimony of Jack Lunt**

1 what was the property used for; do you know?

2 A. No.

3 Q. Okay. So you say you ran cattle and hay into the '60's.

4 What building existed back when you first got out of the military

5 in '51; do you recall?

6 A. Mr. Whitt had a barn there and a lane there, and we had

7 a basement home at that time.

8 Q. Okay. Is that a basement home that exists where the

9 house currently sits?

10 A. Yes.

11 Q. Okay. It's been expanded and there's some sheds, but

12 the house was there?

13 A. Yes.

14 Q. Okay. What was the lane used for?

15 MR. GREENWOOD: Objection, foundation.

16 THE COURT: Overruled, he may answer.

17 THE WITNESS: It was used for us and Mr. Whitt to run

18 fork -- or equipment, mowing machines inside, delivery rakes from

19 one place to another.

20 Q. BY MR. BIRCH: Okay. You indicated there was a Whitt

21 barn at one end of it?

22 A. Yes, at the end of the lane.

23 Q. Which direction would that be from --

24 A. West of the 6<sup>th</sup> South -- 6<sup>th</sup> West.

25 Q. Okay. Did there come a time when the McNaughtons built

1       Q.   How far back from the road do you believe that barn was  
2 located?

3       A.   From clean back to the oil where 6<sup>th</sup> West --

4       Q.   Yeah.

5       A.   -- 200 and -- about 247, 48 feet.

6       Q.   Okay. At that point the lane to the west ended; is that  
7 correct?

8       A.   Yes.

9       Q.   What did Whitts do when they went down that lane? Where  
10 did they go?

11      A.   Back in their field.

12      Q.   That would have been to the south?

13      A.   Yes.

14      Q.   Okay. What did the McNaughtons do when they hit the end  
15 of the lane?

16      A.   They'd go on north.

17      Q.   Okay. What was -- isn't there a fence between the  
18 McNaughton and the Whitt property?

19      A.   Yes.

20      Q.   Back there?

21      A.   Yes.

22      Q.   Hasn't there been there -- one there for as long as you  
23 can remember?

24      A.   Yes.

25      Q.   Okay. So how did you get through the fence?

1       A.    There was a gate that went down through Mr. Whitt's  
2 corral that we could go through the gate and back in to our  
3 place.

4       Q.    All right.  What would you -- what did you go down that  
5 lane for?

6       A.    When we wintered -- or weaned the calves we'd go down  
7 there because the cows would be on this side of the fence, and  
8 we'd go through there and go through that gate to feed the calves  
9 we'd weaned.

10      Q.    Okay.  Did you take equipment down that lane?

11      A.    Yes, a bob sleigh and a wagon.

12      Q.    Okay.  Did you ever take any hay equipment down that  
13 lane?

14      A.    Yes, that would be the hay equipment.

15      Q.    Okay.  Any other use of that lane you can recall?

16      A.    No.

17      Q.    Okay.  Who used the lane?

18      A.    Just the people -- me and whoever, but there was mostly  
19 just the people that lived there, me and Mr. Whitt.

20      Q.    Okay.  Did -- was there any discussions between you  
21 and -- do you recall ever having a discussion with Mr. Whitt  
22 about using the lane?

23      A.    No.

24      Q.    Okay.  Was there any easement ever granted or any  
25 permission ever granted?

1 A. That's --

2 Q. As a matter of fact, did it look like this one?

3 A. Yes.

4 Q. Okay. Just so they didn't think we were trying to do  
5 that with a 10-foot tape. Did you have an opportunity to measure  
6 the distance between the -- what is now asphalt and this fence  
7 that you can see in Exhibit 5-B and 5-C, this fence that goes  
8 east and west?

9 A. From the oil?

10 Q. Yeah. Was there a post or something back there?

11 A. Yes.

12 Q. Okay. How far back is that?

13 A. It's 175 feet from the oil back to the fence.

14 Q. Okay. To this fence right here?

15 A. Yes.

16 Q. Okay. How much further past that fence did the old lane  
17 go to the Whitt barn?

18 A. About 62 feet to the gate where the barn was.

19 Q. Okay. Then how big was the gate?

20 A. Oh, 10 or 12 feet.

21 Q. Okay. That was as far, then, as the McNaughtons ever  
22 used the property?

23 A. Yes.

24 Q. Okay. Then how wide was it from the back of this  
25 barn --

1 THE COURT: Counsel, let me stop you again. I just  
2 wanted to make sure I understood that. The fence on the south  
3 side that you've talked about goes back how far?

4 THE WITNESS: It's 175 feet from the oil back to the  
5 fence.

6 THE COURT: And how far beyond that was the old Whitt  
7 barn?

8 THE WITNESS: It's 62 feet.

9 MR. BIRCH: Well, that's to the gate, your Honor. There  
10 was a gate.

11 THE WITNESS: To the gate where the barn was.

12 THE COURT: All right.

13 Q. BY MR. BIRCH: Now did you have a chance to measure  
14 the width? By that I mean the distance north and south of the  
15 fence --

16 A. Yes.

17 Q. -- of the lane? Okay. How far was it from the back  
18 side of this barn over to this fence that we can see here in  
19 Exhibit 5-D?

20 A. It's 35 feet.

21 Q. Okay. As you came down to the -- by the road, how far  
22 wide is that --

23 A. It's 35 feet, it was 35.

24 Q. Okay, and 35 feet put you where; do you recall?

25 A. Put you to the -- within four -- three or four feet of

1 Counsel, if you'll approach the bench.

2 (Short recess taken)

3 THE COURT: Thank you. Please be seated. What is your  
4 name, ma'am?

5 MS. BOREN: Pardon?

6 THE COURT: What is your name?

7 MS. BOREN: Moneves Boren.

8 THE COURT: Ms. Boren, if you could raise your right  
9 hand, please, and take an oath right here.

10 COURT CLERK: You do solemnly swear that the testimony  
11 you shall give in the matter now before this Court shall be the  
12 truth, the whole truth, and nothing but the truth, so help you  
13 God?

14 THE WITNESS: I do.

15 THE COURT: Thank you very much. You may take the  
16 witness stand.

17 Counsel, before we begin, in chambers I indicated that  
18 when I was the county attorney for Wasatch County I was consulted  
19 about a boundary line issue, my recollection is in this general  
20 area. I have no recollection with whom I talked. It's just come  
21 to my mind.

22 THE WITNESS: Judge?

23 THE COURT: Have you consulted with your clients about  
24 that?

25 — MR. BIRCH: I have, your Honor. I have consulted not



1 only with my client, but also the witnesses who are family and  
2 who have been involved in the dispute over the years. They've  
3 all indicated that you're a handsome fellow, but they don't  
4 recall seeing you at any time prior to today, and never consulted  
5 with you about this matter.

6 THE COURT: All right. Mr. Greenwood?

7 MR. GREENWOOD: The witness was going to say something.

8 THE COURT: I'd like to hear from you first.

9 MR. GREENWOOD: My clients have not been involved with  
10 you. They don't recognize you. They don't recall anything like  
11 that. All their property is in Heber City, so I don't know if  
12 you had jurisdiction (inaudible).

13 THE COURT: Okay. Thank you very much.

14 THE WITNESS: Could you speak a little louder or  
15 clearer. I can't understand you.

16 THE COURT: I will do that, and I'll direct that the  
17 parties do that as well.

18 THE WITNESS: Thank you.

19 THE COURT: And I'll speak up. Thank you very much.

20 MONEVES BOREN

21 having been first duly sworn,

22 testifies as follows:

23 DIRECT EXAMINATION

24 BY MR. BIRCH:

25 Q. Thank you for being here today, Moneves. Could you tell

Tab 5

# **Testimony of Diana Lance**

1 THE WITNESS: I do.

2 THE COURT: Thank you very much. Please take the  
3 witness stand.

4 MR. GREENWOOD: If I go too quick, your Honor, just say,  
5 "Slow down," okay?

6 THE COURT: All right. You may proceed.

7 DIANA LANCE

8 having been first duly sworn,

9 testifies as follows:

10 DIRECT EXAMINATION

11 BY MR. GREENWOOD:

12 Q. Please tell us your name.

13 A. Diana Lance.

14 Q. Where do you reside, Diana?

15 A. At 292 West Main in Midway.

16 Q. Do you own property in Heber City?

17 A. I do.

18 Q. Describe that property to us.

19 A. We own a little over nine acres between -- the south  
20 boundary is actually 91 North, but off of 600 West. It starts at  
21 109 North and goes to about 205 North.

22 Q. How long have you owned that property?

23 A. Since 1991.

24 Q. When did you first become acquainted with that property?

25 A. We were looking for property in the spring of 1991 to

Tab 6

# **Testimony of Frankie Housell**

1       A.    I resided on -- I can't remember the address, but it was  
2 on the other side of the depot grounds when it was the depot  
3 grounds and the railroad tracks, Midway Lane.

4       Q.    Are you familiar with the property that's in question  
5 today, namely property at 205 West, 6 -- 205 North 600 West?

6       A.    Yes.

7       Q.    Describe to us that property. What is it there?

8       A.    That's my grandparents' home.

9       Q.    Your grandparents were whom?

10      A.    Frank and Maude Whitt.

11      Q.    Okay. Did you ever work for them?

12      A.    No, but I stayed with them lots.

13      Q.    Tell us when you stayed with them.

14      A.    I stayed with them every weekend until I was probably 16  
15 or 17.

16      Q.    Okay. I'm not going to look for ages here, but what  
17 dates -- what years would that be in?

18      A.    It would have been from probably -- I stayed there when  
19 I was real little. Probably from 1945 to 1957.

20      Q.    Let me hand you an exhibit, Exhibit 5-A. In that photo  
21 there appears to be a lane. Do you see that?

22      A.    Yes.

23      Q.    Describe to us what that lane is that you see.

24      A.    That was the driveway to my grandparents' property.  
25 Their back fen -- their back way into their house was by my

1 grandfather's grainery on the -- they'd go in on the left there.  
2 Then the car sheds where they parked their cars was a little bit  
3 farther down on the left. Then the grainery was next. Then  
4 there was a open -- a gate that opened that went into a large  
5 corral, and then there was a huge barn there and an opening that  
6 came out from the corral on the other side into the field.

7 Q. Do you remember any fences being present in the '40's  
8 and '50's?

9 A. Yes.

10 Q. Can you describe to the Court where those fences were?

11 A. My grandmother had a fence around her property to keep  
12 the cattle and stuff off of her -- out of her flowers and her  
13 garden. It went around the whole front of the house, down the  
14 side to the back part where they went into the house.

15 Q. What was it made of?

16 A. Wood.

17 Q. Do you see it in that photo? Probably can't see it.

18 A. No, but it should be there.

19 Q. Okay. All right. Were there any other -- now that  
20 fence extended back to how far?

21 A. It only went back as far as the grainery.

22 Q. And how -- can you see the grainery in that photo?

23 A. Not in this photo.

24 Q. Probably not. It went back to the grainery. Now you  
25 mentioned that there was a gate --



1       A.   Not -- excuse me, I take that back. It was not the  
2 grainery, it was right next to the fence -- the fence where we  
3 went into the back of their house, my grandfather had a -- like a  
4 tool shop. He did all -- he kept all of his tools, all of his  
5 work things in there. Then there was a carport and then there  
6 was the grainery, and the fence only went to that shop.

7       Q.   Let me hand you Exhibit 5-F.

8           THE COURT: So that my notes are correct, Ms. Housell,  
9 the -- there's a tool -- there's a tool shop first?

10          THE WITNESS: Uh-huh.

11          THE COURT: And we're talking about those out buildings  
12 that are on the -- would have been the north property line, the  
13 north side of your parents -- your grandparents' property?

14          THE WITNESS: Uh-huh.

15          THE COURT: There's a tool shed first if I'm walking --

16          THE WITNESS: Yeah.

17          THE COURT: -- east, and then what --

18          THE WITNESS: Uh-huh.

19          THE COURT: And then what building?

20          THE WITNESS: Then there was a carport, a large one.  
21 They put their vehicles in there, and they had all kinds of  
22 assorted stuff in there.

23          THE COURT: And then --

24          THE WITNESS: It had an entry way on both sides, on the  
25 back side and the front side.

1 THE COURT: Okay. Then the grainery?

2 THE WITNESS: And then the grainery.

3 THE COURT: Okay. Again, how far back did that wooden  
4 fence go?

5 THE WITNESS: To the tool shop, and then it would  
6 have -- it stopped there and then it came up through the other  
7 part of the yard. There was no fence on that part from the  
8 grainery to the -- I mean you couldn't put your car in the  
9 garages if there was a fence.

10 THE COURT: Okay. Thank you.

11 Q. BY MR. GREENWOOD: How far back from the grainery was  
12 the Whitt barn?

13 A. There was a big corral and then the barn; 200 feet  
14 maybe.

15 Q. Okay. Do you remember seeing a barn on the neighbor's  
16 property, the McNaughton property?

17 A. When I -- I don't know if I -- about a barn. Mostly  
18 what I remember about their property is the swings on the big  
19 trees over there.

20 Q. Okay. Describe to the Court the big trees and where  
21 they are located.

22 A. They were -- there was two trees, and they had swings on  
23 them. My grandfather was very, very definite with my brother and  
24 I that we were not to climb over that fence and go swing on those  
25 trees. He said, "If you want to go swimming in the canal you go

Tab 7

# **Testimony of Duane Smith**

1 Q. Tell the Court how you're familiar with it.

2 A. Well, when I was -- when I first started -- I was  
3 probably eight or nine-years-old, I used to take cows back and  
4 forth to pasture for the McNaughtons.

5 Q. Okay. Now --

6 A. And --

7 Q. Go ahead.

8 A. Then --

9 Q. And you worked for the McNaughtons?

10 A. Yes.

11 Q. Okay. Were you aware where the Whitt property is in  
12 relation to that McNaughton property?

13 A. Yes.

14 Q. Yes. Did you ever take cows along the boundary between  
15 the Whitt and the McNaughton property?

16 A. No.

17 Q. Okay. Describe for the Court what you mean to be the  
18 boundary in the properties. Exhibit No. 5-A, let me hand you a  
19 photo. Can you identify what's in that photo?

20 A. Yes. The Link McNaughton house is to the north.

21 MR. BIRCH: May I approach, your Honor?

22 THE COURT: Yeah. You --

23 MR. GREENWOOD: It's 5-A.

24 MR. BIRCH: See which photo. Sorry. Thank you.

25 Exhibit 5-A.

1 property.

2 THE COURT: Where on the frontage?

3 THE WITNESS: Just -- oh, probably about 150 feet to the  
4 north.

5 THE COURT: To the north of what?

6 THE WITNESS: To the north of the property line.

7 THE COURT: Okay.

8 Q. BY MR. GREENWOOD: Was it to the north of the house to  
9 south of the house?

10 A. North.

11 Q. Okay.

12 A. That was before the house was built.

13 Q. And after? After the house was built?

14 A. They had --

15 Q. Well, was the access still there after the house was  
16 built?

17 A. Yes. Well, the trees was taken down when they built the  
18 house.

19 Q. So the front willow trees --

20 A. But there was an iron gate there to the -- well, no,  
21 first there was a wire gate to the north of the house.

22 Q. So there was a wired gate on the front --

23 A. Yes.

24 Q. -- of the house?

25 A. Before the house was built there was a wire gate right

1 A. Well --

2 Q. By that I mean the one on the south side.

3 A. On the south side of the --

4 Q. On the south side of the lane.

5 A. Of the lane over here.

6 Q. Right. The one that's through the locusts now.

7 A. Okay. There was an old wire fence around the house  
8 here.

9 Q. Okay.

10 A. And back before then there was a grainery and a storage  
11 shed, and then a wooden fence and then the barn.

12 Q. So the wooden fence went right back to the barn?

13 A. Yeah.

14 Q. Okay. Did you -- do you recall how far off of 6<sup>th</sup> West  
15 the barn sat or how far back it was?

16 A. Approximately 150 feet, maybe 200.

17 Q. Maybe 200? Okay. Do you recall how wide the lane was  
18 from the fence to the edge of the -- well, how wide the lane was?

19 A. How wide the lane was?

20 Q. Yeah.

21 A. I would say, just roughly guessing, about 40 feet.

22 MR. BIRCH: Okay. One moment, your Honor.

23 (Counsel confers with client)

24 MR. BIRCH: No further questions, your Honor.

25 ///

Tab 8



# **Testimony of Frank Pia**

1 Q. Are you able to tell the Court -- are you able to give  
2 your -- what's your estimate of the distance between 6<sup>th</sup> West and  
3 the Whitt barn?

4 A. I'm just taking a guess here, 175, 150 --

5 Q. Okay, but you measure off of photographs, correct?

6 A. Yes. Well, you're asking me one that I haven't  
7 measured, but --

8 Q. Okay. You've indicated that from 2<sup>nd</sup> -- no, from the  
9 property over to this northern access was about 150, right?

10 A. Yeah, 150, 175.

11 Q. So I'm asking you how far you think it is from 6<sup>th</sup> West  
12 to the Whitt barn.

13 A. Okay. You're talking about the center line or are you  
14 talking about the right of way?

15 Q. No, I'm talking about the road, 6<sup>th</sup> West.

16 A. Center line?

17 Q. Sure.

18 A. About 150, 100 -- thereabouts to this barn back here?

19 Q. Uh-huh. So you believe that the property boundary to  
20 this access is the same as 6<sup>th</sup> West to this barn?

21 A. It looks like it's pretty close.

22 Q. Okay. Are you able to see the residue of the barn in  
23 Exhibit -- residue, that's not a good word. The remnants of the  
24 barn in Exhibit 44?

25 A. Yes, right here.