

2007

Kiley Miller and John Rzeczycki v. San Juan
County, a Utah Political Subdivision, Red Rock
4-Wheelers, Inc., and State of Utah by and through
the School and Institutional Trust Lands
Administration, and John and Jane Does 1-5 : Brief
of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KILEY MILLER and JOHN
RZECZYCKI,

Plaintiffs-Appellants,

vs.

SAN JUAN COUNTY, a Utah
political subdivision, RED ROCK
4-WHEELERS, INC., and STATE OF
UTAH by and through the SCHOOL
AND INSTITUTIONAL TRUST
LANDS ADMINISTRATION, and
JOHN DOES 1-5,

Defendants-Appellees.

JOINT BRIEF OF APPELLEES
SAN JUAN COUNTY and RED
ROCK 4-WHEELERS, INC.

Case No. 20070546 CA

Judge: Hon. Lyle R. Anderson

Appeal from the Seventh Judicial District Court, San Juan County,
Judge Lyle R. Anderson

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UTAH APPELLATE COURTS

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PARTIES

All parties are identified in the caption. The Utah School and Institutional Trust Lands Administration (“SITLA”) is represented by Thomas A. Mitchell 675 East 500 South, Suite 500, Salt Lake City, Utah. Appellants never served SITLA with process in this action and SITLA did not appear in this action.

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code § 78-2-2(3)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court correctly construe its March 22, 2006 order from a prior case involving the same parties to find that the same claims raised in this subsequent case were res judicata? The standard of review is correctness. *Macris & Assocs. v. Neways, Inc.*, 2000 UT 93, 16 P.3d 1214.

2. Did the trial court correctly dismiss appellants' complaint herein as barred by res judicata? The standard of review is correctness. *Id.*

STATEMENT OF THE CASE

1. This is an appeal of the trial court's dismissal with prejudice of Appellants' complaint in this action, "the Second Action." Appellants filed the Second Action after failing to timely file an appeal in a prior action, "the First Action. The trial court dismissed the Second Action as res judicata from the final disposition of the same claims in the First Action. Appellees accept Appellants' statement of the case, so far as its goes. However, Appellees offer herewith a more detailed procedural history of relevant proceedings.

First Action

2. Appellants filed their "Verified Complaint for Preliminary Injunction" against San Juan County ("the County") and Red Rock 4-Wheelers,

Inc. (“RR4W”) on March 31, 2004. Appellants’ complaint requested the trial court to prevent 2004 Jeep Safari participants from using a road called the Strike Ravine Trail where it passes over real property in San Juan County Appellants are purchasing from the Utah School and Institutional Trust Administration (“SITLA”). R. 41, 52-78. The trial court denied Appellants’ request for a preliminary injunction at hearing on April 2, 2004. R. 42. The court’s ruling was formalized by written order entered April 19, 2004.¹ Id.

3. On May 17, 2004 Appellants filed an Amended Complaint in the First Action. R. 42, 79-71. The Amended Complaint’s first cause of action requested the trial court to quiet title to what was called “the Lower Helldorado Trail,” a route not involved in the official Jeep Safari.² The second and third causes of action requested the trial court to quiet title to the Strike Ravine Trail.

4. On or about May 28, 2004 and June 17, 2004 San Juan County and Red Rock 4-Wheelers respectively filed similar answers and counterclaims. R. 42-43, 92-100, 101-110. The counterclaims’ first causes of action asked the trial court to quiet title to the Strike Ravine Trail by finding that San Juan County and RR4W held temporary public easements pursuant to Utah Code § 72-5-203(1), and

¹ Copies of written rulings and orders from the First Action are included in the Addendum.

² This claim was subsequently dismissed pursuant to stipulation on June 19, 2006. R. 266-67.

related provisions over the real property allegedly owned or held by Appellants. The counterclaims' second causes of action requested injunctive relief to prevent Appellants from interfering with Appellees' uses of the Strike Ravine Trail. The counterclaims' third cause of action requested the trial court to declare the Strike Ravine Trail a public thoroughfare under Utah Code § 72-5-104.

5. The parties filed cross motions for partial summary judgment regarding the Strike Ravine Trail. R. 43-44. The trial court denied Appellants' motion for partial summary judgment and granted Appellees' motions for partial summary judgment by its Order dated March 3, 2005. R. 44-45, R. 111-114. The trial court ruled that San Juan County, RR4W and the public had temporary public easements or rights-of-way to use the Strike Ravine Trail pursuant to the "Rights of Way Across State Lands Act," Utah Code § 72-5-201, *et seq.*, stating:

2. Defendants' motions for partial summary judgment are granted as follows:

A. Uncontradicted evidence having been presented that the Strike Ravine trail had been constructed and maintained, or used by a responsible authority and existed prior to January 1, 1992, the Court determines that San Juan holds for the public, and Red Rock 4-Wheelers, Inc., holds for its own uses pursuant to Section 72-5-201, Utah Code, a temporary public easement or right-of-way to use the Strike Ravine trail. All members of the public have the right to travel the Strike Ravine trail. This temporary public easement was not extinguished when the State of Utah sold the land across which the Strike Ravine trail passes to the plaintiffs. The purpose a member of the public has in traveling the Strike Ravine trail is irrelevant.

B. The temporary easement exists until a permanent easement is established under Section 72-5-203(2), Utah Code. The parties conceded the fair market value for a permanent easement must be paid. Because the School and Institutional Trust Lands Administration ("SITLA") is not a party to this case, the court cannot determine at this time whether compensation for the easement should be paid to SITLA or plaintiffs. The court also cannot determine whether SITLA or plaintiffs have standing to dispute the value placed on the permanent easement or make the determination referred to in Section 72-5-203(c), Utah Code.

C. This court does not believe that defendants can postpone indefinitely petitioning for establishment of the permanent easement. The Court encourages the parties, in cooperation with SITLA, to agree upon a timetable for establishing the permanent easement and determining the fair value thereof. In the absence of agreement, the court will intervene to set deadlines and mechanisms for resolving this matter at the invitation of any party.

R. 112-13.

6. Thereafter, although the case was not final, Appellants filed their first notice of appeal on April 7, 2005. R. 45; Court of Appeals appeal no. 20050369-CA. This appeal would be summarily dismissed by this Court, with the remitter filed with the trial court on August 1, 2005. R. 46.

7. The trial court's ruling at paragraph C. stated, "*This court does not believe that defendants can postpone indefinitely petitioning for establishment of the permanent easement.*" R. 113. However, SITLA advised the parties that it took the position that it could not grant a permanent easement after SITLA had issued a certificate of sale. Thus advised, RR4W on or about July 29, 2005 RR4W

moved to join the State Institutional and Trust Lands Administration (“SITLA”) to the action and for leave to file a third-party complaint against SITLA and to file a supplemental counterclaim against Appellants. R. 46, 115-126. RR4W stated, *inter alia*, in its memorandum:

7. RR4W has rights under Section 72-5-201 and Section 72-5-203(2), UCA and other portions of the Rights-of-Way Across State Lands Act, Section 72-5-201, et seq. ("the Statute"). RR4W also has rights under the Order. Among these rights are the Temporary Easement and RR4W's right to obtain the Permanent Easement by payment of the value of the Permanent Easement.

8. RR4W intends pay for and, thereby, acquire the Permanent Easement. However, the Court and RR4W have not been able to determine whether the party/parties entitled to payment is/are SITLA or Plaintiffs. Therefore, assuming the instant motion is granted, RR4W intends to interplead the payment ("the Payment") into the Court and let the Court determine whether SITLA or Plaintiffs is/are entitled to the Payment.

9. RR4W requires that the Court intervene to grant relief to which it is entitled, including obtaining the Permanent Easement. RR4W reserves all rights under its earlier counterclaim against Plaintiffs.

R. 119.

8. On August 5, 2005, San Juan County filed its motion for leave to join SITLA as a third-party defendant and for leave to file its proposed supplemental counterclaims against Appellants and third-party complaint against SITLA. R. 46.

9. On August 15, 2005, the trial court held a scheduling conference. The parties stipulated to joining SITLA and to the filing of Appellees' third-party complaint and supplemental counterclaims. The trial court authorized RR4W and San Juan County to file their third-party complaints and supplemental counterclaims and set oral arguments for January 24, 2006, anticipating that SITLA would be served and the issues briefed by such time. R. 46-47.

10. On August 22, 2005 the trial court signed and entered the order joining SITLA as a party and granting Appellees leave to file their supplemental counterclaims and third party complaints. R. 47. On August 23, 2005, RR4W filed its supplemental counterclaim and third party complaint. R. 47, 127-138. On September 1, 2005 San Juan County filed its supplemental counterclaim and third-party complaint. R. 47, 139-152. On or about August 23, 2005 RR4W tendered \$825 to the Clerk as payment for a permanent easement with the payee to be determined under RR4W's supplemental counterclaim and third-party complaint. R. 47.

11. SITLA accepted service (R. 47), and, on October 7, 2005 SITLA served on all parties *State of Utah's Rule 54(b) Motion to Modify March 3, 2005 Order and Rule 12(b) Motion to Dismiss the Third-Party Complaints of Red Rock 4-Wheelers, Inc. and San Juan County*. R. 47-48, 148-151. Under the heading "Relief Requested" at page 2 SITLA's motion stated, "The Trust Lands

Administration requests ... modification of this Court's order of March 3, 2005 in this matter." R. 149.

12. With its motion SITLA filed a supporting memorandum dated October 7, 2005. R. 152-177. Point II of SITLA's memorandum was headed: "The Court's March 3, 2005 Order Should Be Modified to Reflect SITLA's Sale of the Subject Property and the Inability of Either SITLA or Buyers to Issue an Easement under the Right-of-Way Act." R. 159. Contrary to the Court's position, SITLA contended that it could not issue a permanent easement after it had issued a certificate of sale to Appellants. In Point II SITLA offered, as one alternative option for amendment of the trial court's March 3, 2005 Order, for the trial court to "find that the 'temporary ' easement encumbered the property as an existing right, and that the same continues to exist indefinitely so long as the property does not revert to the State."³ R. 162.

³ SITLA moved the trial court to find either (1) that "the County was placed on notice that the subject property was to be sold, and did not object or seek any permanent easement before the sale," or, (2) "that the certificate of sale was expressly subject to Defendants' temporary easements." R. 162. The trial court had already rejected SITLA's proposed alternative (1), finding inadequate due process notice to Appellees at the temporary injunction hearing on April 2, 2004 (R. 213-215) and in its denial of Appellants' motion for partial summary judgment and granting of Appellees' motions for partial summary judgment. Alternative (2) was the trial court's law of the case, and was a basis for the March 3, 2005 Order. No due process notice of intent to extinguish temporary easement rights was included in SITLA's general notice of intent to sell the property. SITLA's sale to Appellants preceded, and its due process defects were the impetus for (R. 204),

13. On November 4, 2005 Appellees filed their joint motion and memorandum "*...To Stay Defendants' Response to SITLA's Motion to Dismiss Third Party Complaint and Joint Motion to Modify Order.*" R. 48, 178-187. In their motion and memorandum, Appellees accepted SITLA's offer to amend the March 3, 2005 Order to "find that the 'temporary' easement encumbered the property as an existing right, and that the same continues to exist indefinitely so long as the property does not revert to the State." R. 162, 183-84. Appellees moved the trial court to modify the March 3 Order expressly as set forth in their memorandum. Part of the joint motion's effect, if granted, would be to dismiss SITLA as a third-party defendant. R. 186.

14. On November 25, 2005 Appellants filed *Plaintiffs' Joinder in the State's Rule 54(b) Motion to Modify March 3, 2005 Order and Rule 12(b) Motion to Dismiss the Third Party Complaints* ("Appellants' Joinder"). R. 48, 188. Significantly, Appellants' Joinder stated, "Plaintiffs ("Miller/Rzeczycki") hereby joins (sic) in the State of Utah ("SITLA") Rule 54(b) Motion to Modify March 3, 2005 Order and Rule 12(b) Motion to Dismiss the Third Party Complaints."

SITLA's adoption of Rule 850-80-250 and its procedures for due process notice and extinguishment of temporary easements. R. 213-15, 192-194, 196, 204, 206-09. Accordingly, the trial court had no basis to depart from finding (2), the existing law of the case.

Miller/Rzeczycki hereby adopts Points, I, II, and III of the Memorandum filed by SITLA in support of its motion." (Emphasis added.)

16. On November 28, 2005 SITLA served on Appellees *SITLA's Third Party State of Utah's Response to Defendants' Joint Motion to Stay Defendants' Response to SITLA's Motion to Dismiss and Third Party Complaint and Joint Motion to Modify Order*. R. 48, 222-24. Therein SITLA stated, SITLA "has no objection to Defendants' Motion to Stay," and, "The State takes no position as to wisdom of the Defendants' proposed changes to the March 3, 2005 order ..." R. 223.

17. On December 13, 2005 Appellees filed Appellees' *Reply Memorandum in Support of Defendants' Joint Motion to Stay Defendants' Response to SITLA's Motion to Dismiss Third Party Complaint and Joint Motion to Modify Order*. 48, 225-249. This memorandum argued that the trial court should modify the March 3 Order as moved in Appellees' Joint Stay Motion, since Appellants were estopped to deny the relief (having repeatedly insisted that SITLA could not grant a permanent easement), and, additionally, because Appellants themselves had unconditionally moved for such relief in their joinder to SITLA's motion. R. 230-33, 188.

18. On December 13, 2005 Appellees also filed *Defendants' Joint Memorandum in Response to State of Utah's Motion to Modify March 3, 2005*

Order, which reiterated Appellees' positions in their Joint Motion. R. 48, 178-87. On January 24, 2006 the trial court considered the pending motions and heard oral argument. R. 48-49. SITLA advised the trial court that it "has no objection to the [Appellees'] motion to amend/modify [the March 3 Order]." R. 49. Appellees had previously submitted a proposed *Order Modifying March 3, 2005 Order and Dismissing Defendants' Supplemental Counterclaims and Third-Party Complaints*, which the trial court would ultimately sign. R. 49, 254-57. The trial court granted Appellants three weeks to file an objection to the proposed order. R. 49.

19. On February 14, 2006 Appellants filed their one paragraph objection. R. 49, 257-58. On February 21, 2006 Appellees filed their joint response. R. 49, 260-65. On March 22, 2006, the trial court issued its ruling. R. 49, 250-52. Also on March 22, 2006 the trial court signed the *Order Modifying March 3, 2005 Order and Dismissing Defendants' Supplemental Counterclaims and Third-Party Complaint*. R. 254-57. The March 22, 2006 order stated as follows:

The Court having considered the State of Utah's ("SITLA") Rule 54(b) Motion to Modify the March 3, 2005 Order and the Joint Motion to Modify Order of Defendants Red Rock 4-Wheelers, Inc. ("RR4W") and San Juan County ("the County"), collectively called "Defendants," and finding good cause to grant same,

IT IS HEREBY ORDERED:

1. That the Court's March 3, 2005 Order ("the Order") is modified as follows:

A. Paragraphs 1 and 2 and 2.A. remain the same without modification.

B. Existing paragraphs 2.B. and 2.C. of the Order are hereby stricken.

C. A new Paragraph 2.B. is inserted into the Order to state,

B. Plaintiffs acquired the property subject to the temporary easement. The temporary easement exists until a permanent easement is established under Section 72-5-203(2). Under Plaintiff's and SITLA's position no permanent easement can be granted (unless the property reverts to SITLA). This means that the temporary easement is of indefinite duration. Only if Plaintiffs were to forfeit under the certificate of sale or if SITLA were to otherwise resume all equitable as well as legal title would RR4W and the County potentially be able to apply for a permanent easement."

D. A new Paragraph 2.C. is inserted into the Order to state,

C. This ruling applies only to this action and, except in this action, shall have no affect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or actions.

2. That Defendants' Supplemental Counterclaims and Third-Party Complaints are dismissed. Such dismissal does not preclude Defendants from asserting their rights to permanent easements if Plaintiff's property reverts or returns to SITLA.

In its ruling the trial court stated that the March 22, 2006 order was "the best language available to describe the present application of the law to the facts in this case." (R. 252; emphasis added.)

20. On April 6, 2006 Appellants filed their second premature notice of appeal although the trial court had not yet ruled upon all causes of action in

Appellants' amended complaint and in Appellees' counterclaims. R. 49; Court of Appeals appeal no. 20060331-CA. This second appeal was dismissed upon Appellees' motion for summary disposition and remanded by *Memorandum Decision Court of Appeals* order filed with the trial court on May 31, 2006. R. 50.

21. The parties then filed a stipulation to dismiss without prejudice Appellants' and Appellees' remaining causes of action and the trial court entered an *Order Dismissing Remaining Claims Without Prejudice* on June 19, 2006. R. 50, 266-67. Appellants then filed their third improper appeal (Court of Appeals appeal no. 20060721-CA); this time late-filing their notice of appeal on July 31, 2006. R. 50. Having missed the final date to file an appeal, Appellants on August 17, 2006 filed a motion for the trial court to extend the time to appeal. R. 50, 268-98.

23. Appellees objected to Appellants' requested extension of time. R. 51-51, 299-303. The trial court denied Appellants' motion to extend the time for appeal by order dated September 22, 2006. R. 51, 304-08. Appellants did not appeal the trial court's denial of Appellants' motion to extend the time for filing an appeal, thus bringing the First Action to a close.

Second Action

24. Appellants commenced this Second Action by filing their complaint herein April 5, 2007. R. 3-9, 309-315.

25. Appellants concede that this Second Action has the same parties and the same claims as adjudicated in the First Action. Appellants' Br. at 6.

25. Appellees moved, *inter alia*, to dismiss the Second Action on the ground that the Second Action was barred by *res judicata*. R. 10-317, 328-333. The trial court dismissed the Second Action as barred by *res judicata*. R. 337-340.

SUMMARY OF ARGUMENT

1. The First Action's March 22, 2006 order is clear on its face. Paragraph 2.C. of the order clearly states that the trial court's ruling applies to the claims decided in the First Action and that *res judicata*, collateral estoppel and other issue preclusion apply to the claims decided in the First Action, as "this action" is expressly excepted from the non-application of issue preclusion to other actions. Only as to claims not ruled upon in the First Action would *res judicata*, collateral estoppel and other issue preclusion not apply.

2. The record fully supports the clear meaning of paragraph 2.C. of the March 22, 2006 order.

3. Appellants' Second Action involves the same parties and the same claims that were finally disposed by the March 22, 2006 and June 19, 2006 orders in the First Action. Therefore, the Second Action was barred by *res judicata* and the Second Action was properly dismissed with prejudice.

4. Appellants' complaint in the Second Action, by failing to assert claims against SITLA, was futile and therefore properly dismissed with prejudice.

5. Appellants' complaint in the Second Action, by failing to assert claims against SITLA, while nominally naming SITLA, was filed in bad faith and therefore properly dismissed with prejudice.

ARGUMENT

I. Appellants' Complaint Was Properly Dismissed because Appellants' Claims Are Barred by Res Judicata.⁴

A. Introduction.

This is an appeal from the Second Action Appellants have filed regarding the Strike Ravine Trail road, which intersects real property Appellants are purchasing from the Utah School and Institutional Trust Lands Administration ("SITLA"). Previously, over two and one-half years in the First Action, the trial court finally adjudicated Appellants' claims regarding the Strike Ravine Trail in the First Action, case number 040700037. The First Action involved Appellants filing two premature, dismissed appeals that delayed the case. The First Action also involved Appellants belatedly filing a third appeal after the expiration of the 30 day time period, unsuccessfully moving the trial court to extend the time for

⁴ This point rebuts Appellants' second argument. Appellants' Br. 8-10.

appeal, and then failing to file any appeal of the trial court's denial of Appellants' motion to extend the time for appeal.⁵

Having failed to appeal the Court's final judgment in the First Action, Appellants filed the Second Action. Appellants concede that the Second Action "involves the same parties and the same claims as" the First Action. Appellants' Br. at 6. Without providing any relevant background or context to the Court, Appellants assert that they may de novo re-litigate the matters resolved in the First Action, thereby burdening Appellees and the judicial system with years more of litigation. Appellants' assertion is based on language in the First Action's March 22, 2006 order that states:

C. This ruling applies only to this action and, except in this action, shall have no affect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or actions.

The trial court in the Second Action properly rejected Appellant's attempt to misconstrue the trial court's order in the First Action. R. 337-40. The trial court correctly ruled that the order language did not authorize de novo litigation of the case, stating, "Paragraph 2.C. is most reasonably interpreted to eliminate any

⁵ A true copy of the First Action's docket is found at R. 37-51. Record citations to these events are set forth in Appellee's statement of the case, *supra*.

“issue preclusion” effects of the order in any other dispute involving SITLA, RR4W, the County or Plaintiffs.” R. 339-40.

In its March 22, 2006 ruling in the First Action the trial court had noted that the language was “the best language available to describe the present application of the law to the facts in this case” (R. 252), given the “most puzzling scenario” (R. 250), that had occurred in the First Action. Appellees in sub-point C will explain the First Action’s puzzling procedural scenario, something that was Appellant’s duty in marshaling the facts for its appeal, but which Appellants have utterly failed to do. Initially, however, Appellees show that the order is clear on its face and thereby bars Appellants from re-litigating the First Action. R. 339-40.

B. The March 22, 2006 Order Is Clear on Its Face.

Paragraph 2.C. of the March 22, 2006 order clearly states that the trial court’s ruling applies to the claims decided in the First Action and that res judicata, collateral estoppel and other issue preclusion apply to the claims decided in the First Action, since “this action” is expressly excepted from the non-application of issue preclusion to other actions. Only as to claims not ruled upon in the First Action would res judicata, collateral estoppel and other issue preclusion not apply. In its ruling in the Second Action the trial court correctly stated, “Paragraph 2.C. is most reasonably interpreted to eliminate any “issue preclusion” effects of the order

in any other dispute involving SITLA, RR4W, the County or Plaintiffs.” R. 339-40.

As discussed below the parties had litigated only claims specifically related to the Strike Ravine Trail and the ruling’s res judicata effect was to be limited to these claims. The ruling would not apply to any other routes that may have been affected by sales of land by SITLA where SITLA may have similarly failed to give RR4W and the County due process notice and opportunity to protect their easement rights. The language is straightforward and Appellants cannot unilaterally endow the order with an absurd meaning. *Cf. Buehner Block Company v. UWC Associates*, 752 P.2d 892, 895(Utah 1988): “[T]erms are not necessarily ambiguous simply because one party seeks to endow them with a different meaning than that relied upon by the drafter.”

C. The Record Shows Appellants’ Construction of the Order to Be Untenable.

Appellants undertook to purchase 160 acres from SITLA under a certificate of sale. R. 64. The 160 acres were within a school section granted to the State at statehood. Roads, including a route known as the Strike Ravine Trail, passed through and over portions of the 160 acres. Around the school section adjoining lands are held by the United States Bureau of Land Management. Rights-of-way by prescription could be created over the adjoining BLM lands pursuant to federal

law R.S. 2477. However, it is unclear whether public or private rights-of-way by prescription may be obtained over Utah sovereign lands absent express statutory authority. The Utah legislature addressed the issue by in 1992 enacting the “Rights-of-Way Across State Lands” act, Utah Code § 72-5-201, *et seq.* The act authorizes “temporary easements” and “permanent easements” over State trust lands. The provision regarding temporary easements, Utah Code § 72-5-203(1), states:

(1) (a) (i) Subject to Section 53C-1-302 and Subsection 53C-1-204(1), a temporary public easement or right of entry is granted for each highway existing prior to January 1, 1992, that terminates at or within or traverses any state lands and that has been constructed and maintained or used by a responsible authority.

...

(b) Each easement shall remain in effect through June 30, 2004, or until a permanent easement or right of entry has been established under Subsection (2), whichever is greater.

Temporary easements under the statute, thus, are by express grant, with the condition of such grant being only that the highway existed prior to January 1, 1992, traverses state lands and has been constructed, maintained, or used by a responsible authority.⁶

⁶ ““Responsible authority’ means any private party, the state of Utah, or a political subdivision of the state ...” Utah Code § 72-5-202.

RR4W and its members had used the Strike Ravine Trail prior to January 1, 1992 as had San Juan County and its citizens. On the eve of the 2004 Jeep Safari, Appellants filed the First Action against Appellees claiming that Appellants' purchase of the 160 acres had extinguished any rights in existing roads on the property. Appellants moved the trial court to enjoin RR4W's use of the Strike Ravine Trail during the Jeep Safari. The trial court denied the injunction, finding, *inter alia*, that SITLA had not used due process notice or procedures necessary to extinguish temporary easements.⁷ This due process ruling was the trial court's continuing law of the case and therewith meant that SITLA had retained the right

⁷ R. 213-15. Due process requires that before a forfeiture may occur notice must be given by a method "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Dusenbery v. United States*, 534 U.S. 161, 168-69 (2002), citing and affirming *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Since SITLA never gave any notice reasonably calculated to apprise Appellees that their temporary easements were subject to forfeiture and never gave Appellees an opportunity to preserve their rights, there could be no lawful forfeiture. Appellees' temporary easements remained on the property after SITLA's sale to Appellants. Conversely, the involved statute and existing road put Appellants on inquiry notice that the Strike Ravine trail was a temporary easement. Inquiry notice "is presumed because of the fact that a person has knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact." *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 837 (Utah 1998) (quoting 66 C.J.S. Notice § 6 (1950)). SITLA subsequently adopted Rule 850-80 to address this obvious due process deficiency. R. 216-218. Rule 850-80-250 sets forth specific due process requirements that SITLA must adhere to before it may extinguish temporary easements as part of any conveyance of SITLA lands; requirements that were not followed regarding the Strike Ravine Trail. R. 193-94

and duty to grant permanent easements to Appellees under Utah Code § 72-5-203(1).

After considering cross-motions for partial summary judgment, the trial court ruled on March 3, 2005 that under § 72-5-203(1) RR4W and the County both owned temporary easements over the Strike Ravine Trail over Appellants' property. R. 112; paragraph 2.A.

Throughout the First Action litigation Appellants contended that Appellees could never receive a permanent easement under Utah Code § 72-5-203(2), asserting that Defendant's right to a permanent easement was lost when SITLA sold the property to Appellants without expressly reserving the Strike Ravine Trail. The trial court rejected this argument as reflected by paragraphs 2.B. and 2.C. of its March 3, 2005 ruling:

B. The temporary easement exists until a permanent easement is established under Section 72-5-203(2), Utah Code. The parties concede that fair market value for a permanent easement must be paid. Because the School and Institutional Trust Lands Administration ("SITLA") is not a party to this case, the court cannot determine at this time whether compensation for the easement should be paid to SITLA or plaintiffs. The court also cannot determine whether SITLA or plaintiffs has standing to dispute the value placed on the permanent easement or make the determination referred to in Section 72-5-203(2)(c), Utah Code.

C. This court does not believe that defendants can postpone indefinitely petitioning for establishment of the permanent easement. The Court encourages the parties, in cooperation with SITLA, to agree upon a timetable for establishing the permanent easement and determining the fair

value thereof. In the absence of agreement, the court will intervene to set deadlines and mechanisms for resolving this matter at the invitation of any party.

R. 112-13.

SITLA, contrary to the trial court's position, took the position that it could not grant a permanent easement once it had sold the property to Appellants. R. 126. As a result Appellees moved to join SITLA to the action to compel SITLA to grant permanent easements to Appellees. R. 46, 115. The Court ordered SITLA joined as a third party defendant and SITLA was duly served with process.

To extricate itself from the case, SITLA immediately moved the trial court to modify the March 3, 2005 order. R. 149. In Point II of its memorandum SITLA moved the trial court to amend its March 3 2005 Order to "find that the 'temporary' easement encumbered the property as an existing right, and that the same continues to exist indefinitely so long as the property does not revert to the State."⁸ R. 162.

Appellants filed a joinder that expressly joined in SITLA's memorandum point II even though such joinder eliminated any mechanism for the trial court to make Appellants whole.⁹ Appellees filed a motion and memorandum accepting SITLA's

⁸ See Note 3.

⁹ The trial court's March 22, 2006 ruling stated, "The Court invited the inclusion of SITLA ... because SITLA could be the agency [to which Appellees could apply and pay for a permanent easement]. ... The Court was also concerned that SITLA might have some responsibility to the Owners ... At the latest hearing, the Owners

“indefinite duration temporary easement” offer and moved the trial court to amend the order accordingly. Faced with unanimous stipulation of the parties the trial court amended its March 3, 2005 order (R. 111) by its order dated March 22, 2007 (R. 254) to provide that Appellees’ temporary easements would remain indefinitely until the property might revert to SITLA.

It was in the process of carefully stipulating to SITLA’s proposed modification of the March 3, 2005 order that Appellees proposed the substitute paragraph 2.B. and paragraph 2.C. language that came to be in the Court’s March 22, 2006 order. Appellees, for purposes of the Strike Ravine Trail over Appellants’ property only, accepted SITLA’s and Appellants’ position that SITLA could not grant a permanent easement -- even though this was contrary to the trial court’s due process/permanent easement law of the case. Appellees so stipulated because: 1) Appellees’ temporary easements in the current action would continue indefinitely until SITLA might at some time reacquire the property, and, if SITLA were to reacquire the property, Defendant’s temporary easements would then be subject to conversion to permanent easements under the statute;¹⁰ and, 2) in any other dispute involving property sold by SITLA without due process to Appellees,

made it clear that they do not intend to participate with the County and Red Rock in a process to determine the value of a permanent easement ...”
R. 251.

Appellees would not be bound by collateral estoppel from again arguing lack of due process and that SITLA remains able to grant a permanent easement where it has not extinguished a temporary easement through due process notice and procedures.¹¹

In their joint memorandum Appellees explained the need for the Paragraph 2.C. language that Appellants now misconstrue. Appellees stated:

Plaintiffs and third party defendant SITLA have both asserted the position that it is impossible for Defendants to obtain a permanent easement from SITLA after sale of the property under a Certificate of Sale ("the Position").¹² [note 1 in original]

The Position assumes that Defendants cannot, under any circumstances, obtain a permanent easement where the property has already been sold under certificate because SITLA's Certificate of Sale "conveyed all relevant executory rights" and SITLA retained "only bare legal title" with no "right or ability to convey a permanent easement." SITLA Mem. at 6-8.

¹⁰ Paragraph 1.C. of March 22, 2006 order amending paragraph 2.B. of March 3, 2005 order and paragraph 2 of March 22, 2006 order. R. 254.

¹¹ Paragraph 1.D. of March 22, 2006 order amending paragraph 2.C. of March 3, 2005 order. R. 254.

¹²[Note 1] *Plaintiff's Objection to Proposed Order*, dated February 14, 2005, at page 2, "... it is plaintiffs' contention that [Defendants'] opportunity [to obtain a permanent right-of-way] passed with the sale of the property ..." SITLA's *Memorandum in Support of (1) Rule 54(b) Motion to Modify March 3, 2005 Order and (2) Rule 12(b) Motion to Dismiss the Third Party Complaints of Red Rock 4-Wheeler's, Inc. and San Juan County*, at page 10, "SITLA cannot grant a permanent easement because it has nothing left to grant." RR4W's *Supplemental Complaint and Third Party Complaint* alleges at paragraphs 6 and 19 that SITLA has taken this position.

Accordingly, under the Position, SITLA has no discretion to consider whether to grant a non-existent permanent easement.

Defendants, while not agreeing with the Position, and believing that the Court also holds a contrary view of the law, is willing to accept the Position for purposes of this litigation only so long as acceptance of the Position carries with it necessary amendments of the Order and with Plaintiffs and SITLA bearing the necessary consequences of the Position.

The Position necessarily means that neither SITLA nor Plaintiffs claim the right to be paid for a permanent easement, since both SITLA and Plaintiffs contend that there is, or can be, no permanent easement. Therefore, under the Position, paragraph 2.B. of the Order is not necessary.

The Position further necessarily means that SITLA and Plaintiffs are permanently estopped to contend that Defendants must apply for permanent easements, since under the Position there could not exist permanent easements for which Defendants might apply. Therefore, under the Position, paragraph 2.C. of the Order is not necessary.

As the result of the Position paragraphs 2.B. and 2.C. of the Order should be stricken. A new Paragraph 2.B. should be inserted to state,

B. Plaintiffs acquired the property subject to the temporary easement. The temporary easement exists until a permanent easement is established under Section 72-5-203(2). Under Plaintiff's and SITLA's position no permanent easement can be granted (unless the property reverts to SITLA). This means that the temporary easement is of indefinite duration. Only if Plaintiffs were to forfeit under the certificate of sale or if SITLA were to otherwise resume all equitable as well as legal title would RR4W and the County potentially be able to apply for a permanent easement."

It must be understood that this ruling would only apply to this action and would not serve as precedent. A new Paragraph 2.C. should be inserted to state,

C. This ruling applies only to this action and, except in this action, shall have no affect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on

the parties hereto, those in privity with them, or on any other persons or actions.

Having assumed the Position, SITLA and Plaintiffs cannot object to this result. ...

R. 183-185, underlined emphases added. The above discussion and particularly the highlighted language explains how and why the involved language came to be included in the trial court's order of March 22, 2006, which amended the March 3, 2005 order. Noting the "puzzling scenario" before it, the trial court in the First Action signed the proposed order submitted by Appellees as "the best language available to describe the present application of the law to the facts in this case." R. 250-51.

In its ruling dismissing the Second Action the trial court stated, The Court correctly stated:

Paragraph 2.C. is most reasonably interpreted to eliminate any "issue preclusion" effects of the order in any other dispute involving SITLA, RR4W, the County or Plaintiffs. Because of the peculiar and puzzling nature of this dispute the parties were understandably concerned about the effect of the Order on any other disputes that might arise. However, they clearly intended that the order have "claim preclusion" in "this action," namely Civil No. 0407-27 (sic). To read paragraph 2.C. as Plaintiffs advocate would mean that the Order had no effect in resolving the claims presented in Civil No. 0407-37."

R. 339. The trial court emphasized, "This court certainly intended its [First Action] decision, reached only after several hearings, and mind-bending analysis of the pertinent statutes, would operate as an adjudication on the merits, and finally

resolve this dispute between the parties.” R. 339. Accordingly, the trial court correctly dismissed the Second Action.

D. The Court’s Final Order in the First Action Bars Appellants’ Claims as Res Judicata.

Appellants acknowledge that the Second Action involved the same parties and the same claims that were finally adjudicated in the First Action. Appellants’ Br. 6. Therefore, Appellants’ Second Action was barred by Res Judicata. The Supreme Court addressed res judicata in *Snyder v. Murray City Corp.*, 2003 UT 13; 73 P.3d 325, 332, stating:

¶33 "The doctrine of res judicata serves the important policy of preventing previously litigated issues from being relitigated.' Res judicata encompasses two distinct doctrines: claim preclusion and issue preclusion." See *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 57, 44 P.3d 663 (quoting *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 733 (Utah 1995), and citing *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 19, 16 P.3d 1214).

¶34 "Generally, 'claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously.'" *Miller*, 2002 UT 6 at ¶ 58 (quoting *Culbertson v. Bd. of County Comm'rs*, 2001 UT 108, ¶ 13, 44 P.3d 642). In order for a claim to be precluded under this doctrine the party seeking preclusion must establish three elements:

"First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits."

Miller, 2002 UT 6 at ¶ 58 (quoting *Macris & Assocs.*, 2000 UT 93 at ¶ 20) (further citation omitted).

All three elements for claim preclusion are present in this action. The parties and claims in the Second Action are the same as in the First Action. The First Action resulted in a final adjudication of the Strike Ravine Trail issues as intended by the parties and the trial court. R. 266-67, 339. Appellants failed to timely appeal that final adjudication and failed to appeal the trial court's denial of Appellants' motion to extend the time for filing an appeal. R. 268-308. Appellants cannot again litigate the same claims.

II. Appellants' First Argument Is a Red Herring. The March 22, 2006 Order Was Not Final on March 22, 2006 and Resulted from Stipulation of the Parties, Not from a Summary Judgment.

Appellants' first argument, Appellants' Br. 7-8, ignores the procedural history of the First Action. When the trial court signed the March 22, 2006 order modifying the March 3, 2005 order, the First Action was not yet final as there remained claims and counterclaims unresolved by the trial court. These remaining claims included the first cause of action of Appellants' amended complaint (regarding the Helldorado Trail) and the second and third causes of action of RR4W's and the County's counterclaims. In fact, Appellants second premature appeal, which followed entry of the March 22, 2006 order, was dismissed because the trial court's dispositive Strike Ravine Trail orders (the March 3, 2005 order as

modified by the March 22, 2006 order) were not final so long as unresolved claims were pending.¹³ R. 49-50.

Appellants and Appellees stipulated, and the trial court ordered, by order entered June 19, 2006, that the remaining claims and counterclaims were dismissed without prejudice. R. 266-67. Pursuant to such order the March 22, 2006 order, effective June 19, 2007, became final with prejudice. Appellants so understood since 1) it was necessary for Appellants to have the trial court's March 22, 2006 order become final in order for the Strike Ravine Trail claim to be ripe for appeal, and 2) Appellants filed a notice of appeal on July 31, 2006 (R. 50), something they would not have done had they not considered themselves bound by the trial court's Strike Ravine Trail orders.

Further, the March 22, 2006 order did not result from a summary judgment ruling (as had the March 3, 2005 order). Rather, the March 22, 2006 order resulted from the parties' stipulation that the March 3, 2005 order would be modified and that SITLA would be dismissed as a party. R. 47-48, 148-189, 219-252.

Appellants, without condition, joined in SITLA's motion to modify the March 3, 2005 order, and stipulated to SITLA's dismissal from the First Action necessitating the trial court's rulings. R. 48, 188. Appellants' argument is simply

¹³ See this Court's May 25, 2006 Memorandum Decision dismissing Appeal No. 20060331-CA.

an unfounded collateral attack in lieu of their failure to timely file an appeal in the First Action.

III. Appellants' Third Argument Was Not Presented to the Trial Court and Has No Basis under Utah law.

Appellees object to Appellants' third ("equitable exception") argument, Appellants' Br. 10-11, as this argument was not presented to the trial court and thus was not preserved for consideration in this appeal. *Tschaggeny v. Millbank Insurance Company*, 2007 UT 37, 163 P.3d 615, 620. Without waiving their objection Appellees respond as follows.

Appellants invited the trial court's rulings in the First Action, joining in SITLA's motion to amend the March 3, 2005 order. Appellants declined the trial court's affordance of a remedy involving SITLA and stipulated to SITLA's dismissal. Appellants received just what they asked for before they failed to timely appeal the March 22, 2006 order and failed to appeal the trial court's denial of an extension of time to file an appeal. This scenario would not present an equitable foundation for avoidance of the doctrine of res judicata, if, *arguendo*, there were such a doctrine in Utah. Appellant's naming SITLA a party in the Second Action while yet again asking no relief against SITLA likewise cuts hard against any plea to equity.¹⁴

¹⁴ Discussed in following points.

Appellants cite no case remotely similar to this case where equity has overridden res judicata. The court in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981) upheld the application of res judicata. *American Estate Management Corporation v. International Investment and Development Corporation*, 1999 UT App 232, 986 P.2d 765, likewise strongly enforced res judicata, even as to issues not actually litigated, but which should have been litigated. *In re J.J.T.*, 877 P.2d 161 (Utah Ct. App. 1994) addressed family law matters involving the protection of children. Even here the Court found that res judicata did not apply due to differing claims, not that res judicata regarding the same claims could be equitably avoided. Appellants have not shown that Utah courts have ever adopted an equitable exception to the application of res judicata. To accept Appellants' argument would shake the foundations of res judicata, leaving no final judgment free from "equitable" attack.

IV. Appellants' Second Action Complaint Was Futile on Its Face, Providing an Alternative Basis to Uphold the Trial Court's Dismissal of the Second Action with Prejudice.

Appellants' Second Action complaint, although naming SITLA as a defendant in the caption, conspicuously stated no claims against SITLA and requested no relief against SITLA. Thus, Appellants' posturing of the Second Action was the same as Appellants' posturing where the First Action bottlenecked. During the First Action Appellants (against the trial court's opportunity to

do so) refused to request any relief regarding SITLA, joined in SITLA's motion to modify the March 3, 2005 Order, and stipulated to SITLA's dismissal. This occurred after Appellants complained about the indeterminate length of Appellees' temporary easements in their *Objection to Proposed Order* dated February 17, 2005 (R. 45), after the Court stated that it would provide a remedy (paragraphs 2.B. and 2.C. of March 3, 2005 order), and after Appellees had caused SITLA to be joined as parties in the First Action in order to resolve permanent easement and compensation issues. Without seeking definitive relief regarding SITLA in the Second Action, Appellants again involved Appellees in a lawsuit that could never result in any meaningful relief. In other words Appellants again brought a futile proceeding before the trial court. R. 33-34.

This situation compares to denials of leave to amend to state a claim that is futile. A party may not amend a complaint to add a claim that is legally insufficient or futile. *Smith v. Grand Canyon Expedition Company*, 2003 UT 57, 84 P.3d 1154, 1162-63 (Utah 2003). "[L]eave to file an amendment should be denied when the moving party seeks to assert a new claim that is legally insufficient or futile. See *Kasco Services Corp. v. Benson*, 831 P.2d 86, 92-93 (Utah 1992); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 804 P.2d 900, 904 (Idaho 1991). *Andalex Resources, Inc. v. Meyers*,

871 P.2d 1041, 1046 (Utah App. 1994). Appellants' refusal to seek non-futile relief requires that their Second Action complaint be dismissed with prejudice.

V. Appellants' Second Action Complaint's Deception Provides an Alternative Basis to Uphold the Trial Court's Dismissal of the Second Action with Prejudice.

By including SITLA in the Second Action complaint caption while not stating any claims against SITLA, Appellants attempted to "pull a fast one" on the trial court and Appellees, creating the illusion that Appellants were seeking meaningful relief necessarily involving SITLA where, in fact, they were not. R.

33-34. Comparison again may be made to amendment cases. In *Forman v. Davis*, 371 U.S. 178, 181 (1962), the United States Supreme Court stated:

In the absence of any apparent or declared reason – such as undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

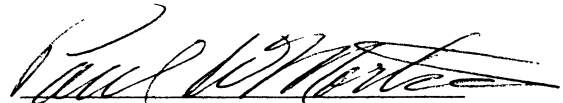
Emphases added. Appellants herein have acted in bad faith and with dilatory motive in filing their slight-of-hand pleading that could lead to no meaningful relief. This provides a further basis to dismiss Appellants' Second Action.

CONCLUSION

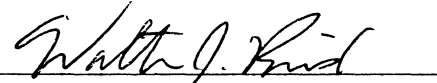
The trial court correctly ruled that the Second Action was barred under res judicata. Accordingly, the decision of the trial court should be affirmed.

Dated this 13th day of December, 2007.

HANKS & MORTENSEN, P.C.

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PAUL W. MORTENSEN
Attorneys for Respondent Red
Rock 4-Wheelers, Inc.

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

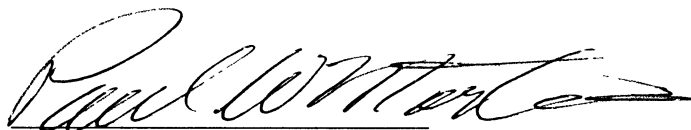
WALTER J. BIRD
Deputy San Juan County Attorney
Attorney for Respondent San Juan
County

CERTIFICATE OF SERVICE

The undersigned certifies that on the 13th day of December, 2007 he caused two copies of the foregoing Joint Brief of Respondents to be served by depositing same in the United States mail, first class, postage prepaid addressed as follows:

Bruce R. Baird
Hutchings Baird Curtis & Astill, P.L.L.C.
9537 South 700 East
Sandy, Utah 84070

Thomas A. Mitchell
School and Institutional Trust Lands Administration
675 East 500 South, #500
Salt Lake City, Utah 84102 (courtesy copy-not party to appeal)

A handwritten signature in black ink, appearing to read "Paul W. Mitchell", written over a horizontal line.

ADDENDUM

ADDENDUM


Selected Written Orders from the First Action

Index

Date	Order	Addendum Page
April 19, 2004	Order Denying Motion for Preliminary Injunction	1
March 3, 2005	Order (re summary judgment motions, entered March 8, 2005)	6
March 22, 2006	Ruling (re March 22, 2006 order)	10
March 22, 2006	Order Modifying March 3, 2005 Order and Dismissing Defendants' Supplemental Counterclaims and Third-Party Complaints	14
Sept. 25, 2006	Order (denying Plaintiffs' motion to extend deadline for filing appeal)	17

SEVENTH DISTRICT COURT
San Juan County

FILED APR 19 2004

CLERK OF THE COURT
BY _____ DEPUTY 

Paul W. Mortensen
Attorney for Defendants
Red Rock 4-Wheelers, Inc.
P. O. Box 1294
Centeville, Utah 84014
Phone/Fax: (801) 292-7059

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, UTAH

KILEY MILLER & JOHN
RZECZYCKI,

Plaintiffs,

vs.

SAN JUAN COUNTY, a Utah
Political Subdivision, RED ROCK
4-WHEELERS, INC., and JOHN
and JANE DOES,

Defendants.

ORDER DENYING MOTION
FOR PRELIMINARY
INJUNCTION

Civil No. 040700037

Judge: Anderson

The above action came before the Court for hearing on the 2nd day of April, 2004, pursuant to Plaintiffs' motion for a preliminary injunction. Plaintiffs appeared personally and by their counsel, Steve Russell. Defendant Red Rock 4-Wheelers, Inc. ("RR4W") appeared personally through its officers Doug McElhaney and Ber Knight and by its counsel Paul W. Mortensen. Walter J. Bird appeared on behalf of Defendant San Juan County.

The Court specifically considered Plaintiffs' request for the Court to enjoin defendants from using two routes that pass through Plaintiff's property; to wit: the Strike

Ravine trail and the Lower Helldorado Trail. Plaintiffs presented evidence that they purchased their property from State Institutional and Trust Lands (SITLA), that motor vehicles have used the Strike Ravine and the Lower Helldorado, and that RR4W intended to use the Strike Ravine trail as an official trail during the 2004 Jeep Safari.

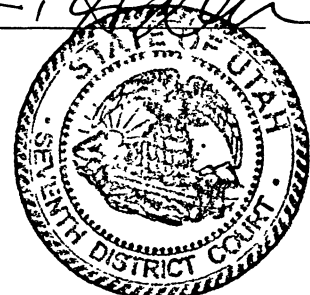
With respect to the Strike Ravine trail, Defendant RR4W presented evidence that the trail has been used by members of the public from as early as the 1960's and 1970's, including testimony of personal use since the 1970's by Doug McElhaney, his encountering other motorists on the route, and a photograph showing evidence of bulldozer construction and hillside-cut of the trail at the northeast border of Plaintiff's property. Ber Knight of RR4W testified that RR4W had used the Strike Ravine trail as an official route in the 1991 Jeep Safari, as well as subsequent years, and had by motorized vehicles "scouted" the trail months previous to 1991. Based upon evidence of public use and RR4W use of the Strike Ravine trail, prior to January 1, 1992, the effective date of Rights-of-Way Across State Lands Act, Section 72-5-201, *et seq.*, *Utah Code Annotated*, the Court found there was at least some evidence of public and RR4W use of the trail prior to January 1, 1992. Further considering the evidence, the Court found that Plaintiffs failed to show that they would suffer irreparable harm, that their harm exceeded potential harm to Defendants if relief were granted or that an injunction would not be contrary to the public interest. Therefore, Plaintiffs are not entitled to an injunction regarding the Strike Ravine trail.

With respect to the Lower Helldorado trail, both RR4W and San Juan County represented that they have no intention to use the trail during the 2004 Jeep Safari, or thereafter, unless and until there is evidence that the trail was used prior to January 1, 1992. No evidence was produced at hearing to show that the trail had been used before January 1, 1992, but both defendants reserved to right to discover and present such evidence at subsequent hearing or trial on the merits. Given both defendants' lack of intention to use the Lower Helldorado trail, the Court found no need for an injunction to issue, and, accordingly, declined to issue an injunction. With regard to the general public, the Court indicated that it would be inclined to enjoin travel on the Lower Helldorado on Plaintiffs' property, but would not do so in the absence of evidence of any member of the public who has stated any intent to use the trail. The Court stated that Plaintiffs could document vehicles or persons who may pass upon the Lower Helldorado trail and bring an action for trespass and related damages, if it is subsequently determined that there is no right-of-way through the Lower Helldorado on Plaintiff's Property.

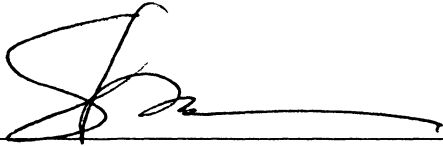
Based upon such rulings, IT IS HEREBY ORDERED that Plaintiff's request for an injunction is DENIED.

Dated this 19th day of April, 2004.

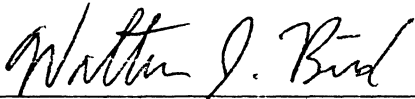

JUDGE



APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to read 'Steve Russell', written over a horizontal line.

STEVE RUSSELL, Attorney for Plaintiffs

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

Walter J. Bird, Attorney for Defendant
San Juan County

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040700037 by the method and on the date specified.

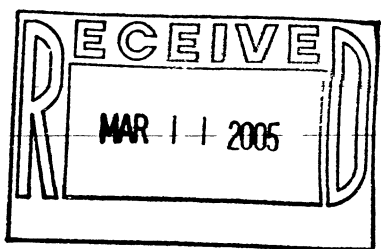
METHOD NAME

Mail PAUL W. MORTENSEN
 ATTORNEY DEF
 PO BOX 1294
 CENTERVILLE, UT 84014

Dated this 19th day of April, 2004.



Deputy Court Clerk



SEVENTH DISTRICT COURT
San Juan County

FILED MAR - 8 2005

CLERK OF THE COURT

BY

DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KILEY MILLER and JOHN
RZECZYCKI,
Plaintiff,

vs.

SAN JUAN COUNTY, a Utah
Political Subdivision, RED
ROCK 4-WHEELERS, INC., and
JOHN and JANE DOES,
Defendant/Respondent,

ORDER

Case No.0407-37
Judge Lyle R. Anderson

This matter came before the court for hearing on January 31, 2005. The court considered the memoranda and arguments of counsel and verbally announced its decision. Defendant Red Rock 4-Wheelers, Inc., submitted a proposed order to which plaintiffs object. The court has considered those objections and the responses thereto and has determined that judicial economy is best served by the court preparing its own order.

IT IS HEREBY ORDERED as follows:

1. Plaintiff's motion for summary judgment is denied. Plaintiffs erroneously argue that persons who historically obtained a permit for the Jeep Safari cannot benefit from a public easement. There is at least a genuine issue of fact about whether the public

enjoys an easement to traverse plaintiff's property. Red Rock 4-Wheelers, Inc., and members of the public participating in the Jeep Safari have no less right to traverse plaintiff's property than the general public.

2. Defendant's motions for partial summary judgment are granted as follows:

A. Uncontradicted evidence having been presented that the Strike Ravine trail had been constructed and maintained or used by a responsible authority and existed prior to January 1, 1992, the court determines that San Juan Count holds for the public, and Red Rock 4-Wheelers, Inc., holds for its own uses pursuant to Section 72-5-201, Utah Code, a temporary public easement or right-of-way to use the Strike Ravine trail. All members of the public have the right to travel the Strike Ravine trail. This temporary public easement was not extinguished when the State of Utah sold the land across which the Strike Ravine trail passes to the plaintiffs. The purpose a member of the public has in traveling the Strike Ravine trail is irrelevant.

B. The temporary easement exists until a permanent easement is established under Section 72-5-203(2), Utah Code. The parties concede that fair market value for a permanent easement must be paid. Because the School and Institutional Trust Lands

Administration ("SITLA") is not a party to this case, the court cannot determine at this time whether compensation for the easement should be paid to SITLA or plaintiffs. The court also cannot determine whether SITLA or plaintiffs has standing to dispute the value placed on the permanent easement or make the determination referred to in Section 72-5-203(2)(c), Utah Code.

C. This court does not believe that defendants can postpone indefinitely petitioning for establishment of the permanent easement. The court encourages the parties, in cooperation with SITLA, to agree on a timetable for establishing the permanent easement and determining the fair value thereof. In the absence of agreement, the court will intervene to set deadlines and mechanisms for resolving this matter at the invitation of any party.

DATED this 3rd day of March, 2005.



[Handwritten Signature]
District Court Judge


CERTIFICATE OF SERVICE

I hereby certify that I mailed, hand delivered, or faxed, a true and correct copy of the foregoing Order, this 8th day of March, 2005, to the following:

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Paul W. Mortensen
Hanks & Associates
Attorneys for Defendants
Red Rock 4-Wheelers, Inc.
8 East Broadway, Suite 740
Salt Lake City, Utah 84111


Deputy Court Clerk

MAR 24

FILED MAR 22 2006

CLERK OF THE COURT

BY _____
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KILEY MILLER and JOHN
RZECZYCKI,
Plaintiffs,

vs.

SAN JUAN COUNTY, a Utah
Political Subdivision, RED
ROCK 4-WHEELERS, INC., and
JOHN and JANE DOES,
Defendants,

vs.

STATE of UTAH, by and through
the SCHOOL AND INSTITUTIONAL
TRUST LANDS ADMINISTRATION,
Third-Party Defendant.

RULING

Case No.0407-37

Defendants San Juan County (the "County") and Red Rock 4-Wheelers, Inc. ("Red Rock") submitted a proposed order which plaintiffs Kiley Miller and John Rzeczycki (the "Owners") have objected. Third-party defendant School and Institutional Trust Land Administration ("SITLA") has previously secured the court's signature on an order dismissing it from this action.

This case presents the court with perhaps the most puzzling scenario it has ever encountered. The "puzzlement" stems from the language of the operative statute, Section 72-5-203, Utah Code. The

positions taken by the parties have not reduced the complexity of the issues. The court invited the inclusion of SITLA in this case because of the possibility that SITLA could be the agency to which the County or Red Rock should apply for a permanent easement, and to which they should make payment for that easement. The court was also concerned that SITLA might have some obligation to the Owners for having sold them property subject to an unrecorded easement. SITLA has expressed the view that the sale documents with the Owners protect it from any such claim and the Owners did not dispute that. SITLA adamantly declares that it would have no right to grant a permanent easement until and unless the property reverts to it because of failure of the Owners to fulfill their contract to pay for the property. The County and Red Rock did not dispute this. The court accordingly agreed to dismiss SITLA.

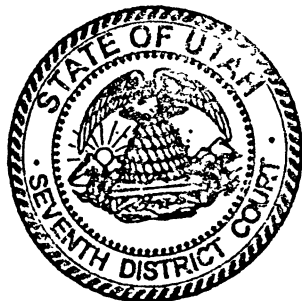
At the latest hearing, the Owners made it clear that they do not intend to participate with the County and Red Rock in a process to determine the value of a permanent easement that is anything like the process that would have been followed by the County or Red Rock and SITLA before the sale. The court is at a loss to determine how to force participation by private owners in a process created for public owners of land. Moreover, the court is unsure how to apply the statutory standard of "a public benefit commensurate with


the value of the permanent easement or right of entry." Section 72-5-203(2)(b), Utah Code, to a private transaction.

The court considered declaring that, whatever the County and Red Rock had before the sale from SITLA to the Owners, it was extinguished by the sale. However, since expressing the view that this case is a "toss-up" the court has read again the language of Section 72-5-203. The legislature used clear language of conveyance when it "granted" a "temporary public easement." The statute further provides that this easement lasts until a permanent easement has been established. The court is not empowered to ignore clear statutory language of conveyance, particularly when no party has asserted a claim that the legislature lacked authority to act as it did.

The court has signed the proposed order submitted by the County and Red Rock as the best language available to describe the present application of the law to the facts of this case.

DATED this 22nd day of March, 2006.




District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed, hand delivered, or faxed, a true and correct copy of the foregoing Ruling, this 22nd day of March, 2006, to the following:

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Deputy Court Clerk

SEVENTH DISTRICT COURT
San Juan County

FILED MAR 22 2006

CLERK OF THE COURT

BY _____
DEPUTY

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IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, UTAH

KILEY MILLER & JOHN
RZECZYCKI,

Plaintiffs,

vs.

SAN JUAN COUNTY, a Utah
Political Subdivision, RED ROCK
4-WHEELERS, INC., and JOHN
and JANE DOES,

Defendants.

vs.

STATE of UTAH, by and through the
SCHOOL AND INSTITUTIONAL
TRUST LANDS ADMINISTRATION,

Third-Party Defendant.

(Proposed)
ORDER MODIFYING MARCH 3,
2005 ORDER AND DISMISSING
DEFENDANTS' SUPPLEMENTAL
COUNTERCLAIMS AND THIRD-
PARTY COMPLAINTS

Civil No. 0407-37
Judge: Hon. Lyle R. Anderson

The Court having considered the State of Utah's ("SITLA") Rule 54(b) Motion to Modify the March 3, 2005 Order and the Joint Motion to Modify Order of Defendants Red Rock 4-Wheelers, Inc. ("RR4W") and San Juan County ("the County"), collectively called "Defendants," and finding good cause to grant same,

IT IS HEREBY ORDERED:

1. That the Court's March 3, 2005 Order ("the Order") is modified as follows:

A. Paragraphs 1 and 2 and 2.A. remain the same without modification.

B. Existing paragraphs 2.B. and 2.C. of the Order are hereby stricken.

C. A new Paragraph 2.B. is inserted into the Order to state,

B. Plaintiffs acquired the property subject to the temporary easement. The temporary easement exists until a permanent easement is established under Section 72-5-203(2). Under Plaintiff's and SITLA's position no permanent easement can be granted (unless the property reverts to SITLA). This means that the temporary easement is of indefinite duration. Only if Plaintiffs were to forfeit under the certificate of sale or if SITLA were to otherwise resume all equitable as well as legal title would RR4W and the County potentially be able to apply for a permanent easement."

D. A new Paragraph 2.C. is inserted into the Order to state,

C. This ruling applies only to this action and, except in this action, shall have no affect of legal or factual precedent, res judicata, collateral estoppel or other issue preclusion on the parties hereto, those in privity with them, or on any other persons or actions.

2. That Defendants' Supplemental Counterclaims and Third-Party

Complaints are dismissed. Such dismissal does not preclude Defendants from

asserting their rights to permanent easements if Plaintiff's property reverts or
returns to SITLA.

Dated this 22nd day of March, 2006 ²⁰⁰



Judge [Signature]

CD 28

FILED SEP 25 2006

CLERK OF THE COURT

BY _____
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KILEY MILLER and JOHN
RZECZYCKI,
Plaintiffs,

vs.

SAN JUAN COUNTY, a Utah
Political Subdivision, RED
ROCK 4-WHEELERS, INC., and
JOHN and JANE DOES,
Defendants,

vs.

STATE OF UTAH, by and through
the SCHOOL AND INSTITUTIONAL
TRUST LANDS ADMINISTRATION

ORDER

Case No.0407-37

Plaintiffs have moved the court, pursuant to Rule 4(e), Utah Rules of Appellate Procedure, to extend the deadline for filing a notice of appeal in this case. It is not disputed that the last day plaintiffs could file their notice of appeal was July 19, 2006. It is also not disputed that plaintiffs attempted to file their notice of appeal by mailing a copy of the notice of appeal on July 19, 2006, to the Seventh Judicial District Court in Castle Dale, the site of the Seventh District Court of Emery County, or that the deputy clerks in Castle Dale received the notice of appeal on July

21, 2006.

Were the question dispositive, the court would be inclined to determine that mailing the notice of appeal to the wrong seat of this court is the kind of neglect that should be excused. It is the kind of mistake that could be made by office staff unfamiliar with the geography of Utah and her political subdivisions. However, defendants point out in their memorandum opposing an extension that the notice of appeal would not have been timely filed even if it had been mailed to the right location for filing. Plaintiffs' only reply to this point is that it states the obvious.

Unfortunately for plaintiffs, this reply leaves the court without any explanation of why plaintiffs waited until July 19, 2006, to see that a notice to appeal was filed and then chose a method of delivery that was certain to fail to meet the deadline. Without any explanation for waiting until the last day and then mailing instead of filing, the court is unable to determine that the failure to file was the result of excusable neglect.

The court may also grant an extension for good cause. Plaintiffs argue that the court should grant their motion so this case can be appealed now. They claim that the language of paragraph 2.C. inserted in the March 3, 2005, order of this court deprives the court's decision in this case of any preclusive effect on any

future action plaintiffs or others may file. It therefore follows that judicial economy would be served by allowing plaintiffs to proceed with their appeal, which would lead to a decision that has at least precedential, if not preclusive, effect.

This court certainly intended that its order finally resolve -at this level- the issue presented by the parties concerning the application of Section 72-5-203, Utah Code, to the facts of this case. Whether the language actually has the meaning plaintiffs ascribe to it is best resolved when that issue is squarely presented if and when plaintiffs assert their claims again. In fact, if paragraph 2.C. has the meaning plaintiffs assign, it is likely that this court has not succeeded in issuing a final, appealable order, and there is substantial risk that the appellate efforts of the parties during this round will be entirely wasted.

The court has considered whether there is a public interest in advancing to an appellate level the puzzling issue created by the interaction of Section 72-5-203 with the past policy of State Institutional and Trust Lands Administration ("SITLA") of not making any effort to determine the validity of Section 203 easements before selling state lands. However, as far as this court knows, plaintiffs are the only buyers of state lands who have this kind of legal issue. According to representations of counsel for

SITLA, SITLA has taken steps to ensure that state lands are not, in the future, sold to buyers unaware of existing "temporary public easement[s]" of indefinite duration. This court is unable to determine that the issues in this case must be addressed by higher courts so that future buyers and sellers of state lands will know how to proceed.

The motion for extension of time to file notice of appeal is denied. No further order of this court with respect to that motion is required.

DATED this 22nd day of September, 2006.



30 R. Anderson
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed, hand delivered, or faxed, a true and correct copy of the foregoing Order, this 25 day of September, 2006, to the following:

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Deputy Court Clerk