

2000

James R. Wilhelm and Linda Rose Wilhelm v. Pine Meadows Estates, Inc., a Utah corporation; Milton R. Farney; Marvin R. Shapiro; Robert C. Dolley :
Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES R. WILHELM and LINDA ROSE WILHELM,	:	
	:	BRIEF OF APPELLEES
Plaintiffs/Appellees,	:	
	:	Priority No. 15
vs.	:	
	:	
PINE MEADOWS ESTATES, INC., a Utah corporation; MILTON R. FARNEY; MARVIN R. SHAPIRO; ROBERT C. DOLLEY,	:	
	:	Court of Appeals Case No. 20000559-CA
Defendants/Appellants.	:	District Court Case No. 960600032

APPEAL FROM DECREE AND JUDGMENT OF THE SIXTH DISTRICT COURT
Honorable Judge K. L. McIff Presiding

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Utah Court of Appeals

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TABLE OF CONTENTS

JURISDICTIONAL BASIS FOR THIS APPEAL	1
ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTES AND RULES	2
STATEMENT OF THE CASE	2
1. Nature of the Case	2
2. Course of Proceedings	3
3. Disposition in the Court Below	3
4. Statement of Facts	3
A. Preliminary Objection	3
B. Statement of Facts	3
i. Plaintiffs' Evidence	3
ii. Defendants' Evidence	13
iii. Judge McIff's Findings of Fact	18
SUMMARY OF ARGUMENTS	30
ARGUMENT	31
I. Defendants failed to prove by clear and convincing evidence that the disputed road had been abandoned to public use by the Wilhelms for any continuous ten year period	31
II. By no stretch of the imagination are Judge McIff's Forty-Six Findings of Fact clearly erroneous	35

III. Appellants failed to prove that a ten year public road existed which superceded the recording of the Strawberry Valley Estates, Unit II, plat	36
IV. Appellants are estopped from asserting a ten year public road pre-dating their deeds	37
V. There is no need of any kind for any more detailed Findings of Fact on the Wilhelms' blocking of the disputed road. The findings Judge McIlff made are more than sufficient to support his Legal Conclusions....	39
VI. The judgment of the trial court should be affirmed and the case remanded to the trial court for determination and award of attorney's fees incurred on appeal	41
CONCLUSION	42

TABLE OF AUTHORITIES

Cases

<i>Campbell v. Box Elder County</i> , 346 U. A. R. 9, 962 P. 2d 806 (Ut. Ct. App., 1998)	33
<i>Copper State Leasing Co. v. Blacker Appliance & Furn. Co.</i> , 770 P. 2d 88 (Ut., 1988)	36
<i>Draper City v. Estate of Bernardo</i> , 888 P. 2d 1097, 1099 (Ut., 1995).....	33
<i>Gillmor v. Gillmor</i> , 745 P. 2d 461 (Ut. Ct. App., 1987)	36
<i>Hall v. Fitzgerald</i> , 671 P. 2d 224 (Ut., 1983).....	39
<i>Peterson v. Combe</i> , 20 Ut. 2d 376, 438 P. 2d 545 (Utah, 1968)	40
<i>Porco v. Porco</i> , 79 U. A. R. 35, 752 P. 2d 365 (Ut. Ct. App., 1988).....	41
<i>State v. Wright</i> , 744 P. 2d 315 (Ut. Ct. App., 1987)	36

Rules

Rule 33, Utah Rules of Appellate Procedure	41
Rule 52(a), Utah Rules of Civil Procedure	35

Statutes

27-12-89, Utah Code	2
57-1-12, Utah Code	38
72-5-104, Utah Code	2

Other Authorities

<i>Estoppel and Waiver</i> , Section 4, 28 Am Jur 2d 603 (1966)	39
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JURISDICTIONAL BASIS FOR THIS APPEAL

Appellees concur with appellant's statement of jurisdiction

ISSUES PRESENTED FOR REVIEW

Appellees are property owners James R. and Linda Wilhelm (hereinafter the "Wilhelms"). They have fought and prevailed below against the imposition of an unplatted road across their Cedar Mountain property. Appellees disagree with appellants' list of eight issues presented for review and submit that are thinly veiled attempts to avoid the reality of the trial outcome below—that Judge McIff found appellants and their witnesses unbelievable or their testimony unpersuasive and consequently that

they had not met their burden of proof. Appellees will nevertheless respond to the issues raised.

DETERMINATIVE STATUTES AND RULES

The Wilhelms accept appellants' statement of determinative statutes, the full text of which are appended to appellants' brief, subject to the clarification that until 1998, 72-5-104, Utah Code, previously appeared at 27-12-89, Utah Code, and until then did not include subparts two and three.

STATEMENT OF THE CASE

1. Nature of the Case

This is suit filed by the Wilhelms against the Pine Meadows Estates, Incorporated, and named individuals, essentially the developer of the area, seeking as primary relief by the time of trial, closure of an unplatted road asserted across their two lots in the Strawberry Valley Estates, Unit 2, Subdivision on Cedar Mountain in Kane County, Utah.

Appellee objects to appellants' lengthy statement of the Nature of the Case. It is not appropriate to include in a statement of the Nature of the Case lengthy factual narrative and argument, much of which is directly contrary to the facts as found by the trial court.

2. Course of Proceedings

Appellee accepts as substantially accurate appellant's statement of the Course of Proceedings.

3. Disposition in the Court Below

Judge McIff entered Findings of Fact and Conclusions of Law concluding that no public thoroughfare existed and later signed a Decree and Judgment permitting the Wilhelms to close and obliterate the roadway (R. 313, 333).

4. Statement of Facts

A. Preliminary Objection

Appellants pay lip service to the requirement that they marshal the evidence supporting the trial court's findings of fact, but then include facts in their Statement of Facts assertions directly contrary to those found by the trial court. Because appellants have failed to fully and accurately marshal the evidence supporting the trial court's findings, appellees make a more thorough statement here.

B. Statement of Facts

i. Plaintiff's Evidence

1. Plaintiff James R. Wilhelm (hereinafter "Mr. Wilhelm") testified that he is an air force veteran with multiple tours of duty and numerous combat missions in Vietnam

((Transcript appears at R. 347. References to trial transcript hereafter are as "R. 347") *R. 347 at 25*).

2. He read about Strawberry Valley Estates on Cedar Mountain in Kane County, Utah in an aviation magazine and determined to visit the place on Memorial Day weekend, 1968 (*R. 347 at 26*).

3. He flew in and was met at the airstrip by Milton Farney and Bill Pringle who proceeded to show him the property (*R. 347 at 26*).

4. They showed him about four different places, some alongside the runway, then some hillside lots and then some lots up on top (*R. 347 at 27*).

5. He was not yet interested so they took him along a different road to Lots 38 and 39, which he decided to purchase (*Ibid*).

6. Mr. Wilhelm specifically remembers that they did not drive up through Lots 38 and 39, the lots he purchased, to get to the lots on top, but went around another way (*R. 347 at 28*).

7. Lots 38 and 39 are hillside lots located on Bonanza Circle which dead-ends close to both lots. Mr. Wilhelm chose those two lots in part because they were on a dead-end and would have little traffic (*R. 347 at 29*).

8. Mr. Wilhelm even remembered the vehicle Mr. Farney and Mr. Pringle drove him around in, a 1950 Chevrolet pickup (*R. 347 at 30*).

9. He testified that they couldn't have climbed up across the two lots because there was a four to six foot embankment at their bottom edge resulting from the road having been cut into the hillside (*Ibid*).

10. He did not see any road proceeding up through Lots 38 and 39 (*R. 347 at 31*).

11. He did see two tire tracks which looked like a four wheel drive vehicle had traversed across the meadow of Lot 38 (*Ibid*), but no mention was made of the tracks by either Mr. Farney and Mr. Pringle and it never even entered Mr. Wilhelm's mind that there would be any issue about those tracks (*R. 347 at 32*).

12. In the fall of 1968, Mr. Wilhelm came back with a travel trailer, planning to release some birds on the property (*Ibid*).

14. Since he could not pull the trailer on to the property, he found Mr. Farney who told him that they would cut in a driveway for him later, but in the meantime he should just park on Bonanza Circle since there wouldn't be any traffic there any way (*R. 347 at 33*). That is what Mr. Wilhelm did (*Ibid*).

15. Mr. Wilhelm presented canceled checks, a contact, and photos to verify the timing of his first visits to the property in 1968 and the condition of the property (*Pl. Ex. 24-30*).

16. By the time Mr. Wilhelm visited his property in the summer of 1970, a driveway had been cut in. (*R. 347 at 33*).

17. Mr. Wilhelm later learned that the driveway was not on either Lot 38 or 39, but on the adjacent Lot 40, angling toward lot 39. (*R. 347 at 34-35; Pl. Ex. 2*).

18. This driveway later became part of the disputed roadway (*R. 347 at 34*).

19. During the summer of 1970, Mr. Wilhelm built the shell of a small cabin on his property, not having any concern about any road on either Lots 38 or 39 (*Ibid*).

20. The first time Mr. Wilhelm noticed any road across his property was September 17 or 18, 1972 (*R. 347 at 35*).

21. He verified these dates through reference to his airline ticket from Saigon to Los Angeles and a charge for a hotel stay in California, as he was on leave during his last tour of duty in Vietnam (*R. 347 at 35-36, Pl. Ex. 34-A, 34-B*).

22. They arrived at night and were awakened the next morning by a motorcycle coming down the hill on a newly bulldozed road. (*R. 347 at 36*).

23. The road was a little wider than a dozer blade, 8 to 10 feet, and very rough and rocky (*R. 347 at 37*).

24. Mr. Wilhelm did not raise the issue with Mr. Farney because he was on leave and had only a few days to spend with his wife (*Ibid*).

25. Mr. Wilhelm confronted Mr. Farney about the road the next summer (*Ibid*).

26. Mr. Farney acknowledged that a local contractor had dozed the road but told Mr. Wilhelm that he didn't think Mr. Wilhelm would mind (*R. 347 at 38*).

27. Mr. Farney suggested that they look at other property and consider a trade but Mr. Wilhelm said no, he had already built his cabin (*Ibid*).

28. Since its purchase, Mr. Wilhelm has only used his property for summer, recreational use (*Ibid*).

29. Until 1979, when he finally retired, Mr. Wilhelm would be there only for extended weekends, with his wife and children maybe staying another week or two without him (*Ibid*).

30. After his retirement from the Air Force, he was able to spend a little more time there, visiting Easter weekend, if possible, but if not, opening the cabin no later than Memorial Day weekend, then staying from about the third week in June to the third week in August, then closing the cabin on Labor Day weekend, or sometimes Thanksgiving weekend (*R. 347 at 39*).

31. He was at the cabin almost every Labor Day weekend (*R. 347 at 39*).

32. From 1973 to 1979, the new cut was not used, except that sometimes he would see Mr. Farney with what he assumed were sales prospects on it (*R. 347 at 40*).

33. For some reason, Labor Day weekend, 1979, there was a lot of traffic up and down the cut by three wheel motorcycles, so that Mr. Wilhelm came back the next summer with a firm resolve to block it (*R. 347 at 41*).

34. That year, 1980, Mr. Wilhelm cut some dead aspen trees and laid them across the cut, where it bisected the top of Lot 38 (*Ibid*).

35. He did not block the bottom of his property because if he had he could not have accessed his own property since that was where the driveway was which Mr. Farney had cut in, and in any case the logs at the top made it so that no one could traverse his property (*R. 347 at 42*).

36. Because of the logs, Mr. Wilhelm had a confrontation with the driver of a water delivery truck who wanted to use the road to go up on top due to a light snowfall the night before which had made the only platted road around the hill more difficult to climb (*R. 347 at 42, 47*).

37. The driver stopped by the door of Mr. Wilhelm's cabin and a conversation ensued during which the driver unfastened his coat, pulled out a gun, and said, "I bet you this might make you change your mind" (*R.347 at 45*). (Defendants' counsel objected to further examination on this event on grounds that the other people involved in it were deceased (*R. 347 at 44*).)

38. Because of the implied threat, Mr. Wilhelm moved the logs, let the driver proceed up the hill, and then replaced the logs (*R. 347 at 47*).

39. Mr. Farney found out about this incident and came to Mr. Wilhelm's cabin (*Ibid*).

40. There followed a confrontational exchange between Mr. Wilhelm and Mr. Farney (*Ibid*), "“What do you think you're doing? . . . ‘Well, that's fairly obvious, I'm blocking the access across my property’ . . . ‘You can't do that.’ . . . ‘Well I just did.’”

(*Ibid*). Mr. Wilhelm thought that it was at this time that Mr. Farney offered a trade for other Panguitch Lake property which Mr. Wilhelm was not interested in (*R. 347 at 48*).

41. This conversation did not resolve the road issue, but it did generate a promise from Mr. Farney that he would ask people to go around the other way (*R. 348 at 49*). Mr. Wilhelm assumed that he had done so because for the next five or six years after 1980 relative peace and quiet was restored (*Ibid*).

42. By the time Mr. Wilhelm came back in June of 1980, someone had cut up and hauled off the logs (*Ibid*).

43. Mr. Wilhelm also testified that the road had been blocked earlier, in 1973 and 1974. He had arranged to get electricity for himself and his neighbors, which required that he have a trench dug across the road and up the hill, which trench was open for most of a year, late summer of 1973 through mid-summer of 1974 (*R. 347 at 50*).

44. On Memorial Day weekend 1986, Mr. Wilhelm encountered “the three wheel races,” like in 1979 (*R. 347 at 51*). Not having any other materials, he and his family took an old car, a 1959 Oldsmobile he had purchased the year before, and pushed it out across the road (*Ibid; Pl. Ex. 38*).

45. Dean Thomas came by driving an old Farmall tractor with a pronged front-end loader on it (*R. 347 at 54*). He threatened to use it on the car, Mr. Wilhelm said if he did, he, Mr. Wilhelm, would call the sheriff, at which Mr. Thomas backed down and went the other way (*Ibid*).

46. Mr. Wilhelm left about Labor Day of 1986 and did not leave the car in the road over the winter (*R. 347 at 55*).

47. After 1986, the Wilhelms decided to try posting the road with “Private Property” and “No Trespassing” signs because the confrontation was defeating the purpose of the cabin (*R. 347 at 55*). They would typically post three signs at the top on metal posts or two by fours and three signs at the bottom tacked to the trees (*R. 347 at 55-56*).

48. Typically whenever they returned after having left the cabin for any period of time, they would find the signs missing, or thrown along the edge of the road, or on their deck or porch (*R. 347 at 56*).

49. While at the cabin, Mr. Wilhelm observed that people he didn’t recognize as neighbors would honor the signs (*R. 347 at 57*). Typically they would pull into the driveway, see the signs and return the way they had come, while neighbors he knew and recognized would not honor them and would traverse his property (*Ibid*).

50. Mr. Wilhelm testified that while the road was never graded or improved while he was at the cabin, it has grown wider over the years, most of the growth coming after 1990 when it was still only a foot more than its 1980 width of 10 to 12 feet. (*R. 347 at 58-59*). By 1993, it was between 18 and 20 feet wide (*Ibid*).

51. In 1993, Mr. Wilhelm first blocked the road with construction materials from his cabin, cement blocks and beams, but then replaced them with steel posts he had

especially constructed, and with locks and chain, at both the bottom and top of the lots (*R. 347 at 59-60; Pl. Ex. 41*). They also placed signs as before (*Ibid*).

52. The steel posts were embedded in cement footings 18 to 24 inches deep (*R. 347 at 61*).

53. When the Wilhelms returned in the summer of 1994, the footings, posts, chains, locks and signs had been entirely removed, and the road had been newly graded (*R. 347 at 61*).

54. In 1994, the Wilhelms took heavy boulders and dragged them up to the top of Lot 38 with a jeep, but once again they were removed in the Wilhelms' absence (*R. 347 at 61-62*).

55. Mr. Farney told him that he wished Mr. Wilhelm hadn't used such large boulders since "we almost got a hernia pushing those off over the edge." (*R. 347 at 62*).

56. In 1995, the Wilhelms had a new driveway graded which accessed the cabin from the about the bottom common corner of Lots 38 and 39 (*R. 347 at 64-65*). At the same time, the Wilhelms had the contractor dump a big pile of dirt on the road where it intersected the top of Lot 38 (*R. 347 at 65*).

57. This dirt pile stayed for almost a year but had been removed by Memorial Day 1996 (*Ibid*).

58. Mr. Wilhelm then pulled some old dead aspen trees across the road (*R. 347 at 67*).

59. Within 30 minutes, a deputy sheriff arrived and cited Mr. Wilhelm for blocking a public road (*R. 347 at 68*).

60. Mr. Wilhelm opposed the citation and the Kane County Justice Court dismissed the citation because there had been no adjudication that the road was a public road (*R. 347 at 68; Pl. Ex. 46*).

61. Mr. Wilhelm did not again block the road but instead filed suit.

62. Mr. Wilhelm has paid property taxes on both Lots 38 and 39, every year since he purchased them (*R. 347 at 69*).

63. The purchase contract for Lots 38 and 39 recites that it is for said lots “in the Strawberry Valley Estates Subdivision as per Map on file in the Office of the Kane County Recorder, State of Utah, subject to covenants, conditions, restrictions, reservations, rights, rights of way and easements of record.” (*Pl. Ex. 26*). It further states that “sales representatives have no authority to make any representations other than those herein stated” and that “Buyer(s) hereby acknowledge that they have received a copy of . . . declaration of restrictions covering this subdivision . . . and agree to be bound thereby.” (*Ibid*).

64. The deeds to Jim Wilhelm for Lots 38 and 39 are general warranty deeds subject only to “covenants, restrictions, reservations, rights of way and easements *of record*” (*Pl. Ex. 35, 36*).

65. No recorded plat has the disputed road on it (*Pl. Ex. 1, 2, 3*).

66. The declaration of Restrictions for Strawberry Valley Estates, Unit 2, provides that “Lot sizes, as prescribed by the subdivision plat for said subdivision, are considered minimum lot sizes and no person shall sell, lease or otherwise dispose of said lot in parcels smaller than the original lot as shown on the recorded plat of said subdivision (*Pl. Ex. 47, p. 1*).

67. The lots on top of the hill above Lots 38 and 39 are part of a different subdivision, developed by this same developer (*Pl. Ex. 1, 3*).

68. Without the disputed road across the Wilhelm lots, there is only one access to the lots on top of the hill (*Pl. Ex. 4*).

ii. Defendants’ Evidence

1. Defendant presented several witnesses from the area, but no immediate neighbor with direct line of sight to the disputed road.

2. Defendants called Mr. Milt Farney who testified that he is an original director, officer and owner of defendant Pine Meadows Estates and that he still retains that capacity (*R. 347 at 96, 102-103*).

3. Mr. Farney testified that the disputed road followed an old logging road, that it was already graded through Mr. Wilhelm’s lots, and a full eighteen feet wide, at the time Mr. Wilhelm bought them in 1968, and they just forget to put it on the plat (*R. 347, 115-118, 138*).

4. He further testified that Mr. Wilhelm choose to build his cabin within 10-12 feet of that already existing road, despite having the entire area to choose from, as he was one of the first buyers (*R. 347 at 138-139*).

5. He further testified that he even talked to Mr. Wilhelm about it and Mr. Wilhelm said this cabin was just his bachelor shack (*R. 347 at 139*).

6. Mr. Farney further testified that the very first time there was even any issue about the road was 1993 when the water truck driver came and told him it had been blocked (*R. 347 at 120, 137*).

7. He further denied every having put in a driveway for Mr. Wilhelm or even having talked about it (*R. 347 at 144*).

8. He had no explanation for the fact that the overall map of the area which he had commissioned for sales promotion attempted to show a road across Lot 38 but did not follow the actual road itself, even though he was now testifying that the road was in existence before Mr. Wilhelm bought his lots (*R. 347 at 142, 145-146*).

9. Mr. Farney acknowledged that he couldn't find an old logging road on the 1960 aerial photo which matched the disputed road. (*R. 347 at 156*).

10. Mr. Farney acknowledged that with the disputed road there were two ways up to the lots on top, that he didn't know which one people were using, and that he supposed the road was being used "just by the people who live up on top." (*R. 347 at 151*).

11. Judge McIff specifically found Mr. Farney's testimony about the omission of the disputed road from the plat not to be credible (*R. 319*).

12. Defendants called Mr. Bill Pringle who testified that he worked with Mr. Farney in selling lots in the subdivision (*R. 347 at 176*). He testified that in cutting in new roads sometimes they followed logging trails and sometimes they did not (*R. 347 at 180*).

13. He further testified that the disputed road was "more or less like a trail coming down off the hill there" and that he didn't know when Clark Lamb went in and widened it out (*R. 347 at 177*). He later testified that "there wasn't much of a road there, but there was a road" (*R. 347 at 182*).

14. He did not know whether the disputed road had been graded or not when Mr. Wilhelm purchased his lots (*R. 347 at 178*).

15. He confirmed Mr. Wilhelm's testimony that he would typically drive customers around the long way up on top, not on the disputed road, rather than "take a customer on a bad, bad road" (*R. 347 at 185*).

16. He confirmed seeing the 1959 Oldsmobile, even offering to buy it, but he was not sure if it blocked the road (*R. 347 at 189*).

17. Mr. Pringle even confirmed loaning the truck which was used to haul the dirt which Mr. Wilhelm used to block the road, knowing it was going to be dumped on the road to block it (*R. 347 at 195*).

18. Mr. Pringle acknowledged that he knew that the Wilhelms were upset before the 1990's. He even testified that “they possibly had just cause for that because you start out with 560 acres and all of a sudden you have 800 and 900 customers, and then you start getting a lot of traffic that you never saw like in 1970. All of a sudden in the 1990's this traffic has tripled and quadrupled, and he did discuss that with me and I discussed it with him, too.” (*R. 347 at 196*).

19. Defendants called one Wallace Holst who testified that he bought property about 1968, and that, “I guess I drove up the disputed road. . . .” (*R. 347 at 199*), and “I could have driven up that road in 1968. . . .” (*R. 347 at 200*), and finally, “yes, we did drive that road now that I think about it” (*Ibid*).

20. But Mr. Holst also testified that his first memory of the road was as a graded road, not as a two track road (*R. 347 at 213*) and that he thought that the other way around was built several years later (*R. 347 at 200*), which disputed the testimony of both Mr. Farney and Mr. Pringle.

21. Mr. Holst also acknowledged that he “just didn’t see anyone use” the disputed road (*R. 347 at 210*).

22. Defendants called Ronald Graham who first testified that he “saw” many people use the disputed road, but on cross-examination had to acknowledge that there were two routes to his cabin, including the disputed route, that he did not have a direct

view of the road but that he assumed use of the disputed road from seeing people coming past his cabin. (*R. 347 at 223, 226*).

23. Mr. Graham also acknowledged a conversation with Mr. Farney prior to his testimony in court in which Mr. Farney told him that as of 1969 “there was one way and one way only up that mountain” (*R. 347 at 228*).

24. Defendants called Harry Moyer who first testified that in 1967 or 1968 the road was not bladed but later testified that he was not sure whether it was or not (*R. 347 at 235*).

25. He also testified that his cabin is down by the airstrip, not in the area of disputed road, that his trips up to the disputed road area were infrequent, and that the people he observed using the road were people who were with him (*R. 347 at 241-243*).

26. Defendants called Paul Fullmer, chief of the Cedar Mountain Fire Protection District.

27. Mr. Fullmer testified to his wide experience with the Forest Service in using aerial photographs, including lining up two similar maps, and looking at them through a stereoscope, so that the “contour features, like your roads, your mountains, trees or whatever” stand out in three dimensions (*R. 347 at 249*).

28. Even Mr. Fullmer had to testify that from the 1960 photographs, “I can see an opening, a clear opening is what it would be. I assume there would be a road, but it could be just a clearing at the time (*R. 347 at 254*). He acknowledged he could not even see

any tire tracks (*R. 347 at 256*). On questioning by the court, he testified as follows respecting the 1960 photos:

“THE COURT: On these exhibits that I’m looking at through glasses, I can see a road up in the triangle area where I can actually see a road, and I can see an opening but I can’t see a road which would correspond with the Wilhelm Road location.

“THE WITNESS: Right.

“THE COURT: Is that the same thing you see?

“THE WITNESS: Right, in the 1960 photo, right.” (*R. 347 at 258*).

29. Defendants last called Stan Grumewald who testified that he did not see the road blocked, but acknowledged that he bought his property in 1972, built his cabin in 1978, and for many years was there only for two week vacations (*R. 347 at 260-262*).

iii. Judge McIff’s Findings of Fact

Judge McIff made the following findings of fact, each with ample evidentiary support in the record. Here the finding is quoted first, then some of the evidentiary support for that finding is set forth in italics, with citations to the record:

“1. Defendant, Pine Meadows Estates, Inc. (hereinafter “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 \$4,390.00” (*Pl. Ex. 26*).

“2. Pine Meadows is a closely held corporation with the other defendants being owners, officers and/or directors thereof.” (*R. 347 at 12-13, 96, 102-103*).

“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.” (*Pl. Ex. 1*). *Mr. Wilhelm testified that these were hillside lots on a dead-end Circle and that this was one of the reasons why he bought these two lots (R. 347 at 29)*.

“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.” (*Pl. Ex. 3, 4*).

“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.” (*Pl. Ex. 1, 3*).

“6. Several lots in Ponderosa are back to back with Lots 38, 39 and 40 and the adjoining lots on either side in Strawberry.” (*Compare Pl. Ex. 1, 3*).

“7. The plats for Strawberry and Ponderosa are separate and neither reflect how the two plats fit together.” *Ibid*.

“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.” (*Aerial photos, Def. Ex. 9a, 9b*).

“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.” *Ibid.*

“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.” (*Pl. Ex. 1, 3*).

“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.” *Mr. Pringle testified that the roads followed the logging trails, but that there were many of them all over the property, some of which became finished roads, some of which didn't (R. 347 at 177, 183). This was confirmed by the aerial photos (Ex. 9a, 9b in comparison with the recorded plats, Pl. Ex. 1, 3).*

“12. Only a fraction of the old logger/hunter roads became surveyed and platted roads when the various subdivision plats were recorded.” *Ibid.*

“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. (*Pl. Ex. 1*).

“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.” (*R. 347 at 185*). *Jim Wilhelm testified that Mr. Pringle drove him around the hill to the north to see lots up on top, but not up through these two lots he eventually purchased (R. 347 28-30). He also testified that they couldn't drive up through those two lots because of a steep embankment along the front of the lots resulting from the cut for the regularly platted road across the front of his lots (Ibid).*

“15. The evidence was inconclusive as to when the road across lots 38, 39 and 40 was first graded. Plaintiff 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.” *Jim Wilhelm testified that when he first inspected the property with Mr. Pringle all he saw were two tire tracks in the meadow on Lot 38 and that no mention was made of the tracks by anyone, and that it didn't even enter his mind that there would be an issue about those tracks creating a road (R. 347 at 31-32). Mr. Pringle testified that he was not sure there was a graded road through those lots when purchased by Mr.*

Wilhelm (R. 347 at 178). He acknowledged that he would never take a customer on a “bad, bad road” (R. 347 at 185). Mr. Farney, director of Pine Meadows Estates, Inc., testified that not only was there a 20 foot unplatted but graded road through lots 38 and 39 when Mr. Wilhelm bought them, Mr. Wilhelm also built his cabin right next to this unplatted road, that he asked Mr. Wilhelm why he was doing it, and that Mr. Wilhelm told him it was only his “bachelor shack” (R. 347 at 138-139). It is no wonder that the Court specifically found Mr. Farney’s testimony that Pine Meadows “inadvertently neglected” to include the disputed road on the plat not to be credible. (R. 319).

“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.” *Mr. Wilhelm testified that he had completed the shell of his cabin by 1970 (R. 347 at 34).*

“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 into the mountain slope.” *(R. 347 at 34-35, 42).*

“18. Plaintiffs were issued warranty deeds by Pine Meadows on January 6, 1972 for lot 39 and on September 25, 1975 for lot 38.” *(Pl. Ex. 35, 36).*

“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.” (*Pl. Ex. 3*).

“20. The Court was furnished something akin to a master plan 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.” (*Pl. Ex. 4*). *It is clear from comparing the road line drawn on the Overall Map with the photos of the present road (Def. Ex. 21, 22, 23) that the disputed road does not follow the road line appearing on the Overall Map.*

“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.” (*Pl. Ex. 35, 36*).

“22. Pine Meadows originally conveyed Strawberry Lot 40 to others, but has since reacquired title and is the current owner thereof.” (*Pl. Ex. 2, 48*).

“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 time frame, Pine Meadows attempted to obtain an easement from plaintiffs on Lots 38 and 39, but plaintiffs declined.” (*Pl. Ex. 48*).

“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).” (*Pl. Ex. 35, 36*).

“25. None of the defendants have ever obtained or retained an easement of record across Strawberry Lots 38 and 39.” *No written easement has ever been claimed by defendants.*

“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.” *The overall map shows a longer way around to Ponderosa Villa Unit C (Pl. Ex. 4), rather than up through the Wilhelm lots. Several witnesses testified about this road (R. 347 at 27, 151, 180, 185).*

“27. Lots 38, 39 and 40 each had a frontage of 94.10 feet.” (*Pl. Ex. 1*).

“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. . . .” (*Pl. Ex. 4*).

“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 plan or sketch, it would reduce Lot 38 by some 43%.” (*Compare Pl. Ex. 1 and 4*).

“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.” *Judge McIff simply did not believe Mr. Farney’s testimony that a 20 foot wide graded road was already there when Mr. Wilhelm bought and Mr. Farney just forgot to put it on the plat (R. 347 at 113-114, 138-139).*

“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.” *Mr. Pringle testified that it was not until the late 1980's or 1990's that Kane County*

“came in with their blades” (R. 347 at 193). Mr. Wilhelm installed steel posts in cement footings and blocked the road with chains as early as 1993 (R. 347 at 59-61).

“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.” *Mr. Wilhelm and Mr. Pringle both confirmed limited traffic on the disputed road during these years (R. 347 at 40, 49, 196).*

“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.” *(R. 347 at 38-40).*

“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 simply was not an extensive amount of development on the mountain at that time.” *(R. 347 at 40, 49, 196).*

“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 the plaintiffs blocking efforts resulted in confrontations with would-be users where plaintiffs made clear their opposition to continued use.” *Jim Wilhelm testified extensively about blocking the road by trenching in 1973 and 1974 (R. 347 at 49-50), with aspen logs in*

1980 (R. 347 at 41-48), by parking a 1959 Olds across it in 1986 (R. 347 at 53-55), by starting to post signs about 1986 (R. 347 at 56-57), by cement blocks and beams in 1993 (R. 347 at 59-61), by boulders in 1994 (R. 347 at 61), by piles of dirt in 1995 and 1996 (R. 347 at 65-66), and lastly by aspen logs in 1996 (R. 347 at 67-68), which resulted in a citation for blocking a public road, which citation was later dismissed by the Kane County Justice Court for lack of proof of a public road (Pl. Ex. 46). Some of these blockings resulted in confrontations involving threats of force and heated argument (R. 347 at 41-68).

“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.” *Mr. Wilhelm testified that most years while he was visiting at his cabin little use was made of the disputed road (R. 347 at 40, 49), but that events such as what seemed like a Labor Day road rally in 1979 made him determined to block the road the next year, which he did (R. 347 at 40-41). He further testified that in later years complete strangers would honor even his posted signs, while neighbors wouldn’t (R. 347 at 57). Mr. Pringle also testified that by the 1990’s traffic was not anything like it was in the ‘70’s, having tripled and quadrupled (R. 347 at 196).*

“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.” (R. 347 at 59-61).

“39. Pine Meadows’ agent, Bill Pringle, was somewhat aware of plaintiffs’ efforts to block access and use over the years, and had a clear memory of the more permanent and extensive effort during the 1990's.” *Mr. Pringle testified that he knew that Mr. Wilhelm had attempted to block the road over a period of years, but that his best memory of it was when it was in the 1990's* (R. 347 at 196).

“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.” *Mr. Pringle testified that Kane County did not come in and widen the disputed road until the late 1980's or 1990's* (R. 347 at 193).

“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.” *It seems perfectly fair to characterize the evidence as showing that as use increased, so did plaintiffs’ efforts to block access* (R. 347 at 41-68).

“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.” (*Pl. Ex. 46*).

“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.” (*R. 347 at 59-67*).

“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.” *Plaintiffs blocked the disputed road in 1973-74, 1980, 1986, 1993, 1994, 1995, 1996* (*R. 347 at 49-68*).

“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 [their] request for attorney’s fees.”

“46. Defendants counterclaimed asking the court to find and decree the existence of a public thoroughfare across plaintiffs’ property.”

As a footnote on page 11 of his Conclusions of Law, Judge McIff also finds that the “old unimproved roads (before platting) did not reach the status of public thoroughfares.” This is supported by testimony of Mr. Pringle that when the subdivisions were platted, some of these “logging trails.” were platted while some were not, and Mr. Wilhelm’s testimony that there were only tire tracks up through his two lots when he

bought them, so insignificant that the issue of a later road claim did not even enter his mind (*R. 347 at 31-32*).

Further, another of defendants' witnesses expressly corroborated the lack of any Wilhelm road in 1960, a date less than ten years before the Mr. Wilhelm purchased his lots. Paul Fullmer, chief of the Cedar Mountain Fire Protection District, brought the 1960 aerial photos as an apparent expert in their use, including special stereoscopic glasses to inspect them (*R. 347 at 247-250*). Nevertheless, he acknowledged that this first acquaintance with the area was 1966 (*R. 347 at 257*), and he admitted on examination by plaintiffs' counsel and the court that while he could see clearing in the area of the disputed Wilhelm road, *he could not see a road* (*R. 347 at 256-258*). ; *Def. Ex. 9a, 9b*).

SUMMARY OF ARGUMENTS

In this case, the appellants simply failed to carry their burden of proving ten years continuous use of the disputed roadway as a public thoroughfare by clear and convincing evidence. In light of that, all of their attacks on the work of the trial court are without merit. Judge McIff's Findings of Fact are amply supported by the record, and even if they weren't, it would not help appellants escape the fact that their case remained unproven. There was no credible proof of an unplatted road pre-dating the Strawberry Valley Estates, Unit 2, plat. Appellants were allowed to present all of their evidence on this point, despite the court's prior ruling that such evidence was not legally relevant. The court then found all such evidence not to establish a public thoroughfare predating the

plat. The court also found that Pine Meadows Estates was estopped by its deeds from asserting a public thoroughfare predating the plat. This is a correct result and is premised not on concepts of breach of deed covenants but on the doctrine of estoppel by deed. It is not significant that Judge McIff did not make detailed findings as to exact times and effects of the various blockings by the Wilhelms because he also found that the use made was sporadic and limited, not continuous, and primarily by neighbors, not by members of the general public. The judgment below should be affirmed and the case remanded for determination and award to the Wilhelms of their attorney's fees and costs incurred in defending this appeal.

ARGUMENT

I. Defendants failed to prove by clear and convincing evidence that the disputed road had been abandoned to public use by the Wilhelms for any continuous ten year period.

One of the great tragedies of this case is the extent to which it represents a violation of the lives and property rights of the Wilhelms. One might expect abuse and harassment such as that directed against the Wilhelms to have occurred under a totalitarian regime, but not here.

It is no small thing that despite the thirty year history of these events no one ever initiated proceedings to obtain any kind of declaration that they had acquired any kind of road rights over the Wilhelms' property, despite the fact that anyone doing so would have the burden of proving dedication and abandonment by clear and convincing evidence.

All with any interest in the issue were content to blade roads without permission, to steal signs, and to tear up barricades, all under cover of a darkness, as it were, created by virtue of the fact that the Wilhelms were not rear round residents and were therefore unable to defend their property. Without intending to be maudlin about it, undersigned counsel submits that the abuse directed against the Wilhelms, first by a developer who blades a road through their property without their permission, and then perpetuated by their neighbors who have an extreme interest in fixing Milt Farney's error in not platting a second access to the lots on top, represents the worst kind of cowardice and deceit.

All the Wilhelms have ever wanted is to be protected in the very fundamental American right of being left alone in the enjoyment of what ought to be a place of peace and refuge. Instead that place has become a site of contention between those who ought to otherwise be friends, thanks to an inept and less than ethical developer whose testimony Judge McIff expressly found unbelievable. Instead the Wilhelms took the initiative and filed this very costly lawsuit, initiated and pressed despite the opposition of the developer and their neighbors, even though they have undisputed title to their property and absolutely nothing the law requires them to prove. Why should this be required of anyone? Wouldn't experience, ethics and common decency all indicate that if Mr. Farney or any of the Wilhelm neighbors truly thought that at some point in time a ten year period of uninterrupted public use had in fact occurred that an action to quiet title to the disputed road would have been filed by one of them? This inaction speaks

volumes about the truth of this case. Either they knew that there was no such ten year period, or they didn't care until now, thirty years later. And, if they didn't care, then their testimony is highly suspect because they did not have enough invested in the issue at the time to be truthful and accurate in their recollections and in the testimony Mr. Farney prompted them to give thirty years after the fact.

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*, 346 U. A. R. 9, 962 P. 2d 806 (Ut. Ct. App., 1998). The law in Utah is also well settled that the burden can only be met by proof which is clear and convincing. *Ibid.* "The law does not lightly allow the transfer of property from private to public use. The public's taking of property in such circumstances as this case presents requires proof of dedication by clear and convincing evidence . [Citations omitted.] This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect. [Citation omitted.] In addition, 'the presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it. [Citations omitted.]" *Draper City v. Estate of Bernardo*, 888 P. 2d 1097, 1099 (Ut., 1995).

Appellants' primary attack is an assault on Judge McIff's Findings of Fact as against the clear weight of the evidence. The Wilhelms respectfully submit that those Findings are amply supported by the record as demonstrated above. But more significantly, this assault on Judge McIff's Findings of Fact begs the primary question

here, that being whether appellants even came close to carrying their burden of proving abandonment and dedication by clear and convincing evidence. The Wilhelms and appellants can debate the evidence, and this court can review it, but when all is said and done Judge McIff was not persuaded as there was clear and convincing proof of anything Mr. Farney wanted proven at trial.

In their conclusion (Appellants' Brief, p. 50), appellants incredibly ask the court to simply overturn Judge McIff and declare a public road. How does this court tell Judge McIff that he should have been persuaded by what he heard? Every witness for appellants had a different recollection of the history of the road and its gradual improvement. By their accounts the "road" was bladed, not bladed, narrow, two tracked, or twenty feet wide when Mr. Wilhelm bought his property. None of these people recalled the blocking of the road, but so what? Even if telling the truth, and there is some doubt about that given the amount of animus which now exists, these people were summer visitors to Cedar Mountain, just like the Wilhelms, all with floating and varying schedules and agendas. It is not even surprising that they don't recall, or choose not to recall, the blockades. It is also noteworthy that the key witnesses the Wilhelms could have called to corroborate those early events are now deceased, as stated by counsel for appellants in objections to Mr. Wilhelm's descriptions of those events.

None of all the witnesses appellants chose to present had an actual line of sight from their respective properties to observe first hand what use was or was not made of the

disputed road. Some had cabins up on top, some below, but none in the immediate vicinity. On cross-examination it became clear that their testimony as to use of the road was by opinion and reputation, not by first hand observation. On the other hand, Mr. Wilhelm testified directly as to what he saw over those thirty years, i.e., very little use of the disputed road by anyone and relative peace and quiet, except for periodic disruptions to which he responded by blocking the road. His testimony was corroborated in a general way by Mr. Pringle who testified that he knew the Wilhelms were upset before the 1990's and that "they possibly had just cause for that because you start out with 560 acres and all of a sudden you have 800 and 900 customers, and then you start getting a lot of traffic that you never saw like in 1970. All of a sudden in the 1990's this traffic has tripled and quadrupled, and he did discuss that with me and I discussed it with him, too." (R. 347 at 196).

As Judge McIff concluded in his Findings of Fact and Conclusions of Law, "all of this adds up to a failure on the part of the defendants to meet their burden of proof." (R. 313). The judgment below should be affirmed.

II. By no stretch of the imagination are Judge McIff's Forty-Six Findings of Fact clearly erroneous.

By Rule 52(a), Utah Rules of Civil Procedure, "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Findings are not clearly erroneous if they simply disagree with a disappointed litigant's view of the evidence. The clearly erroneous standard does not eliminate the deference traditionally accorded to the fact finder to determine the credibility of witnesses. *State v. Wright*, 744 P. 2d 315 (Ut. Ct. App., 1987). Under this standard, the appellate court defers to the trial court's factual assessment unless there is clear error. *Copper State Leasing Co. v. Blacker Appliance & Furn. Co.*, 770 P. 2d 88 (Ut., 1988). If there is a reasonable basis in the evidence for the findings, they should be affirmed. *Gillmor v. Gillmor*, 745 P. 2d 461 (Ut. Ct. App., 1987).

In the present case, all of Judge McIff's Findings are amply supported by the record, as demonstrated above at *subsection iii* of the Wilhelms' Statement of Facts. And, as urged in the preceding section of this Argument, appellants' argument that Judge McIff's Findings of Fact are clearly erroneous is pointless in any case because appellants simply failed to carry their burden of proof.

III. Appellants failed to prove that a ten year public road existed which superceded the recording of the Strawberry Valley Estates, Unit II, plat.

During the course of proceedings below, appellants' strategy has shifted between trying to prove a public road pre-dating the plat, as in their early motions, and trying to prove ten years uninterrupted use after the Wilhelms bought the property. At trial they attempted to prove both, and failed to prove either.

With respect to the pre-existing road, none of the witnesses, no matter how long they stared into the stereoscopic view of the 1960 photos could find a road which

corresponded to the location of the disputed road. It simply was not there. Mr. Wilhelm bought his lots in 1968, less than ten years later. His purchase contract recites that he is buying Lots 38 and 39, Strawberry Valley Estates, Unit II, “as per Map on file in the Office of the Kane County Recorder, State of Utah, subject to: covenants, conditions, restrictions, reservations, rights, and rights of way and easements *of record*.” (Pl. Ex. 26). Because ten years had not elapsed since the 1960 photos which show no road, it simply is not possible for anyone to prove that a public road superceded either the plat or Mr. Wilhelm’s purchase of his lots. Pine Meadows Estates, in recording the plat, repudiated any “road” inconsistent with that plat, and in this case there was no road visible in the area of the disputed road as of a date within ten years prior to the recording of the plat.

As Judge McIff stated, “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 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,*” adding at footnote one, that “*the old unimproved roads (before platting) did not reach the status of public thoroughfares.*” [Emphasis supplied.] (R. 315).

IV. Appellants are estopped from asserting a ten year public road pre-dating their deeds.

Appellants assail Judge McIff’s conclusion that they are precluded from asserting a public road predating the plat with the claims that (1) it is too late to do so, the statute of

limitations for breach of deed covenants having run; and (2) they were prevented from presenting evidence to establish a pre-existing road.

With respect to the latter, the claim simply has no foundation. Judge McIff allowed into the record every scrap of evidence appellants wanted to put into the record, and, despite his earlier ruling on the parties' cross motions for summary judgment, he specifically found that the evidence was insufficient to establish any public thoroughfare pre-dating the plat. Appellants' version of the evidence was presented and rejected. There is nothing else to be done.

With respect to the former, appellants misconstrue the manner in which the plat-deeds set of facts is being used. No damages were awarded for breach of any deed covenant, even though there is a continuing statutory covenant in the deeds that Pine Meadows Estates "will forever warrant and defend the title thereof in the grantee, his heirs, and assigns against all lawful claims whatsoever." Section 57-1-12, Utah Code. The principle relied on by the Wilhelms and Judge McIff is that of *estoppel*. Pine Meadows Estates cannot on the one hand warrant title, and on the other say, sorry, we didn't really mean it, your title is subject to a pre-existing road. As Judge McIff noted in his conclusions, "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. . . . It is untenable as a matter of law for either defendants or the County to include some old improved 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.” (R. 316).

Support for this analysis is found in the basic common law concept of Estoppel by Deed, which “rests upon the inequity of allowing the party estopped from asserting a contrary position. The principle is that when a man has entered into a solemn engagement by deed, he shall not be permitted to deny any matter which he has asserted therein, for a deed is a solemn act to any part of which the law gives effect as a deliberate admission of the maker. . . . *Estoppel and Waiver, Section 4, 28 Am Jur 2d* 603 (1966). *cf. Hall v. Fitzgerald, 671 P. 2d* 224 (Ut., 1983). Judge McIff was entirely correct in his application of estoppel to the facts of this case.

V. There is no need of any kind for any more detailed Findings of Fact on the Wilhelms’ blocking of the disputed road. The findings Judge McIff made are more than sufficient to support his Legal Conclusions.

Appellants challenge Judge McIff’s Findings of Fact as inadequate on the question of whether Mr. Wilhelm in fact blocked the road. Appellants overlook the fact that Judge McIff expressly found the uses made of the disputed road to be “sporadic and limited,” rather than continuous (R. 318). This Finding is expressly supported by the testimony of plaintiff and Jim Wilhelm as well as by defense witness Bill Pringle (R. 347 at 196).

Appellants also overlook the fact that Judge McIff found such use as was made to have been made “by neighbors within the subdivision developed by Pine Meadows as opposed to members of the general public.” (R. 318). Use by neighboring land owners

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.” *Peterson v. Combe*, 20 Ut. 2d 376, 438 P. 2d 545 (Utah, 1968)

With these other findings by Judge McIff, no detailed findings as to the quality, extent, or duration of the blocking is even relevant or necessary since even without *any* blocking of the disputed road, continuous public use simply was not proven.

In his Findings of Fact, Judge McIff found that the blocking corresponded with the attempted use.

“ 37. Plaintiff’s 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.” (R. 318).

This is a perfectly fair characterization of the evidence. It places neither too great nor too little emphasis on the blocking. It recognizes that there are few witnesses to the early blockings precisely because there was no extensive public use. It is entirely adequate because appellants presented no sufficient, clear and convincing evidence of continuous public use of the disputed road.

VI. The judgment of the trial court should be affirmed and the case remanded to the trial court for determination and award of attorney's fees incurred on appeal.

In other cases, this Court has affirmed the judgment below at the same time that it has remanded to the trial court for a determination and award of attorney's fees and costs incurred on appeal. *cf. Porco v. Porco*, 79 U. A. R. 35, 752 P. 2d 365 (Ut. Ct. App., 1988) and cases cited therein.

Undersigned counsel is not in the habit of asking for sanctions on opposing parties, as most often points are legitimately debatable, and as he values his relationships with opposing counsel in general, these opposing counsel in particular. Nevertheless, given Judge McIff's detailed factual findings, given the standard of review, given Judge McIff's polite finding that Milt Farney simply did not tell the truth on the witness stand, and given the fact that each point appellants' attempt to assert is rendered moot by their own failure to prove public use by clear and convincing evidence, the Wilhelms submit that justice would be served in a small way by compelling these appellants to bear the cost of defending against this appeal. The Wilhelms submit that this appeal meets the standard of a frivolous appeal, i.e., "one having no reasonable legal or factual basis," *Porco v. Porco*, *supra*, at 369, or as in Rule 33, Utah Rules of Appellate Procedure, "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law."

CONCLUSION

The decree and judgment below should be summarily affirmed and the case remanded to the trial court for determination and award to the Wilhelms of their attorney's fees and costs incurred on appeal.

DATED this 25th day of April, 2001.

By: 

L. Edward Robbins
Attorney for Plaintiffs/Appellees
James R. and Linda Wilhelm

Certificate of Service

I hereby certify that on the 25th day of April, 2001, I served the foregoing Brief of Appellee upon the following by depositing two true and correct copies thereof in the U. S. Mails, first class postage fully prepaid, addressed as follows:

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