

2000

James R. Wilhelm, Linda Rose Wilhelm v. Pine Meadows Estates, Inc., Milton R. Farney, Marvin R. Shapiro, Robert C. Dolley : Brief of Appellant

Utah Court of Appeals

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**JAMES R. WILHELM and LINDA ROSE
WILHELM,**

Plaintiffs/Appellees,

VS.

PINE MEADOWS ESTATES, INC.,
MILTON R. FARNEY, MARVIN R.
SHAPIRO, ROBERT C. DOLLEY,

Defendants/Appellants.)

INITIAL BRIEF OF APPELLANTS

Priority No. 15

Court of Appeals Case No. 20000559-CA

District Court Case No. 960600032

APPEAL FROM SIXTH DISTRICT COURT JUDGMENT,
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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FILED
Utah Court of Appeals

FEB 20 2001

Paulette Stagg
Clerk of the Court

**JAMES R. WILHELM and LINDA ROSE
WILHELM,**

VS.

Defendants/Appellants.)

District Court Case No. 960600032

Attorneys for Defendants/Appellants

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Rules

None

Other

None

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Rules

None

Other

None

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(j) (2000).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Are the Court's Findings of Fact with Respect to Historical Existence and use of the Valley View Drive/Wilhelm Road clearly erroneous? This issue was raised and preserved below in Defendants written closing argument and proposed Findings of Fact and Conclusions of Law.

Standard of Review: The question of whether the trial court's Finding of Fact are clearly erroneous is reviewed using a clearly erroneous standard. See, e.g., *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992). "The clearly erroneous standard 'requires that if the findings . . . are against the clear weight of the evidence, if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings will be set aside.'" *State v. C.A.*, 995 P.2d 17 (Utah App. 1998) (quoting *In Re J.N.*, 960 P.2d 403, 407 (Utah App. 1998)). "In addition, a party challenging the court's findings must marshal the evidence in support of those findings, and then show that the marshaled evidence is insufficient, as a matter of law, to support the findings." *Id.* (citing *In re J.M.V.*, 958 P.2d 943, 947 (Utah App. 1998)).

2. Is the trial court's finding that there was not a ten-year period of uninterrupted use clearly erroneous? This issue was raised and preserved below in Defendants written closing argument and proposed Findings of Fact and Conclusions of Law.

Standard of Review: The question of whether the trial court's Finding of Fact are clearly erroneous is reviewed using a clearly erroneous standard. See, e.g., *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992). "The clearly erroneous standard 'requires that if the findings . . . are against the clear weight of the evidence, if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings will be set aside.'" *State v. C.A.*, 995 P.2d 17 (Utah App. 1998) (quoting *In Re J.N.*, 960 P.2d 403, 407 (Utah App. 1998)). "In addition, a party challenging the court's findings must marshal the evidence in support of those findings, and then show that the marshaled evidence is insufficient, as a matter of law, to support the findings." *Id.* (citing *In re J.M.V.*, 958 P.2d 943, 947 (Utah App. 1998)).

3. Are the trial court's conclusions supported by the findings of fact and/or are the conclusions correct? This issue was raised and preserved below in Defendants written closing argument proposed Findings of Fact and Conclusions of Law.

Standard of Review: The question of whether a trial court's findings of fact are sufficient to support its conclusions of law is reviewed for correctness. See, e.g., *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991); *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah App. 1993); *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991); *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App. 1991). Additionally, conclusions of law are reviewed for correctness. *Id.*

4. Did the trial court err in finding that there was not an uninterrupted ten year period of use of the road by the public prior to plaintiffs' permanent blocking

thereof? This issue was raised and preserved below in Defendants written closing argument and proposed Findings of Fact and Conclusions of Law.

Standard of Review: The question of whether the trial court's Finding of Fact are clearly erroneous is reviewed using a clearly erroneous standard. See, e.g., *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992). "The clearly erroneous standard 'requires that if the findings . . . are against the clear weight of the evidence, if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings will be set aside.'" *State v. C.A.*, 995 P.2d 17 (Utah App. 1998) (quoting *In Re J.N.*, 960 P.2d 403, 407 (Utah App. 1998)). "In addition, a party challenging the court's findings must marshal the evidence in support of those findings, and then show that the marshaled evidence is insufficient, as a matter of law, to support the findings." *Id.* (citing *In re J.M.V.*, 958 P.2d 943, 947 (Utah App. 1998)).

5. Are the trial court's findings of fact sufficient to support its conclusion of law sufficiently detailed to support its ultimate decision that there was a legally sufficient blocking of the road and that the road was not a public thoroughfare? This was raised and preserved below in Defendants written closing argument and proposed Findings of Fact and Conclusions of Law.

Standard of Review: The question of whether a trial court's findings of fact are sufficient to support its conclusions of law is reviewed for correctness. See, e.g., *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991); *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah App. 1993); *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991); *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App. 1991). Additionally, conclusions of law are reviewed for correctness. *Id.*

6. Did the trial court err, as a matter of law, in concluding that there was not a ten-year uninterrupted period of use of the road and that the road was therefore not a public thoroughfare? This issue was raised and preserved below in Defendants written closing argument and proposed Findings of Fact and Conclusions of Law.

Standard of Review: This presents a question of law that should be reviewed for correctness. See, e.g., *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992).

7. Did the trial court err by failing to consider all evidence pertaining to the existence of a public thoroughfare including evidence prior, during and/or after the warranty deeds were executed by defendant? This issue was raised and preserved below in Defendants written closing argument and proposed Findings of Fact and Conclusions of Law, and objection to Plaintiff's motion for Summary Judgment.

Standard of Review: This presents a question of law that should be reviewed for correctness. See, e.g., *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992).

8. Did the court err in concluding that the statute of limitations had not expired and the court could rely upon the warranty deed to prevent defendant from asserting the public thoroughfare doctrine? This issue was raised and preserved below in Defendants written closing argument and proposed Findings of Fact and Conclusions of Law.

Standard of Review: This presents a question of law that should be reviewed for correctness. See, e.g., *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992).

DETERMINATIVE CONSTITUTIONAL PROVISIONS

There are no Constitutional Provisions for the State of Utah or the United States.

DETERMINATIVE STATUTES

Utah Code Ann. 72-5-104 (1999)

Utah Code Ann. §57-1-12 (2000)

STATEMENT OF THE CASE

Nature of the Case

Defendant Pine View Meadow Estates respectfully begs this Court's indulgence in using this section to try and give this Court both a flavor as well as the nature of this case. Defendant respectfully urges this Court to keep several important facts in mind as it reviews this case. Pine View Meadow Estates is a subdivision developer of high mountain property subdivided for the purpose of recreational living. Defendant developed the property in several different plat phases, although some of the phases were intertwined as the development proceeded. The plat upon which Plaintiff purchased two (2) lots (hereinafter "the lots") is in a subdivision titled Strawberry Valley Subdivision. Strawberry Valley is located adjacent to a second subdivision which was being developed simultaneously with Strawberry Valley. This subdivision is identified as the Ponderosa Villa. Plaintiff purchased the lots almost two (2) years after Defendant commenced construction and development of both Subdivisions.

In order to develop Ponderosa Villa, (the upper elevated subdivision), it was initially necessary to grade a road from Strawberry Valley, (the lower elevated subdivision), to Ponderosa Villa. The first constructed road, known as Valley View Drive and referred in the case as the Wilhelm Road, is the bases of this dispute. The road commences from Bonanza Circle and traverses up and across lots 38 and 39 of Strawberry Valley to Ponderosa Villa. A second road was constructed a short time later and was also constructed at the time Plaintiff purchased lots 38 and 39.

Plaintiff purchased lots 38 and 39 in Strawberry Valley in early summer of 1968 and made payments on the lots for several years prior to actually being issued warranty deeds, and was well aware, at the time the deeds were issued, that people were utilizing Valley View Drive/Wilhelm Road to access their properties in Ponderosa Villa or to access adjacent forest land. Governmental agencies utilized Valley View Drive/Wilhelm Road on a regular basis to service fire protection for neighboring areas and it was testified by many that hunters, strangers, guests, sight-seers, and every form of public utilized Valley View Drive/Wilhelm Road during the roads existence.

This is a case wherewith Plaintiff is attempting to close and blockade Valley View Drive/Wilhelm Road which has been open and available for use by the public for over thirty (30) years. Plaintiff's claim of right to close Valley View Drive/Wilhelm Road is based upon a Warranty Deed executed by Defendant Pine View Meadows Estates in the early 1970's which failed to identify and describe the roadway easement. Plaintiff also claims a right of closure because of three alleged brief and temporary road blocks in the years 1973, 1980 and 1986. Specifically, Plaintiff asserts that when Garkane Power trenched an underground power line across the road during the years of 1973-74, through use of an

independent contractor, Plaintiff may rely on the trench as an effective blockage of the road; in 1980, Plaintiff alleges that he blocked the road for a weekend with the use of a car parked horizontally across the road; and in 1986 by felling a tree across the road which was removed by unknown persons for firewood. Defendant asserts that the road has been open to the public for over thirty years and should thus be deemed a public road. Defendant asserts further that all three of the road blocks were insufficient based on the nature of blocking and lack of notice to the public.

Plaintiff initially instituted this action demanding actual damages, punitive damages, attorney fees and closure of Valley View Drive/Wilhelm Road. The only matter before this Court on appeal is the trial court's order that Plaintiff be permitted to close Valley View Drive/Wilhelm Road. Defendant asserts that Valley View Drive/Wilhelm Road has been open to the public for more than thirty (30) years and that by virtue of Utah Code Ann. §75-2-104, (1953 as amended), Valley View Drive/Wilhelm Road has been abandoned and deemed a public road, and Plaintiff has no authority to block or close Valley View Drive/Wilhelm Road and prevent its use by the general public.

Course of the Proceedings

On or about June 25, 1997, Plaintiffs filed their Complaint against Defendants alleging a breach of warranty under the deed executed by Defendants to Plaintiffs and requesting damages and judgment against Defendants. Defendants filed their Answer and Counterclaim on or about August 6, 1997 alleging that no breach of the warranty deed occurred and that Plaintiffs had knowledge of the disputed roadway and had agreed to keep the same open to the public.

On or about March 24, 1998, Plaintiffs filed their Motion for Leave to Amend Complaint to add an additional cause of action requesting closure of the roadway in dispute. On or about May 28, 1998, said Motion for Leave to Amend Complaint was granted by the Court. Plaintiffs' Amended their Complaint and Defendants answered the same on or about April 29, 1998. On or about July 8, 1998, Plaintiffs filed a Motion for Summary Judgment. Defendants filed a counter Motion for Summary Judgment on or about July 28, 1998. On or about March 8, 1999, the Trial Court issued its Ruling on Motions for Summary Judgment partly denying both Motions and permitting the matter to proceed to trial. The Trial Court did find that all evidence regarding the existence of a public roadway prior to the issuance of the Warranty Deeds was irrelevant and inadmissible because no reference to any existing roadway was contained in the Warranty Deed issued by Defendants to Plaintiffs. As such, Defendants were precluded from claiming the existence of a roadway predating the conveyance.

Defendants, who were represented by different counsel at the time, filed a Notice of Appeal on or about March 30, 1999. On or about April 21, 1999, Defendants filed their Motion for Summary Disposition and Plaintiffs filed their counter Motion for Summary Disposition on or about April 23, 1999. Then counsel for Defendants, Attorney Patrick H. Fenton, withdrew from the action on or about May 21, 1999. On or about June 1, 1999, the case was remanded to the trial court for further proceedings and the appeal was dismissed until a final judgment was entered. A Notice of Entry of Appearance as Counsel was filed by the undersigned on or about August 11, 1999 on behalf of Defendants. A trial was held on February 24, 2000.

On or about March 3, 2000, Plaintiffs filed their Proposed Memorandum Decision, Findings of Fact and Conclusions of Law and Proposed Decree. On or about March 8, 2000, Defendants filed their Objection thereto and requested a 10-Day Extension in which to file their Proposed Memorandum Decision. The Extension was granted on or about March 17, 2000. Defendants submitted a Motion for Reconsideration on Court's Ruling on Summary Judgment Motions along with their Closing Argument in Support of Motion for Findings of Fact and Conclusions of Law on or about March 27, 2000. Defendants submitted their Proposed Findings of Fact and Conclusions of Law and Proposed Decree on or about April 5, 2000. On or about April 10, 2000, Plaintiffs filed their Objection to Defendants' Motion for Reconsideration on Ruling on Summary Judgment Motions. On or about May 19, 2000, Plaintiffs submitted their Response to Defendants' Objection to Findings of Fact and Conclusions of Law and Notice to Submit to the Court.

The Court issued its Findings of Fact and Conclusions of Law on or about May 4, 2000, and issued a Decree and Judgment on or about May 24, 2000, in favor of Plaintiffs holding that an unplatted roadway of some degree did exist and ordered the same to be closed at Plaintiffs' expense, and awarding Plaintiff costs only. On or about June 21, 2000, Defendants filed their Notice of Appeal.

STATEMENT OF THE FACTS

The facts are set forth to allow this Court to carefully review the issues in this case. Footnotes, where necessary, help aid the Court in examining the facts in proper context.

1. Defendant Pine Meadows Estates, Inc. is a Utah corporation formed for the purpose of developing a mountain estate subdivision which was accessible by an air strip (R. 347: Pages 12, 13).

2. Several different plats were filed with regard to several phases of the subdivision at different times in the Kane County Recorder's Office (R. 347: Pages 109-111).
3. Prior to filing a plat, Defendant plowed the roads in the subdivision and had the road surveyed in order to draft the plats for future recording in the Kane County Recorder's Office (R. 347: Page 110).
4. In order for the plats to be approved, it was necessary for all roads to be inspected. As such, construction on the roads commenced in 1966 (R. 347: Page 111).
5. The Valley View Drive/Wilhelm Road was constructed in 1966. (R. 347: Page 116).
6. The Valley View Drive/Wilhelm Road followed an old Timber Road which was there before the property was purchased. (R. 347: Pages 117 - 118, 155, 156, 177).
7. Much of the development occurred within several future subdivisions at the same time even though plats for those subdivisions had not yet been formally recorded with the Kane County Recorder's Office (R. 347: Page 112).
8. The actual recording of Strawberry Valley plat occurred on May 10, 1968 and Ponderosa Villa plat was recorded in 1969 (R. 347: Page 110).
9. Plaintiff purchased two (2) lots, Lots 30 and 39, both located within Strawberry Valley plat and issued checks for the same in 1968. (R. 347: Pages 27-28).
10. At the time Plaintiff purchased the properties, a rough road had been graded in across Lots 30 and 39, linking Strawberry Valley to Ponderosa Villa. The road is identified as the Valley View Drive/Wilhelm Road (R. 347: Pages 112, 127).
11. Plaintiff asserts that no road traversed the property, but only a four-wheel drive track crossed Lot 38. (R. 347: Page 31).

12. Bill Pringle testified that when Plaintiff purchased the lot, the Valley View Drive/Wilhelm Road was a narrow road. (R. 347: Page 178)
13. Wallace Holst testified that when he purchased his lot, the Valley View Drive/Wilhelm Road was a narrow road when he was first there. (R. 347: Page 213)
14. Harry Moyer testified that he purchased his lot in 1967, and constructed his cabin in 1968 and that the Valley View Drive/Wilhelm Road was a narrow road in 1968. (R. 347: Pages 233-35)
15. Wallace Holst testified that he purchased a lot in 1968 and testified that he went and looked at the Ponderosa Villa Subdivision and drove up the Valley View Drive/Wilhelm Road. (R. 347: Page 199).
16. Wallace Holst testified that the only way he new how to get to Ponderosa Villa Subdivision was on the Valley View Drive/Wilhelm Road. (R. 347: Page 201).
17. Wallace Holst testified that he knew the road was there before he built his cabin which was in 1969 or 1970. (R. 347: Page 212)
18. In 1970, Plaintiff commenced construction of his cabin (R. 347: Page 33).
19. Plaintiff asserts that the first time he noticed Valley View Drive/Wilhelm Road through his property was on September 18, 1972 (R. 347: Page 35).
20. Between 1973 and 1979, Plaintiff admitted that, on occasion, they witnessed strangers on Valley View Drive/Wilhelm Road with Mr. Farney but that there was not a significant amount of use on the road until 1979 (R. 347: Page 40).
21. In 1968 Milt Farney took many people up the Valley View Drive/Wilhelm Road to show them property in the Ponderosa Villa Subdivision. (R. 347: Page 119)

22. Milt Farney traveled the Valley View Drive/Wilhelm Road on a daily basis between the years 1967 through 1980. (R. 347: Page 126)
23. Bill Pringle traveled the Valley View Drive/Wilhelm Road on a daily basis, sometimes hundreds of times each summer between 1968- 1990 and the first time Pringle ever had knowledge that the road was blocked was in the mid 1990's. (R. 347: Page 186).
24. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, almost daily basis, several times a day, and never saw the road blocked in 1973-74 or 1980 (R. 347: Page 219).
25. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, on weekends and vacation days, especially memorial day weekends, in 1986 and other years and he and never saw the road blocked. (R. 347: Page 221).
26. Ronald Lloyd Graham testified that he saw strangers, hunters, snowmobilers, forest service, pedestrians, and was able to use the road anytime he pleased. (R. 347: Pages 222-224).
27. Harry Moyer testified that he saw strangers, hunters, pedestrians, and recreational vehicles use the road. (R. 347: Page 240).
28. Bill Pringle traveled the road daily but only saw the road blocked while the power line was being installed. He never saw the car block the driveway nor did he ever see any logs block the driveway. (R. 347: Pages 189-191)
29. The only blocking Bill Pringle or Wallace Holst saw was in the 1990's. (R. 347: Pages 189, 204)

30. That since the creation of the disputed road across Lots 38 and 39, the undisputed testimony is that the road has been open to the general public for forestry and public personnel, recreational, snowmobiling, recreational vehicles, hunting, ingress and egress of property owners throughout various subdivisions, the water truck and the general public. (R. 347: Pages 131 - 133, 150,)
31. That Warranty Deeds were issued by Pine Meadows Estates to Plaintiff James R. Wilhelm on January 6th, 1972 for Lot 39 and September 25th, 1975 for Lot 38 (R. 84, 85).
32. Valley View Drive/Wilhelm Road was temporarily blocked by a trench cut into the road for the purpose of installing electrical power to Plaintiff's cabin as well as other homeowners in the Ponderosa Villa Subdivision (R. 347: Page 50).
33. Said trench was dug by a private party to meet the requirements of GarKane Power (R. 347: Page 78).
34. The trench was approximately four (4) feet deep and eighteen (18) inches wide (R. 347: Page 82).
35. The trench across the road impeded traffic for approximately one week. (R. 347: Page 127)
36. On Memorial Day weekend of 1980, Plaintiff asserts that he blocked Valley View Drive/Wilhelm Road at the top of Lot 38 with dead aspen trees (R. 347: Page 40, 49).
37. Plaintiff did not block the bottom of Valley View Drive/Wilhelm Road at that time as he did not access his property (R. 347: Page 42).

38. Defendant asserts that when he returned in June of 1980, the logs had been cut up and removed (R. 347: Page 49).
39. In 1986, Plaintiff testified that he blocked Valley View Drive/Wilhelm Road with a 1959 Oldsmobile (R. 347: Page 53).
40. Valley View Drive/Wilhelm Road was physically blocked again by Plaintiff in 1993 (R. 347: Page 56).
41. In 1993, Plaintiff placed construction materials across Valley View Drive/Wilhelm Road (R. 347: Page 59).
42. In 1996, Plaintiff was approached by Deputy Kitchen of the Kane County Sheriff's Department and informed that he was blocking a public roadway (R. 347: Page 68).
43. After refusing to remove the debris, Plaintiff was cited for blocking a public road (R. 347: Page 168).
44. Kane County maintained all of the roads in the Strawberry Valley and Ponderosa Villa Subdivisions (R. 347: Pages 121-122).
45. Kane County maintained the Valley View Drive/Wilhelm Road for several years prior to the lawsuit. (R. 347: Pages 121-122).
46. Kane County placed a yield sign on Valley View Drive/Wilhelm Road at the top of the hill. (R. 347: Page 123)
47. Paul Fullmer was the fire chief of Cedar Mountain Fire District. (R. 347: Page 247)
48. Paul Fullmer testified that as a person who is familiar with special maps, he could locate the Valley View Drive/Wilhelm Road on the 1960 map as a line road. (R. 347: Pages 250-252)

49. Paul Fullmer testified he recalled using the Valley View Drive/Wilhelm Road in the mid-1960's because of the post sale timber, and that he utilized it for fire fighting and other forestry purposes such as tree planting, logging, etc. (R. 347: Pages 252-253).
50. Paul Fullmer testified that prior to 1967 Valley View Drive/Wilhelm Road was a well traveled road, and that he personally drove it in 1966. (R. 347: Pages 254, 258)
51. Paul Fullmer saw hunters use the road. (R. 347: Page 255)
52. Paul Fullmer uses the road to get access to forest land. (R. 347: Page 255)

SUMMARY OF THE ARGUMENT

POINT I

The trial court's findings of fact with respect to the historical existence and use of the Valley View Drive/Wilhelm Road were clearly erroneous because of the overwhelming evidence supported by a multitude of witnesses who testified that they traveled the road on a daily basis during the periods which Plaintiff testified he was present and blocked the road. Furthermore Plaintiff testified that no road existed at the time he initially purchased the property which was unequivocally contradicted not only by testimony of numerous witnesses, but by several forest service aerial photographs which clearly depict a road traversing lots 38, 39 and 40 both prior to and after Plaintiff's purchase of his lots. The court also found in its Findings of Fact that the road existed prior to and after Plaintiff purchased the property.

POINT II

The trial Court's Findings of Fact that there was not a ten-year period of uninterrupted use is clearly erroneous in that first and foremost there is virtually no

Findings of Fact with regard to this issue. It is a fundamentally factual necessity to determine whether blockage of the road actually transpired and if so, whether the attempted blocking was sufficient to give the world notice of Plaintiff's intent to retain private dominion of the road. Furthermore, once a public road has been established for the necessary period, any attempt to block the road thereafter by Plaintiff was futile and wholly inadequate to effectively privatize the road. The only finding provided by the trial court supporting its Conclusions of Law was in Paragraph 36 which simply states that plaintiff undertook efforts to block access to the road with logs, vehicles, reliance upon trenching undertaken by others, and personal notice. The trial court categorically failed to define which, if any, of the blockages effectively obstructed use of the road, and if so when and which blocking were productive. This information is necessary to determine if a then-year period of uninterrupted use occurred.

POINT III

The trial court's conclusions of law are not generally supported by the Court's own Findings of Fact. However, the real problem with several paragraphs in the conclusion is that it wholly fails to address mandatory issues and those issues addressed are incorrect as a matter of law. The conclusions sites a number of things which are irrelevant to the fundamental issue of whether a public road had been established. The most consequential question revolves around whether there was a ten-year (or more) uninterrupted use of the road by the general public. This conclusion summarily states that the road "is not" a public thoroughfare without and indicia of what does or does not constitute a public thoroughfare.

POINT IV

If only one of the Plaintiff's attempts to block the road are ineffective, then the public utilized the road for a 10 year period. The fundamental statutory requirement to establish a public road is that the public use be "continuous" for a period of not less than ten years. Therefore the definition of "continuous use" is crucial in the determination of whether a road was, is or has become a "public" road. The trial court's cursory treatment of this issue in its findings of fact effectively eviscerate any rational conclusion of law and make it impossible to develop a logical conclusion as to whether there was an uninterrupted ten year period and whether a public road was established.

POINT V

The Court did not make any specific findings with respect to any blockages of the road and this is a critical mistake by the Court because the ineffective blockages support the conclusion that Plaintiff effectively interrupted the statutory 10 year period of continuous use, as a matter of law—this is the heart and soul of this case. The Court is obligated to make clear and concise findings of fact to support its conclusions which it has **not**.

POINT VI

The trial court incorrectly found that there was not a 10 year period of use which was uninterrupted by Plaintiff's attempts to block the road. Plaintiff's attempt to block the road through reliance on Garkane's installation of an underground power line is completely groundless and not supported by law. The depositing of dead tree limbs and temporary blocking of the road with a car is also inadequate and failed to give adequate notice to the general public.

POINT VII

The Trial Court must consider the entire history of the road in determining its existence as a public right-of-way and not from the date the deed was executed. By failing to consider the entire life of the road's existence, the court failed to properly apply the law which, while sparse and only discussed in dicta, indicates that public easements which are apparent and in their nature permanent and irremediable should be construed against the person receiving a warranty deed, presumably based on public policy.

POINT VIII

Upon issuance of a Warranty Deed, the grantor agrees to warrant the property, but as in any contractual obligation, the warranty is subject to the statute of limitations which commenced when Plaintiff Wilhelm viewed the disturbance. While the conclusions are unclear, it appears that the Court found that Defendant was bound by the Warranty Deed and could not assert the public road doctrine. This ruling is illogical and incorrect because the Statute of Limitations had run against Plaintiff.

ARGUMENT

POINT I

ARE THE TRIAL COURT'S FINDINGS OF FACT WITH RESPECT TO THE HISTORICAL EXISTENCE AND USE OF THE VALLEY VIEW DRIVE/WILHELM ROAD CLEARLY ERRONEOUS?

The question of whether the trial court's Finding of Fact are clearly erroneous is reviewed using a clearly erroneous standard. See, e.g., *State v. Pena*, 869 P.2d 932, 935 (Utah 1994); *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992). "The clearly erroneous standard 'requires that if the findings . . . are against the clear weight of the evidence, if the appellate court otherwise reaches a definite and firm conviction that a mistake has been

made, the findings will be set aside.” *State v. C.A.*, 995 P.2d 17 (Utah App. 1998) (quoting *In Re J.N.*, 960 P.2d 403, 407 (Utah App. 1998)). “In addition, a party challenging the court’s findings must marshal the evidence in support of those findings, and then show that the marshaled evidence is insufficient, as a matter of law, to support the findings.” *Id.* (citing *In re J.M.V.*, 958 P.2d 943, 947 (Utah App. 1998)).

In the present case, the Court made the following findings with respect to the historical existence and use of the Valley View Drive/Wilhelm Road:

8. Prior to recording any of the subdivision plats, and in the area encompassed by the same, there were several old unimproved one-vehicle-width roads that had been used by loggers, hunters, ranchers, forestry personnel and others. These old roads are barely visible on aerial photography dating to the early 1960's and supplied to the Court. The roads consisted essentially of tire tracks left over a period of time and appear not to follow a well-thought plan.
9. One of the old roads crossed portions of Lots 38 and 39, purchased by plaintiffs from defendant Pine Meadows, and also crossed a corner of Lot 40.
.....
14. At the time of the purchase, plaintiff James R. Wilhelm and the defendant Pine Meadows, through its duly authorized agent Bill Pringle, walked over and inspected the two lots. Pringle was the selling agent in the deal with plaintiffs. Pringle acted as the selling agent of Pine Meadows for some 100 lots between 1968 and 1990.
15. The evidence was inconclusive as to when the road across lots 38, 39 and 40 was first graded. Plaintiffs remembered it was not graded at the time of purchase. Pine Meadows’ president said it was, but its selling agent, Pringle, thought it may not have been. The initial grading effort was much more narrow and conservative than later occurred.
.....
17. Plaintiffs accessed their property from the platted road fronting the same. They likely followed an old logger/hunter road (the Valley View Drive/Wilhelm Road) to get to the cabin site, but it was necessary to perform some earth work to access this old road from the platted road which had been cut along the mountain slope.
.....
33. During the 1970's and into the 1980's the amount of development in the various subdivision plats in proximity to Lots 38 and 39 was

limited, and accordingly the amount of vehicular traffic in the area was likewise limited.

....
35. During the 1970's and into the 1980's there was some use of the old road across Lots 38, 39 and 40 by others who had constructed cabins in the general vicinity. This use, however, was both limited and sporadic because there as simply not an extensive amount of development on the mountain at that time.

....
37. Plaintiffs' blocking efforts were not exhaustive but neither was the amount of use. Moreover, the use appears essentially to have been made by neighbors within the subdivisions developed by Pine Meadows as opposed to members of the general public.

A. Evidence Supporting Findings

1. Plaintiff asserts that no road traversed the property, but only a four-wheel drive track crossed Lot 38. (R. 347: Page 31).
2. Bill Pringle testified that when Plaintiff purchased the lot, the Valley View Drive/Wilhelm Road was a narrow road. (R. 347: Page 178).
3. Plaintiff asserts that the first time he noticed Valley View Drive/Wilhelm Road through his property was on September 18, 1972. (R. 347: Page 35).

B. Evidence Contrary to Findings

1. The Valley View Drive/Wilhelm Road was constructed in 1966. (R. 347: Page 116).
2. The Valley View Drive/Wilhelm Road followed an old Timber Road which was there before the property was purchased by Defendants. (R. 347: Pages 117 - 118;155-156; 177).
3. At the time Plaintiff purchased the properties, a rough road had been graded in across Lots 30 and 39, linking Strawberry Valley to Ponderosa Villa. The road is identified as the Valley View Drive/Wilhelm Road. (R. 347: Pages 112, 127).
4. Plaintiff asserts that no road traversed the property, but only a four-wheel drive track crossed Lot 38. (R. 347: Page 31).
5. Bill Pringle testified that when Plaintiff purchased the lot, the Valley View Drive/Wilhelm Road was a narrow road. (R. 347: Page 178)
6. Wallace Holst testified that when he purchased his lot, the Valley View Drive/Wilhelm Road was a narrow road when he was first there. (R. 347: Page 213)
7. Harry Moyer testified that he purchased his lot in 1967, and constructed his cabin in 1968 and that the Valley View Drive/Wilhelm Road was a narrow road in 1968. (R. 347: Pages 233-35)
8. Wallace Holst testified that he purchased a lot in 1968 and testified that he went and looked at the Ponderosa Villa Subdivision and drove up the Valley View Drive/Wilhelm Road. (R. 347: Page 199).

9. Wallace Holst testified that the only way he new how to get to Ponderosa Villa Subdivision was on the Valley View Drive/Wilhelm Road. (R. 347: Page 201).
10. Wallace Holst testified that he knew the road was there before he built his cabin which was in 1969 or 1970. (R. 347: Page 212)
11. In 1970, Plaintiff commenced construction of his cabin. (R. 347: Page 33).
12. Plaintiff asserts that the first time he noticed Valley View Drive/Wilhelm Road through his property was on September 18, 1972. (R. 347: Page 35).
13. Between 1973 and 1979, Plaintiff admitted that, on occasion, they witnessed strangers on Valley View Drive/Wilhelm Road with Mr. Farney but claimed that there was not a significant amount of use on the road until 1979. (R. 347: Page 40).
14. In 1968, Milt Farney took numerous people up the Valley View Drive/Wilhelm Road to show them property in the Ponderosa Villa Subdivision. (R. 347: Page 119)
15. Milt Farney traveled the Valley View Drive/Wilhelm Road on a daily basis between the years 1967 through 1980. (R. 347: Page 126)
16. Bill Pringle traveled the Valley View Drive/Wilhelm Road on a daily basis, sometimes hundreds of times each summer between 1968-1990 and the first time Pringle ever had knowledge that the road was blocked was in the mid 1990's. (R. 347: Page 186).
17. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, daily basis, and sometimes several times a day, and never saw the road blocked in 1973-74 or 1980. (R. 347: Page 219).
18. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, on weekends and vacation days, especially memorial day weekends, in 1986 and other years and he and never saw the road blocked. (R. 347: Page 221).
19. Ronald Lloyd Graham testified that he saw strangers, hunters, snowmobilers, forest service, pedestrians, and was able to use the road anytime he pleased. (R. 347: Pages 222-224).
20. Harry Moyer testified that he saw strangers, hunters, pedestrians, and recreational vehicles use the road. (R. 347: Page 240).
21. Kane County maintained all of the roads in the Strawberry Valley and Ponderosa Villa Subdivisions including the Valley View Drive/Wilhelm Road. (R. 347: Pages 121-122).
22. Kane County maintained the Valley View Drive/Wilhelm Road for several years prior to the lawsuit. (R. 347: Pages 121-122).
23. Kane County placed a yield sign on Valley View Drive/Wilhelm Road at the top of the hill. (R. 347: Page 123)
24. Paul Fullmer was the fire chief of Cedar Mountain Fire District. (R. 347: Page 247)
25. Paul Fullmer testified that as a person who is familiar with special maps, he could locate the Valley View Drive/Wilhelm Road on the 1960 map as a line road. (R. 347: Pages 250-252)
26. Paul Fullmer testified he recalled using the Valley View Drive/Wilhelm Road in the mid-1960's because of the post sale timber, and that he utilized it for fire fighting and other forestry purposes such as tree planting, logging, etc. (R. 347: Pages 252-253).
27. Paul Fullmer testified that prior to 1967 Valley View Drive/Wilhelm Road was a well traveled road, and that he personally drove it in 1966. (R. 347: Pages 254, 258).

28. Paul Fullmer saw hunters use the road. (R. 347: Page 255).
29. Paul Fullmer uses the road to get access to forest land. (R. 347: Page 255).

C. Conclusion

As is evident from the marshaled evidence, the Court had before it numerous individuals who were familiar with and had in fact used the road long before Plaintiffs came on the scene. In fact, the Trial Court found in its Finding No. 8 and 9, as set forth above, that the Valley View Drive/Wilhelm Road was already in existence at the time Plaintiff's purchase the property and the only apparent dispute was as to its graded condition. Additionally, the Court had before it numerous witnesses who were in and around the property and the Valley View Drive/Wilhelm Road far more often than Plaintiffs. The Court admitted as much in its Finding No. 34 wherein it stated that:

Also during the 1970's and into the 1980's the plaintiff James R. Wilhelm was actively involved in a professional career outside the state of Utah and along with his wife was only an infrequent visitor to the cabin they constructed.

All the witnesses who testified about the historical existence of the road and its use, with the exception of Plaintiff, who was nothing more than an "infrequent visitor", testified that the road had existed long before the subdivision was developed and that it received extensive use both by them and by others witnessed by them. And, each of the witnesses who so testified, with the exception of Plaintiff, spent most of the summers and a good portion of the winters resident on the property and used the Valley View Drive/Wilhelm Road.

This is important. The Court had before it witnesses who testified extensively about the historical and continued use of the road. The Court had not one witness before it that could actually and credibly contradict this testimony—not one. The only witness for

Plaintiffs was Plaintiff, James R. Wilhelm, and he admitted that he was very rarely at the site. In fact, even the Court admitted this very important and salient fact as set forth in Finding No. 34. The reality is that the testimony of those that frequently traveled the road and witnessed others doing the same stands before the Trial Court and this Court uncontradicted.

It is clear, therefore, after Defendants have marshaled the evidence, that the Trial Court's findings are against the clear weight of the evidence and that a mistake has been made. As a result, this Court should set aside any and all findings that attempt to limit both the historical existence of the road and the scope and amount of its use.

POINT II

IS THE TRIAL COURT'S FINDING THAT THERE WAS NOT A TEN-YEAR PERIOD OF UNINTERRUPTED USE CLEARLY ERRONEOUS?

The trial court made the following finding with respect to a ten-year period of uninterrupted use:

44. At no time between the time of contracting to purchase Lots 38 and 39 and the filing of this law suit was there a ten year period of uninterrupted use of the disputed road by members of the public.

Appellants submit that this "finding" is actually a conclusion. In so far as it is a conclusion, its legal sufficiency is discussed and challenged hereafter. Through an abundance of caution and to assist this Court in understanding the problems inherent in this statement, whether it is a finding or conclusion, Appellants will treat this statement as if it were a finding and go through the marshaling exercise.

A. Evidence Supporting Finding

1. Plaintiff testified that in 1973 the road was temporarily blocked by Garkane Power, and/or its agents, who dug a trench across the road for the purpose of installing underground power lines to supply power to lot owners in the subdivision. (R. 347: Pages 50, 78). The trench was approximately 4 feet deep, 18 inches across and impeded traffic on the road for approximately one week. (R. 347: Pages 78, 82, 127).
2. Plaintiff further testified that on Memorial Day Weekend in 1980, he blocked the road at the top of Lot 38 with dead aspen trees. (R. 347: Pages 40, 49). Plaintiff further testified that in June of 1980 he drove the road and there were no aspen trees blocking the road. (R. 347: Page 49).
3. Plaintiff also testified that in 1986, he pulled a 1959 Oldsmobile across the road for a period of two or three days. (R. 347: Page 53). Plaintiff thereafter testified that when he left he pulled said vehicle out of the road. (R. 347: Page 55).
4. Plaintiff further testified that in 1993 he pulled construction material across the road in an attempt to block the same. (R. 347: Page 59).

B. Evidence Contrary to Finding

1. The Valley View Drive/Wilhelm Road was constructed in 1966. (R. 347: Page 116).
2. The Valley View Drive/Wilhelm Road followed an old Timber Road which was there before the property was purchased by Defendants. (R. 347: Pages 117 - 118, 155-156, 177).
3. At the time Plaintiff purchased the properties, a rough road had been graded in across Lots 30 and 39, linking Strawberry Valley to Ponderosa Villa. The road is identified as the Valley View Drive/Wilhelm Road. (R. 347: Pages 112, 127).
4. Plaintiff asserts that no road traversed the property, but only a four-wheel drive track crossed Lot 38. (R. 347: Page 31).
5. Bill Pringle testified that when Plaintiff purchased the lot, the Valley View Drive/Wilhelm Road was a narrow road. (R. 347: Page 178)
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8. Wallace Holst testified that he purchased a lot in 1968 and testified that he went and looked at the Ponderosa Villa Subdivision and drove up the Valley View Drive/Wilhelm Road. (R. 347: Page 199).
9. Wallace Holst testified that the only way he new how to get to Ponderosa Villa Subdivision was on the Valley View Drive/Wilhelm Road. (R. 347: Page 201).
10. Wallace Holst testified that he knew the road was there before he built his cabin which was in 1969 or 1970. (R. 347: Page 212)

11. In 1970, Plaintiff commenced construction of his cabin. (R. 347: Page 33).
12. Plaintiff asserts that the first time he noticed Valley View Drive/Wilhelm Road through his property was on September 18, 1972. (R. 347: Page 35).
13. Between 1973 and 1979, Plaintiff admitted that, on occasion, they witnessed strangers on Valley View Drive/Wilhelm Road with Mr. Farney but claimed that there was not a significant amount of use on the road until 1979. (R. 347: Page 57).
14. In 1968, Milt Farney took numerous people up the Valley View Drive/Wilhelm Road to show them property in the Ponderosa Villa Subdivision. (R. 347: Page 119)
15. Milt Farney traveled the Valley View Drive/Wilhelm Road on a daily basis between the years 1967 through 1980. (R. 347: Page 126)
16. Bill Pringle traveled the Valley View Drive/Wilhelm Road on a daily basis, sometimes hundreds of times each summer between 1968-1990 and the first time Pringle ever had knowledge that the road was blocked was in the mid 1990's. (R. 347: Page 186).
17. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, daily basis, and sometimes several times a day, and never saw the road blocked in 1973-74 or 1980. (R. 347: Page 219).
18. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, on weekends and vacation days, especially memorial day weekends, in 1986 and other years and he and never saw the road blocked. (R. 347: Page 221).
19. Ronald Lloyd Graham testified that he saw strangers, hunters, snowmobilers, forest service, pedestrians, and was able to use the road anytime he pleased. (R. 347: Pages 222-224).
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21. Kane County maintained all of the roads in the Strawberry Valley and Ponderosa Villa Subdivisions including the Valley View Drive/Wilhelm Road. (R. 347: Pages 121-122).
22. Kane County maintained the Valley View Drive/Wilhelm Road for several years prior to the lawsuit. (R. 347: Pages 121-122).
23. Kane County placed a yield sign on Valley View Drive/Wilhelm Road at the top of the hill. (R. 347: Page 123)
24. Paul Fullmer was the fire chief of Cedar Mountain Fire District. (R. 347: Page 247)
25. Paul Fullmer testified that as a person who is familiar with special maps, he could locate the Valley View Drive/Wilhelm Road on the 1960 map as a line road. (R. 347: Pages 250-252)
26. Paul Fullmer testified he recalled using the Valley View Drive/Wilhelm Road in the mid-1960's because of the post sale timber, and that he utilized it for fire fighting and other forestry purposes such as tree planting, logging, etc. (R. 347: Page 252-253).

27. Paul Fullmer testified that prior to 1967 Valley View Drive/Wilhelm Road was a well traveled road, and that he personally drove it in 1966. (R. 347: Pages 254, 258).
28. Paul Fullmer saw hunters use the road. (R. 347: Page 255).
29. Paul Fullmer uses the road to get access to forest land. (R. 347: Page 255).

C. Conclusion

There are two things to consider here. First, and this is discussed in more detail below, whether the blockings testified to by Plaintiff were sufficient to interrupt the public's use of the road and prevent uninterrupted use for a period of ten-years. Appellants argue below that such blockings do not constitute an interruption of the use of the road as required by law. Second, is whether the finding is clearly erroneous. All of Plaintiff's testimony involved minor blockages such as trees or a vehicle placed in the road for a very brief period of time or even a blockage by another entity altogether that Plaintiff tries to use to his benefit as if it demonstrated his intent to exclude the public therefrom. Before this Finding could be operative as either a finding or a conclusion the trial court would have had to find or conclude that the above blockages were sufficient to prevent a ten-year uninterrupted use of the road. The trial court never made this kind of a finding or conclusion. As such, therefore, this Finding is not supported by the evidence, is clearly erroneous and a mistake has been made and this Court should overturn and/or strike this Finding in its entirety.

POINT III

**ARE THE TRIAL COURT'S CONCLUSIONS
SUPPORTED BY THE FINDINGS OF FACT
AND/OR ARE THE CONCLUSIONS
CORRECT?**

The question of whether a trial court's findings of fact are sufficient to support its conclusions of law is reviewed for correctness. See, e.g., *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991); *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah App. 1993); *Woodward v. Fazio*, 823 P.2d 474, 477 (Utah App. 1991); *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App. 1991). Additionally, conclusions of law are reviewed for correctness. *Id.*

The trial court did not number its conclusions of law but instead opted to make them in a narrative manner. Appellants therefore refer to the conclusions by paragraph number so as to aid this Court in its review of the conclusions and in following Appellants' argument.

1. Paragraph 1

When Pine Meadows and its close circle of owners, officers and directors selected among the old unimproved roads those for inclusion in its formal plats, it necessarily evidenced its intent to abandon others not so included. The evidence is clear that, for whatever reason, defendants did not include as a platted road the old logger/hunter road which apparently crossed a portion of Lots 38, 39 and 40. Rather, defendants platted new roads, one of which services the same purpose historically served by the old roadway in question. Kane County accepted the plats with the lots and dedicated roads as shown thereon. If the County or the defendants required additional access or intended some other road to be recognized, it should have been shown on the plat. It is untenable as a matter of law for either defendants or the County to include some old unimproved roads, elevating them to the status of platted roads, exclude others and then claim those excluded encumber lots which appear on the face of the plat to be unencumbered. The incongruence of such a claim is further heightened by the recordation of restrictive covenants which provide that each lot is at a minimum permissible size and preclude any sale or disposition otherwise. Moreover, Pine Meadows' conveyance by warranty deed carried with it the statutory guarantee of "quiet possession" and "that the premises are free from all encumbrances" and that Pine Meadows would "forever warrant and defend the title . . . against all lawful claims whatsoever."¹ UCA §57-1-12. Under the facts of this case, these defendants are precluded from asserting

¹ This statement is contrary to the applicable statute of limitations that is discussed elsewhere in this Brief.

that a public thoroughfare existed when the plats were recorded in 1968 and 1969 and when the deeds were issued to plaintiffs in 1972 and 1975; and this is so even if the proof were sufficient to establish a pre-existing "public thoroughfare" which the Court concludes it is not.

Analysis

Some of the above conclusion is arguably supported by the findings. However, the real problem with this conclusion is that it does not speak to the issues in this case and insofar as it does it is incorrect as a matter of law. The conclusion cites a number of things including Appellants' failure to properly record the Pine Valley/Wilhelm road on the plat that was accepted by Kane County, the size of the lots and the issuance of warranty deeds. None of these things or the others cited in the conclusion are relevant to the issue of the public thoroughfare. If there was a public thoroughfare it would not matter if the road was not recorded on the deed, size of the lots or the warranty deeds. The question revolves around whether there was a ten-year (or more) uninterrupted use of the road. This conclusion summarily, and without any relevant support in the findings, simply states that the road "is not" a public thoroughfare without any of the legally sufficient indicia of what constitutes or does not constitute a public thoroughfare. This conclusion is full of legal error, is not supported by any relevant findings, is conclusory in nature and should be set aside.

2. Paragraphs 2 and 3

(2) Defendants' claim that a public thoroughfare thereafter came into existence is not supported by the facts. The governing statute, §72-5-104, provides as follows:

A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

The law in Utah is well settled that the burden of proof is on the side trying to prove dedication to the public. This burden can only be met by proof which is clear and convincing. Moreover, there is a presumption in favor of the property owner and his ownership is accorded a high degree of sanctity. It has also been held that use by neighboring landowners and their personal visitors is not sufficient to prove public use. These persons cannot be numbered in the class of members of the general public using such road in a fashion that might ripen into a dedication under the road statute. The use must be such that it is a "thoroughfare" where members of the public have a general right of passage. Finally, it is generally recognized that unambiguous acts by the owner which evidences an intention to exclude the public from uninterrupted use destroys the prescriptive right and the 10-year period must begin anew.

(Citations omitted.)

The evidence laid before the Court by defendants was less than "clear and convincing". Defendants called several persons that testified of the use over a couple of decades before being completely blocked out, but for the most part this was use by neighboring lot-owners, or those who provided services to them; and the absence of extensive development, particularly during the early years, limited the nature and opportunity for conflict and also reduced the occurrences where plaintiffs' efforts to blockade coincided with others' efforts to use. But some confrontations did exist, sufficient to evidence plaintiffs' intent to exclude the public from uninterrupted use. Furthermore, the blockade devices employed by plaintiffs, including those that were of a permanent nature during the 1990's, were removed when plaintiffs were not around.

Analysis

Appellants have no problem with paragraph 2 insofar as it accurately states the law. The real problem is evident in paragraph 3. Appellants' witnesses who testified to using the road and witnessing others using the road were not neighboring landowners or those providing services to them. There are no findings supporting this statement. Additionally, the law states that "adjoining landowners" may not claim a public thoroughfare, it does not state that "neighboring landowners" may not claim a public thoroughfare. *Marden R. Kohler and Joy J. Kohler v. Martin*, 916 P.2d 910 (1996). None of Appellants' witnesses were

adjoining landowners. Therefore, this is an erroneous statement and this Court should set it aside.

Additionally, the trial court states that the level of development in the subdivision directly correlated to the level and amount of traffic on the road and that this erroneous fact is somehow relevant. There is no finding supporting this conclusion. The only evidence (although there must be a finding) was a statement made by Plaintiff who by the trial court's own admission was a very infrequent visitor to the property (see Finding of Fact number 34) and had no real ongoing knowledge of how the road was used and by whom. Moreover, Plaintiff's statement is clearly contradicted by all of Appellant's witnesses who frequently used and witnessed others using the road during all times relevant to this action. None of them testified that the amount of development was somehow related to the amount of traffic on the road since many of them used the road all the time and witnessed members of the public using the road for recreational purposes regardless of the level of development. This statement is both erroneous and irrelevant and should be set aside.

The trial court next discusses the fact that since there was little development and little traffic there were not many confrontations between Plaintiff and people trying to use the road although such confrontations existed and said confrontations were sufficient to evidence plaintiffs' intent to exclude the public from "uninterrupted" use. This is again an erroneous and irrelevant statement. There was only one confrontation that Plaintiff testified to and that was with a person now deceased. Plaintiff did indicate that when he was there he told people trying to use the road not to and that they generally respected his wishes. However, the trial court found that Plaintiff was but an infrequent visitor to the property. Therefore, there simply could not have been that many confrontations especially

because the trial court has made the claim that travel over the road was infrequent due to the lack of development. Thus, the confrontations, if any, did not rise to the level of constituting a “blockage” of the road sufficient to defeat a claim of a public thoroughfare. This point is covered in significant detail below.

Finally, the trial court claims that the blockages Plaintiff put in the road were removed when he was not around. Appellants are not certain the relevance of this statement. The few and inadequate blockages that Plaintiff placed on the road were always quickly removed.

Conclusion

The conclusions of law, besides being confusing, are not supported by the findings and those that are have no relevance or impact upon the ultimate question of whether a public thoroughfare existed and they certainly do not defeat a claim of a public thoroughfare. As such, Appellants request that this Court overturn and/or set aside the erroneous conclusions of law.

POINT IV

DID THE TRIAL COURT ERR IN CONCLUDING THAT THERE WAS NOT AN UNINTERRUPTED TEN-YEAR PERIOD OF USE OF THE ROAD BY THE PUBLIC PRIOR TO PLAINTIFFS’ PERMANENT BLOCKING THEREOF

The critical nature of the trial court’s failure to make adequate findings of fact and conclusions of law will now become readily apparent. As stated above, one of the statutory requirements to establish a public road is that the public use be “continuous” for a period of not less than ten years. See Utah Code Ann. § 72-5-104 (2000). Therefore the definition of “continuous use” is crucial in the determination of whether a road was, is or

has become a “public” road. Again, the trial court to gloss over these important definitions and criteria and did not make adequate findings of fact or conclusions of law with respect thereto.

The Utah Supreme Court in *Crane v. Crane*, 683 P.2d 1062 (Utah 1984) specifically addressed the issue of “continuous use” in determining whether a prescriptive easement had attached to a property, as follows:

A need not be “regular” or “constant” in order to be “continuous.” All that is necessary is that the use be as often as is required by the nature of the use and the needs of the claimant.

Id. at 1064 (citing *Richards v. Pine Ranches, Inc.*, 559 P.2d 948, 949 (Utah 1977)).

Defendants introduced the following testimony at trial with respect to the use of the road:

1. The Valley View Drive/Wilhelm Road was constructed in 1966. (R. 347: Page 116).
2. The Valley View Drive/Wilhelm Road followed an old Timber Road which was there before the property was purchased by Defendants. (R. 347: Page 117 - 118, 155-156, 177).
3. At the time Plaintiff purchased the properties, a rough road had been graded in across Lots 30 and 39, linking Strawberry Valley to Ponderosa Villa. The road is identified as the Valley View Drive/Wilhelm Road. (R. 347: Pages 112, 127).
4. Plaintiff asserts that no road traversed the property, but only a four-wheel drive track crossed Lot 38. (R. 347: Page 31).
5. Aerial photographs clearly depict the establishment of the road. (R. Trial Court-Exhibits 6-13; not provided by Court: See attached addendum)
6. Bill Pringle testified that when Plaintiff purchased the lot, the Valley View Drive/Wilhelm Road was a narrow road. (R. 347: Page 178)
7. Wallace Holst testified that when he purchased his lot, the Valley View Drive/Wilhelm Road was a narrow road when he was first there. (R. 347: Page 213)
8. Harry Moyer testified that he purchased his lot in 1967, and constructed his cabin in 1968 and that the Valley View Drive/Wilhelm Road was a narrow road in 1968. (R. 347: Page 233-35)
9. Wallace Holst testified that he purchased a lot in 1968 and testified that he went and looked at the Ponderosa Villa Subdivision and drove up the Valley View Drive/Wilhelm Road. (R. 347: Page 199).
10. Wallace Holst testified that the only way he new how to get to Ponderosa Villa Subdivision was on the Valley View Drive/Wilhelm Road. (R. 347: Page 201).

11. Wallace Holst testified that he knew the road was there before he built his cabin which was in 1969 or 1970. (R. 347: Page 212)
12. In 1970, Plaintiff commenced construction of his cabin. (R. 347: Page 33)
13. Plaintiff asserts that the first time he noticed Valley View Drive/Wilhelm Road through his property was on September 18, 1972. (R. 347: Page 35).
14. Between 1973 and 1979, Plaintiff admitted that, on occasion, they witnessed strangers on Valley View Drive/Wilhelm Road with Mr. Farney but claimed that there was not a significant amount of use on the road until 1979. (R. 347: Page 57).
15. In 1968, Milt Farney took numerous people up the Valley View Drive/Wilhelm Road to show them property in the Ponderosa Villa Subdivision. (R. 347: Page 119)
16. Milt Farney traveled the Valley View Drive/Wilhelm Road on a daily basis between the years 1967 through 1980. (R. 347: Page 126)
17. Bill Pringle traveled the Valley View Drive/Wilhelm Road on a daily basis, sometimes hundreds of times each summer between 1968-1990 and the first time Pringle ever had knowledge that the road was blocked was in the mid 1990's. (R. 347: Page 186).
18. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, daily basis, and sometimes several times a day, and never saw the road blocked in 1973-74 or 1980. (R. 347: Page 219).
19. Ronald Lloyd Graham traveled the Valley View Drive/Wilhelm Road on a regular basis, on weekends and vacation days, especially memorial day weekends, in 1986 and other years and he and never saw the road blocked. (R. 347: Page 221).
20. Ronald Lloyd Graham testified that he saw strangers, hunters, snowmobilers, forest service, pedestrians, and was able to use the road anytime he pleased. (R. 347: Pages 222-224).
21. Harry Moyer testified that he saw strangers, hunters, pedestrians, and recreational vehicles use the road. (R. 347: Page 240).
22. Kane County maintained all of the roads in the Strawberry Valley and Ponderosa Villa Subdivisions including the Valley View Drive/Wilhelm Road. (R. 347: Pages 121-122)
23. Kane County maintained the Valley View Drive/Wilhelm Road for several years prior to the lawsuit. (R. 347: Page 121-122).
24. Kane County placed a yield sign on Valley View Drive/Wilhelm Road at the top of the hill. (R. 347: Page 123)
25. Paul Fullmer was the fire chief of Cedar Mountain Fire District. (R. 347: Page 247)
26. Paul Fullmer testified that as a person who is familiar with special maps, he could locate the Valley View Drive/Wilhelm Road on the 1960 map as a line road. (R. 347: Pages 250-252)
27. Paul Fullmer testified he recalled using the Valley View Drive/Wilhelm Road in the mid-1960's because of the post sale timber, and that he utilized it for fire fighting and other forestry purposes such as tree planting, logging, etc. (R. 347: Pages 252-253).
28. Paul Fullmer testified that prior to 1967 Valley View Drive/Wilhelm Road was a well traveled road, and that he personally drove it in 1966. (R. 347: Pages 254, 258).
29. Paul Fullmer saw hunters use the road. (R. 347: Page 255).
30. Paul Fullmer uses the road to get access to forest land. (R. 347: Page 255).

31. Forest service aerial photographs show that the Valley View Drive/Wilhelm Road existed in 1960 as a mountain road. (Trial Court- Exhibit 6; not provided by Court: See attached addendum)²
32. Forest service aerial photographs clearly show that the Valley View Drive/Wilhelm Road existed as an improved road in 1967. (Trial Court- Exhibit 10; not provided by Court: See attached addendum)³
33. Forest service close-up aerial photographs clearly show that the Valley View Drive/Wilhelm Road existed as an improved road in 1967. (Trial Court- Exhibit 11; not provided by Court: See attached addendum)⁴
34. Forest service aerial photographs clearly show that the Valley View Drive/Wilhelm Road existed in 1977. (Trial Court- Exhibit 12; not provided by Court: See Attached Addendum)⁵
35. Forest service close-up aerial photographs clearly show that the Valley View Drive/Wilhelm Road existed as an improved road in 1977. (Trial Court- Exhibit 13; not provided by Court: See attached addendum)⁶
36. The difference in the condition of the road between 1967 and 1976 is minor as evidenced by a comparison of the two photographs. (Trial Court- Exhibits 10, 12; not provided by Court: See Attached Addendum)

The above testimony clearly demonstrates that the road was subject to “continuous use” by numerous individuals most of whom had also seen others, often strangers, frequently using the road. Even Plaintiff admitted that when he was present, which was seldom, he also saw strangers use the road and when asked not to, they complied with his requests. Furthermore, the road accesses forest property and was open to hunters, snowmobilers, and other recreationists as well as forest personnel.

² Plaintiff requested a copy of all documents from the Trial Court but was provided only a copy of the transcript and pleadings. No Exhibits presented at the time of trial were provided. Because of the limited number of Exhibits utilized in Plaintiff’s brief a motion by Plaintiff requesting this Court to order transfer of the Exhibits to the Court of Appeals has been submitted contemporaneously herewith.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

The next critical question is whether any of Plaintiffs' verbal protestations, blocking attempts, or those imputed to him such as the trench dug by Garkane Power, were sufficient to cause a blocking of the road so as to defeat any ten-year period of uninterrupted use. In *Memmott v. Anderson*, 642 P.2d 750 (Utah 1982), the Utah Supreme Court was faced with a set of facts similar to the present case. In *Memmott*, the plaintiffs erected a gate across a road in dispute and placed great reliance on the existence of the gate in showing that the road was not a public thoroughfare because of the "break" in usage allegedly caused by the erection of the gate. The Court looked to the history of the road and determined that "if a road were a public thoroughfare before the gate was erected, the erection of the gate does not change the public nature of the road." *Id.* at 753 (citing *Sullivan v. Condas*, 290 P. 954 (1930)). The *Memmott* Court also took judicial notice as to the purpose for which the road was originally constructed. In its final determination the Court relied on what it termed "substantial" evidence that showed the road had been originally constructed under the protection of federal statute on public lands by hands of "the public." *Id.* at 753. Testimony in the present case, as indicated above, from an uninterested party indicates that there was a use of the Wilhelm road prior to 1966 for use by forestry personnel and other members of the public. The court made the following findings with respect to the existence of a road:

8. Prior to recording any of the subdivision plats, and in the area encompassed by the same, there were several old unimproved one-vehicle-width roads that had been used by loggers, hunters, ranchers, forestry personnel and others. These old roads are barely visible on aerial photography dating to the early 1960's and supplied to the court. The roads consisted essentially of tire tracks left over a period of time and appear not to follow a well-thought plan.
9. One of the old roads crossed portions of Lots 38 and 39, purchased by plaintiffs from defendant Pine Meadows, and also crossed a corner of Lot 40.

In order to block a road that has either become a public road or to interrupt a ten year period of uninterrupted use, there must be an actual interference with the claimant's use by means of erecting physical obstacles or otherwise use of the servient parcel in such a manner so as to prevent the adverse use. It is not sufficient to attempt an interruption of the public use. See, e.g., *Margoline v. Holefelder*, 218 A.2d 227, 228 (Pa. 1966) (holding that a blockade of a disputed driveway for two days did not constitute actual interruption when there was no evidence of attempted use). It is also not sufficient to render a use less convenient. See, e.g., *Brown v. Ware*, 630 P.2d 545, 547 n.2 (Ariz. App. 1981) (holding that the stringing of barbed wire across a roadway was deemed insufficient to interrupt usage where the wire was knocked down a day after it was erected); *South Norwalk Lodge v. Palco Hats, Inc.*, 100 A.2d 735, 737 (Conn. 1953) (stating that claimant continually removed barriers from right-of-way and continued use thereof); *King v. Corsini*, 335 N.E.2d 561, 565 (Ill. App. 1975) (holding that acts of landowner blocking road for short periods did not interrupt public use). **The obstruction must in fact interfere with the claimant's usage.** See, e.g., *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes*, 404 S.E.2d 677, 687 (N.C. 1991); *Reed v. Piedimonte*, 138 A.2d 937, 937 (N.Y. 1988) (holding that there was no evidence that the erections of temporary barriers "ever effectively interfered with, or disturbed, plaintiff's continuous use of the driveway").

In *Hammond v. Johnson*, 66 P.2d 894 (1937), the court stated that:

To interrupt the continuity of the adverse occupant's possession, there must be a physical interruption of the adverse possession, or a suit or some unequivocal act of ownership which interrupts the exercise of the right claimed and being enjoyed by the adverse claimant. 2 C.J.S., Adverse Possession, p. 701, and cases cited. Such interruption of the adverse

claimant's occupancy or user, to stop the running of the statute, must be of the same definite character as must the adverse claimant's occupancy or user, to stop the running of the statute, must be of the same definite character as must the adverse claimant's possession and user be to start the statute running. The interruption must be open, notorious, and under claim of right such as to manifest an intention to repossess the property and dispossess the occupant, and be a challenge to his right and dominion. It must bear on its face an unequivocal intention to take possession.

There was never a sufficient effort on the part of Plaintiff to block the public thoroughfare once it existed. If the erection of a gate blocking the roadway was insufficient in *Memmott*, then certainly the minimal efforts by Plaintiffs, and Plaintiffs verbal protestations to a few passer-byes, prior to 1993, fall woefully short as set forth hereafter.

There were three attempts to block the road in the present case between the time Plaintiff purchased the land and the initiation of this lawsuit—a period of over thirty years. And, of critical importance, one of the blockages was not even by Plaintiffs and cannot be imputed to them in order to prevent the ten-year period of uninterrupted use. Plaintiff, James R. Wilhelm, testified that he attempted to block the road, or at least the road was blocked, on the following occasions:

1. Plaintiff testified that in 1973-74 the road was temporarily blocked by Garkane Power, and/or its agents, who dug a trench across the road for the purpose of installing underground power lines to supply power to lot owners in the subdivision. (R. 347: Pages 50, 78).⁷
2. Plaintiff further testified that on Memorial Day Weekend in 1980, he blocked the road at the top of Lot 38 with dead aspen trees. (R. 347: Pages 40, 49).

⁷ As set forth below, the Court allowed this blocking to somehow be imputed to the efforts of Plaintiffs to block the road and as a manifestation to the public of their efforts to exclude the public therefrom. This is patently absurd and contrary to the law. This blockage had nothing to do with Plaintiffs' efforts and furthermore could not be considered a manifestation of their desire to exclude the public therefrom. There is also a question as to whether Plaintiffs were even aware of this blockage before they began to prepare for this action at which point they tried to use it to their advantage. Also, as argued below, without this blockage there clearly was a ten-year period of uninterrupted use. This is why it is so critical that this Court be able to examine the individual blockages which the Trial Court utterly failed to identify.

- Plaintiff further testified that in June of 1980 he drove the road and there were no aspen trees blocking the road. (R. 347: Page 49).
3. Plaintiff also testified that in 1986, he pulled a 1959 Oldsmobile across the road for a period of a few days. (R. 347: Page 53). Plaintiff thereafter testified that when he left he pulled said vehicle out of the road. (R. 347: Page 55).
 4. Plaintiff further testified that in 1993 he pulled construction material across the road in an attempt to block the same. (R. 347: Page 59).⁸

None of these blockages constitute a sufficient blockage or interference with use to defeat a claim of a ten-year uninterrupted use. However, each blockage deserves some additional analysis.

1973 Blockage

Plaintiff testified that the road was temporarily blocked in 1973 by Garkane Power, a local utility, for the purpose of digging a trench to bury electrical power lines. Plaintiffs had nothing to do with this blocking other than facilitating the unified ordering of power by a group of homeowners desiring power. Appellants are aware of no law, in any jurisdiction, that would allow the imputation of this blockage to Plaintiffs and that it somehow manifested Plaintiffs' intent to keep the public from using the road. The claim that it somehow can be imputed to Plaintiffs is patently absurd. It should also be noted that defendant's witnesses have no collection of the trench blocking the road indicating that it did not last as long and Plaintiff claims.

Plaintiffs purchased their lots in 1968. Even if this Court does not allow Appellants to go back earlier than Plaintiffs' purchase of their lots, the first attempt to block the road

⁸ As set forth below, Defendants are not challenging the sufficiency of the blockages after 1990. The question of the actual or adequacy of the blockages in the 1970s and 1980s however goes to the heart of the Trial Court's findings and conclusions with respect to the existence of lack of existence of a ten-year uninterrupted period of use.

by Plaintiffs was in 1980, as discussed below. Therefore, if the Garkane Power trenching is not counted as a blockage by Plaintiffs, there was an uncontroverted twelve-year uninterrupted period of use by the public prior to Plaintiffs' attempt to block the road in 1980. As set forth above, all that is required is a ten-year period of uninterrupted use of the road.

1980 Blockage

Plaintiff testified that on Memorial Day Weekend in 1980 he pulled some dead aspen trees across the road at the top of his property. He further testified that in June of that year, only a few weeks later, he drove the road and the aspen trees had been removed. None of Defendant's witnesses, who used the road on a regular basis, had any knowledge of this minor and very temporary attempt to block the road in 1980. Furthermore, this blockade fails to provide any notification to the general public of an intent to impede traffic. Dead aspen trees are indigenous to the area and could have been construed by any passerby as a simple failure to fasten down a load of debris being transported for either firewood or disposal on forest land.

As is evident from the case law set forth above, the blockage must be of a substantial nature and it must actually interfere with use of the road. The aspen tree blockage was temporary, minor and it was removed almost immediately. As such it did not interfere with the public's use of the road and cannot, as a matter of law, be considered a sufficient blockage of the road to defeat its uninterrupted use. The next blockage didn't occur until 1986 and if the 1980 blockage was insufficient to defeat uninterrupted use of the road, which it is not, then there was a period running from 1968 to 1986 (18 years) without an adequate attempt to block the road. And even if this Court considered it such,

the road in question already has more than a ten-year period of uninterrupted use. The nature of this blockage therefore must be so substantial and of such duration that it will defeat what has already become a public thoroughfare—a few dead aspen trees simply cannot defeat what is already a public road.

1986 Blockage

Plaintiff testified that in 1986, he pulled a 1959 Oldsmobile across the road for a period of several days. Plaintiff thereafter testified that when he left he pulled said vehicle out of the road. Again, under the case law set forth above, this was not a sufficient blockage to defeat the uninterrupted use of the road. And as set forth above with respect to the dead aspen trees, even if this Court considered it such, the road in question already has more than a ten-year period of uninterrupted use. The nature of this blockage therefore must be so substantial and of such duration that it will defeat what has already become a public thoroughfare—pulling a car across the road for a few days is simply not sufficient to defeat what already is a public road.

Conclusion

The trial court clearly erred in finding Plaintiff's testimony sufficient to support an interrupted use of the road. This is especially true with respect to the Garkane Power trenching, but is also true with respect to the dead aspen trees and the short duration blockage by an antique vehicle. The trial court's findings and conclusions on this issue, sparse as they may be, are contrary to law. This Court should therefore reverse the trial court's conclusions in this regard and issue an opinion that the road in question became and remained a public road despite any blockage attempts.

POINT V

ARE THE TRIAL COURT'S FINDINGS OF FACT SUFFICIENT TO SUPPORT ITS CONCLUSION OF LAW SUFFICIENTLY DETAILED TO SUPPORT ITS ULTIMATE DECISION THAT THERE WAS A LEGALLY SUFFICIENT BLOCKING OF THE ROAD AND THAT THE ROAD WAS NOT A PUBLIC THOROUGHFARE?

The question of the adequacy or sufficiency of the Court's Findings of Fact is reviewed for correctness. See, e.g., *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991); *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah App. 1993); *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991); *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App. 1991). In this case the Court did not make any specific findings with respect to the blockage of the road. This is a critical error on the part of the Court because the nature and number of alleged blockages are critical in determining whether there actually was a blockage, as a matter of law—this is the heart and soul of this case. And, in fact, the Court is required to make clear and concise findings of fact to support its conclusions which in this case it has not.

In fact, in this case, the Court made only the following findings with respect to the blockage:

36. During the 1970's and 1980's, plaintiff on several occasions undertook efforts to block access to the road, sometimes with logs, sometimes with vehicles and by reliance upon trenching (of which the plaintiff was not aware) undertaken by others and sometimes by personal notice. Some of plaintiffs [sic] blocking efforts resulted in confrontations with would-be users where plaintiffs made clear their opposition to continued use.
37. Plaintiffs' blocking efforts were not exhaustive but neither was the amount of use. . . .
39. Pine Meadows' agent, Bill Pringle, was somewhat aware of plaintiffs' effort to block access and use over the years, and had a clear memory of the more permanent and extensive effort during the 1990's [This is actually not

accurate—Mr. Pringle testified that he had no knowledge of any blockage until the mid-1960s (R. 347: Pages 189-191)].

. . . .

43. The permanent type devices installed by plaintiffs to block access to the road were physically removed on more than one occasion. Plaintiffs continued to use the cabin only for recreation use and were not present when removed.
44. At no time between the time of contracting to purchase Lots 38 and 39 and the filing of this law suit was there a ten-year period of uninterrupted use of the disputed road by members of the public.

Based on these findings the Court concluded that Plaintiffs had adequately blocked the road and that there never was an uninterrupted ten-year period of use. The trial court then went on to make the following conclusion, presumably based upon the above findings:

The evidence laid before the Court by defendants was less than “clear and convincing”. Defendants called several persons that testified of the use over a couple of decades before being completely blocked out, but for the most part this was use by neighboring lot-owners, or those who provided services to them; and the absence of extensive development, particularly during the early years, limited the nature and opportunity for conflict and also reduced the occurrences where plaintiffs’ efforts to blockade coincided with others’ efforts to use. But some confrontations did exist, sufficient to evidence plaintiffs’ intent to exclude the public from uninterrupted use. Furthermore, the blockade devices employed by plaintiffs, including those that were of a permanent nature during the 1990’s, were removed when plaintiffs were not around.

(R. 347: Page 314).

The problem here is that it is impossible to tell whether a ten year period of uninterrupted use truly existed. The trial court’s findings and conclusions lack sufficient detail to allow this Court any meaningful appellate review on this issue. See *Michele Mciver Bell v. Harold Freeman Bell*, 810 P.2d 489 (1991); (the trial court will not disturb a trial court’s ruling. . . .as long as the court “exercises its discretion within the bounds and under the standards we have set and has supported its decision with adequate findings

and conclusions.”). See also, *Paul Edward Roberts v. Sheri Lynn Roberts*, 835 P.2d 193 (1992). This is perplexing because there was testimony by Plaintiff about his specific attempts to block the road and testimony by a multitude of defense witnesses indicating that they were not aware of any blockages until the middle of the 90's when their use of the road was first disturbed. However, the Court glossed over the testimony on this issue from both sides. The question, and this is a critical and dispositive question, which if any of the blocks actually occurred and which, if any of the blocks were adequate to provide the necessary notice. The Court failed miserably on both accounts of providing this mandatory information. Furthermore, the Trial Court could not have made appropriate findings even if it wanted to. Plaintiff, James R. Wilhelm, testified that he attempted to block the road, or at least the road was blocked, on the following occasions:

1. Plaintiff testified that in 1973-74 the road was temporarily blocked by Garkane Power, and/or its agents, who dug a trench across the road for the purpose of installing underground power lines to supply power to lot owners in the subdivision. (R. 347: Pages 50, 78). The trench was approximately 4 feet deep, 18 inches across. (R. 347: Pages 78, 82, 127).⁹
2. Plaintiff further testified that on Memorial Day Weekend in 1980, he blocked the road at the top of Lot 38 with dead aspen trees. (R. 347: Pages 40, 49). Plaintiff further testified that in June of 1980 he drove the road and there were no aspen trees blocking the road. (R. 347: Page 49).¹⁰
3. Plaintiff also testified that in 1986, he pulled a 1959 Oldsmobile across the road for a period of a few days over memorial weekend. (R. 347: Page 53). Plaintiff

⁹ As set forth below, the Court allowed this blocking to somehow be imputed to the efforts of Plaintiffs to block the road and as a manifestation of their efforts to exclude the public therefrom. This is patently absurd and contrary to the law. This blockage had nothing to do with Plaintiffs' efforts and furthermore could not be considered a manifestation of their desire to exclude the public therefrom. Also, as argued below, without this blockage there clearly was a ten-year period of uninterrupted use. This is why it is so critical that this Court be able to examine the individual blockages which the Trial Court utterly failed to identify.

¹⁰ As also set forth below, the blockage must be of a permanent nature before the law will consider a blocking adequate for the purposes asserted by Plaintiffs. This particular alleged blockage was not of such a nature.

thereafter testified that when he left he pulled said vehicle out of the road. (R. 347: Page 55).

4. Plaintiff further testified that in 1993 he pulled construction material across the road in an attempt to block the same. (R. 347: Page 59).¹¹

The Trial Court failed to specifically identify when and how long each of these alleged blockages existed, if at all. The Trial Court merely glossed this whole important and dispositive issue over, and ignored the legal ramifications of each alleged blockage by lumping all the blockages together and indicating that they occurred “[d]uring the 1970’s and 1980’s.” This Court should overturn the ruling of the Trial Court on this failure alone. Stated differently, the Trial Court is not allowed to make findings and conclusions that are unsupported by the evidence as it has done in this case.

POINT VI

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT THERE WAS NOT A TEN-YEAR UNINTERRUPTED PERIOD OF USE OF THE ROAD AND THAT THE ROAD WAS THEREFORE NOT A PUBLIC THOROUGHFARE

Utah Code Ann. § 72-5-104 (2000) provides that

A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

Historically, in order for a private road to become a public thoroughfare there must have been evidence of intent by the owner to dedicate the road to a public use and an

¹¹ As set forth below, Defendants are not challenging the sufficiency of the blockages after 1990. The question of the actual or adequacy of the blockages in the 1970s and 1980s however goes to the heart of the Trial Court’s findings and conclusions with respect to the existence or lack of existence of a ten-year uninterrupted period of use.

acceptance by the public. *Gillmor v. Carter*, 391 P.2d 426 (Utah 1964). In the last 20 years, however, the Utah Supreme Court has changed the historical rule and stated that the test is only whether a roadway has been continuously used by members of the general public for at least ten years and that it is no longer necessary to examine the intent of the owner. *Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981); *see also Kohler v. Martin*, 916 P.2d 910 (Utah App. 1996) (ruling that when a roadway has been continuously used by the general public for a period greater than ten years, it is impliedly dedicated to the public as a public highway).

The Utah Supreme Court has also provided guidance as to what constitutes “continuous use” for purposes of determining use over a ten-year period:

A use need not be “regular” or “constant” in order to be “continuous.” All that is necessary is that the use be as often as required by the nature of the use and the needs of the claimant.

Crane v. Crane, 683 P.2d 1062, 1064 (Utah 1984) (citing *Richards v. Pine Ranch, Inc.*, 559 P.2d 948, 949 (Utah 1977)).

Uncontradicted testimony before the Trial Court indicated that the Wilhelm Road had been used and used often for numerous purposes and by numerous people from the mid-1960s to the early to mid-1990s when it was permanently blocked. The critical question then becomes whether there was ten-year period of uninterrupted use which devolves squarely upon the subsidiary question of whether there was a blockage of the road that was sufficient as a matter of law that interfered with a ten-year period of uninterrupted use.

There must be an actual interference with the public's use of the road by means of erecting physical obstacles or otherwise by the use of the servient parcel in such a way as to prevent the adverse use. It is not sufficient to attempt an interruption. *Margoline v. Holefelder*, 218 A.2d 227, 228 (Pa. 1966) (holding that blockage of a driveway for two days did not constitute actual interruption when there was no evidence of attempted use during the blockage).

POINT VII

DID THE TRIAL COURT ERR BY FAILING TO CONSIDER ALL EVIDENCE PERTAINING TO THE EXISTENCE OF A PUBLIC THOROUGHFARE INCLUDING EVIDENCE PRIOR, DURING AND/OR AFTER THE WARRANTY DEEDS WERE EXECUTED BY DEFENDANT.

The trial court entered a Ruling on Summary Judgment Motions on or about March 8, 1999 ruling or holding that by virtue of Defendant executing a Warranty Deed, Defendant was precluded from claiming the existence of a roadway which pre-dates the conveyance. (R. 165) Presumably such ruling came from the cases cited by Plaintiff, to wit: *Jones v. Grow Inv. & Management Company*, 358 P.2d 909 11 Ut.2d 326 (Utah 1961) and *Brauer-Harrison Inc. v. Comby*, 799 P.2d 716 (Ut. Ct. App. 1990). Both of the cases cited by Plaintiff were cases dealing with a private easement or the assertion of a private easement. In Plaintiff's motion only the findings of each case was cited and dicta denoting a different finding under dissimilar circumstances was never introduced to the court; that is, that under certain situations, an assertion of the existence of a public road by one who formerly executed a Warranty Deed may be admissible. *Jones* specifically states that:

“if the deed contains anything which would indicate that a known encumbrance was not intended to be within the covenant, the purchaser cannot claim that such an encumbrance was a breach of covenant. However, **with the possible exception of public easements that are apparent and in their nature permanent and irremediable**, [emphasis added], mere knowledge of the encumbrance is not sufficient to exclude it from the operation of the covenant. The intention to exclude an encumbrance should be manifested in the deed itself, for a resort to oral or other extraneous evidence would violate several principles of law in regard to deeds.”

This additional language clearly indicates that the court is permitted to consider evidence prior to the issuance of the warranty deed when that evidence is utilized for the purpose of asserting that a public roadway was apparent, permanent and irremediable. Interesting enough, in Judge Crockett’s concurring opinion, he stated that “If the easement is of such a character and use is open and notorious, and the purchaser knows of its existence, he should not be permitted to accept the conveyance and then claim breach of covenant with respect to something about which he had full knowledge.” *Id.* at 912.

It has been one of Defendants’ primary contentions that the roadway in dispute is a public roadway and has been used by the public for more than 25 years, has not been blocked and was apparent at the time Plaintiff purchased the property. Furthermore, the warranty deed contained language stating that the conveyance was “subject to: covenants, conditions, restrictions, reservations, rights of way and easement of record” (R. 347: Page 85) If the public roadway existed at the time the deeds were executed, then the conveyance was subject to the public right of way and Plaintiff was put on notice of the same. Furthermore, even if the public road way had not been established for the prerequisite 10 year period, this court should find that the execution of the Warranty Deeds did not foreclose public use of the road or toll the ten year period. Intuitively, by virtue of

the public thoroughfare doctrine, it is the public who adversely possesses the right of use and not a single individual. This Court should therefore overturn the Trial Court's ruling on the Summary Judgment motion and consider facts prior to the issuance of the Warranty Deed in determining whether a public thoroughfare had already been established by general public usage. In so doing, there is simply no question that there was considerably more than a ten-year period of uninterrupted use.

POINT VIII

DID THE COURT ERR IN CONCLUDING THAT THE STATUTE OF LIMITATIONS HAD NOT EXPIRED AND THE COURT COULD RELY UPON THE WARRANTY DEED TO PREVENT DEFENDANT FROM ASSERTING THE PUBLIC THOROUGHFARE DOCTRINE

In the statutory warranty deed form, the operative language consists of the verbs signifying that the grantor "conveys and warrants" the property to the grantee. In using this language, the grantor not only conveys fee simple title ("together with all of the appurtenances, rights and privileges thereunto belonging"), but does so with five statutory warranties, three of which are applicable, to wit:

- (1) That the grantor guarantees the grantee, and the grantee's heirs and assigns, in the quiet possession of the premises (covenant of quiet enjoyment);
- (2) That the premises are free from all encumbrances (covenant against encumbrances); and
- (3) that the grantor, and the grantor's heirs and personal representatives, will forever warrant and defend the title of the premises in the grantee and the grantee's heirs and assigns against all lawful claims (covenant of warranty).

Covenant (1) is a present covenant, because it was allegedly violated, at the moment the warranty deed became effective and the statute of limitations began to run from the time of the conveyance. Covenants (2) and (3) are future covenants, because they are violated, if at all, only at some time in the future, after the conveyance. For future covenants, the limitations period begins to run only after disturbance in title occurs. *East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co.*, 238 P.280 (Utah 1925). The scope of the warranties is also subject to restrictions on the property imposed by public statutes as in this case. If a road was already established or being established by the public, then the public could continue to utilize the property irrespective of private transactions occurring on the property until the property owner took affirmative action to prevent continued use of the road such as blocking the same.

Even though the grantor (Defendant) agrees to warrant the property, it is not without limitation. This limitation is subject to the statute of limitations which commenced when Plaintiff Wilhelm viewed the disturbance. Plaintiff admittedly saw the disturbance in the early 1970's. (R. 347: Page 35) Therefore, by the time this action was initiated the Statute of Limitations had long-since lapsed and the Trial Courts reliance on the same to protect Plaintiffs is misplaced. In the Courts Conclusion of Law, (the trial court did not number its conclusions of law but instead opted to make them in a narrative manner. Appellants therefore refer to the conclusions by paragraph number so as to aid this Court in its review of the conclusions), it states:

1. Paragraph 1

... Moreover, Pine Meadows' conveyance by warranty deed carried with it the statutory guarantee of "quiet possession" and "that the premises are free from all encumbrances" and that Pine Meadows would "forever

warrant and defend the title . . . against all lawful claims whatsoever.” UCA §57-1-12. Under the facts of this case, these defendants are precluded from asserting that a public thoroughfare existed when the plats were recorded in 1968 and 1969 and when the deeds were issued to plaintiffs in 1972 and 1975; and this is so even if the proof were sufficient to establish a pre-existing “public thoroughfare” which the Court concludes it is not.

While such an conclusion may be true had this action been brought within the Statute of Limitations period, it was not. Plaintiffs had six years from the time they discovered the existence of the road to commence an action for Breach of Warranty of Title against Defendants which would have lapsed no later than January 6th, 1978 for Lot 39 and September 25th, 1981 for Lot 38. As previously stated, Plaintiffs commenced the lawsuit on or about October 23, 1996 and are therefore barred by the Statute of Limitations from a seeking the warranty protection inappropriately afforded by the Trial Court in its conclusions. Therefore, this court should consider all testimony in determining whether the road was utilized by the public from the date of its inception or at least until 1960 to the first time Plaintiffs successfully blocked the road to determine if the general public had a ten year period of uninterrupted use, and if this court should so find, then it should reverse the Trial Court and find that the road has been abandoned to public usage.

CONCLUSION

Based upon the foregoing arguments, the road should be deemed as a public road or the matter should be remanded back to the Court for further findings.

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of February, 2001, I caused to be mailed, first class postage prepaid, unless otherwise indicated below, a copy of the foregoing **INITIAL BRIEF OF APPELLANTS** to the following:

A handwritten signature in black ink, appearing to read "L. Robbins", written over a horizontal line.

Utah Court of Appeals
450 South State
Salt Lake City, UT 84114
FILED
[Original and 7 Copies]

L. Edward Robbins
Attorney for Plaintiff/Appellees
190 West Center Street
Kanab, UT 84741
MAILED
[2 Copies]

Milton Farney
17481 Norwood Park Place
Tustin, CA 92780
MAILED
[1 Copy]

ADDENDUM

(4) adequate drainage in connection with any highway, cut, fill, or channel change and the maintenance of any highway, cut, fill, or channel change;

(5) weighing stations, shops, offices, storage buildings and yards, and road maintenance or construction sites;

(6) road material sites, sites for the manufacture of road materials, and access roads to the sites;

(7) the maintenance of an unobstructed view of any portion of a highway to promote the safety of the traveling public;

(8) the placement of traffic signals, directional signs, and other signs, fences, curbs, barriers, and obstructions for the convenience of the traveling public;

(9) the construction and maintenance of storm sewers, sidewalks, and highway illumination;

(10) the construction and maintenance of livestock highways; and

(11) the construction and maintenance of roadside rest areas adjacent to or near any highway.

History: L. 1963, ch. 39, § 96; 1991, ch. 137, § 24, 27-12-96; renumbered by L. 1998, ch. 270, § 130.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as §

27-12-96, and in the introductory paragraph, made stylistic changes and deleted the first sentence concerning the manner in which the department may acquire real property necessary for future state highway purposes.

72-5-103. Acquisition of rights-of-way and other real property — Title to property acquired.

(1) The department may acquire any real property or interests in real property necessary for temporary, present, or reasonable future state highway purposes by gift, agreement, exchange, purchase, condemnation, or otherwise.

(2) (a) Title to real property acquired by the department or the counties, cities, and towns by gift, agreement, exchange, purchase, condemnation, or otherwise for highway rights-of-way or other highway purposes may be in fee simple or any lesser estate or interest.

(b) If the highway is a county road, city street under joint title as provided in Subsection 72-3-104(3), or right-of-way described in Title 72, Chapter 5, Part 3, Rights-of-way Across Federal Lands Act, title to all interests in real property less than fee simple held under this section is held jointly by the state and the county, city, or town holding the interest.

(3) A transfer of land bounded by a highway on a right-of-way for which the public has only an easement passes the title of the person whose estate is transferred to the middle of the highway.

History: L. 1963, ch. 39, § 101; 1991, ch. 137, § 29, 27-12-101; renumbered by L. 1998, ch. 270, § 131; 2000, ch. 324, § 6.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as §

27-12-101, and added new Subsection (1), making related changes in subsection designation.

The 2000 amendment, effective March 16, 2000, added Subsection (2)(b), making a related change.

72-5-104. Public use constituting dedication — Scope.

(1) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

(2) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.

(3) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

History: L. 1963, ch. 39, § 89, 27-12-89; renumbered by L. 1998, ch. 270, § 132; 2000, ch. 324, § 7.

Amendment Notes. — The 1998 amendment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-89.

The 2000 amendment, effective March 16, 2000, substituted “is” for “shall be deemed to have been” in Subsection (1) and added Subsections (2) and (3).

NOTES TO DECISIONS

ANALYSIS

Evidence.

Generally.

Private rights.

Sufficiency of proof of dedication.

Width of roadway.

Evidence.

Evidence showing, among other things, that roadway was used continuously for recreational and agricultural purposes and for access to other business activities supported the trial court’s ruling that the roadway was dedicated or abandoned to the public. *Kohler v. Martin*, 916 P.2d 910 (Utah Ct. App. 1996).

Generally.

Where all three elements under this section for the establishment of a public highway were satisfied, the court had no discretion to ignore that fact and erred in concluding that a road was not a public highway. *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997).

Private rights.

Creation of a private right in a public thoroughfare cannot occur; a prescriptive right is in conflict with the dedication of land to the use of

the general public. *Kohler v. Martin*, 916 P.2d 910 (Utah Ct. App. 1996).

Sufficiency of proof of dedication.

Because there were material issues of fact as to whether people using a road were members of the general public or landowners in the area, who had either a private right or permission to use the road, and there were conflicting statements as to public use of the road for recreational purposes, summary judgment in favor of the proponents of dedication was erroneous. *Draper City v. Estate of Bernardo*, 888 P.2d 1097 (Utah 1995).

Finding that a road was not a public thoroughfare was proper based on evidence that the road was generally used only during the deer hunting season and was frequently closed to the public at other times, and that its use during the hunting season was by permission of the owners. *Campbell v. Box Elder County*, 962 P.2d 806 (Utah Ct. App. 1998).

Width of roadway.

Generally, the width of a public road is determined according to what is reasonable and necessary under all the facts and circumstances. *Kohler v. Martin*, 916 P.2d 910 (Utah Ct. App. 1996).

72-5-105. Highways once established continue until abandoned.

All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any highway, or by other competent authority.

History: L. 1963, ch. 39, § 90, 27-12-90; renumbered by L. 1998, ch. 270, § 133.

Amendment Notes. — The 1998 amend-

ment, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-90, and made a stylistic change.

72-5-106. Expiration of franchise of toll bridge or road.

If the franchise of any toll bridge or road expires by limitation, forfeiture, or nonuser it is a free public highway, and no claim shall be valid against the public for right-of-way or for land or material comprising the bridge or road.

Ed. 1198 (1919), appeal dismissed, 254 U.S. 616, 41 S. Ct. 147, 65 L. Ed. 440 (1920).

—Title conveyed.

Under this section, one who conveys coal lands before he has applied to the government to purchase the same conveys a good title thereto. *Ketchum Coal Co. v Pleasant Valley Coal Co.*, 50 Utah 395, 168 P. 86 (1917).

Where grantor purporting to convey title to mining claims described them in his deed by

name of claim and survey number, he was estopped from making any claim to property described in deed when he subsequently acquired title thereto. *Wall v. Utah Copper Co.*, 277 F. 55 (8th Cir. 1921).

Cited in *Barlow Soc'y v. Commercial Sec. Bank*, 723 P.2d 398 (Utah 1986); *Utah Farm Prod Credit Assoc. v. Wasatch Bank*, 734 P.2d 904 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am Jur. 2d Deeds §§ 341, 342.

C.J.S. — 26 C.J.S. Deeds § 105.

A.L.R. — Property insurance, or public li-

ability insurance, as covering, in absence of express provision, after-acquired premises or realty, or subsequent additions to described realty, 18 A L.R 3d 795.

57-1-11. Claimant out of possession may convey.

Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner and with the same effect as if he were in the actual possession thereof.

History: R.S. 1898 & C.L. 1907, § 1980; C.L. 1917, § 4880; R.S. 1933 & C. 1943, 78-1-10.

COLLATERAL REFERENCES

C.J.S. — 14 C.J.S. Champerty and Maintenance §§ 15, 16.

57-1-12. Form of warranty deed — Effect.

Conveyances of land may be substantially in the following form:

WARRANTY DEED

_____ (here insert name), grantor, of _____ (insert place of residence), hereby conveys and warrants to _____ (insert name), grantee, of _____ (insert place of residence), for the sum of _____ dollars, the following described tract _____ of land in _____ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this _____ (month/day/year).

A warranty deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights, and privileges thereunto belonging, with covenants from the grantor, his heirs, and personal representatives, that he is lawfully seised of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs, and assigns in the quiet possession thereof; that the premises are free from all encumbrances; and that the grantor, his heirs, and personal representatives

will forever warrant and defend the title thereof in the grantee, his heirs, and assigns against all lawful claims whatsoever. Any exceptions to these covenants may be briefly inserted in the deed following the description of the land.

History: R.S. 1898 & C.L. 1907, § 1981; C.L. 1917, § 4881; R.S. 1933 & C. 1943, 78-1-11; L. 2000, ch. 75, § 20.

Amendment Notes. — The 2000 amend-

ment, effective May 1, 2000, updated the date line in the warranty deed form and made stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Actions for breach of warranty.

— Irremediable easement.

Appurtenances.

— Parol evidence.

— Water rights.

Covenant against encumbrances.

— Waiver.

Covenants running with land.

Determination of character of instrument.

“Encumbrances” construed.

Formal requirements.

— Presumptions.

— Signature of witness.

Interest conveyed.

Liability of grantor.

— Materialman’s lien.

Limitation of actions.

Vendor’s lien.

Way of necessity.

Cited.

Actions for breach of warranty.

Where paramount title is in sovereign, purchaser may yield to that title, and such yielding constitutes constructive eviction which will support action on covenant of warranty. *East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co.*, 65 Utah 560, 238 P. 280 (1925).

In an action by a grantee against his grantor for breach of warranty because in a quiet title action between the grantor and a third person, the title was quieted in the third person, the grantor cannot assert the defense that because the third party had filed no *lis pendens* the grantee was not bound by the earlier decree. *Briggs v. Hess*, 122 Utah 559, 252 P.2d 538 (1953).

— Irremediable easement.

In a rescission action for anticipatory repudiation of a real estate contract, summary judgment in buyers’ favor was authorized, because an irremediable easement was not excepted from the property description in the contract. *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716 (Utah Ct. App. 1990).

Appurtenances.

On severance of estate by sale of part thereof,

all easements of permanent character that have been created in favor of land sold, and which are open and plain to be seen, and are reasonably necessary for its use and convenient enjoyment, unless expressly reserved by grantees, pass as appurtenances to land; cement walk constructed in front of several lots which was used as easement in connection with use and occupation of lots passed as an appurtenance to lots on sale thereof. *Rollo v. Nelson*, 34 Utah 116, 96 P. 263, 26 L.R.A. (n.s.) 315 (1908).

A warranty deed conveys the fee simple title “together with all the appurtenances, rights and privileges thereunto belonging,” by force of this section, unless some rights are reserved by the terms of the conveyance. Accordingly, deed conveyed prescriptive right to conduct water through ditch along the right of way without any mention of such right, because such easement for an appurtenant water right is an appurtenance to the land. *Petrofesa v. Denver & R.G.W.R.R.*, 110 Utah 109, 169 P.2d 808 (1946).

— Parol evidence.

Where there was latent ambiguity as to the existence of a ditch and a right of way as an appurtenant to the land conveyed by a deed, parol evidence was admissible. *Egelund v. Fayter*, 51 Utah 579, 172 P. 313 (1918).

Where deed, while conveying appurtenances as matter of law, was silent as to just what appurtenances were, latent ambiguity existed which could be explained by parol testimony. *Wade v. Dorius*, 52 Utah 310, 173 P. 564 (1918).

Evidence is admissible to establish what was appurtenant to property under statutory form of deed, which has effect of passing all appurtenances to property, as not varying terms of written instrument. *Adamson v. Brockbank*, 112 Utah 52, 185 P.2d 264 (1947).

— Water rights.

Deed of general warranty of quiet and peaceable possession does not warrant water rights unless they are appurtenant to land conveyed. *George v. Robison*, 23 Utah 79, 63 P. 819 (1901).

Covenant against encumbrances.

Where defendant’s deed to plaintiffs was in the statutory form and excepted from the cov-

FILED
KANE COUNTY

MAR 27 2000

 Clerk
SIXTH DISTRICT COURT

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

JAMES R. WILHELM and LINDA ROSE
WILHELM,

Plaintiffs,

v.

PINE MEADOWS ESTATES,
INCORPORATED, a Utah corporation;
MILTON R. FARNEY; MARVIN R.
SHAPIRO; ROBERT C. DOLLEY,

Defendants.

DEFENDANTS' CLOSING ARGUMENT
IN SUPPORT OF ITS MOTION FOR
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 960600032

Judge K. L. McIff

COMES NOW Defendants Milton R. Farney and Pine Meadows Estates, Inc., a Utah corporation, (hereinafter "Defendants") and do hereby enter their closing argument in support of their Findings of Fact and Conclusions of Law previously filed. This action was commenced by Plaintiffs James R. Wilhelm and Linda Rose Wilhelm (hereinafter "Plaintiffs") seeking an order from the Court requiring Defendants to close a road through Plaintiffs' property, pay damages for

closure of the road, and pay Plaintiff's attorney fees in prosecuting this action. At the time of the closing argument, Defendants requested an opportunity to submit its closing argument in writing because of time commitments later that evening. The Court indicated that it would accept Findings of Fact and Conclusions of Law, and that the Court had already made a determination that due to the statute of limitations, Plaintiffs were barred from claiming any damages against Defendants for the repair or cost of closure of the road. During opening statement, Plaintiffs' Counsel indicated that they were dropping any claim for attorney fees as the same was not provided because the law suit was between the Grantor, (Defendants), and Grantee, (Plaintiffs). The only remaining issue to be argued, therefore, was the type of continued use of the road and whether the road should be deemed as a public road.

The only witness called by Plaintiffs was James R. Wilhelm. Defendants called seven (7) witnesses including Defendant Milton R. Farney. Two of Defendants' witnesses were the initial developers who worked intricately with the infrastructure development. The remaining five witnesses were a forest ranger who has never owned property in the area, the Moyers who were one of the first persons to purchase property in the area, but who have subsequently sold their property and no longer resided in the area, and three current property owners familiar with the road, Mr. Ronald Graham, Stan Grimwald and Buzzy Holts, all of whom still own property in the subdivision or adjacent subdivisions and who are familiar with the roads because of their frequent travel of the same. Each of the property owners reside in various parts of the subdivision

and utilized the road for multiple purposes on a frequent basis, not by means of compulsion, but by pleasure and without the consent of Plaintiffs.

Mr. Pringle, the developer of the subdivision roads who was not named as a Defendant, was called because of his testimony regarding his frequent use of the road on a daily basis since the subdivision was developed. Testimony was that he used the road every day and hundreds of times each summer for ingress and egress and for showing lots to prospective buyers. He further testified that the road was initially graded to a width of 12-15 feet (big enough for two vehicles to pass each other) and that the road was definitely roughed in at the time Plaintiff purchased the lots. Significantly, Mr. Pringle stated that they tried to follow old roads as much as possible to leave the natural terrain undisturbed. While he could not recall that the road existed in this particular area, Mr. Farney confirmed that the Wilhelm road was graded in 1965-66 along a pre-existing road.

Paul Fullmer, who is the current Cedar Mountain fire chief and prior Dixie National Forest Ranger, worked in the area for well over 40 years was called because of the following: (1) his familiarity with the area, (2) his use of the road to access forest land by the government, (3) his knowledge of use of the road by numerous members of the public as a personal witness to the same, (4) he was the individual who obtained from his office the 1967 and 1976 photographs and was familiar with how to read them, (5) his knowledge as to the current necessity of the road, and (6) an individual who was a disinterested party who had nothing to gain by his testimony. He testified that he had used the road while working for the forest service and that it was his belief

that the road had been used by logging companies as well as a personal witness to its use by hunters, strangers, campers and other individuals who were accessing the forest land beyond Plaintiffs' property. The logging commenced in the early 1960s for only a few years. He further testified that the road was important and was deemed by the public as a necessary second access off the mountain in case of fire.

The Moyers were called to testify because they were one of the first people to purchase property in the area, had lived in the area full time for numerous years during applicable times of blockage, had utilized the road on a semi-regular basis and had sold their cabin several years previous, once again, as witnesses with no ulterior motives or personal interest. Each of the witnesses were familiar with the road and did testify to its existence prior to Wilhelm's purchase of the property and that no blocking of the road occurred prior to 1993.

At trial, numerous exhibits were presented and stipulated to by both parties. Among these exhibits, the most probative being areal photographs presented by both the Plaintiffs and Defendants, ranging from 1960 to 1976, which provided significant support and clarity with regard to the existence of the road. There can be no doubt that road existed and had been significantly improved when comparing the 1967 photograph with the 1960 photograph. Even more compelling than oral testimony is a comparison of the areal photographs from 1967 and 1976 which, when studied side by side, show clearly that the road was obviously present and appears to be of the same approximate width, extent and nature at the same location. This evidence clearly shows that a road was there prior to Plaintiffs' purchase of the property in 1968, yet

Plaintiffs' testimony was adamant that there was no road through the property when he walked the property on the date he decided to purchase the same. Interestingly enough, Plaintiff James R. Wilhelm does recall seeing some tracks going through the property but that these tracks had only bent the grass over and did not appear to be significant. He also testified to a large berm which no other witness verified and, in fact, disputed. Defendants are left to wonder, after viewing the evidence, how one could remember minor tracks through the grass and yet fail to recognize that the a roughed-in road existed of at least 12 feet in width as testified by all of the witnesses questioned, a fact which Plaintiff denied on rebuttal testimony, even then, after viewing the photographs and hearing the testimony. Defendants assert that this Court should reconsider the self-serving testimony of Plaintiff James R. Wilhelm under the circumstance of this irrefutable testimony which clearly supports the testimony of seven witness against the self-serving testimony of one witness, the Plaintiff.

Witnesses Moyer and Grimwald both testified that they purchased the property in the 1967 and that they both utilized that road to explore the country, to gather firewood, and for access to the upper forest area. Neither party saw any blockade until 1993 when Plaintiff stretched a cable chain across the road to impede travel. Interestingly, the parties were notified of that blockage and went to look at the same, out of curiosity and surprise. Each wondered how the Plaintiff could block the road, as they believed it was public road and had been opened to access for well over 25 years. Stan Grimwald was the water truck driver from the mid 1980's and he never saw a blockage even though he traveled the road regularly to deliver water.

Mr. Grimwald, another forest ranger, testified that he traveled the road in 1968 and that he was on the mountain during all holidays and tried to be there every other weekend. He indicated that he utilized the road to access the forest property on top of the mountain and had no doubt that the road existed. He also provided his own professional opinion that a two-track road existed in the 1960 photograph which could be seen by looking through the spectrograph. Likewise, Mr. Fullmer testified that, upon looking at the 1960 photos, while he could not be absolutely certain, he believed that the spectrograph showed the existence of a road over the Wilhelm property in the 1960s photograph. Both of these individuals had utilized these types of photographs on a frequent basis through their profession and were accustomed to examination of this type of evidence. Each could be considered an expert witnesses with regard to examining these types of photographs as it was a part of their professional work.

Mr. Pringle also presented a very interesting perspective as to his knowledge that the road had never been blocked prior to 1993. Counsel for Plaintiff, on numerous occasions tried to contradict and persuade Mr. Pringle to admit that no road existed at the time that Plaintiffs purchased the property. It is also interesting to note that as he was being examined by Defendants' counsel, that he often utilized the "Clinton Defense" by failing to recall the actual condition of the road in 1967 and from that time forward. However, even under the examination of both counsel, Mr. Pringle did not waiver on the fact that he lived in the area and that he utilized that road on a daily basis and, in his own words, hundreds of times each summer and never observed the road blocked until 1993. This is direct contradiction to testimony by Plaintiff

which indicated that he had blocked the road in 1973 through 1974, a period indicated somewhere in the neighborhood of one year. Surely, if Plaintiff had, indeed, blocked the road for a period of one year, witnesses would have remembered. Furthermore, even Plaintiff admitted that the intended digging of the line in 1973 and 1974 by GarKane Power was for the purpose of running the line only and was not intended to block the road. Obviously, if the trenching of the road was intended to install a power line, then the blocking of the road during that period does not constitute a blockade sufficient to interrupt the use of the road by the general public. Furthermore, it is important to notice that none of the witnesses who utilize the road every summer, many of whom live there during the entire summer, ever witnessed the road blocked during a year-long period. Obviously, if such had been the case, they would have remembered the road being blocked in 1973 through 1974, 1980, and 1986 as they all came to view the blocked road in 1993. Also, how many witnesses must Defendants call to satisfy the coincidences that all of them missed the blockage each time at the same time. Defendants submit that enough witnesses have proven that Plaintiffs did not block the road until 1993.

Finally, the testimony of Ronnie Graham lends additional weight to the open existence of the road until 1993. It is interesting to note that on both 1973 and 1980, certain memorable events occurred in Mr. Graham's life which lends weight to his knowledge that the road was open during the years that Plaintiff claims they were blocked. In 1973, Mr. Graham received his first motor scooter and proceeded to "ride it all over the place" including up and down the Wilhelm road. Mr. Graham noted that the Wilhelm road was a special attraction because it was steep, fun to ride

the motorcycle on, and that he rode it on a daily basis and never recalled seeing the road blocked for any extended period of time. Obviously, in 1973 and 1974, an 18" deep trench would not block a motor scooter from riding up and down the road and, in fact, might provide an added bit of fun in jumping over the dirt pile. In 1980, when Plaintiff asserts that he blocked the road for a period of time with a fallen tree, Mr. Graham testified that he got his XR-125 and that, once again, he road all over the mountain, including the Wilhelm road, during the entire summer. He also testified that at that time, while Plaintiffs were there, his sister babysat the Wilhelm children during the summer and, in fact, he and his parents used the road to travel to the Wilhelm cabin to check on the children until Plaintiffs' returned at 3:00-4:00 a.m. It seems unreasonable and obviously would have been an impact upon any party if they had been required to stop because of the blockade and climb over the same to approach Plaintiffs' cabin in the early hours of the morning. Likewise, Mr. Pringle would have certainly remembered an inability to travel the road in 1980 if the same had been blocked by a tree.

In 1986, Plaintiff again claims to have blocked the road with a vehicle. At that time, Mr. Wilhelm had confrontations with several witnesses regarding the blockage of the road by the car and, yet, Mr. Wilhelm never called any witness to verify this assertion. Surely, if landowners in the area were so up in arms that they are "patting their guns" and threatened to move the car with a tractor, this would have been a memorable experience to any witness. Coincidentally, the two witnesses that he supposedly had these conversations with are now deceased. Furthermore, when blocking of the road did actually occur in 1993, it did, in fact, create a disturbance of which

everyone was aware. Even those who do not live within the subdivision came to look at the road. This natural human reaction, without additional testimony, is compelling and clearly convincing of the fact that had Plaintiff effectively blocked the road prior to that time, it would have been brought to the attention of everyone and would have been a memorable experience to which all memories would have been able to draw upon. Interesting enough, the very time that he blocked the road in 1986 was during the weekend when Plaintiff testified that the “motorcycle races” occurred and yet no one, including Ron Graham a motorcycle enthusiast, can recall. Would not people have complained had Plaintiff interrupted their fun?

In summation, the overwhelming testimony of all witnesses called at the time of trial, including that of Plaintiff, is that in 1973 and 1974, the road was not blocked. The only impact upon the road was the digging of the trench to install the power line, which did not impede travel or effectively block the road. The overwhelming testimony regarding any blockage in 1980 concludes that the road was not blocked. Only Plaintiff himself testified that the road was blocked during this time. The other witnesses testified that it had not been blocked. However, even if the Court does find that the road was blocked based on Plaintiff’s lone testimony, Plaintiff did admit that the blockage was not effective as the same was immediately removed and he did not further act to protect the road at that time.

Likewise, in 1986, none of the witnesses recall any car being used to block the road. However, even if Plaintiff did utilize a vehicle to block the road, Defendants assert that the same was not effective, in manner or means, as it did not provide adequate notice to those adverse

possessors who were utilizing the road that the road was intended to be blocked. Numerous witnesses testified that at various times and in various manners, cars blocked the road for a period of time. On occasions when these cars blocked the road it was impassible and at other times it was not. Defendants assert that it was necessary for Plaintiff to utilize some other means of blocking the road other than placing a car in the middle of the road without further notification such as a sign or other means to establish that the road was intentionally being blocked to deliberately prevent travel.

On several occasions, Plaintiffs indicated that they blocked the road on one end of the property. Obviously, the blocking of that road was on the upper end of the property as a general rule or by Plaintiff's cabin excepting the alleged blocking of by the car. Witnesses Pringle, Graham and Farney testified that they were utilizing the road on a daily basis during that time. Defendants contend that if someone were utilizing a steep, semi-narrow road, and had traveled up or down the road for a significant distance, roughly a 1,000 feet in length, and then was required to back up or down the road for almost of the entire distance of the road because it was blocked, it is highly doubtful that the witnesses would have forgotten this incident. They certainly didn't forget the 1993 incident which occurred over seven years ago.

Defendants do not dispute that from 1993 to the present, Plaintiff utilized numerous and varied means of blocking the road. These were all acknowledged and admitted by all of the parties. They also assert that the blocking caused such a scene, it was brought to the attention of the other property owners in the subdivision. Defendants concede that this was an effective

blocking of the road and, from that time forth, Plaintiff effectively blocked the road on various occasions. This, however, was too little, too late as the road had already been established as a public road. This is further evidenced by Kane County maintaining the road during the 1990s and before. If it was not a public road, why did Kane County place signs at the end of the road and maintain and improve the road to County standards? Why did Sheriff Kitchen issue Plaintiff a ticket for blocking the road? The answer is obvious, it was and has been for years considered a public road by all but the Plaintiffs.

The matter presently before the Court has an interesting nuance, which no other trial court specifically has addressed; being that Plaintiff is the one asserting that the road running through his property has not been designated as a public road and, therefore, is seeking the Court to compel Defendants to close the roads. Because Plaintiffs are the moving parties in this matter, they generally have the burden of proof to show, by preponderance of the evidence, that the road was not a public road. Plaintiff failed to meet that burden of proof and Defendants clearly and convincingly have shown that the road has been open to the public for over 30 years. There can be no doubt that the road was open to the public in that numerous parties, both residing within and without the subdivision, and including governmental entities utilized, maintained and traveled the road at their own pleasure and convenience. The testimony was abundantly clear that between 1960 and 1980, the road was never intentionally blocked by Plaintiffs or anyone else. This alone is sufficient time to establish the ten year minimum for public roads. Because Plaintiffs are the parties seeking to close the road, as against the entire public and not just Defendants, the fact that

the property was transferred by Defendant Pine Meadows Estates to Plaintiffs does not vitiate public use of the road prior to the transfer of the Deed, and the testimony was unrebutted that the road had been utilized by not only property owners but also by hunters, governmental employees, recreational users, county and federal workers, and the general public. Furthermore, the law was never intended to prevent a grantor from claiming that a road was open to the public because he transferred it to the grantee. If the road is open to the public and has been utilized by the public for a period of ten years, it automatically becomes a public road and, once open to the public, cannot be reclaimed by virtue of the fact that Grantor transferred the property to another upon which the public road exists. If this were so, then every road open and utilized by the public which was thereafter incorporated into a deed transferring the property from grantor to grantee would limit the public from claiming that the road had already existed. Furthermore, it would be foolish to prevent a grantor from rectifying his error as the burden then falls upon a third party to initiate an action to prevent closure of the road. Defendants assert that this would be against public policy.

While it is admittedly a burden upon the servient estate to have a road traverse through the property, and while the law does not lightly allow the transfer of property from private to public use, it is not necessary to prove that the owner of a private road had intended to offer the road to the public under dedication by use statute, because the owner's intent may be inferred for mere acquiescence in allowing the public to utilize the road. Draper City v. Estate of Bernardo, 888 P.2d 1097 (Utah 1995). Utah Code Ann. §72-5-1041 (1999) states that "a highway shall be

deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.” This intent may be inferred from the declarations, acts or circumstances of use by the general public. Gilmore v. Carter, 391 P.2d 426, 428 (Utah 1964). The evidence clearly shows that the road was open to the public and that the general public was never blocked from utilizing the road from at least 1965 to 1980 and Defendant argues from 1965 until 1993. Transfer of the property from one to another is irrelevant with regard to the public road doctrine because the evidence shows that the road has been continuously used, this Court should find, just as Kohler v. Martin, 916 P.2d, 910, Utah App. (1996) that the roadway has been continuously used by the general public for a period greater than ten years and is, thus, impliedly dedicated to the public as a public highway.

In reviewing the evidence, “continuous use” is crucial in the determination of whether the road was, is or has become a public road. This Court recognizes that in consideration of both Crane v. Crane, 683 P.2d 1062 (Utah 1984) and Memmott v. Anderson, 642 P.2d 750 (Utah 1982) the road need not be used in a “regular” or “constant” basis to be continuous but that it must be utilized as is necessary and is as often as required by the nature of the use and the needs of the claimants. Even though Plaintiffs erected some barriers from 1993 forward, if the road was public prior to these barriers being constructed, the barriers do not change the public nature of the road. Furthermore, in Memmott, that Court took judicial notice as to the purpose for which the road was originally constructed and in its final determination, relied upon “substantial” evidence to show that the road had been originally constructed under the protection of federal statute on

public lands by the “hands of the public”. Testimony from a disinterested party indicates that there was a road access across the disputed area as early as 1966, for forest ranger and other public purposes and that while the road was subsequently expanded by Defendants in 1967 and thereafter minimally improved and expanded by Kane County in the late 1980's and early 1990's, the road has existed in substantially the same manner in which it exists today for over 20 years.

The evidence also is substantial from both parties that the interruptions by Plaintiffs, if at all prior to 1993, were minimal and did not substantially interrupt the use of the road. Even if accepting Plaintiff's testimony, because Plaintiffs did not adequately block the road sufficiently to warn and disrupt the use of the road, and to give adequate notice to the occupants of the road prior to 1993, the road must be deemed as a public road. In *Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981), the party opposing the road sought to claim that the road was blocked during the movement of sheep and the Court, by specifically finding that a public road existed, clearly indicated that the temporary barricades were not sufficient to warrant a disruption to the public. Furthermore, in reviewing sister jurisdictions, this trial court finds that there must be an actual interference with claimant's use by means of erecting physical obstacles or otherwise use of the servient parcel in such a manner as to prevent adverse use. See *Margoline v. Holefelder*, 420 Pa. 544, 546, 218 A2d 227, 228 (1966) (blockade of driveway for two days did not constitute actual interruption when there was no evidence of attempted use.); *Brown v. Ware*, 129 Ariz. 249, 251 n.2, 630 P.2d 545, 547 n.2 (Ct. App. 1981) (stringing barbed wire across a roadway deemed insufficient to interrupt usage when barrier was knocked down one day later); *South Norwalk*

Lodge v. Palco Hats, Inc., 140 Conn. 370, 374, 100 A.2d 735, 737 (1953) (claimant repeatedly removed barriers from right-of-way and continued use); *King v. Corsini*, 32 Ill. App. 3d 461, 466, 335 NE.2d 561, 565 (1975) (acts by landowner blocking road for short periods did not interrupt public use). It is not sufficient to attempt an interruption or to render the use less convenient. The obstruction must, in fact, interfere with the claimant's usage. See *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes*, 329 NC 37, 54, 404 SE.2d 677, 687 (1991); *Reed v. Piedimonte*, 138 AD.2d 937, 937, 526 NYS.2d 273, 274 (1988) (no evidence that erection of temporary barriers "ever effectively interfered with, or disturbed, plaintiff's continuous use of the driveway"). Moreover, use of the land by the owner for the same purpose as the claimant does not constitute any interruption and mere protest by the owner, whether oral or written, will not interrupt an adverse usage as in *Hammond v. Johnson*, 66 P.2d 894 (1937), the court stated that:

To interrupt the continuity of the adverse occupant's possession, there must be a physical interruption of the adverse possession, or a suit or some unequivocal act of ownership which interrupts the exercise of the right claimed and being enjoyed by the adverse claimant. 2 C.J.S., Adverse Possession, p. 701, and cases cited. Such interruption of the adverse claimant's occupancy or user, to stop the running of the statute, must be of the same definite character as must the adverse claimant's occupancy or user, to stop the running of the statute, must be of the same definite character as must the adverse claimant's possession and user be to start the statute running. The interruption must be open, notorious, and under claim of right such as to manifest an intention to repossess the property and dispossess the occupant, and be a challenge to his right and dominion. It must bear on its face an unequivocal intention to take possession.

To interrupt the continuity of the adverse occupant's possession, there must be a physical interruption of the adverse possession, or a suit or some unequivocal act of ownership which

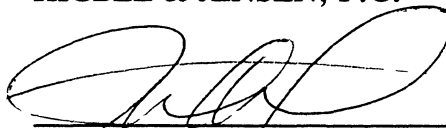
interrupts the exercise of the right claimed and being enjoyed by the adverse claimant. 2 C.J.S. Adverse P. 701, and cases cited. Such interruption of the adverse claimant's occupancy are used to stop the rendered statute, must be of the same definite character as much the adverse claimant's occupancy or use which was necessary to start the statute running. The interruption must be open, notorious, and under claim of right such as to manifest an intent to repossess the property and dispossess the occupant, and be a challenge to his right and dominion. It must bear on its face an unequivocal intention to take possession. This type of action simply did not occur based on both Plaintiff's and Defendant's testimony.

Finally, this Court should find it persuasive that Kane County has treated the disputed road as a public road. As in, *Feldker v. Crook*, 567 NE.2d 1115, 1125 (1991) ("maintenance of a road by public authorities is a strong indication that the road is a public highway, and the converse of this proposition is a public highway . . ."), this Court finds that the Sheriffs intent to require the road to remain open, Kane County Road Department's maintenance and upkeep of the road, and Fire Chief of the Cedar Mountain Fire District assertion that the road is necessary to service the public, is persuasive in determining that the disputed road has been abandoned to the public. See also *Wilson v. Seminole Coal, Inc.*, 336 SE.2d 30, 31 (Wva. 1985) (construing statute to provide that a public road may be established by public use for statutory period accompanied by some recognition of such road by public authorities); Idaho Code §40-202 (1993) (requiring that roads used as highways "shall have been worked and kept up at the expense of the public").

Based upon the foregoing, and the cumulative testimony of numerous witnesses, it is evident that Plaintiffs never sufficiently provided notice nor interrupted use of the road as a public road for the purposes stated above until 1993 and that Defendants Findings of Fact and Conclusions of Law reflect the determination of this Court and an Order declaring that the road has been abandoned to the public and an Order reflecting the same is hereby ordered prepared by the Defendants.

DATED this 27th day of March, 2000.

HIGBEE & JENSEN, P.C.

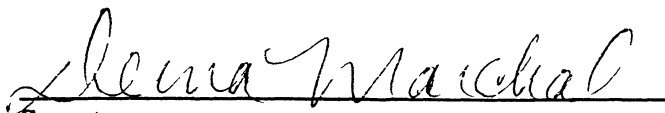


JUSTIN W. WAYMENT
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of March, 2000, a true and correct copy of the within and foregoing **OBJECTION TO PLAINTIFFS' PROPOSED MEMORANDUM DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DEFENDANTS' MOTION FOR 10-DAY EXTENSION TO FILE PROPOSED MEMORANDUM DECISION** was mailed, first-class postage prepaid, to the following:

L. Edward Robbins
Attorney for Plaintiffs
190 W. Center Street
Kanab, Utah 84741


Secretary

FILED
KANE COUNTY
MAY 08 2000
Clerk
SIXTH DISTRICT COURT

DISTRICT COURT, KANE COUNTY, UTAH

76 North Main

Kanab, Utah 84741

Telephone: (435) 644-2458 Fax: (435) 644-2052

JAMES R. WILHELM and LINDA ROSE
WILHELM,

Plaintiff,

vs.

PINE MEADOWS ESTATES,
INCORPORATED, MILTON R. FARNEY;
MARVIN R. SHAPIRO; ROBERT C.
DOLLEY,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 960600032

Assigned Judge: K. L. McIFF

THIS MATTER having come on regularly for trial on February 24, 2000 before the Honorable K. L. McIff, and Plaintiffs James R. Wilhelm and Linda Rose Wilhelm appearing by and through their attorney, L. Edward Robbins, and Defendants Milton R. Farney and Pine Meadows Estates, Inc., appearing by and through their attorneys of record, Justin W. Wayment and Blaine T. Hofeling. The Court previously granted partial summary judgment, but has been generous in allowing evidence and has reconsidered all issues and being fully advised in the premises does hereby adopt the following:

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FINDINGS OF FACT

- 1- Defendant, Pine Meadows Estates, Inc. (hereafter Pine Meadows) and plaintiff James R. Wilhelm entered into a real estate purchase contract on or about June 30, 1968. Under the contract, plaintiff purchased two lots identified as Lots 38 and 39 in the Strawberry Valley Estates Subdivision for the amount of \$4,390.
- 2- Pine Meadows is a closely held corporation with the other defendants being owners, officers and/or directors thereof.
- 3- Lots 38 and 39 purchased by plaintiffs were part of Strawberry Valley Estates, Unit #2 (hereafter "Strawberry") located along the slope of a hill in a mountainous area of Kane County.
- 4- Immediately adjacent to Strawberry and essentially on top of the hill is another group of lots known as Ponderosa Villa Unit C (hereafter "Ponderosa"). There are other subdivision units developed by Pine Meadows in the immediate vicinity.
- 5- Strawberry was approved by Kane County on Jan. 8, 1968 and recorded on May 10, 1968. Ponderosa was approved by Kane County on Dec. 9, 1968 and recorded on Feb. 17, 1969.
- 6- Several lots in Ponderosa are back to back with Lots 38, 39 and 40 and the adjoining lots on either side in Strawberry.

- 7- The plats for Strawberry and Ponderosa are separate and neither reflect how the two plats fit together.
- 8- Prior to recording any of the subdivision plats, and in the area encompassed by the same, there were several old unimproved one-vehicle-width roads that had been used by loggers, hunters, ranchers, forestry personnel and others. These old roads are barely visible on aerial photography dating to the early 1960's and supplied to the Court. The roads consisted essentially of tire tracks left over a period of time and appear not to follow a well-thought plan.
- 9- One of the old roads crossed portions of Lots 38 and 39, purchased by plaintiffs from defendant Pine Meadows, and also crossed a corner of Lot 40.
- 10- When Pine Meadows recorded its various subdivision plats, it surveyed and engineered roads to service the various lots, reflecting the roads on the recorded plats and dedicating them to the use of the public. The platted roads are forty feet (40') in width, some four times the width of the old unimproved roads in the area.
- 11- In some instances Pine Meadows platted roads which corresponded with some of the old logger/hunter roads and in some instances roads were platted in areas where no prior road of any nature had existed.
- 12- Only a fraction of the old logger/hunter roads became surveyed and platted roads when the various subdivision plats were recorded.

- 13- The Strawberry plat did not show a road crossing Lots 38, 39 and 40 but showed only a road fronting the lots and providing access thereto.
- 14- At the time of the purchase, plaintiff James R. Wilhelm and the defendant Pine Meadows, through its duly authorized agent Bill Pringle, walked over and inspected the two lots. Pringle was the selling agent in the deal with plaintiffs. Pringle acted as the selling agent of Pine Meadows for some 100 lots between 1968 and 1990.
- 15- The evidence was inconclusive as to when the road across lots 38, 39 and 40 was first graded. Plaintiffs remembered it was not graded at the time of purchase. Pine Meadows' president said it was, but its selling agent, Pringle, thought it may not have been. The initial grading effort was much more narrow and conservative than later occurred.
- 16- After contracting to purchase Lots 38 and 39 on June 30, 1968, but before receiving title, plaintiffs entered upon the property and constructed a cabin.
- 17- Plaintiffs accessed their property from the platted road fronting the same. They likely followed an old logger/hunter road to get to the cabin site, but it was necessary to perform some earth work to access this old road from the platted road which had been cut along the mountain slope.
- 18- Plaintiffs were issued warranty deeds by Pine Meadows on January 6, 1972 for lot 39 and on September 25, 1975 for lot 38.

- 19- The plat covering Ponderosa shows a road running to the rear of Strawberry Lot 38 but it dead-ends at the boundary between the two plats. The road on the Ponderosa plat is in the general area, but it is unclear from the evidence whether it is in the exact location of the road now claimed by defendants.
- 20- The Court was furnished something akin to a master plat showing how the various subdivisions fit together, but this was not an official plat and was never approved nor recorded. It shows a road running from front to back on Strawberry Lot 38, parallel and adjacent to the westerly lot line. It is unclear whether this was originally shown on this unofficial document or drawn in at a later time. In any event, none of the parties claim the actual existence of a road which corresponds to this depiction, and it is clearly at variance with the official plat and with the unplatted road in question which cuts diagonally across three lots.
- 21- The warranty deeds issued to plaintiffs do not contain a reservation for roadways and there is nothing appearing on the Strawberry plat covering Lots 38 and 39 which would have put plaintiffs on notice of any unplatted road or easement.
- 22- Pine Meadows originally conveyed Strawberry Lot 40 to others, but has since reacquired title and is the current record owner thereof.
- 23- During the time that it did not own Lot 40, and under date of Aug. 2, 1995, Pine Meadows obtained an easement across Lot 40 and duly recorded the same on aug. 10,

1995. During this same time frame, Pine Meadows attempted to obtain an easement from plaintiffs on Lots 38 and 39, but plaintiffs declined.
- 24- Each warranty deed from Pine Meadows to plaintiffs provided only that the conveyance was "Subject to: covenants, conditions, restrictions, reservations, rights of way and easements of record" (emphasis added).
- 25- None of the defendants have ever obtained or retained an easement of record across Strawberry Lots 38 and 39.
- 26- In conjunction with its platting and subdivision effort, Pine Meadows opened a new road which was duly platted and constructed and which served and continues to serve essentially the same purpose as had previously been served by the road which defendants claim crossed Lots 38, 39 and 40.
- 27- Lots 38, 39 and 40 each had a frontage of 94.10 feet.
- 28- The restrictive covenants governing Strawberry provided that "Lot sizes, as prescribed by the subdivision plat . . . are considered minimum lot sizes and no person shall sell, lease or otherwise dispose of said lot in parcels smaller than the original lot sizes. . . ."
- 29- The roadway claimed by defendants cuts diagonally across Lots 38, 39 and 40, comes within a few feet of plaintiffs' cabin and would, if recognized, substantially reduce the size of each lot. If a road were cut out of Lot 38 alone, as shown on the unofficial master plat or sketch, it would reduce Lot 38 by some 43%.

- 30- The Court does not find credible defendants' claim that defendants "inadvertently neglected" to include the disputed road on the plat or reserve a roadway easement on the deeds issued to plaintiffs.
- 31- The Court makes no finding with respect to whether the route across Lots 38, 39 and 40 is preferable to the newly platted route, nor does it make any finding as to whether or not two different accesses would be desirable. These are essentially policy issues for the public body not for the Court to decide.
- 32- Kane County approved the various plats, and particularly Strawberry and Ponderosa, with access as platted and with no reference to the road in question. Any effort by the county to thereafter create or recognize a public road came less than ten years before plaintiffs permanently blocked access and did not follow any statutory procedure.
- 33- During the 1970's and into the 1980's the amount of development in the various subdivision plats in proximity to Lots 38 and 39 was limited, and accordingly the amount of vehicular traffic in the area was likewise limited.
- 34- Also during the 1970's and into the 1980's the plaintiff James R. Wilhelm was actively involved in a professional career outside the state of Utah and along with his wife was only an infrequent visitor to the cabin they had constructed.
- 35- During the 1970's and into the 1980's there was some use of the old road across Lots 38, 39 and 40 by others who had constructed cabins in the general vicinity. This use,

however, was both limited and sporadic because there was simply not an extensive amount of development on the mountain at that time.

- 36- During the 1970's and 1980's, plaintiff on several occasions undertook efforts to block access to the road, sometimes with logs, sometimes with vehicles and by reliance upon trenching undertaken by others and sometimes by personal notice. Some of plaintiffs blocking efforts resulted in confrontations with would-be users where plaintiffs made clear their opposition to continued use.
- 37- Plaintiffs' blocking efforts were not exhaustive but neither was the amount of use. Moreover, the use appears essentially to have been made by neighbors within the subdivisions developed by Pine Meadows as opposed to members of the general public.
- 38- By the time the 1990's arrived, the amount of use had increased and during or about 1993 plaintiffs responded with signs and by installing steel posts in cement with a lock chain blocking access.
- 39- Pine Meadows' agent, Bill Pringle, was somewhat aware of plaintiffs' effort to block access and use over the years, and had a clear memory of the more permanent and extensive effort during the 1990's.
- 40- During the 1990's, the road in question was improved and substantially widened, presumably by Kane County, though it was not a party to these proceedings. Defendants did not participate in the expansion and improvement of the road in question.

FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 960600032, Page 9-

- 41- The widening and improvement and increased use prompted a much more extensive and ongoing effort on the part of plaintiffs to disallow access. It is undisputed that this has occurred at least since 1993.
- 42- Plaintiffs' efforts at blocking the road and preventing access met with resistance by others, including the Kane County Sheriff who cited plaintiff for blocking a public road sometime during 1996. The action was dismissed in the justice court for lack of evidence that the road was in fact a public road.
- 43- The permanent type devices installed by plaintiffs to block access to the road were physically removed on more than one occasion. Plaintiffs continued to use the cabin only for recreation use and were not present when removal occurred.
- 44- At no time between the time of contracting to purchase Lots 38 and 39 and the filing of this law suit was there a ten-year period of uninterrupted use of the disputed road by members of the public.
- 45- Plaintiffs commenced this action on or about October 23, 1996 seeking an order closing the road, requiring restitution of the land and for attorney's fees. Before trial, plaintiffs abandoned its request for attorney's fees.
- 46- Defendants counterclaimed asking the court to find and decree the existence of a public thoroughfare across plaintiffs' property.

CONCLUSIONS OF LAW

When Pine Meadows and its close circle of owners, officers and directors selected among the old unimproved roads those for inclusion in its formal plats, it necessarily evidenced its intent to abandon others not so included. The evidence is clear that, for whatever reason, defendants did not include as a platted road the old logger/hunter road which apparently crossed a portion of Lots 38, 39 and 40. Rather, defendants platted new roads, one of which serves the same purpose historically served by the old roadway in question. Kane County accepted the plats with the lots and dedicated roads as shown thereon. If the County or the defendants required additional access or intended some other road to be recognized, it should have been shown on the plat. It is untenable as a matter of law for either defendants or the County to include some old unimproved roads, elevating them to the status of platted roads, exclude others and then claim those excluded encumber lots which appear on the face of the plat to be unencumbered. The incongruence of such a claim is further heightened by the recordation of restrictive covenants which provide that each lot is at the minimum permissible size and preclude any sale or disposition otherwise. Moreover, Pine Meadows' conveyance by warranty deed carried with it the statutory guarantee of "quiet possession" and "that the premises are free from all encumbrances" and that Pine Meadows would "forever warrant and defend the title. . . against all lawful claims whatsoever". UCA §57-1-12. Under the facts of this case, these defendants are precluded from asserting that a public thoroughfare existed when the plats were recorded in 1968 and 1969 and when the deeds

were issued to plaintiffs in 1972 and 1975; and this is so even if the proof were sufficient to establish a pre-existing "public thoroughfare" which the Court concludes it is not.¹

Defendants' claim that a public thoroughfare thereafter came into existence is not supported by the facts. The governing statute, §72-5-104², provides as follows:

A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

The law in Utah is well settled that the burden of proof is on the side trying to prove dedication to the public. *Campbell v. Box Elder County*, 962 P.2d 806 (UT App 1998). This burden can only be met by proof which is clear and convincing. *Ibid*. Moreover, there is a presumption in favor of the property owner and his ownership is accorded a high degree of sanctity. *Draper City v. Estate of Bernardo*, 888 P.2d 1097 (UT 1995). It has also been held that use by neighboring landowners and their personal visitors is not sufficient to prove public use. These persons cannot be numbered in the class of members of the general public using such road in a fashion that might ripen into a dedication under the road statute. *Petersen v Combe*, 438 P.2d 545 (UT 1968). The use must be such that it is a "thoroughfare" where members of the public have a general right of passage. *Heber City Corp. v Simpson*, 942 P.2d 307 (UT 1997). Finally, it is generally

¹ The Court is mindful of the stringent requirements for a public body to abandon or vacate a dedicated road or public thoroughfare. How that relates to the county's official acts in this case need not be resolved since the old unimproved roads (before platting) did not reach the status of public thoroughfares.

² Before 1998 the statute was found at 27-12-89 UCA.

recognized that unambiguous acts by the owner which evidences an intention to exclude the public from uninterrupted use destroys the prescriptive right and the 10-year period must begin anew. *Highways* §27, 39 *AmJur* 2d, 1999 at 603.

The evidence laid before the Court by defendants was less than "clear and convincing". Defendants called several persons that testified of the use over a couple of decades before being completely blocked out, but for the most part this was use by neighboring lot-owners, or those who provided services to them; and the absence of extensive development, particularly during the early years, limited the nature and opportunity for conflict and also reduced the occurrences where plaintiffs' efforts to blockade coincided with others' efforts to use. But some confrontations did exist, sufficient to evidence plaintiffs' intent to exclude the public from uninterrupted use. Furthermore, the blockade devices employed by plaintiffs, including those that were of a permanent nature during the 1990's, were removed when plaintiffs were not around.

The County's assertion of a right on behalf of the general public does not appear to have arisen until near or during the 1990's. This was too little too late and was clearly and strenuously resisted by plaintiffs beginning in 1993. The County may have been caught off-guard by all of this proposed development in the late 1960's, but this does not excuse a failure to properly deal with access issues at the time the plats were approved. The access was as reflected on the recorded plat, and lot purchasers were entitled to rely thereon. More particularly, lot owners

were not only entitled to rely upon the existence of the platted roads, but the non-existence of unplatted roads later claimed by these defendants and the County in contradiction of the approved plats. If the County now considers the access inadequate, it can pursue such remedies as are authorized by law.

All of this adds up to a failure on the part of the defendants to meet their burden of proof. Furthermore, defendants of all people were not in a position to advance the claim of a public thoroughfare. Any use by them would have been inconsistent with the continuing obligation of Pine Meadows under the warranty deeds and would have arisen for the benefit and purposes of its development and its lot owners and not for the general public. Neither Pine Meadows nor its officers or directors gained any right from use in violation of the express warranty.

While the Court concludes that a public thoroughfare does not exist, it is unable to compel defendants to assume the responsibility for obliterating the roadway. There wasn't any proof that defendants were responsible for its widening and improvement. This renders moot defendants' argument with respect to the statute of limitations. To the extent the statute of limitations argument was also intended to apply to the warranties under the deeds, the argument is rejected. The grantor's duty to "forever warrant and defend" precludes the grantor from pursuing a course that would create encumbrances inconsistent with the warranty.

Plaintiffs' claims for attorney's fees having been abandoned, the Court does not consider the same. Plaintiffs' are awarded costs incurred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 960600032, Page 14-

Plaintiffs' counsel is directed to prepare a decree and judgment in conformity with the findings and conclusions herein entered.

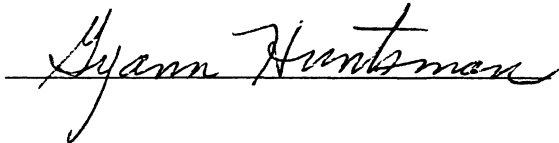
Dated this 4th day of May, 2000.


K. L. McIFF
District Court Judge

CERTIFICATE OF SERVICE

On May 5, 2000 a copy of the above was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
L. Edward Robbins Attorney at Law 190 West Center Kanab, UT 84741	[m]	Justin W. Wayment Blaine T. Hofeling HIGBEE, JENSEN & MACFARLANE 250 South Main P.O. Box 726 Cedar City, UT 84721	[m]



RECORD OF WITNESSES AND EXHIBITS

Page 1

960600032

Case Number

James & Linda Wilhelm
Plaintiff

Pine Meadows Estates
Defendant

Edward Robbins
Attorney for Plaintiff

Justin Waymunt
Attorney for Defendant

PLAINTIFF

Date	Name of Witness	Date	No.	Description of Exhibits	Admitted	
					Yes	No
2/25	James Wilhelm	2/25	1	Map-plat map ⁽⁵⁻¹⁰⁻⁰⁰⁾ - Strawberry Valley ^(Unit #2)	R	
"	Milton Farney	"	2	Map-plat map ^(Copied 2-16-00) - Strawberry Valley ^(Unit #2)	R	
		"	3	Map-plat map of Ponderosa	R	
		"	4	Overall map ^{Villa}	R	
		"	5	Map-plat map of lots ^{*32 & 39}	R	
		"	6	Photo-Arial-Black & White ⁽⁶⁻²⁸⁻⁰⁰⁾	R	
		"	7	Photo-Arial	R	
		"	8	Photo-Arial	R	

DEFENDANT

Date	Name of Witness	Date	No.	Description of Exhibits	Admitted	
					Yes	No
2/25	Milton Farney	2/25	9a	Close-up ^(smaller) arial-black & white	R	
"	Bill Pringle	"	9b	Arial ^(smaller) photo-black & white	R	
"	Wallace Holst	"	10	Arial photo ⁽¹²⁻¹⁻⁰⁰⁾ -Black & white	R	
"	Ronald Graham	"	11	Close-up arial - Black & white	R	
"	Harry Moyer	"	12	Arial photo ⁽⁶⁻¹⁸⁻⁷⁷⁾ -color	R	
"	Paul Fullmer	"	13	Close-up arial-color photo	R	
"	Stanley Grumewald	"	14	Photo-Road	R	
		"	15	Photo-Road, Cabin, suburban	R	
		"	16	Photo-Cabin	R	
		"	17	Photo-Road-downhill	R	
		"	18	Photo-Road & suburban	R	
		"	19	Photo-Intersection	R	
		"	20	Photo-Road-uphill	R	
		"	21	Photo-Road-uphill-long view	R	
		"	22	Photo-Road-curve & tank	R	
		"	23	Photo-Road-tank-close-up	R	

RECORD OF WITNESSES AND EXHIBITS

Page 2

960600032

Case Number

James & Linda Wilhelm
Plaintiff

Pine Meadows Estates
Defendant

Edward Robbins
Attorney for Plaintiff

Justin Wayment
Attorney for Defendant

PLAINTIFF

Date	Name of Witness	Date	No.	Description of Exhibits	Admitted	
					Yes	No
7/25		7/25	24	Check to Pine Meadows ⁽⁶⁻³⁰⁻⁶⁸⁾	R	
		"	25	Check to Pine Meadows ⁽⁶⁻³⁰⁻⁶⁸⁾	R	
		"	26	Contract of Sale: 6-30-68	R	
		"	27	Photo - 1968 of lots & embank.	R	
		"	28	Photo - 1968 of lots & embank.	R	
		"	29	Photo - 1968 of lots	R	
		"	30	Photo - 1968 of lots & embank.	R	
		"	31	Photo - 1970 - Cabin construc.	R	

~~DEFENDANT~~

Date	Name of Witness	Date	No.	Description of Exhibits	Admitted	
					Yes	No
		"	32	Photo - 1970 - Cabin construc.	R	
		"	33	Photo - 1970 - Cabin construc.	R	
		"	34 ^a	Charge card - Hotel stay.	R	
		"	34 ^b	Airline ticket to LA.	R	
		"	35	Warranty Deed - Lot #39	R	
		"	36	Warranty Deed - Lot #38	R	
		"	37	DD 214 - Military Service Paper	R	
		"	38	Title / Reg. & Bill of Sale. ^(old)	R	
		"	39	Photo of white car.	R	
		"	40	Video tape.	R	
		"	41	Receipts for building supplies ^(to block road)	R	
		"	42	Invoice from Kenner for dirt.	R	
		"	43	Photos - Priv. Prop. sign & rocks	R	
		"	44	Photo - Priv. Prop. sign & rocks	R	
		"	45	Photo - Priv. Prop. sign & rocks	R	
		"	46	Citation & documents from JC.	R	
		"	47	Declaration of Restrictions	R	
		"	48	Easement Deed	R	