

2011

Jim Purkey and Jan Purkey v. Kent Max Roberts and Jilene Roberts : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Purkey v. Roberts*, No. 20110365 (Utah Court of Appeals, 2011).

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IN THE UTAH COURT OF APPEALS

JIM AND JAN PURKEY,

Plaintiffs,

v.

KENT MAX ROBERTS AND JILENE
ROBERTS,

Defendants/Cross-Claimant/Appellant,

v.

DR. ROGER RUSSELL,

Cross-Defendant/Appellee.

Case No.: 20110365-CA

Dist. Ct. Case No.: 070600015

AMENDED BRIEF OF APPELLEE

Appeal from a Final Judgment and an Order Denying Motion'
to Alter or Amend the Judgment of the
Sixth Judicial District Court in and for Sanpete County,
The Honorable Marvin D. Bagley Presiding

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JURISDICTIONAL STATEMENT

The Supreme Court has original jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j). Pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure, the Supreme Court transferred this appeal to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

ISSUES AND STANDARDS OF REVIEW

Issue One. The Appellant failed to marshal all of the evidence in support of the District Court's trial judgment and Ruling on Appellant's Motion to Alter or Amend Judgment.

Standard of Review. Marshalling all of the evidence in support of the District Court's judgment and ruling is a question of fact: whether the Appellant marshaled all of the evidence in support of the District Court's trial judgment and Ruling on Appellant's post trial motion and whether Appellant has demonstrated that when the Court's judgment and ruling is viewed in a light most favorable to upholding the judgment and ruling the Court erred in making its judgment and ruling is reviewed for correctness. See *College Irrigation v. Logan River & Blacksmith Fork Irrigation*, 135 P.2d 123 (Utah 1989).

Issue Two. Whether the trial court was correct when it concluded that the Roberts waived their claim for quiet title of the north boundary of their property west of the Roberts' home based upon (1) Mr. Roberts' testimony waiving his right, (2) the Roberts were represented by legal counsel, (3) Mrs. Roberts did not refute or clarify Mr. Roberts' waiver during her testimony subsequent to Mr. Roberts testimony.

Standard of Review. “Waiver presents a mixed question of law and fact; whether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, and the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations. *See Chen v. Stewart*, 100 P.3d 117 (Utah 2004).

Issue Three. Whether the trial court was correct when it concluded that Mrs. Roberts is not entitled to an order enjoining Dr. Russell from further trespass on her land, in light of Mr. Roberts waiver of any claim of trespass on property on the north property boundary west of the Roberts’ house and the Court’s finding that the fence is located on a public easement.

Standard of Review. Whether certain acts constitute trespass is a mixed question of law and fact, which is reviewed as factual determination. *See Walker Drug Co., Inc. v. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998).

Issue Four. Whether the trial court was correct when it declined to award their attorney fees to the Roberts for prosecuting their claims against Dr. Russell in this matter.

Standard of Review. A trial court’s interpretation of language authorizing attorney fees is reviewed for correctness. *R.T. Nielson Co. v. Cook*, 40 P.3d 1119 (Utah 2002).

RELEVANT STATUTORY PROVISIONS

There are no statutory provisions whose interpretation is central to this appeal.

STATEMENT OF THE CASE

The primary goal of Appellant’s appeal is not to quiet title or force Dr. Russell to move his fence. The primary goal is to obtain attorney’s fees against Dr. Russell as Appellant’s counsel admitted to the Court during oral argument on Appellant’s Motion to Alter or Amend

Judgment. This purpose is memorialized in Minute Entry and Order Following Hearing re: Defendants' Motion to Alter or Amend Judgment as to Cross-Defendant Dr. Roger Russell.

The initial complaint in this matter was filed by Plaintiffs Jim Purkey and Jan Purkey against the Defendant/Cross Claimant and Appellants Max Roberts and Jilene Roberts on January 23, 2007. (R. at 1.) The Roberts later filed a counterclaim against the Plaintiffs on September 14, 2007 (R. at 58) and subsequently filed a cross-claim against the Cross-Defendant and Appellee, Dr. Roger Russell on September 24, 2008. (R. at 101.) A two-day trial was held on the Purkey's complaint and Roberts' counterclaim and cross-claim March 22-23, 2010 before the honorable Judge Marvin D. Bagley. (R. at 659.)

During Max Roberts' testimony the court intervened asking the following of Mr. Roberts:

The Court: From your house going west, do you claim that Mr. Purkey is responsible for that road being off where it should be?

Mr. Roberts: No sir.

The Court: So your only concern in this lawsuit is from your house going east?

Mr. Roberts: Going east. I put that road in, sir.

(Tr.1 205:7-13.)

Mrs. Roberts was present during Mr. Roberts' testimony as were the Roberts attorneys. Mrs. Roberts testified on the following day and did not dispute, take issue to or deny Mr. Roberts testimony as shown above.

At the end of the trial, the District Court made findings of fact and conclusions of law on the record, which were finally prepared by Appellant's and memorialized in the District Court's

written Findings of Fact and Conclusions of Law and Judgment, both entered September 15, 2010, one hundred and seventy six (176) days after the trial.

Mrs. Roberts filed a Motion to Amend or Alter the Judgment on September 27, 2010, (R. at 690) which the District Court denied. (R. at 879.) In its Minute Entry and Order re: Defendants' Motion to Alter or Amend Judgment as to Cross Defendant Dr. Roger Russell, the District Court found that the goal of the Roberts' Motion "was to obtain attorney's fees against Dr. Russell for the Roberts." The Court further stated that "[t]o his credit, Counsel admitted this was so." The Minute Entry and Order Following Hearing Re Defendants' Motion to Alter or Amend Judgment as to Cross-Defendant Dr. Roger Russell was entered March 31, 2011. Mrs. Roberts filed a Notice of Appeal on April 14, 2011.

STATEMENT OF THE FACTS

I. BACKGROUND OF THE LITIGATION

Appellant Jilene Roberts is the owner of real property located in rural Sanpete County. (R. at 677.) She owned this real property as a joint tenant with and was a co-party in this litigation with her husband, Max Roberts, until he passed away on April 5, 2010. (R. at 677; 731-32.) Appellee Dr. Roger Russell is the owner of real property that abuts the north boundary of Appellant's real property. (R. at 677.) On September 4, 1992, Mr. Roberts, Theo Mulder, Jo Newton and Jerry Nielsen signed a document designating the road running along the north boundary of Appellant's real property as a public road. On May 6, 1998, the Appellant signed a quitclaim deed purporting to give a right-of-way over the north 32 feet of Appellant's property to Jim and Jan Purkey. Sometime after 1999, a barbed-wire fence was constructed between the real

properties. (R. at 677.) On October 4, 2002, the Defendants, including the Appellant, signed a dedicated a plat map, indicating that a 32 foot strip of land dedicated as a street for the perpetual use of land owners and public safety access. Sometime after 1999, a barbed-wire fence was constructed on a line near the border between the properties. (R. at 677.) It was never disputed and therefore, must be considered admitted, that at some point in time between 1999, when the fence was erected, and the filing of Appellants' cross-claim, Dr. Russell discovered that the fence separating the properties had been knocked down, that Mr. Roberts was parked and burned material on what was considered to be Dr. Russell's property, and that when confronted with this information, Mr. Roberts put the fence back up, in the same location as it had been erected by Dr. Russell.

This matter is a part of a larger action brought by the Purkeys against the Roberts, regarding a disputed easement on the Roberts' real property. (R. at 101.) As part of determining the location of the platted easement with respect to the road which was actually on Roberts' property, the Roberts commissioned a survey and at that time learned that the fence separating Russell's and Roberts' real property was actually on the Roberts' property, encroaching between 7 and 14.5 feet. (R. at 678-79.)

II. PROCEDURAL HISTORY

The Roberts filed a cause of action against Dr. Russell for quiet title and trespass on September 24, 2008, as a cross-claim within the pre-existing litigation between the Purkeys and the Roberts. (R. at 101.) The cross-claim was answered pro se by Dr. Russell on October 10, 2008. (R. at 107.) The Roberts filed for summary judgment on the claim on March 30, 2009.

(R. at 127.) The Roberts' motion for summary judgment was granted in an order dated April 29, 2009 for Dr. Russell's failure to respond. (R. at 255.) On July 23, 2009, Dr. Russell obtained counsel and filed a Motion to Set Aside the summary judgment order, (R. at 292) which was granted in an Order entered on October 4, 2009. (R. at 394.) As a condition of setting aside the judgment, the District Court ordered that "if Cross-Defendant does not prevail in his defense, Cross-Claimants shall be entitled to their reasonable attorney's fees from . . . May 27, 2009. (R. at 395.)

A. Trial

The matter went to trial on March 22 & 23, 2010. (R. at 659.) At the beginning of the trial the Court accepted the following facts as admitted: (Tr.1 26:17-22)

1. That the fence separating the Roberts' real property from the Russell property was constructed between January 1999 and January 2002;
2. That either Dr. Russell or his predecessors in interest caused the fence to be built, and did not rely upon any representation by either Roberts or by Ludlow Engineering in deciding where to build the fence; and
3. That neither Dr. Russell nor his predecessors in interest signed or in any way participated in the creation of the Purkey Subdivision Plat A.

The undisputed evidence at trial was that the fence separating the Russell real property from the Roberts' real property was erected 14.5 feet on the Roberts' real property on the west end of the property and 7.4 feet on the Roberts' real property on the east end of the property, (R.at 678-79) well within the 32 foot public easement running along the north boundary of the Roberts' real property.

At trial, the main issue before the Court was the location of the road that was used by the Purkeys to access their property, which was to the east of the Roberts' real property. Before the Purkeys bought their land to the east of the Roberts, the Roberts had put in a road. This pre-existing road was situated near the north boundary of the Roberts' real property and stretched approximately 600 feet west of the Roberts' home to the west edge of the Roberts' real property. Power poles existed on the north side of the road. (Tr 1 186:20 – 187:3.)

Sometime in 1998, the Purkeys asked the Roberts for a right of way over the north thirty-two (32) feet of the Roberts' real property. (R. at 677.) The parties later executed Purkey Subdivision Plat A, which platted the 32-foot right of way west of the Roberts' home to match the road as it existed, as both parties mistakenly believed the road to be within the 32-foot right of way. Based upon the parties' mutual mistake, the Purkeys matched the pre-existing road and constructed the road to their home outside the 32-foot right of way.

Counsel for the Appellants was clear in his questioning of his client, Mr. Roberts, about the placement of power poles and the road in question. Subsequently, the District Court, in order to further clarify Mr. Roberts' testimony regarding his property line and the road west of the Roberts' home, asked the following questions of Mr. Roberts:

The Court: From your house going west, do you claim that Mr. Purkey is responsible for that road being off where it should be?

Mr. Roberts: No sir.

The Court: So your only concern in this lawsuit is from your house going east?

Mr. Roberts: Going east. I put that road in, sir.

(Tr.1 205:7-13.)

Thereafter, Counsel for Mr. Roberts' did not clarify Mr. Roberts' testimony, nor did Mrs. Roberts dispute, disagree with, or clarify Mr. Roberts' previous testimony when she was on the stand.

As stated in Appellant's brief, the Court did clarify Mr. Roberts' waiver of his claim against Dr. Russell during Counsel's closing arguments. The Court clearly stated, "I said [to Mr. Roberts] do you want to change anything from your house looking west? He said '[N]o, I don't want to change anything from my house looking west. I'm only concerned from my house east.' The Court went on to state that it "interpreted he [Mr. Roberts] was waiving his claim . . . I think your client waives his claim." (Tr.2 23:6-24:19.)

Therefore, the District Court found that when Mr. Roberts had testified, he had waived the Roberts' claims against Dr. Russell to establish quiet title to the north boundary from the Roberts' home west. (R. at 679, 683; Tr.2 50:16-18)

The Court further denied Roberts' claims for trespass (Tr.2 50:13-15) and finally, the District Court denied Roberts' claim for attorney fees against Dr. Russell. (R. at 683; Tr.2 51:19-52;1.)

B. Motion to Alter or Amend Judgment

Appellant's counsel submitted the Findings of Fact and Conclusion of Law and the written Judgment approximately 170 days after the trial, giving Appellees adequate time to research and prepare a Motion to Alter or Amend Judgment. Appellant's motion was denied and

an Order was entered on March 31, 2011. Thereafter, Mrs. Roberts brought a Motion to Alter or Amend. (R. at 690.)

SUMMARY OF ARGUMENT

This Court should uphold the findings and rulings of the Sixth District Court in this matter because (I) Mr. Roberts clearly and unequivocally stated his waiver of any claims of quiet title for the north property west of his house and Mrs. Roberts, who was represented by counsel did not repudiate or dispute that waiver; (II) Mr. Roberts' waiver then made the concerns of the north boundary west of the Roberts' house moot; (III) the District Court's ruling on trespass was correct as Dr. Russell's fence was located on a general public easement on the Roberts' real property; and (IV) the District Court correctly found, therefore, that no parties prevailed in the trial of this matter and awarded no attorneys fee.

ARGUMENT

POINT I:

THE APPELLANT HAS FAILED TO MARSHAL ALL OF THE EVIDENCE IN SUPPORT OF THE DISTRICT COURT'S TRIAL JUDGMENT AND RULING ON APPELLANT'S MOTION TO ALTER OR AMEND JUDGMENT, NOR HAS APPELLANT DEMONSTRATED THAT WHEN THE COURT'S JUDGMENT AND RULING IS VIEWED IN A LIGHT MOST FAVORABLE TO THE JUDGMENT AND RULING, THE COURT ERRED IN MAKING ITS JUDGMENT AND RULLING

This Court and the Utah Supreme Court consistently hold that "it is incumbent upon appellants to marshal all of the evidence in support of the findings of the trial court and then to demonstrate that even when viewed in the light most favorable to the to the trial findings of fact, conclusions of law and judgment and the denial of Appellant's Motion to Alter or Amend

Judgment, the evidence is insufficient to support its findings.” College Irrigation v. Logan River & Blacksmith Fork Irrigation, 135 P.2d 123 (Utah 1989). Without such marshaling or analysis, this Court should decline the Appellant’s request to overturn the District Court’s rulings in this matter. K.J. Scharff v. BMG Corp., 700 P.2d 1068 (Utah 1989). Dr. Russell should not be compelled to canvass the record and cull from it all of the testimony, exhibits, or inferences which, taken together, persuaded the District Court to rule in his favor.

POINT II.

THE DISTRICT COURT WAS CORRECT IN RULING THAT THE ROBERTS HAD WAIVED THEIR CLAIM FOR QUIET TITLE TO THE NORTH BOUNDARY WEST OF THEIR HOUSE

A. Mr. Roberts clearly and unequivocally waived the Roberts’ claim for quiet title of the north property.

Defendant Max Roberts was Appellant’s key witness in the District Court trial, testifying for approximately four (4) hours.

Waiver is “the intentional relinquishment of a known right.” Barnes v. Wood, 750 P.2d 1226, 1230 (Utah App. 1988). To waive a right there must be an existing right, benefit, or advantage; knowledge of its existence; and an intention to relinquish it.” Id. The party’s action or conduct must unequivocally evince an intent to waive or must at least be inconsistent with any other intent. Id.

Moreover, “[w]aiver is an equitable doctrine based upon fairness and justice. The existence of waiver ordinarily is a question of fact and is foremost a question of intent”. Hecla Mining Co. v. Star-Morning Co., 839 P.2d 1192, 1196 (Idaho 1992). Appellant’s authority

supports Appellee's theory that Mr. Roberts intended to waive any and all claims regarding his property west of his home. The Court's question was clear and unambiguous, "So your only concern in this lawsuit is from your house going east?" To which Mr. Roberts stated on the record, "Going east. I put that road in, sir". (Tr.1 205: 7-13.)

There was an existing right in the present matter, the Defendants' and Appellant's right to seek an injunction to force Dr. Russell to move his fence to the legal line separating the properties belonging to the Appellant and Dr. Russell and to bring a claim to quiet title to the land between the existing fence and the legal boundary between the two properties.

Mr. and Mrs. Roberts had knowledge of their existing right.

The Court relied upon Mr. Roberts' testimony and direct responses to the Court's questioning in determining that Appellants waived their claims to quiet title against the Purkeys and Dr. Russell for all points west of the Roberts' home.

Mr. Roberts clearly stated to the District Court, when responding to the Court's direct question, that his only concern in this lawsuit was from his house "going east", thereby clearly waiving any claims against Dr. Russell for concerns about the property line to the west of the Roberts' home.

Mr. Roberts' counsel continued direct examination of Mr. Roberts following the Court direct examination and counsel failed to clarify or rescind Mr. Roberts' response to the Court's questioning.

Subsequently, Defendant Jilene Roberts took the stand on the following day, March 23, 2010, and testified from approximately 2:08 until 2:40. Mrs. Roberts testified for approximately thirty three (33) minutes.

During Mrs. Roberts' testimony and questioning by her counsel, Mrs. Roberts did not refute, clarify, or even attempt to explain or question Mr. Roberts' testimony waiving the Defendants' claims against Dr. Russell for quiet title of property near the northern boundary of the Roberts' property west of the Roberts' home.

Given Mr. Roberts' clear testimony and Mrs. Roberts failure to address this issue, the controversy concerning all matters and claims west of the Roberts' home became moot.

"The strong judicial policy against giving advisory opinions dictates that courts refrain from adjudicating moot questions." *Merhish v. H.A. Fulton & Associates*, 646 P.2d 731, 732 (Utah 1982). *See also State v. Stronquist*, 639 P.2d 171 (Utah 1981). Based upon Utah's judicial policy, the District Court in this matter had no position but to refrain from further adjudication of Mr. Roberts' claims against Dr. Russell regarding quiet title or trespass on real property west of the Roberts' home.

Dr. Russell acknowledges that express statements and affirmative conduct must be unequivocal and inconsistent with any other intent to support a waiver and concedes that waivers should not be easily inferred.

Mr. Roberts clearly stated that he was only concerned about his north property line to the east of his home and Mrs. Roberts added nothing to Mr. Roberts' testimony, nor did she dispute it, thereby inferring her agreement with Mr. Roberts' position and waiver.

During Appellant's counsel's closing argument, the Court interrupted and asked, "What is it you are asking against Mr. Russell?"

Appellant's counsel stated, "Against Dr. Russell we would like to quiet title to the north boundary according to the property description."

The Court then stated, "How come when I asked your client what he was asking in this lawsuit, I asked him specifically because I wanted to know this. I said, do you want to change anything from your house looking west. He said, 'No, I don't want to change anything from my house looking west. I'm only concerned from my house east.' . . . I interpreted he was waiving his claim for anything from his house. I don't think it is fair to Mr. Russell for him to say that and then come back and not give him a chance to oppose it. I think you client waives his claims." (Tr.2 23: 6-24:19)

The District Court not only heard Mr. Roberts' testimony, it asked the question to clarify Mr. Roberts' waiver. The District Court was, therefore, in the best position to determine Mr. Roberts' intent. Appellant's failure to request a continuance when confronted with the Court's position during closing arguments indicates Appellant's acquiescence to Mr. Roberts' waiver.

Initially, Mr. Roberts and the Appellant were seeking to quiet title against Dr. Russell and force him to move his fence along the north boundary of the Roberts' real property, including the property line to the west of the Roberts' home. In waiving their claims for quiet title, the Roberts have not relinquished ownership of any land. The legal boundaries have been established through the trial of this matter.

B. Mrs. Roberts failure to dispute or repudiate Mr. Roberts' waiver supports the parties' waiver of the claim for quiet title west of the Roberts' home.

Appellant's argument that the acts of one joint tenant cannot bind the property without assent from the other joint tenants is misplaced in this matter. It is the rule of this court that, while under joint tenancy both parties hold concurrent ownership in the same property, a joint tenant of real property by conveying his interest therein severs and terminates the joint tenancy by creation of a tenancy in common. See Shiba v. Shiba, 186 P.3d 329 (Utah 2008), see also Tracy-Collins Trust Co. v. Goeltz, 301 P.2d 1086 (Utah 1956).

Therefore, if it is determined that Mr. Roberts' waiver gives ownership of the land between the legal boundary of the real properties and the fence to Dr. Russell, Mr. Roberts has severed and terminated the joint tenancy and Mrs. Roberts now owns the property in tenancy in common with Dr. Russell.

C. Waiver of a claim after a proceeding has begun does not require a motion.

While the express language of Utah Rules of Civil Procedure 41(b) states a defendant must bring a motion to dismiss to enforce a court order, Utah courts have consistently ruled "that a court may dismiss a claim sua sponte, without a motion by the defendant". Panos v. Smith's Food & Drug Centers, Inc., 913 P.2d 363, 364 (Utah App. 1996).

Wherefore, the District Court was afforded the authority to dismiss or consider Mr. Roberts' claims waived without a motion from the parties.

D. The District Court correctly amended Cross-Defendant's pleadings.

Appellant's argument that Dr. Russell did not assert an affirmative defense of waiver is not well taken. Mr. Robert's waiver took place at the trial of this matter, when questioned by the District Court. Dr. Russell could not have anticipated Mr. Roberts' waiver and therefore could not properly plead the affirmative defense of waiver prior to Mr. Roberts' waiver of his claims concerning property west of his house prior to the trial of this matter.

Utah Rule of Civil Procedure 15(b) provides two situations in which a court can rule on issues not raised by the pleadings. The first situation – the mandatory 15(b) amendment to conform – requires the trial court to consider issues not raised in the pleadings if the parties tried the issues by express or implied consent. *See Fibro Trust, Inc. v. Brahman Financial, Inc.* 974 P.2d 288 (Utah 1999). *See also Keller v. Southwood North Medical Pavilion, Inc.*, 959 P.2d102 (Utah 1998). The Appellant's failure to object to Dr. Russell's testimony regarding his understanding of the location of the property boundary line and Roberts' past conduct which implied the correct location of the fence in question, supports the argument that this issue was tried by implied consent. *Fibro Trust* at 291.

The second situation – the permissive 15(b) amendment – was denied by the District Court in Dr. Russell's closing argument.

The District Court found, in paragraph 7 of its Findings of Fact and Conclusions of Law re Defendants' Motion to Alter or Amend Judgment as to Cross-Defendant Dr. Roger Russell, "that the prior pleadings of the parties were effectively amended by trial evidence as provided by URCP Rule 15".

POINT III.

THE DISTRICT COURT WAS CORRECT WHEN IT DENIED THE ROBERTS' CLAIM FOR TRESPASS

On September 4, 1992, Mr. Roberts, Theo Mulder, Jo Newton and Jerry Nielsen signed a document designating the road running along the north boundary of Appellant's real property as a public road. On May 6, 1998, the Appellant signed a quitclaim deed purporting to give a right-of-way over the north 32 feet of Appellant's property to Jim and Jan Purkey. On October 4, 2002, the Defendants, including the Appellant, signed a dedicated a plat map, indicating that a 32 foot strip of land dedicated as a street for the perpetual use of land owners and public safety access.

It is unclear exactly when Dr. Russell built his fence, but the District Court found it was built in approximately 2000.

As stated in Appellant's brief, a defendant is liable for trespass when "(2) the defendant interfered with the plaintiff's exclusive right to possession of the property by entering the plaintiff's land".

The District Court heard the testimony and inspected the evidence presented at the trial of this matter and ruled as a Conclusion of Law; "[t]he 1998 right-of-way is valid as a matter of law . . ." The right of way extended 32-feet from the north boundary of Appellant's real property. Dr. Robert's fence is located within that right of way, being 4.5 feet to 14.4 feet across the property boundary. Dr. Robert's fence and use of Appellant's real property does not and cannot

interfere with the Appellant's "exclusive right to possession of the property", as it is located on the public easement. (R. at 678.)

The District Court specifically found that the claim of trespass, against Dr. Russell, "involves that portion of the Roberts' property that is already subject to a general easement by the public, and Dr. Russell likely had the right to be on that property as well as anyone else."

POINT IV

THE DISTRICT COURT WAS CORRECT WHEN IT DENIED APPELLANT'S REQUEST FOR ATTORNEY'S FEES

It must be noted that Utah follows the traditional American rule, regarding awarding attorney's fees, which states that "attorney fees are not recoverable by a prevailing party, unless authorized by statute or contract." *Gallegos v. Lloyd*, 178 P.3d 922, 924 (Utah App. 2008). The *Gallegos* case is on point as it addresses unintentional trespass on real property. The *Gallegos* court went on to find that "[t]he present case does not fall under any of the previously-recognized exceptions to the general rule against awarding attorney fees in tort cases." *Gallegos* at 924. *See also Gardiner v. York*, 153 P.3d 791 (Utah App. 2006). There are no facts to distinguish this matter from the *Gallegos* case and, therefore, this matter does not fall under any previously-recognized exception to the general rule against awarding attorney fees in tort cases.

Moreover, Appellee has cited no statutory reference to guide this court in awarding attorney fees.

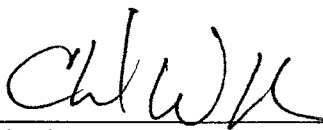
The District Court found that [n]o party prevailed in this litigation for the purposes of Utah R. Civ. P. 54(d) and found, therefore, that no party is entitled to their costs. See Paragraph 35 of Findings of Fact and Conclusions of Law from the trial of this matter.

“Trial courts apply a flexible and reasoned approach to the determination of who prevailed at trial.” *Gallegos* at 926. *See also A.K. Whipple Plumbing & Heating v. Guy*, 94 P.3d 270 (Utah 2004). The Court in this matter did just that and adjusted the location of the road in question in accordance to the plat map.

CONCLUSION

For the foregoing reasons, Appellee, Dr. Roger Russell, respectfully requests that this Court uphold the District Court’s decision.

RESPECTFULLY SUBMITTED this 28th day of November 2011.



Charles W. Hanna
Attorney for Cross-Defendant/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2011, a true and correct copy of the foregoing Brief of Appellee was served by the method indicated below, to the following:

- ☒ U.S. Mail, Postage Prepaid
- ☐ Facsimile Transmission
- ☐ Hand Delivery
- ☐ Electronically
- ☐ Overnight Mail

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