

2008

Wasatch County, a body politic of the State of Utah  
v. E. Ray Okelberry, Brian Okelberry, Eric  
Okelberry, West Daniels Land Association, Utah  
Division of Wildlife Resources : Reply Brief of  
Appellants

Utah Court of Appeals

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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

Plaintiff-Appellee,

vs.

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

Defendants-Appellants.

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Case No. 20080988-CA

REPLY BRIEF OF APPELLANTS

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APPEAL FROM THE FINAL DECREE  
OF THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY,  
THE HONORABLE DONALD J. EYRE

---

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**UTAH APPELLATE COURTS**

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Case No. 20080988-CA

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REPLY BRIEF OF APPELLANTS

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**ARGUMENT**

**I: PRIVATE PROPERTY IS CONSTITUTIONALLY  
PROTECTED; THE TRIAL COURT MISUNDERSTOOD THAT  
ONLY MINIMAL ACTIONS ARE REQUIRED TO RETAIN  
THE PRIVATE CHARACTER OF PRIVATE ROADS.**

Wasatch County and the trial court incorrectly viewed the Supreme Court's decision as requiring that the landowner perform some act the sole purpose of which was to interrupt public use. The issues in this case and the Supreme Court's test must be considered, however, in light of the constitutional protections of private property. If the Dedication Statute<sup>1</sup> were interpreted to allow the public to take private property without just

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<sup>1</sup>Utah Code § 72-5-104(1) (2006).

compensation, it would be unconstitutional.<sup>2</sup> The statute must be viewed not as a grant, but only a rule of evidence to evaluate whether the landowner voluntarily gave or dedicated the road to the public.<sup>3</sup> As correctly recognized in an early Utah case, before a road “becomes public in character the owner of the land must consent to the change.”<sup>4</sup>

Because intent was not recognized as relevant under the case law in effect at the time of the initial trial, Okelberrys moved to reopen to allow evidence directly focused on their intent.<sup>5</sup> Even the limited evidence that was presented, however, still admits of only one conclusion: Okelberrys viewed their land (*all* their land, including the roads) as private. They viewed themselves as having the right to control use of their land (including the roads), and acted in accordance with the fact that the land was private.

Thus, when Ray Okelberry locked the gates to assist in keeping his sheep enclosed, although one of his intentions was to control the sheep, it is equally obvious that he intended to keep people from opening the gate. He intended to interrupt their use of the road “as a public thoroughfare.” It was an action, fully consistent only with private property ownership, that said, “I am choosing to not allow the public to freely use the road at this time.”

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<sup>2</sup>See U.S. Const. amend. V; Utah Const. art. I, § 22.

<sup>3</sup>See *Vaughn v. Williams*, 345 So. 2d 1195, 1199 (La. Ct. App. 1977).

<sup>4</sup>*Morris v. Blunt*, 49 Utah 243, 251, 161 P. 1127, 1131 (1916). The discussion on pages 25-26 of Okelberrys’ initial brief establishes that this requirement of intent is still valid law in Utah.

<sup>5</sup>R. 616-611.

The trial court's ruling must "should be construed together as a whole so as to give meaning and force to all of its terms."<sup>6</sup> While the trial court did express that no other witness saw Ray Okelberry lock the gates<sup>7</sup> and acknowledged Ray's self interest, the court also said, "The Court finds that while there may have been occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, and 1970s, these were few and far between, were not intended to restrict public access, and were not reasonably calculated to interrupt public use of the roads."<sup>8</sup> This can only be viewed as a finding that Ray Okelberry had locked gates, together with a conclusion that the locking was not legally sufficient to meet the Supreme Court's standard. The three purported legal defects identified by the trial court, however, reveal a fundamental misunderstanding of the test established by the Supreme Court.

In reviewing the evidence regarding the three purported legal defects, it is important to remember the burdens of proof. After stating its new bright-line rule, the Supreme Court stated:

This rule does not change the burden of the party claiming dedication. For a highway to be deemed dedicated to the public, the party claiming dedication must establish by clear and convincing evidence that the road at issue was continuously

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<sup>6</sup>*Hubble v. Cache County Drainage Dist.*, 123 Utah 405, 410, 259 P.2d 893, 896 (1953).

<sup>7</sup>Lee Okelberry testified that he didn't lock the gates, but said nothing about whether Ray may have done so. Trial Transcript, June 30, 2004, at 141. Lee Okelberry operated on a different part of the property, and thus had no occasion to go through some of the gates locked by Ray Okelberry when the sheep were being moved. Trial Transcript, June 29, 2004, at 201. His testimony did not contradict the testimony of Ray Okelberry.

<sup>8</sup>R. 670.



used as a public thoroughfare for a period of ten years; credible evidence of the type of interruption defined above--an overt act intended to and reasonably calculated to interrupt use of a road as a public thoroughfare--simply precludes a finding of continuous use.<sup>9</sup>

In other words, while Wasatch County had a burden of proving its case by clear and convincing evidence, Okelberrys' evidence did not need to meet that standard. The standard applicable to Okelberrys' evidence was that it be credible.

The trial court found the occasions when Ray Okelberry locked the gates were "few and far between." All that is required, however, is one instance of blocking every ten years. The fact that the gate locking was few and far between does not defeat its legal effect.

The trial court "found" that the locked gates were not intended to restrict public access.<sup>10</sup> Reading the ruling as a whole, however, reveals that the trial court concluded that because the gate was locked only occasionally, and because few if any people were blocked, therefore Ray Okelberry must not have intended to restrict public access. Again, the law is otherwise. And, there could be no other purpose for locking the gates except to prevent public access. Sheep can't tell the difference between a locked gate and one that is merely wired shut. The only possible purpose of a lock is to prevent a human from entering.

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<sup>9</sup>*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 15, 179 P.3d 768.

<sup>10</sup>It must be remembered that Okelberrys did not present direct evidence of intent because that was not relevant under the case law in effect at the time of trial. See Point III below.

It is apparent the court acknowledged Ray Okelberry had occasionally locked the gates to assist in controlling his sheep, but thought there needed to be something more dramatic to show “intent” to interrupt public use of the road.

The trial court also “found” that the locked gates “were not reasonably calculated to interrupt public use of the roads.”<sup>11</sup> Again, it appears the trial court believed there had to be some major action that “interrupted public use of the roads generally.”<sup>12</sup> Okelberrys were not required to “construct reinforced fencing” together with “the installation of additional physical barriers, roads, lighting, cameras, and sensors”<sup>13</sup> along all points of access to the property. This was Okelberrys’ private property. All that was needed was some sufficient action to show their intent to retain that private character, to show that they did not consent to it being changed to a public road. If the gates were locked at all, that would have interrupted public use of the roads. As demonstrated in *Town of Leeds v. Prisbrey*,<sup>14</sup> it does not matter that no one was actually prevented from using the roads. And, the Supreme Court in this case emphasized that if the action would have interrupted public use on a heavily

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<sup>11</sup>R. 670.

<sup>12</sup>R. 671.

<sup>13</sup>Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1103 note), as amended by P.L. 110-161, Div E, Title V, § 564, 121 Stat. 2090, which provides for fencing along parts of the border between the United States and Mexico.

<sup>14</sup>2008 UT 11, 179 P.3d 757.

traveled road, the action would be legally sufficient to interrupt public use on a lightly traveled road:

We emphasize here, however, that the action necessary by the landowner to establish an interruption in public use does not vary depending on the level of public use. An overt act intended and reasonably calculated to interrupt public use restarts the statutory period, and the effectiveness of such act is not tied to the level of public use. In other words, an act by a landowner sufficient to interrupt public use of a road used on a daily basis by the public is also sufficient to interrupt public use of a road used on a monthly basis by the public.<sup>15</sup>

The trial court's statements that Okelberrys' evidence failed to show that they "interrupted public use of the roads generally," coupled with the conclusion that "while there may have been occasions in which Mr. Okelberry locked the gates in the 1950s, 1960s, and 1970s," these actions were legally insufficient, show that the trial court did not understand the minimal nature of the actions necessary to retain the private character of the roads. The decision of the trial court must be reversed with instructions to hold that the roads are private.

**II: LEE OKELBERRY INTERRUPTED USE OF THE ROAD AS A PUBLIC THOROUGHFARE BY STOPPING PERSONS TO JUDGE WHETHER THEIR PURPOSE IN USING THE ROADS WAS ACCEPTABLE.**

The trial court summarized Lee Okelberry's testimony as follows:

He testified that he occasionally he stopped and talked to people on Parker Canyon Road in the 1950s. . . . If there was any that needed to go through there in any way, shape or form they could

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<sup>15</sup>*Okelberry*, ¶ 17.

ask or they could go through there. We never turned nobody down that had any business down in there.<sup>16</sup>

In other words, the trial court found that Lee Okelberry stopped people “on” the roads to inquire as to their business, and then let them go through because he approved of their purpose in using the roads. Wasatch County asserts that in *Utah County v. Butler*,<sup>17</sup> the Utah Supreme Court rejected as insufficient evidence that the landowner has ejected persons from the property.<sup>18</sup> In *Butler*, however, the trespasser asked to leave was “hunting well off the Road” and was not asked to leave the road itself.<sup>19</sup>

There was no requirement that Lee Okelberry actually eject someone. His acts in stopping to pass judgment on the purpose of those using the roads interrupted use of the roads as a public thoroughfare – somewhere the public had a right to go without interruption. No one using a public road would expect to be stopped and questioned by adjoining landowners. Lee Okelberry’s actions were consistent only with his intent and belief that the roads were private and he had a right to stop people and inquire as to their purpose.

This Court should hold that the actions of Lee Okelberry in stopping people who were using the roads constituted an overt act which was intended to and did interrupt use of the roads as a public thoroughfare.

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<sup>16</sup>R. 674 ¶ 14.

<sup>17</sup>2008 UT 12, 179 P.3d 775.

<sup>18</sup>Wasatch County brief at 8.

<sup>19</sup>2008 UT 12 at ¶ 17.

**III: OKELBERRYS ARE ENTITLED TO A NEW TRIAL TO PRESENT EVIDENCE OF INTENT ADDRESSING THE NEW TEST ADOPTED BY THE SUPREME COURT; EVIDENCE OF CONTROL IS NOT THE SAME AS EVIDENCE OF INTENT.**

Wasatch County asserts as “Okelberrys did their best to try and show that they intended to disrupt the use of the roads by the public.”<sup>20</sup> What Okelberrys did, however, was show physical efforts to control or limit public use. There was little or no testimony on the intentions behind those actions.

The trial court based its ruling largely on the lack of testimony concerning subjective intent. The trial court rejected Okelberrys’ evidence that they asked people to leave the roads because “[n]one of Defendants’ witnesses testified that there was a regular policy of requiring permission or approval to use the roads during that period, nor that asking persons to leave the property was intended to restrict public access to the roads themselves.”<sup>21</sup> Addressing the “keep out” and “no trespassing” signs, the trial court said, “Yet none of Defendants’ witnesses at trial specified their intent when putting up the signs . . . .”<sup>22</sup> With respect to the locked gates, again the trial court focused on Ray Okelberry’s intention, concluding that the gates “were not erected or locked with the requisite intent.”<sup>23</sup>

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<sup>20</sup>Wasatch County brief at 24.

<sup>21</sup>R. 671.

<sup>22</sup>*Id.*

<sup>23</sup>R. 670.

Okelberrys did present evidence of their actions, but did not present evidence of their subjective intent in performing those actions. Prior to the Supreme Court decision in this case, the cases held that subjective intent was irrelevant.<sup>24</sup> Under the Supreme Court's test, as recognized by the trial court, subjective intent is now very relevant.

This Court should hold the trial court abused its discretion in denying Okelberrys' motion for leave to present additional evidence, and remand for a new trial where Okelberrys may present that evidence.

#### **IV: MAINTENANCE OF UNLOCKED GATES CONSTITUTED AN INTERRUPTION.**

As an additional argument showing that unlocked gates must be treated as an interruption of public use, Okelberrys argued that a contrary rule would result in the public taking more than the landowner gave or abandoned. There have always been gates on these roads, but under the trial court's ruling it is arguable that Okelberrys might be required to remove those gates.<sup>25</sup> This property is used for sheep and cattle, and without gates, the use and value of the entire property is impacted. Wasatch County asserts this is a new argument raised for the first time on appeal.<sup>26</sup> When the nature of Okelberry's argument is properly understood, however, it is evident that the argument was raised below.

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<sup>24</sup>See cases and discussion at pages 26-27 of Okelberrys' initial brief. *See also* Clay Alger, Comment, *Use Interrupted: The Complicated Evolution of Utah's Highway Dedication Doctrine*, 2008 Utah L. Rev. 1613, 1635 ("the bright-line test brought intent back into the analysis").

<sup>25</sup>Okelberrys' initial brief at 33-34.

<sup>26</sup>Wasatch County brief at 16-17.

The evidence was unanimous that there have always been gates across these roads. In fact, when Okelberry tried to elicit additional evidence on this subject at trial, the judge sua sponte stopped the questioning, stating there was no dispute among the witnesses as to the location of the gates.<sup>27</sup> The court specifically found “there were gates at the entrances to each of the roads from 1957 to 2004.”<sup>28</sup>

Okelberrys argued repeatedly below that the presence of unlocked gates constitutes an interruption of public use.<sup>29</sup> Okelberrys also argued that the state and federal constitutions prohibit taking a road over private property unless the landowner dedicates that road to the public. For example, Okelberrys presented the following argument to the trial court:

The law does not impose on a landowner the duty to protect and preserve his own property; rather, the law is supposed to protect that property. Only by the clearest of evidence can the law justify declaring that the landowner has dedicated a road to the public. Although the Supreme Court held that excluding members of the public is one way to prevent a road from becoming public, it did not hold it was the only way. Consistent with the constitutional prohibition of taking private property without paying just compensation, the County can prevail only if it proves there was “a giving by the landowner rather than a taking by the public authority.” The cases cited in Okelberry’s initial memorandum show that the presence of closed gates, even if unlocked, negate any inference that Okelberrys “gave” their private property to the public.<sup>30</sup>

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<sup>27</sup>Transcript June 29, 2004, page 158.

<sup>28</sup>R. 673 ¶ 20.

<sup>29</sup>*E.g.*, R. 622-621.

<sup>30</sup>R. 656 (citations and other footnotes omitted).

Although Okelberrys did not make the specific argument that forcing the removal of the gates will result in the County taking more than Okelberrys gave, Okelberrys clearly did argue that the presence of closed, unlocked gates was an interruption of public use and prevent the roads from becoming public.

In the recent case of *Innerlight, Inc. v. Matrix Group, LLC*,<sup>31</sup> the court considered whether an argument had been properly raised below. The issue was whether a forum selection clause was enforceable. Matrix had challenged that clause below by arguing that a condition precedent was not satisfied, but on appeal there was a different focus. The Supreme Court held the issue was nevertheless properly raised:

On appeal, Matrix argues that the forum selection and choice of law provisions of the Contract are enforceable. In so arguing, Matrix does not specifically contend that the forum selection clause and choice of law provisions are enforceable apart from the condition precedent in Section 2 of the Contract. Rather, it argues that the forum selection and choice of law provisions are enforceable because the condition precedent was fulfilled. Although the specific reasoning behind Matrix's conclusion that the forum selection and choice of law provisions are enforceable differs from this court's reasoning in reaching the same conclusion, the fact remains that the main thrust of Matrix's argument is that the forum selection and choice of law provisions are enforceable. We therefore find that the enforceability of the forum selection and choice of law provisions are properly at issue on appeal.<sup>32</sup>

This Court should hold that Okelberrys properly raised all aspects of their argument that the presence of unlocked gates constitutes an interruption, and that a contrary rule would

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<sup>31</sup>2009 UT 31.

<sup>32</sup>*Id.* ¶ 12.



be unconstitutional because it would result in the County taking more than Okelberrys abandoned.

Wasatch County also argues that to “allow a road that meets the requirements for dedication to the public to be somehow limited in scope defeats the purpose of the statute and is unworkable.”<sup>33</sup> This argument assumes that the public somehow has a right to take these roads, and that the purpose of the statute is to grant the public a right to “take” roads. As argued above,<sup>34</sup> the Dedication Statute is not a grant, but only a rule of evidence to evaluate whether a landowner has dedicated his or her property to the public. Any other rule would result in an unconstitutional taking. While the County would obviously prefer to have roads with no gates or other restrictions, the County can use the power of eminent domain to remove those restrictions. Absent payment of just compensation, however, the County cannot take what the landowner did not give.

This Court should hold that the constitutional protections of private property require that either unlocked gates be considered an interruption, or that the gates be permitted to remain even if the road is public.

## CONCLUSION

The trial court erred in again requiring proof that Okelberrys “generally” or “regularly” excluded members of the public from the roads. One intentional act every ten years is sufficient to preserve private property, regardless of whether anyone’s access was

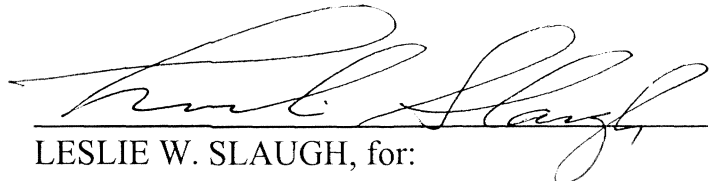
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<sup>33</sup>Wasatch County brief at 5.

<sup>34</sup>Pages 1-2.

actually restricted. Because there was un rebutted evidence of purposeful blocking by Okelberrys, their roads were not “continuously used as a public thoroughfare for a period of ten years.” The decision of the trial court should be reversed with instructions to enter judgment for Okelberrys.

DATED this 13<sup>th</sup> day of July, 2009.



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**MAILING CERTIFICATE**

I **hereby** certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 13<sup>th</sup> day of July, 2009.

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