2018

Charlie W. Harrison and Trena Harrison, Plaintiffs/Appellants, v. Spah Family, Ltd; Stan E. Holland; and Paige Holland, Defendants/ Appellees : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLIE W. HARRISON and TRENA HARRISON, Plaintiffs/Appellants, vs. SPAH FAMILY, LTD; STAN E. HOLLAND; and PAIGE HOLLAND, Defendants/Appellees.	Case No. 20180537 Appeal From Seventh District Court, Grand County, State of Utah Civil No. 160700035 Judge Lyle R. Anderson

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INTRODUCTION

Plaintiffs/Appellants Charlie W. Harrison and Trena Harrison (the "Harrisons") appeal from the final Order and Judgment by the Seventh Judicial District Court for Grand County, State of Utah, quieting title, in Defendants/ Appellees Spah Family, Ltd., Stan Holland and Page Holland (collectively the "Hollands"), to a 40-foot-wide easement by prescription across land owned by the Harrisons. The Order and Judgment, entered June 11, 2018, incorporate the trial court's July 28, 2017 summary judgment ruling that, as a matter of law, the Hollands had satisfied all elements of an easement by prescription across the Harrisons' property—the only issue for trial to the jury being the location and scope of the easement.[1] A copy of the court's June 11, 2018 Order and Judgment (R. 1285-89) is included in the Appendix as Attachment 1; a copy of the court's July 28, 2017 Order on Motions for Summary Judgment (R. 521-24) is included in the Appendix as Attachment 2.

The facts before the trial court, however, demonstrated that the Hollands' claim to a prescriptive easement fails. The Hollands' use of the road across the Harrisons' property was not open, adverse and uninterrupted for the prescriptive period. Use was initially permissive, and never shown to have become adverse.

[1] The Hollands also asserted a claim for damage to two gates on their property. The jury returned a verdict of only $300 on this claim, and no appeal was taken therefrom.

Before the 20-year prescriptive period expired, the Harrisons challenged the Hollands' use of the road and summoned law enforcement to prevent them from using the road.

Even if the Hollands were able to demonstrate prescriptive use by clear and convincing evidence, they offered no competent evidence of its historic course and scope. Due to improper instruction though, the jury imposed a 40-foot easement on the Harrisons' property along a centerline established by a 2016 survey of the road existing at that time – a burden on the Harrison property which had never existed. In fact, the width of the historical use of the road was 8 feet.

Based on the foregoing, this Court should remand this case for entry of judgment in favor of the Harrisons, or for a retrial.

JURISDICTIONAL BASIS FOR APPEAL

This is an appeal from final orders and the judgment of the Seventh Judicial District Court for Grand County. The Utah Supreme Court retained jurisdiction pursuant to Utah Code Ann. § 78A-3-102(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether the trial court erred in ruling on summary judgment that the Hollands had met all the elements necessary to establish an easement by prescription and specifically, whether the Hollands made continuous, adverse and uninterrupted use of the Harrisons' property for a period of 20 years or more, even

though the Harrisons summoned law enforcement which interrupted the prescriptive period and caused a revocation of the Harrisons' acquiescence. (Preserved at R. 262-281, 564-576, 604-610, 1320-1368, 1389.) Review of orders granting summary judgment are reviewed for correctness, affording no deference to the trial court's ruling. *Federal Capital Corp. v. Libby*, 2016 UT 41, ¶ 7, 384 P.3d 221. All facts and resulting inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. *Robinson v. Jones Waldo Holbrook & McDonough, PC*, 2016 UT App 34, ¶ 11, 369 P.3d 119.

2. Whether the trial court erred in holding, as a matter of law on summary judgment, that the Hollands' use of the Harrisons' property was adverse, even though their predecessors-in-interest used the road with the express permission from the developer for a limited purpose, and even though no conversion to an adverse use was shown. (Preserved at R. 262-281, 564-576, 604-610, 1320-1368.) Review of orders granting summary judgment are reviewed for correctness, affording no deference to the trial court's ruling. *Libby*, 2016 UT 41, ¶ 7. All facts and resulting inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. *Robinson*, 2016 UT App 34, ¶ 11.

3. Whether the trial court improperly failed to instruct the jury that the course and scope of the prescriptive easement is measured and limited by the historic use thereof. (Preserved at R. 930, 1748-1750.) Jury instructions, being

statements of applicable law, are reviewed for correctness, affording the trial court no deference. *Green v. Louder*, 2001 UT 62, ¶ 14, 29 P.3d 638; *Child v. Gonda*, 972 P.2d 425, 429 (Utah 1998).

4. Whether the trial court improperly admitted evidence from the Hollands' retained expert, Lucas Blake, that the centerline of the easement by prescription could be estimated by using the centerline of the broadened and altered roadway as it existed in 2016. (Preserved at R. 690-700, 811-820.) A trial court's decision on the admissibility of expert testimony is reviewed for an abuse of discretion. *State v. Holm*, 2006 UT 31, ¶ 10, 137 P.3d 726.

5. Whether the trial court improperly excluded rebuttal evidence from the Harrisons' retained expert, Bradley Bunker, regarding the shortcomings of the survey prepared by Lucas Blake, notwithstanding Mr. Blake's failure to (1) consult historic data concerning use of the roadway crossing the Harrisons' property at any time before the autumn of 2016, and (2) locate a centerline of the roadway from historic data rather than from measuring to the centerline of the road existing in 2016, which had been widened by the Hollands at that time. (Preserved at R. 1821-1823, 1827-1834.[2]) A trial court's decision to exclude expert testimony is reviewed for an abuse of discretion. *Holm*, 2006 UT 31, ¶ 10.

[2] The Approved Statement of Proceedings as to Which Transcript is Unavailable, issued January 10, 2019, is included in the Appendix as Attachment 3. This Court granted the

STATEMENT OF THE CASE

Statement of Facts and Marshaling of Evidence [3]

A. Property Ownership

1. The Harrisons are owners in fee simple of a parcel of real property located at 639 Spotlight Hollow Road, Castle Valley, Utah, more particularly described as follows:

> SE1/4NE1/4SW1/4, LESS the West 66.0 feet of the SE1/4NE1/4SW1/4, Section 35, T25S, R24E, SLBM. (Also known as Parcel "H" on the plat recorded as an attachment to the Restrictive Covenants recorded 11/17/1994 in Book 470 at Page 244.)
>
> TOGETHER with a right-of-way for ingress and egress over an existing road across the N1/2SW1/4 OF Section 35, T25S R24E, SLBM, said road runs from the N line of the N1/2SW1/4 to the S line of the N1/2 SW1/4 and provides access to the S1/2SW1/4 of Section 35, T25S, R24E, SLM
>
> TOGETHER with a 20 foot easement on the North boundary of Parcel G and any other access rights which may (sic) established by the Plat recorded as an attachment to the Restrictive Covenants recorded 11/17/1994 in Book 470 at Page 244.

Amended Complaint, ¶ 10 (R. 10); Answer and Counterclaim, ¶ 2 (R. 19).

The Harrisons' property was designated Parcel H on the plat map of a subdivision known as Willow Basin Subdivision, created by Janice Hawley incident to

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Harrisons' motion to supplement the record, filed pursuant to Rule 11(h) of the Utah Rules of Appellate Procedure, on February 6, 2019. *See* Order.

[3] The majority of the Harrisons' assignments of error herein go to the court's rulings on dispositive motions and improper instruction of the jury, which, as noted above, are reviewable for correctness. Nevertheless, the Harrisons include herewith a marshaling of all evidence supporting the judgment below, to the extent presented at trial.

Restrictive Covenants recorded November 17, 1994 as Entry No. 432742, Book 470, Page 244, Grand County Recorder's Office. (R. 48, 186.)

2. On May 23, 2008, the Harrisons took title to Parcel H by Warranty Deed from Janice Hawley, which was recorded in the Grand County Recorder's Officer as Entry No. 486320, Book 728, Page 588. Amended Complaint, ¶ 14 (R. 12); Answer and Counterclaim, ¶ 1 (R. 19).

3. Defendant/Appellee SPAH Family, Ltd. Partnership ("SPAH") holds title to a parcel of land immediately to the north of Parcel H, more particularly described as follows:

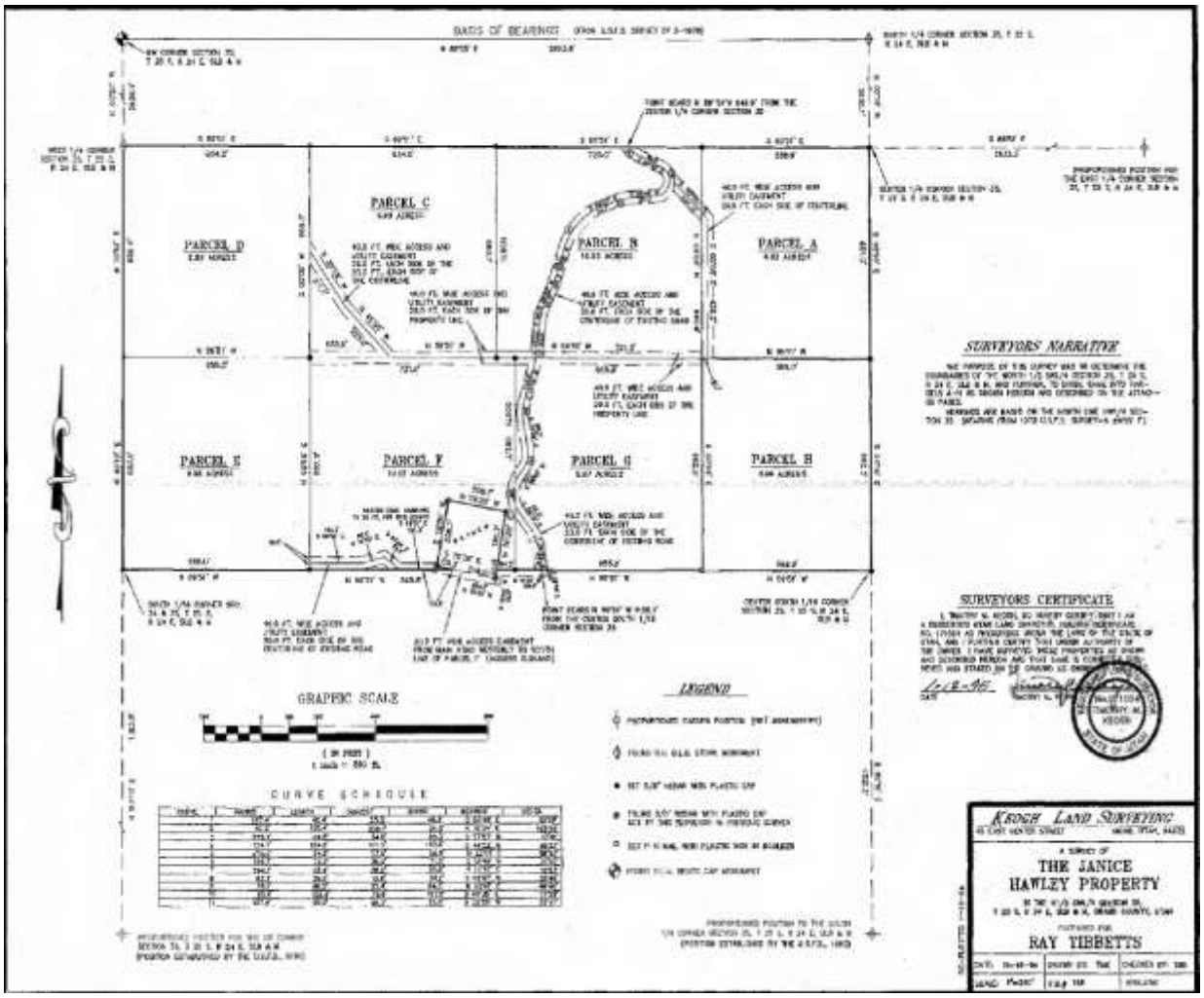
> Beginning at the Center 1/4 Corner of Section 35, Township 25 South, Range 24 East, SLB&M, and proceeding thence with the Center 1/4 line South 0° 10' East 661.0 feet to a Corner, thence North 89° 51' West 589.0 feet to a Corner, thence North 0° 05' West 660.9 feet to a Corner, thence with the Center 1/4 line South 89° 51' East 588.0 feet to the point of beginning, Grand County, Utah.
>
> TOGETHER with a non-exclusive easement for ingress and egress 20.0 feet on each side of the following described centerline: BEGINNING at a point which bears South 86° 34' East 1938.0 feet from the West 1/4 Corner Section 35, T25S, R24E, SLB&M, and proceeding thence with said centerline South 45° 00' East 161.2 feet, thence South 0° 05' East 436.2 feet to the terminus of this centerline description.
>
> SUBJECT to a non-exclusive easement over and across the West 40.0 feet and also a 10 foot wide access easement to a spring that extends Northerly to the Northwesterly area from the roadway.
>
> Subject to all restrictions, easements, and rights-of-way, however evidenced.

(R. 406-07.) On October 17, 1997, SPAH took title to the above-described property (designated on the official plat of Willow Basin Subdivision as "Parcel A"), by Special Warranty Deed from Stan Holland and Page Holland, which was recorded in the Grand County Recorder's Office as Entry No. 442633, Book 509, Pages 427-428. Deposition of Stan Holland ("Holland Depo") at 13:15-25 (R. 377) & Special Warranty Deed, attached to the Holland Depo as Exhibit 5 (R. 406-07).

4. Stan Holland and Page Holland had previously taken title to Parcel A by Warranty Deed from Manuel Torres and Ginger Torres dated August 9, 1996, recorded in the Grand County Recorder's Office as Entry No. 437364, Book 490, Page 83. Holland Depo at 10:4-11 (R. 376) & Warranty Deed, attached to the Holland Depo as Exhibit 4 (R. 405).

5. Manuel Torres and Ginger Torres, the Hollands' grantors, obtained title to Parcel H from Janice Hawley by Warranty Deed dated February 22, 1996, recorded in the Grand County Recorder's Office as Entry No. 436016, Book 484, Page 103. Counterclaim, ¶ 8 (R. 21) & Warranty Deed (R. 50).

6. The relative positions of Parcels A and H in the Willow Basin Subdivision, together with illustrated easements, are shown on the plat map below:



B. Permissive Use

6. Janice Hawley was the original owner of all property within Willow Basin subdivision. Declaration of Janice Kirk Gustafson (formerly Janice Hawley) ("Hawley Decl."), ¶ 2 (R. 309).

7. In November of 1994 Keogh Land Surveying prepared a subdivision plat of Willow Basin subdivision at Janice Hawley's request. Hawley Decl., ¶ 3 (R. 310).

8. As illustrated by the above survey, the subdivision consisted of eight lots, each accessible by roads drawn within the subdivision, all as reflected on the recorded subdivision plat. *Id.*, ¶ 4 (R. 310).

9. It was always Ms. Hawley's intention that the lots within the subdivision be accessed by the road shown on the plat map. Hawley Decl., ¶ 5 (R. 310).

10. After all necessary government agencies had approved the Willow Basin subdivision, Janice Hawley retained Randy Day and Raymond Tibbets of Canyon Country Realty to list and market the lots. *Id.*, ¶ 6 (R. 310).

11. Janice Hawley then entered into an agreement with Manuel and Ginger Torres, under which she conveyed all of her right, title and interest in and to Parcel A of the subdivision to the Torreses in exchange for Manuel Torres' construction of a cabin for her on Parcel G, a property which she had retained. *Id.*, ¶ 7 (R. 310).

12. Ms. Hawley then became aware that, at some time before or after the summer of 1996, Canyon Country Realty or Keogh Land Surveying arranged for the grading of a narrow road connecting Parcel A with adjacent public roads by

means of a road looping over a portion of Parcel H, title to which she had retained. *Id.*, ¶ 8 (R. 310).

13. It was Ms. Hawley's understanding that the purpose of the road crossing Parcel H was not a permanent access to Parcel A, but a means of permitting the Torreses to take prospective purchasers to Parcel A for marketing the other parcels. *Id.*, ¶ 9 (R. 310).

14. While Ms. Hawley neither knew of nor authorized the creation of the road in advance, its use thereafter was for the purposes stated above, and was pursuant to permission from her. *Id.*, ¶ 10 (R. 311).

15. Randy Day of Canyon Country Realty recalled that the road was used by him and his company, with Janice Hawley's express permission. Deposition of Randy Day ("Day Depo") at 19:3-5; 32:19-33:25; 20:6 (R. 330, 333) & Exhibit 1 (R. 402).

C. Interruption of Consent to Use

16. The Hollands were not aware that there was property available for sale within the Willow Basin subdivision until shortly before August 9, 1996, the date on which they acquired title to Parcel A. Holland Depo at 10:12-23 (R. 376). The Hollands' alleged prescriptive use of any portion of the Harrisons' property, therefore, did not commence until August 9, 1996 or later. *Id.*

17. Charlie Harrison notified Stan Holland, well before August 2016 that he forbade the Hollands' use of the road across Parcel H as a means to access Parcel A. Charlie Harrison Declaration ("Harrison Decl."), ¶ 11 (R. 304).

18. Moreover, Page Holland contacted the Sheriff's Office on September 20, 2016 to report that Charlie Harrison "parked a Dozer in the driveway of the access road blocking their property." Sheriff's Report, p. 2 (R. 584).

19. The Sheriff's Report included a Voluntary Statement form, filled out by hand by Page Holland and signed under oath. *See* Sheriff's Report, pp. 4-10 (R. 586-92). The Voluntary Statement form contains the following representation by Defendant Page Holland, concerning, among other things, events in June of 2016:

> Father's Day weekend (June 17, 18 or 19) Charlie Harrison and Stan Holland (my husband) argued about rights to an access road in Willow Basin. *Deputy Black called out – talked to both parties*. We received a written letter dated August 18 from Charlie Harrison's attorney (Jessica Wilde, Jones, Waldo & Holbrook) stating we had no right to use the small portion of the road accessing our cabin.

Sheriff's Report, Voluntary Statement Form (R. 586); emphasis added.

20. At trial, the Hollands offered the following evidence concerning the dispute over their use of the road across the Harrison Property:

a. The dispute over the Hollands' use of the road across the Harrison property commenced in "the summer of 2016." Trial Record ("TR") at 96:15-20 (R. 1521).

b. It arose on Father's Day 2016, when the Hollands were planning a family party on the Holland property. TR at 97:23-98:6 (R. 1522-23).

21. At trial the court prohibited the Harrisons' counsel from inquiring into the altercation of June 2016 between the parties over the Hollands' use of the road across the Harrisons' property. TR at 144:22-145:13 (R. 1569-70).

D. Course and Scope of Historic Use

22. At the time the Hollands acquired their interest in Parcel A in late 1996, the road traversing a portion of Parcel H (apparently placed for access to power utility poles) was one blade width, or eight feet, in width and, in places, was impassable without an off-road vehicle. Harrison Decl., ¶ 10 (R. 304); Day Depo at 18:25-19:2 (R. 290).

23. At trial, Mr. Day confirmed that at the time the Hollands acquired Parcel A, the road traversing Parcel H was one blade width, or eight feet, in width. TR at 229:23-230:30 (R. 1654-55).

24. At no point before or during trial did the Hollands adduce any testimony or other evidence whatsoever controverting the 8-foot width of the road in August of 1996. The Hollands offered only the following:

a. Page Holland testified that the road across the Harrison property, as it existed in 1996 when the Hollands acquired their property,

was a narrow, single-lane road, like others in the subdivision – though wide enough for her to drive a Jeep Cherokee pulling a tent trailer with her husband following in the pickup truck pulling a horse trailer. TR at 108:11-109:12 (R. 1533-34). The Hollands did not measure its width at the time. TR at 109:2-3 (R. 1534).

b. Stan Holland confirmed that, at the time the Hollands first acquired their property, he drove a truck and horse trailer over the road crossing the Harrison property. TR at 120:20-121:11 (R. 1545-46).

25. After acquiring their property, the Hollands built a cabin thereon, and ran construction and cement trucks over the road crossing the Harrison property. TR at 133:23-134:19 (R. 1558-59).

26. According to Stan Holland's trial testimony, the road across the Harrison property was leveled and widened by Charlie Harrison after the Harrisons' acquisition of the Harrison property in 2008. TR at 111:15-22 (R. 1536).

27. At trial, the Hollands' retained expert surveyor, Lucas Blake, testified that:

a. He was familiar with the Willow Basin Subdivision area because he had been hired by Page Holland to prepare a survey. TR at 150:14-25 (R. 1575).

b. At Page Holland's direction, he prepared a survey of the roadway across the Harrison property – as it existed in 2016 – which was introduced as Exhibit 3. TR at 150:23-151:8 (R. 1575-76).

c. The survey was prepared by "estimat[ing] the edge of the dirt road" which they "shot . . . coming up to the property, actually all the way up to the top . . . ." TR at 152:14-22 (R. 1577).

d. From this, Mr. Blake prepared a legal description consisting of the metes and bounds of the existing road at the time the survey was created. TR at 152:23-153:2 (R. 1577-78).

e. Mr. Blake could not testify as to a uniform width of the road, it being wider and narrower in various locations as illustrated on Exhibit 31. TR at 153:25-154:11 (R. 1578-79).

f. From his 2016 metes and bounds description, Mr. Blake worked backward to create a centerline. TR at 154:12-14 (R. 1579).

g. Page Holland first contacted Mr. Blake to perform the survey in October of 2016. TR at 156:13-21 (R. 1581).

28. In cross-examination, Mr. Blake acknowledged the following:

a. Prior to visiting the property in October of 2016 in response to Defendant Page Holland's request, Mr. Blake had never been to the property

(TR at 157:10-12 (R. 1582)); neither had he visited any other Willow Basin properties (TR at 157:13-15 (R. 1582));

b. Before preparing the survey admitted as Exhibit 31, Mr. Blake had done no other survey work on the properties at issue herein (TR at 158:22-25 (R. 1583)); and

c. In preparing his opinion, Mr. Blake had looked at no other documents or data indicating what the road might have looked like in years past, including historic photographs, prior surveys or any information at all as to where the road went or how large it was in 1996 (TR at 159:5-16 (R. 1584)).

Procedural History

The Harrisons filed this action before the Seventh Judicial District Court for Grand County, State of Utah, on September 15, 2016. In their Complaint the Harrisons sought a declaration that they were the owners of an express easement of access over property owned by the Hollands and servicing the Harrisons' property (owned to the south of the Holland property); they also sought a declaration that they owned their own property free and clear of any claim of right, title or interest

(including prescriptive easement rights) by the Hollands. (R. 1-5.) Finally, they sought damages and injunctive relief for trespass across their property. (R. 4.)[4]

The Hollands counterclaimed on September 25, 2016. They sought a declaration that they held prescriptive easement rights across an existing road on the Harrisons' property, for purposes of accessing their property to the north thereof; the Hollands also sought a declaration that the Harrisons had no rights (or limited rights) across the express easement passing over the Hollands' property. Finally, the Hollands claimed damages to two of their gates that blocked access to and from both the Hollands' and Harrisons' properties. (R. 19-32.)

On April 19, 2017, following completion of fact discovery, the Harrisons moved for partial summary judgment, seeking a declaration that, as a matter of law, they held express easement rights across the Hollands' property. (R. 173-222.) Shortly thereafter, on April 28, 2017, the Hollands moved for summary judgment on all claims asserted in their Counterclaim. (R. 223-49.)

A hearing was held on July 11, 2017. (R. 509-11.) By order dated July 28, 2017, the trial court ruled, as a matter of law, that:

a. The Harrisons held good and marketable title in and to an express, nonexclusive easement for access, 40 feet in width, along the western border of the Hollands' property, as illustrated on the plat map

[4] The Harrisons amended their Complaint on September 23, 2016, to make certain factual corrections in their claims. (R. 10-16).

recorded with the restrictive covenants applicable to the Willow Basin Subdivision on November 17, 1994, and were entitled to make all reasonable use of that easement for access to and from their own property; and

b. The Hollands had met all of the necessary elements of a claim of easement by prescription along all or some portion of the roadway crossing the Harrisons' property but that the course, scope or extent of that easement were issues for trial.

(R. 521-24.) The court denied the remainder of the Hollands' motion for summary judgment. (R. 523.) Incident to its ruling, the court held as a matter of law that – notwithstanding the declaration of Janice Hawley (the developer) that (1) the road across Harrisons' property was not included in the subdivision plat as an access road; (2) the road had been cut for the sole purpose of accessing the Holland property for marketing purposes; and (3) was being used with her express permission – the Hollands' use of that road was not permissive. (R. 521-23; 1372-1373.)

On October 9, 2017, the Harrisons moved the court to reconsider its summary judgment order on the Hollands' claim of easement by prescription across the Harrisons' property, noting that newly-uncovered evidence established that Charlie Harrison had confronted Stan Holland on the use of the road crossing the Harrisons' property before the expiration of the 20-year prescriptive period

being claimed by Hollands; and further, the Harrisons had summoned law enforcement to prevent Hollands' use of the road, but that law enforcement had declined to intervene. (R. 564-92.) At a scheduling conference held on November 14, 2017, the court refused even to permit argument on the Harrisons' motion to reconsider, summarily denying the motion without explanation. (R. 1389.)

On March 2, 2018, the Harrisons filed a motion in limine to exclude the expert testimony of Lucas Blake. Mr. Blake, a licensed surveyor, proposed to offer testimony as to the course and extent of the road crossing the Harrisons' property when he first examined it in 2016 – rather than its course and scope during the 20-year prescriptive period preceding the filing of this action.[5] (R. 690-700.) By order dated April 5, 2018, the court denied the Harrisons' motion and in its ruling, stated the following:

> Plaintiffs' Motion in Limine is denied. *Plaintiffs have wasted the time of both the court and opposing counsel with this motion*. *It is plain that the purpose of the survey is to provide the court with the legal description of a pathway on the ground in the event that the evidence establishes that there is a legal right of way along that pathway.* It has never been necessary – and indeed must not become necessary – to hire only a surveyor familiar with the historical use of every centimeter of a claimed easement. Plaintiffs make an elaborate effort to set up a straw man which they very convincingly – and not surprisingly – knock down, but all of their arguments completely miss the point. *If defendants establish the existence of a right of way, it*

[5] Any prescriptive easement crossing the Harrisons' property was limited to its historic use during the prescriptive period. *see* Argument, Point III.

> *will then be very useful to the court to have a metes and bounds description of that right of way so that a judgment can be entered which reduces the likelihood of future litigation.*

(R. 839 (emphasis added).)

A week before trial, on May 7, 2018, the Harrisons submitted their proposed jury instructions to the court. (R. 896-988.) The Harrisons' proposed Jury Instruction No. 31 addressed the historic use of a prescriptive easement:

> **PRESCRIPTIVE EASEMENT LIMITED TO THAT REASONABLY NECESSARY FOR HISTORIC USE**
>
> A prescriptive easement, if established, is limited by the nature and extent of its use during the prescriptive period. Stated differently, the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period (which, as I previously stated, is not less than 20 years). SPAH Family Limited and Hollands must therefore prove, by clear and convincing evidence, the location, width, course, and use which have been made of their prescriptive easement over Harrisons' property for the prescriptive period.

(R. 930.) The Harrisons also proposed Jury Instruction No. 32, dealing with easement by prescription not being established by permissive use:

> **EASEMENT BY PRESCRIPTION NOT ESTABLISHED BY PERMISSIVE USE**
>
> As I previously instructed, a claim of prescriptive easement depends on "adverse use" of the claimed easement for the entire prescriptive period. If, at any time during the prescriptive period, the claimant's use of the property is with permission of the owner, the use is not "adverse," and no prescriptive right arises.
>
> However, if the other elements of prescriptive easement had been proven by clear and convincing evidence, the "adverse" nature of the use is presumed. The burden then shifts to the property owner to prove that the use was not "adverse," but permissive.

(R. 931.)

The case was tried to the jury on May 14 and 15, 2018. (R. 1049-61, 1426-1820.) During trial, the court permitted the Hollands' expert, Lucas Blake, to testify concerning its survey of the supposed easement across Harrisons' property. Mr. Blake presented a survey drawing prepared in anticipation of trial, which showed the location and contours of the road across the Harrison property as he examined it, as well as the supposed location and legal description of its centerline. On cross-examination, however, Mr. Blake acknowledged the following:

a. That Defendant/Counterclaimant Page Holland first contacted him in October of 2016 to perform survey work on the Harrison property (TR at 156:13-21 (R. 1581));

b. That before that time, he had never seen the property, or entered into the Willow Basin Subdivision for to view other properties (TR at 157:6-15 (R. 1582));

c. That the survey work presented on direct examination (Exhibit 31) was the result of that 2016 visit (TR at 158:13-16 (R. 1583));

d. That, in preparation for his testimony, he had never looked at other documents or any other data to indicate what the road might have looked like in prior years (TR at 158:22-159:8 (R. 1584));

e. That he had never examined any historic photographs or aerials (TR at 159:9-13 (R. 1584)); and

f. He had no information concerning the location, configuration or scope of the road across the Harrison property in 1996 (TR at 159:14-16 (R. 1584)).

On the second day of trial, after Lucas Blake's testimony, the court excluded testimony from Brad Bunker, the Harrisons' retained rebuttal expert. Mr. Bunker intended to refute Mr. Blake's survey testimony on the grounds that it did not measure the historic use of the easement during the prescriptive period. Approved Statement of Proceedings as to Which Transcript is Unavailable, dated January 10, 2019 (Appendix Attachment 3).[6] The lower court rejected the admissibility of this evidence, observing that "if he really thinks he can do that, he's intruding into my domain . . . . And he's – he's a friend of mine, I like him, I've had him do surveys, but I would never, never think that that was his responsibility was to decide how you – how – how a descriptive [sic] easement is determined." TR at 270:12-19 (R. 1738).

At the conclusion of evidence, the court instructed the jury on law applicable to prescriptive easements. Incident thereto, the court declined Harrisons' proposed

[6] *See supra* n. 2.

Jury Instruction No. 31, and instructed the jury as follows concerning the historic use of a prescriptive easement:

> You should determine what is reasonably necessary, from the facts and circumstances of this case, for SPAH and the Hollands to access their property, taking into account the historic use and shape of the roadway during its 20 years of use. You may express your decision in terms of the survey, or by determining the width of the easement.

Jury Instruction No. 27 (R. 1085.) The court refused outright to instruct the jury on the impact of permissive use on the claim of prescriptive easement, declining the Harrisons' proposed Jury Instruction No. 32. (*Id*.)

Following deliberation, the jury returned the special verdict form finding that the Hollands had established a prescriptive easement *a full 40 feet in width* along the course of the road described by the Hollands' expert surveyor, Lucas Blake, the jury stating that "this will be consistent with other easements in subdivision." (R. 1094.)

The court entered final judgment on the jury's verdict June 11, 2018. (R. 1285-90) (Appendix Exhibit 2).

On May 18, 2018, the Hollands filed a motion for costs and attorney's fees under Utah Code Ann. § 78B-5-825.[7] By Order dated June 13, 2018, the trial court denied the Hollands' motion and expressed his view of the Harrisons:

[7] The Hollands' motion for attorney's fees also invoked Rule 73, Utah R. Civ. P.; that rule, however, merely identifies procedural requirements for seeking an award of attorney's fees, and establishes no grounds therefor.

> With respect to the vast majority of what was litigated in this case, there is no question that plaintiffs were simply asserting, as was their right, that defendants either had no easement at all, or that the easement was more narrow than defendants desired. It was obvious that plaintiffs were being hardnosed, and certainly not very neighborly. It even seemed to the court that plaintiffs were pursuing a course that was unlikely to ultimately earn them anything worthwhile on the legal front, while simultaneously damaging their relationships and reputations with other cabin owners in the Willow Basin area. That is, however, their legal right.
>
> . . .
>
> Plaintiffs may be difficult people, secure, stubborn, and almost unreasoning in their opinions and legal stances, but the court cannot go so far as to find that they acted in bad faith, i.e., knowing their claims would fail or simply to harm defendants. Their ignorance and lack of regard for the views of others act here as shields to a finding of bad faith.

(R. 1294.)[8]

[8] Although the trial court commented that it was the Harrisons' legal right to pursue their claims, it appears from the court's statement that the court carries clear bias against the Harrisons, regardless of their legal rights and ability to seek relief in a court of law. First, the prescriptive easement claim was the *Hollands'* counterclaim and the Harrisons were entitled to defend such a claim. Second, the basis to defend such a claim was well-taken, in good faith, and for the reasons explained herein, the Hollands did not meet by clear and convincing evidence that they are entitled to the easement awarded (including the width based on the historic use). Finally, this legal action is not the first time that the Harrisons, in their view, have not received a fair shake before the trial court. The Harrisons filed an action against individuals, claiming, in short, that they had conspired to steal a business that Charlie Harrison had purchased. *See Harrison v. Kratz, et al.*, Case No. 140700031 (filed August 19, 2014 and dismissed July 13, 2016 after the parties reached a resolution). After the trial court ruled against the Harrisons on discovery motions, which inevitably would made it very difficult to move prove their claims (*see, e.g.,* Case No. 140700031, February 23, 2015 Minutes for Plaintiff Discovery Issues; April 7, 2015 Minutes for Second Statement of Discovery Issues; May 14, 2015 Order Regarding Plaintiffs' Second Statement of Discovery Issues), and they ended up settling the case. The Court can take judicial notice of the prior lawsuit as a matter of public

SUMMARY OF ARGUMENT

In ruling that, as a matter of law, Hollands held prescriptive easement rights across Harrisons' property, the court ignored the fact that Hollands failed to establish that their use had been continuous and uninterrupted for a full 20 years. Before their 20-year prescriptive period lapsed, the Hollands were confronted with Charlie Harrison and (later) a county sheriff, summoned by the Harrisons, the Hollands were notified that their right to cross Harrisons' property was not acknowledged or acquiesced in. The Harrisons' actions in this regard should be deemed both a revocation of acquiescence in the use of their property as required by governing law, and as the initiation of "legal action" sufficient to interrupt the Hollands' period of prescriptive use.

The Harrisons presented unrefuted evidence, in response to the Hollands' summary judgment motion, that use of the road across their property was (1) outside the intended access roads established by the developer on her recorded plat, (2) created for a specific and limited purpose of access to the Holland parcel for marketing purposes, and (3) used with her express permission. While acknowledging that the foregoing established "permissive use" prior to the

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record. *See* Utah R. Evid. 201(b); *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172 (a court may take judicial notice of public records); *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah Ct. App. 1988) (it is within the appellate court's discretion to take judicial notice of the prior lawsuit). The Harrisons respectfully submit to this Court that the trial court did not handle this case and the *Harrison v. Kratz, et al.*, case fairly and objectively.

Hollands' acquisition of the Holland parcel, the trial court ruled as a matter of law that the change in title of the Holland property converted the "permissive" use to an "adverse" use. This is contrary to governing law, which has long stated that once permissive use is shown, the easement claimant must present clear and convincing evidence of its conversion to an adverse use.

If and when a prescriptive right is established, the scope of that right is governed and limited by the easement's historic use. A trier of fact may not burden the servient estate beyond the scope and extent of the use made of the easement during the prescriptive period. In instructing the jury in this case, however, the trial court ignored this standard, instructing the jury that they "should determine what is reasonably necessary, from the facts and circumstances of this case, for [Hollands] to access their property . . ." The jury's express finding, upon special interrogatories, that the easement across the Harrison's property should be 40 feet in width – not because such width was historically used during the prescriptive period, but because the express, platted easements in the subdivision were of that width – evinces the incorrectness of the court's instruction in this regard.

The trial court improperly permitted testimony from the Hollands' expert land surveyor, Lucas Blake. Mr. Blake's opinion testimony, by his own admission, was limited to measurement of the road across Harrisons' property as it existed in

October of 2016 – well after the road had been widened and reconfigured by Harrisons toward the end of the prescriptive period. Mr. Blake had consulted no historic photographs, no prior survey work, and no other historical evidence which would indicate the course or scope of the road crossing Harrisons' property prior to 2016. Rather, Mr. Blake arrived at his opinion concerning the location and scope of the easement crossing the Harrisons' property by locating what he deemed to be the edges of the road existing in 2016, and "eyeballing" a centerline based thereon. The Hollands offered no evidence at all of the 8-foot-wide roadway's location in 1996.

For the same reason, the court committed prejudicial error in excluding testimony from the Harrisons' designed expert, surveyor Brad Bunker, offered to rebut the methodology used by Mr. Blake in arriving at his conclusions. The jury was thus presented with unrebutted expert testimony, based upon what appeared to be a scientifically-prepared survey, illustrating what might or might not bear any relationship whatever to the historic easement crossing the Harrisons' property.

ARGUMENT

An easement is an interest in real property, typically created by express conveyance or reservation. The exception is the creation of prescriptive easements through adverse use. As prescriptive property interests are in derogation of

individual property rights properly conveyed and held, they must meet specified standards.

Elements of an easement by prescription must be shown by clear and convincing evidence, as set forth in *Jacob v. Bate*, 2015 UT App 206, ¶ 16, 358 P.3d 346:

> To establish a prescriptive easement, the claimant must show, by clear and convincing evidence . . . that its use of another's land was open, continuous and adverse under a claim of right for a period of 20 years . . . .

(Internal quotations and citations omitted). *See also Buckley v. Cox*, 247 P.2d 277, 279-80 (1952); *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254, 1258 (Utah 1998). Utah courts have outlined various limitations on prescriptive use.

First, the use must continue uninterrupted, with the acquiescence of the servient estate's owner, for the entire prescriptive period. While use need not be incessant, it must be continuous and acquiesced in for the entire period. *Lunt v. Kitchens*, 260 P.2d 535, 538 (Utah 1953) (more fully discussed below).

Second, a permitted use (as opposed to an adverse use) may never ripen into an easement. *See Jacob*, 2015 UT App 206, ¶ 19, 358 P.3d 346; *see also Valcarce*, 961 P.2d at 311-12; *Richens v. Struhs*, 412 P.2d 314 (1966).

Finally, even if established, a prescriptive easement is limited in scope, and may burden the servient estate only to the extent of its historic use for the 20-year

prescriptive period; it cannot be expanded, widened or changed beyond the limitations of historic use. *Valcarce*, 961 P.2d at 312 ("the general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period"); *McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978) ("It has long been the law of this jurisdiction, and elsewhere that the extent of an easement acquired by prescription is measured and limited by the use made during the prescriptive period.").

The trial court's treatment of the Hollands' prescriptive easement claim fell short under the foregoing standards at three separate points during the case – once on summary judgment, once in the skewing of expert testimony at trial, and finally in the improper instruction of the jury concerning the scope of the claimed easement. On each of these counts, the verdict and resulting judgment should be reversed, and the case remanded either with instructions to find, as a matter of law, that no prescriptive easement was established, or for retrial.

POINT I: THE TRIAL COURT INCORRECTLY RULED ON SUMMARY JUDGMENT THAT, AS A MATTER OF LAW, THE HOLLANDS' USE OF THE ROAD ACROSS THE HARRISONS' PROPERTY HAD BEEN CONTINUOUS AND UNINTERRUPTED FOR A FULL 20 YEARS.

To begin with, the Hollands failed to present facts on summary judgment establishing, as a matter of law, that they or their predecessors-in-interest had been using the road across Harrisons' property for 20 years. They claim to have

established the date of the road's creation as pre-dating their acquisition of the property on August 9, 1996 (and their first visit thereto some days before), observing that the road was already in place when they first visited, and apparently not new.

At first blush, the existence of a road as of August 9, 1996 would seem to satisfy (albeit by a matter of days) the 20-year prescriptive period requirement, as this case was filed September 15, 2016. There is a clear problem, however, with the trial court's refusal to recognize conduct by the Harrisons that should be deemed a revocation of acquiescence in the use of the road, and an interruption of the prescriptive period. That the Harrisons' conduct did not consist of physically barring the road (which they needed for their own access) or filing a civil lawsuit should not undermine the efforts they took to prevent the Hollands from using the road.

Based on Page Holland's account in the Sheriff's Report, it is clear that in June 2016, months before the 20-year period's conclusion, Charlie Harrison and Stan Holland had a confrontation on the property in which Mr. Harrison challenged Mr. Holland's use of the roadway. The confrontation went beyond simple verbal notice; the dispute escalated between them to the point of calling in a law enforcement officer. This June 2016 confrontation is not disputed: it is reflected in a subsequent police report created in September that year, and sworn to by Page

Holland. Moreover, the County Sheriff's Report reflects a continuing course of conduct between the parties beginning June 2016 and through September 2016, which resulted in the Harrisons filing the present action.

Given the foregoing, there was a genuine issue of material fact on the issue whether the Hollands' prescriptive use of undetermined portions of the Harrisons' property was not interrupted prior to the day of its 20th anniversary, which should, at the very least, have defeated summary judgment. This is so for two reasons.

A. The Harrisons' conduct evidenced clear intent that they did not acquiesce in the Hollands' use of their property for the entire prescriptive period.

The theoretical underpinnings of prescriptive rights in Utah were explained in the case of *Lunt v. Kitchens*, 260 P.2d 535 (Utah 1953), which remains good law in Utah. Therein, the Court considered whether there was "sufficient evidence of [an] adverse user for a period of twenty years to sustain the trial court's finding of a prescriptive easement." *Id.* at 537. In considering the question, the court stated the following concerning the nature of prescriptive easement rights:

> . . . [P]roof of continuous use for the prescriptive period, openly and with knowledge of the landowner, was sufficient to raise a presumption of grant, which in effect was a positive rule of law. *The fact that the grantor with knowledge of such use, makes no protest against it is proof of his recognition of a claim of right in the grantee. In other words, it is conclusively presumed from the landowner's acquiescence for the defined period of time in the other's user of his land, he having the right and power to stop such user, that it is a rightful user*.

Id. at 537 (emphasis added). *Lunt* makes clear, in short, that prescriptive rights arise from the *acquiescence* of the servient estate owner. More recently, in the case of *Judd v. Bowen*, 2017 UT App 56, 397 P.3d 686, the Court of Appeals affirmed the establishment of adversity of use by the acquiescence of the servient estate owner. *See id.* at ¶ 25.

Neither *Lunt* nor any of the cases handed down in Utah since that time have clarified exactly what form of "protest" defeats the presumption of acquiescence for purposes of easement by prescription; clearly, though, the trial court was of the opinion that, short of the filing of a lawsuit or the physical blocking of a road and courting violent confrontation, "acquiescence" could not be revoked. Other courts, however, have considered this issue and have generally held that any conduct that clearly manifests a revocation of acquiescence is sufficient.

In the case of *Allen v. Thomas*, 209 S.W.3d 475 (Ky. Ct. App. 2006), the Kentucky Court of Appeals considered a claim of easement by prescription, inhering in the public, over a dirt road which the defendant claimed to be private. In its ruling, the court of appeals considered, as a matter of first impression, what conduct on a landowner's part would interrupt the easement claimant's use sufficiently to end the prescriptive period. After a discussion of various cases from other jurisdictions, the court then concluded the following:

> . . . [G]iven that prescriptive easements – by their nature – are founded on acquiescence . . . we find that *clear conduct* indicating that a

> property owner is not acquiescing as to a prospective easement owner's claim of right *should rightfully be considered as ending the running of a prescriptive easement period*. Moreover, we believe that our decision here is consistent with our state's long-held policy of disfavoring prescriptive easements. We further conclude that *it will serve to discourage the type of violent confrontations that could result* from forcing a property owner to "successfully" defend his right to keep others off of his land.

209 S.W.3d at 481 (citations omitted) (emphasis added).

Similarly, in *Pittman v. Lowther*, 610 S.E.2d 479 (S.C. 2005), the Supreme Court of South Carolina concluded that "[i]n addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of land, are also sufficient to interrupt the prescriptive period." *Id.* at 481.

Next, in *Kelley v. Westover*, 938 S.W.2d 235 (Ark. Ct. App. 1997), the Arkansas Court of Appeals held that "'any unambiguous act of the owner of the land which evinces his intention to exclude others from the uninterrupted use of the right claimed breaks its continuity so as to prevent the acquisition of an easement therein by prescription." *Id.* at 236-37 (citing 25 Am. Jur.2d, *Easements and Licenses*, § 69 (1996)).

In *Rice v. Miller*, 238 N.W.2d 609 (1976), the Minnesota Supreme Court considered a landowner's claim that the prescriptive rights of the easement claimant had been interrupted before the end of the necessary prescriptive period. Stating (as did the Utah Supreme Court in *Lunt*) that "'[t]he very foundation of the

establishment of a right to an easement by prescription is the acquiescence by the owner of the servient tenement in the acts relied upon to establish such prescriptive right'", the Minnesota court explained that "'[a]cquiescence, regardless of what it might mean otherwise, means, when used in this connection, passive conduct on the part of the owner of the servient estate [c]onsisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user." *Id*. at 611 (citations omitted). Based thereon, the court concluded that various verbal and physical acts, by the landowner, defeated the prescriptive easement claim. *Id.* at 611-12.

The analysis taken by the courts in the foregoing cases is commendable. Given the dependence of prescriptive rights on a landowner's acquiescence in the adverse use of his property, overt actions clearly evincing an intent to end that acquiescence should be deemed sufficient to end the prescriptive period. The alternative is a policy that compels landowners to engage in potentially-violent confrontations, as a prerequisite to the defense of property rights – a "law of the range" mentality which should not persist in Utah jurisprudence in the 21st Century. In other areas of real property law, courts have long since channeled parties away from self-help remedies (*e.g.*, the prohibition against self-help in repossessing demised premises rather than invoking unlawful detainer process, *see, e.g.*, *Pentecost v. Harward*, 699 P.2d 696, 699-700 (Utah 1985)).

In sum, it is in the interests of modern-day common sense and civility that in the face of a dispute over the use of real property, an individual may refer a dispute to law enforcement, before either barricading a road or lawyering up.

As of June 2016, there could be no doubt that the Harrisons did not acquiesce in the Hollands' continued use of the Harrisons' property as their driveway. Law enforcement was contacted. To demand more of the Harrisons in protection of their rights is to advocate a breach of the peace or to encourage the very sort of costly and time-consuming litigation in which the parties now find themselves.

B. At a minimum, a fact question exists whether the parties' invocation of law enforcement intervention in June of 2016 constituted the initiation of "legal proceedings," sufficient to interrupt the Hollands' claim of prescriptive use.

Section 459 of the Restatement (First) of Property provides, in part, that adverse use is uninterrupted with the aid of "legal proceedings." While a Utah court has not issued a decision directly on this point, even if this Court agrees that, short of blocking a road physically and courting violence between neighbors, the owner of real property must initiate "legal proceedings" to determine and proscribe easement rights (*see 4 Tiffany on Real Property* (2017 ed.), § 1206 ("The weight of authority is . . . that mere remonstrances or protests by the landowner will not prevent the acquisition of a right by prescription, in the absence of any physical interference with the user, or legal proceedings based thereon")), there is no logical

reason to limit the type of qualifying "legal proceedings" to the expensive and lengthy processes of a full-blown civil action. Such a lofty standard would be counterintuitive to the average landowner, who would understandably presume that calling the police on a trespasser would be both an adequate, and the most responsible, course of action.

Again, it is a matter of first impression in Utah whether the summoning law enforcement should not be deemed a sufficient invocation of legal redress to interrupt prescriptive use of private property. The Harrisons submit, though, that where an unrepresented party invokes the intervention of law enforcement officials, is advised to obtain legal counsel, attempts to negotiate a resolution, and files a civil action (only when such attempts prove fruitless), "legal proceedings" should be deemed to have been initiated – specifically, when law enforcement was called. Certainly, the calling in of the county sheriff to investigate a claim of unauthorized entry is just as effective to put the easement claimant on notice that the landowner did not consent to the use as is the filing of a formal civil complaint and service of a summons. In either instance, the landowner has invoked the processes of law to place the easement claimant on notice that acquiescence is at an end. (For that matter, physical obstruction of the easement, which all courts recognize as interrupting a prescriptive use, conveys no more emphatic message of non-acquiescence than does calling in the local law enforcement officers.)

Accordingly, a genuine issue of material fact should have precluded the trial court's finding of easement by prescription as a matter of law.

C. The trial court should have balanced the equities of the relief sought – specifically, the Hollands' obligation to do equity before seeking equity.

It should be noted that the Hollands' prescriptive easement claim was *not* because of necessity; the Hollands are not landlocked and can build their own road to their home. But instead, they claimed that they had the right to use the Harrisons' property as their private driveway and – despite being warned and despite the visit by the sheriff in June of 2016 – continued to trespass across the property while the Harrisons were in the process of retaining legal counsel in an attempt to resolve this matter (without resorting to litigation). In so doing, the Hollands managed to avoid an actual civil filing until a few days past the 20th anniversary of their first visit to their lot.

This is a suit in equity and those who seek equity must do equity. The Hollands were on notice, by June of 2016, that they were not welcome to cross the Harrison property. They knew this. They should not have been permitted to use their disregard of that intelligence as a sword to establish prescriptive rights. Moreover, the trial court should have balanced the equities, determined whether the Hollands, seeking equity, have done equity, and reserved the matter for trial.

POINT II: ANY USE OF THE ROAD WAS PERMISSIVE.

As already noted, claims of prescriptive easement must be based on *adverse* use. If the other elements of easement by prescription are met, there is an initial presumption that the use of the easement was adverse; however, proof offered by the owner of the servient estate that use was by permission defeats the prescriptive easement claim. Where the use is shown to be "under" the owner, rather than "against" the owner, *Zollinger v. Frank*, 175 P.2d 714, 715 (1946), no prescriptive use is made out. Notably (and contrary to the trial court's presumption in this case, see below), if the owner of the servient estate demonstrates that the use was initially permissive, the use *remains permissive*, and no prescriptive right matures unless it is thereafter converted to an adverse use. As soon as permissive use is shown, the burden shifts back to the claimant to show that the use *became* adverse, and continued so for the prescriptive period:

> If the owner of the servient estate "sustains that burden and overcomes the presumption by proof that the use was initially permissive, then the burden of going forward with evidence and of ultimate persuasion shifts back to the claimant to show that the use [again] became adverse and continued for the prescriptive period."

Jacob v. Bate, 2015 UT App 206, ¶ 19, 358 P.3d 346 (citing *Richens v. Struhs*, 412 P.2d 314, 316 (Utah 1966)); *see also Valcarce v. Fitzgerald*, 961 P.2d 305, 311-312 (Utah 1998); *see also* Bruce and Ely, *The Law of Easements and Licenses in Land* (2018 ed.) at § 5:9, p. 5-45 ("When use of a servient estate is initially

permissive, the use will confer a prescriptive right only if the user subsequently makes a direct assertion of a claim hostile to the owner.").

In support of cross motions for summary judgment, the Harrisons relied on the declaration testimony of Janice Hawley, the owner of the Willow Basin Subdivision from before the time of its creation in 1994 and the Harrisons' predecessor-in-interest in the Harrison' property. Hawley Decl., ¶¶ 2, 7 (R. 309-10.) Her sworn statement was that, at the time she conveyed the Hollands' parcel to Manuel and Ginger Torres (the Hollands' predecessors-in-interest), she gave permission for use of the roadway across the Harrison parcel (title to which she retained until its conveyance to the Harrisons in 2008) for the limited purpose of permitting the Torreses to access the neighboring parcel for marketing purposes. Hawley Decl., ¶¶ 8-9, (R. 310). Her intent was always that permanent access to all parcels of the subdivision be via roads reflected on the plat. Hawley Decl., ¶¶ 5, 9 (R. 310). The use of the road across the Harrison property, in other words, was permissive during her ownership of that parcel, for the use specified. This was likewise Mr. Day's understanding, both in deposition and at trial. The Hollands made no showing whatsoever of a point in time at which their permitted use of a limited temporary access road became adverse, as required by governing case law.

The trial court, however, completely disregarded this failing, concluding as a matter of law on summary judgment that the change of ownership of the *Holland*

property automatically converted the use of the road to an adverse use, without any other showing. On that same basis, the trial court refused Harrisons' proffered instruction on permissive use. Proposed Jury Instruction No. 32 (R. 931).[9] Remarkably, the trial court's position in this regard was supported by no citation of any authority either by the court or by the Hollands, in derogation of the legal standard established by *Jacob*, *Richens* and *Valcarce.* The law, in fact, is precisely the opposite: only the transfer of the *servient estate* extinguishes the permissive use and renders it adverse. *See generally* Bruce & Ely, *The Law of Easements and Licenses in Land* (2018 ed.) at § 5:9, p. 5-46, and cases cited therein.[10]

POINT III: THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT THE SCOPE OF THE EASEMENT WHICH IT HAD DECLARED ON SUMMARY JUDGMENT WAS LIMITED TO ITS HISTORIC USE.

Where an easement by prescription is determined to exist, its location and scope are established and limited by one thing only: the nature and scope of the historic use made thereof by the claimant. The governing standard was articulated by the Utah Supreme Court in the 1943 decision of *Nielson v. Sandberg*, 141 P.2d 696 (Utah 1943): "[A] prescriptive right would be limited by the nature and extent

[9] Each party is entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it; if a rational jury could find a factual basis in the evidence to support the theory, the trial court is obligated to give the instruction. *State v. Campos*, 2013 UT App 213, ¶ 29, 309 P.3d 1160.
[10] Apparently, only Maryland follows the rule stated by the trial court herein. *Rupli v. South Mtn. Heritage Soc., Inc.*, 202 Md. App. 673, 33 A.3d 1055 (2011).

of use during the prescriptive period." *Id.* at 701. In *Harvey v. Haights Bench Irrigation Co.*, 318 P.2d 343 (Utah 1957), Utah Supreme Court expanded on and explained the reason for the "historic use" limitation:

> In determining the nature of this prescriptive easement, its extent and limitations, the burdens and benefits which it confers upon each estate, we must look to the nature of the use which existed during the prescriptive period. Since the right has its inception in the use during that time, its extent and limitations, its burdens and benefits are determined by *the nature of that use and the understandings of the parties thereto. Thus any use which would have probably been interrupted by the owner of the servient estate had the owner of the dominant estate attempted such use prior to the expiration of the prescriptive period, is a use which places a greater burden on the servient estate and therefore is beyond the prescriptive right acquired by* the dominant estate.

318 P.2d 349 (citation omitted; emphasis in original). In 1998, the Utah Supreme Court reaffirmed the "historic use" limitation on prescriptive easements in *Valcarce*, 961 P.2d 305, *supra*:

> The general rule is that the extent of a prescriptive easement *is measured and limited by its historic use during the prescriptive period*.

Id. at 312 (emphasis added). On March 30, 2017, the Utah Court of Appeals once again reaffirmed the "historic use" limitation, and gave an extensive explanation thereof. In *Judd v. Bowen*, 2017 UT App 56, 397 P.3d 686, the Court of Appeals took up a lower court judgment granting prescriptive easement rights over a neighboring property for use of ingress, egress and parking. In reversing (in part) the lower court's ruling, the Court noted that the prescriptive easement is a "non-

possessory interest" which may not be applied to divest the landowner of ownership rights in the underlying property:

> An easement is an incorporeal right. . . . It is a property interest that consists of the privilege to merely use—rather than occupy or possess—the land of another for a circumscribed, limited purpose. . . . "A prescriptive easement does not result in ownership, but allows only use of property belonging to another for a limited purpose, one that is not inconsistent with the general use of the property by the owner. . . .
>
> As a result, a successful prescriptive easement claimant does not (and, in fact, cannot) gain the right to occupy or possess the landowner's property. Indeed, the claimed right to use may not be inconsistent with either the [landowner's] ownership interest or the general property right of the owner, or the general use of the property by the owner . . . Rather, the rights of the easement holder and the landowner must be capable of being balanced so as to afford each the ability to "use and enjoy" the rights attendant to use the property for a limited purpose on the one hand and ownership on the other.

Id. at ¶¶ 41-42 (internal quotations omitted). The Court then reaffirmed the general rule that by reason of the foregoing, "the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period," and adding that "[t]he easement holder may not be granted a right 'which places a greater burden on the [landowner]'" than during the prescriptive period. *Id.* at ¶ 58 (citing *Valcarce*, 961 P.2d at 312). Based thereon, the Court of Appeals reversed the trial court's findings and order as they related to the widths of the claimants' prescriptive rights, holding that "these orders are inconsistent with the usage that

forms the basis of the Judd's prescriptive right—using the Driveway for ingress and egress purposes." *Id.* at ¶ 65.

In this case, it was established both on dispositive motions and at trial that, 20 years before this action started, the road across the Harrison property was a single blade, or 8 feet, in width. No competent evidence of any sort was offered of its original course. By the Hollands' own evidence, neither the width nor the course of the road changed until after 2008, when the Harrisons acquired their property. As such, governing case law should have limited the Hollands' remedy to an 8-foot-wide easement (assuming the Hollands managed to establish the location thereof, which they did not, as explained in Points IV and V below).

Yet, the court disregarded the Harrisons' proffered instruction regarding the historic use of prescriptive easements, substituting therefor a broad and vague instruction that, if once a prescriptive easement had been found (which, in this case, had been done on summary judgment), the jury was at liberty to decide where, and how large, such an easement should be, given the "reasonable" needs of the dominant estate holders:

> You should determine *what is reasonably necessary, from the facts and circumstances of this case, for SPAH and the Hollands to access their property*, taking into account the historic use and shape of the roadway during its 20 years of use. You may express your decision in terms of the survey, or by determining the width of the easement.

Instruction No. 27 (R. 1085) (emphasis added).

Instruction No. 27 did not accurately state the law. It imposed a much vaguer, more flexible standard than that permitted by governing cases. It also used the words "reasonably necessary," a standard unsupported by and contrary to law.

As a direct and clear result, the jury determined that the Hollands' prescriptive rights encumbered the Harrison property to the extent of a full 40-foot width, as "this will be consistent with other easements in subdivision." The jury was impermissibly given the leeway to impose what it saw as a simple and evenhanded, "reasonable" resolution to the whole case: since all the other easements in Willow Basin Subdivision (even though they had been established by the developer as access roads, and had been given by *express grant*) were 40 feet in width, so should the road across Harrisons' property be 40 feet in width. But governing law does not permit the jury to impose such a standard. The court's instruction misled them into believing it to be a viable solution – a result that the court sought.

POINT IV: THE TRIAL COURT IMPROPERLY PERMITTED EXPERT TESTIMONY FROM THE HOLLANDS' SURVEYOR, LUCAS BLAKE.

Before trial began, Harrisons challenged the methodology of Hollands' retained expert surveyor, Lucas Blake, on a motion in limine. (R. 690-700). The Harrisons based their motion on the Deposition of Lucas Blake ("Blake Depo"):

a. Mr. Blake was first contacted by the Hollands in the summer of 2016.[11] Blake Depo at 25:1-6 (R. 717). Prior to that time, he had never seen or visited the parties' respective properties, and had no knowledge thereof. Blake Depo at 26:19-25; 28:5-16 (R. 717).

b. Mr. Blake visited the property only once, in the company of Defendant Page Holland, within a month or so of his first being contacted. Blake Depo at 28:18-20 (R. 717).

c. During his single visit to the property in the summer of 2016, Mr. Blake conducted measurements from the edge of the road as it then existed. Blake Depo at 29:19-30; 19 (R. 718, 715). He then estimated the centerline of the existing road as of 2016 (by "eyeballing"). Blake Depo at 31:7-14, 32:2-7 (R. 718).

d. Mr. Blake did no other research in connection with his anticipated testimony. Blake Depo at 34:6-16 (R. 719). He later confirmed that he had performed no other investigation, research or examination

[11] As noted, Charlie Harrison filed a lawsuit in 2014, styled: *Harrison v. Kratz, et al.*, Case No. 140700031. *See supra* n. 8. Lucas Blake was initially a named defendant in this action. *See* Case No. 140700031, Docket & Complaint. Then, after he was dismissed from the lawsuit, he was deposed on May 29, 2015. *See* Case No. 140700031, Amended Notice of Deposition. It is therefore no surprise that Mr. Blake was the Hollands' expert witness: His survey in the summer of 2016 was against the backdrop of litigation between him and Mr. Harrison.

concerning the location, scope, course, or dimensions of the easement before the summer of 2016:

> Q. All right. Other than the one visit to the property when you took the measurements you have described, did you do any other examination, research or data gathering to prepare Exhibit 40? . . .
>
> A. Oh. No.

Blake Depo at 34:1-16 (R. 719).

e. In follow-up questioning, Mr. Blake reaffirmed that his knowledge and work related to the layout of the road in the summer of 2016, and that he had no information, direct or indirect, concerning its location, course or scope at any time prior thereto:

> Q. Okay. So it would be fair to say that Exhibit 40 and Exhibit 41, the first page of Exhibit 41, both illustrate the road as it existed in the summer of 2016?
>
> A. Correct.
>
> Q. And, again, you'd never been to the property before the summer of 2016?
>
> A. Correct.
>
> Q. So you don't know what was there before that?
>
> A. No.

Blake Depo at 37:18-38:3 (R. 720).

f. Mr. Blake further admitted that his survey work measured only the flat of the road, and included no tap or toe of any slopes. Blake Depo at

40:10-19 (R. 720). He had no idea when the road was graded to the condition in which he surveyed it. Blake Depo at 41:6-9 (R. 721).

g. Toward the conclusion of his deposition, Mr. Blake was offered, and accepted as correct, the following summary of his testimony:

> Q. Okay. So let's back up, then. You went to the property in the summer of 2016, you took your measurements, you looked at the Keogh land survey on file with the county of the subdivision that this is in, and you prepared the legal description which is the second page of Exhibit 41. Did you then deliver that to the Hollands?
>
> A. Through email, yeah.

Blake Depo at 36:1-8 (R. 719).

The trial court denied the motion in a brief and intemperate memorandum decision. (R. 839.) The lower court's ruling in this regard mirrored its misperception of the scope and location of an easement established by prescription, and permitted expert testimony on the estimated centerline of the road crossing the Harrison property in 2016 – not the road that existed in 1996. In carrying out its role as gatekeeper for expert testimony, the trial court should have excluded Mr. Blake's testimony entirely.

Before a designated expert witness can present opinion evidence to a jury, there must be a threshold showing to the court (as "gatekeeper") that the proposed expert opinion testimony reliably assists the trier of fact to determine the ultimate issue in controversy:

> Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
>
> (1) are reliable,
>
> (2) are based upon sufficient facts or data, and
>
> (3) have been reliably applied to the facts.

Rule 702(b), Utah R. Evid. Rule 702(b), revised in 2011 to clarify prior confusion under the rule and interpretive case law, presently requires not only that the expert be competent, that his methods be recognized or otherwise shown reliable, and that his methodology be sound, but that the theory and methodology be *properly applied to the facts of the case*. *Brewer v. Denver & Rio Grande Western Railroad,* 2001 UT 77, ¶ 19, 31 P.3d 557.

The Harrisons did not challenge Mr. Blake's credentials as a land surveyor; nor did they contend that his survey methodology was flawed or incorrectly performed when he visited the properties at issue in this case in the summer of 2016. Instead, the Harrisons contended that Mr. Blake measured the wrong thing. The issue reserved for trial by the trial court's summary judgment ruling was the scope and extent of an easement created by 20 years' uninterrupted and adverse use, not a roadway more recently configured by the Harrisons. As such, Mr. Blake's methodology was incorrectly applied to the facts of the case and should not have been admitted under Rule 702(b).

As noted under Point III, above, even when established, a prescriptive right may not morph into something more than time and use have established. At trial, the Hollands (as claimants of prescriptive rights across the Harrison property) bore the burden of proving this issue by clear and convincing evidence as to each element of the claim. *Judd v. Bowen*, 2017 UT App 56, ¶ 10, 397 P.3d 686.

The expert testimony of Lucas Blake made no pretense of establishing the historic, 20-year-long use of the easement claimed by the Hollands. Instead, he measured the scope and centerline (which he "eyeballed" from the edges of the then-existing road in 2016) based on observations and measurements taken long after the claimed prescriptive period had started – in fact, at approximately the time this lawsuit was initiated. By his own admission, Mr. Blake consulted no county records other than the subdivision plat map on record with the county recorder's office. He reviewed no historic aerial photographs. He consulted no prior surveys of the property. He interviewed no residents or owners concerning the changes in the road over time. He made no attempt to adjust his measurements based on representations or evidence from any source concerning the original scope and course of the roadway. As such, Mr. Blake's survey work had no bearing on the facts of the case to be determined by the jury.

Mr. Blake's expert opinion on the 2016 configuration of the Hollands' claimed prescriptive easement was also irrelevant. Rule 401, Utah R. Evid., provides the following:

> Evidence is relevant if:
>
> (a) it has any tendency to make any fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

For those reasons set out above, the location of the road in 2016 is of no consequence in determining the scope of a prescriptive right which, by law, must have ripened (if at all) during a 20-year period preceding the filing of this lawsuit. Mr. Blake's testimony did not speak to this issue at all; he had nothing to offer the trier of fact.

Yet the trial court permitted his testimony (and permitted its presentation to the jury unrebutted, as explained below in Point V). As such, the jury was presented with unanswered testimony regarding the location of the easement's supposed historic centerline, which they clearly took as gospel. Rule 403, Utah R. Evid., provides that:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The jury was presented with an illustration from a certified land surveyor showing the scope and course of an easement (albeit as modified during the course of the

prescriptive period, and not measured until 2016) and was thereafter instructed to determine the scope and course of that easement (*see supra* Point III). The jury's response to the verdict form evinces the resulting confusion: the jurors clearly misunderstood the determination that they were called upon to make. Visuals of any sort, and certainly those from a licensed land surveyor – backed up with unrebutted foundational testimony regarding measurements and methods – unquestionably carry powerful and disproportionate weight with a jury. The jury clearly deemed Mr. Lucas' drawing as determinative of the easement's centerline and course even though the fact that they were to determine (the historic location and extent of any prescriptive use) was nowhere shown to them.

POINT V: THE TRIAL COURT IMPROPERLY EXCLUDED REBUTTAL TESTIMONY FROM BRAD BUNKER, HARRISONS' RETAINED EXPERT.

Having erroneously determined that Mr. Blake's testimony was admissible and relevant, the trial court compounded its error by excluding rebuttal testimony from the Harrisons' retained expert, Brad Bunker. Mr. Bunker was prepared to address, as a qualified land surveyor whose credentials matched Mr. Blake's own, why Mr. Blake's approach to establishing the centerline of the supposed prescriptive easement was flawed, in that he had consulted no historic records to determine its location, but had measured backward by "eyeballing" the centerline of the road which he found on the property in 2016. Without explanation, the trial

court concluded that, while Mr. Blake's testimony concerning the location of the easement's centerline and scope was entirely proper, Mr. Bunker's proffered testimony (which simply challenged Mr. Blake's methodology) would impinge upon the role of the court in establishing the elements of prescriptive easement. This was simply not the case. The trial court had permitted Mr. Blake to present forensic testimony concerning the location and course of a prescriptive easement; it should likewise have permitted the Harrisons to present expert testimony challenging the legitimacy and reliability of Mr. Blake's methodology. That rebuttal expert testimony is presumed admissible when an expert has testified in the opposing party's case-in-chief, *see Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993).

CONCLUSION

A review of the record as a whole in this matter presents an inescapable conclusion: the trial court prejudged the case. It determined that the Hollands were to have a prescriptive easement across the Harrisons' property, which would consist of the road as it existed in 2016 and thereafter. To this end, the court:

(1) improperly granted summary judgment as to the existence of an easement by prescription;

(2) displayed a decidedly hostile animus toward the Harrisons in their attempts to dispute this ruling;

(3) improperly admitted expert testimony establishing the location and scope of the easement as the court plainly wished it found;

(4) displayed an equally hostile animus toward the Harrisons in their attempts to dispute the admissibility of the expert testimony as to the single issue remaining;

(5) improperly excluded rebuttal testimony challenging the survey methods used; and

(6) improperly instructed the jury as to the law applicable to the sole determination entrusted to them: the scope and location of the easement.

As a result, the jury returned a verdict saddling the Harrison property with a 40-foot wide easement servicing the Holland property—an easement which has *never* existed on that property, and certainly did not exist for the entire 20 years preceding this case's filing.

In fact, the Harrisons timely challenged the Hollands' continued trespass onto the Harrison property for any purpose by notifying Hollands that Harrisons did not acquiescence in that use and calling the Grand County Sheriff's office to remedy the situation. Prior to the Harrisons' acquisition of their property in 2008, moreover, the prior owner thereof, Janice Hawley, was allowing the Hollands' use (like that of their predecessors-in-interest) by express permission. Even if an easement did exist, moreover, its scope was limited to the 20-year use: an 8-foot-wide, single-blade roadway. At no point in the trial did the Hollands – who bore the burden of proof by clear and convincing evidence – establish the location or course of that path at all.

Based on the foregoing, the Harrisons request that the court's ruling on the Hollands' prescriptive easement claim be reserved and, in the alternative,

remanded to the trial court for retrial on all issues relevant to the Hollands' claim of easement by prescription.

DATED this 15th day of February 2019.

JONES WALDO HOLBROOK & McDONOUGH, PC

By: */s/ Vincent C. Rampton*

Vincent C. Rampton
Jessica P. Wilde
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 24(G)(2)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because:

   ☒ this brief contains 13,053 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2), or

   □ this brief uses a monospaced typeface and contains _____ *[number of]* lines of text, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:

   ☒ this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman, or

   □ this brief has been prepared in a monospaced typeface using _____ *[name and version of word processing program]* in _____ *[name of characters per inch and name of type style]*.

Vincent C. Rampton
Attorney's or Party's Name

Dated: February 15, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellants' Brief was mailed via first class mail, postage prepaid, to the following on the 15th day of February 2019:

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/s/ Vincent C. Rampton

ATTACHMENT 1

The Order of the Court is stated below:
Dated: June 11, 2018 09:37:17 AM

/s/ LYLE R ANDERSON
District Court Judge

Kristine M. Rogers (6978)
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IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, STATE OF UTAH	
CHARLIE W. HARRISON and TRENA HARRISON Plaintiffs, vs. SPAH FAMILY LTD, STAN HOLLAND, and PAGE HOLLAND, Defendants/Counterclaimants.	**ORDER OF JUDGMENT** **Easement and Property Damage** Case No. 160700035 Judge Lyle Anderson

The above-entitled matter came before this Court for Jury Trial on the 14th and 15th days of May, 2018; the Court previously entered an Order on Motions for Summary Judgment the terms of which are incorporated in this final Order of Judgment.

Present for trial were Plaintiffs, Charlie Harrison and Trena Harrison represented by their attorney Vincent Rampton; Stan Holland and Page Holland represented by their attorney Kristine Rogers. The Honorable Lyle

Anderson presiding.

1. The title is quieted in Plaintiffs in and to a non-exclusive easement for access, 40 feet in width, along a portion of the western border of the following described parcel of real property located in Grand County, State of Utah:

BEGINNING at the Center ¼ Corner Section 35, Township 25 South, Range 24 East, SLB&M, and proceeding thence with the Center ¼ line South 0° 10' East 661.0 feet to a Corner, thence North 89° 51' West 589.0 feet to a Corner, thence North 0° 05' West 660.9 feet to a Corner, thence with the Center ¼ line South 89° 51" East 588.0 feet to the point of beginning, Grand County, Utah.

TOGETHER with a non-exclusive easement for ingress and egress 20.0 feet on each side of the following described centerline: BEGINNING at a point which bears South 86° 34' East 1938.0 feet from the West ¼ Corner Section 35, Township 25 South, Range 24 East, SLB&M, and proceeding thence with said centerline South 45° 00' East 161.2 feet, thence South 0° 05' East 436.2 feet to the terminus of this centerline description.

SUBJECT to a non-exclusive easement over and across the west 40.0 feet.

SUBJECT to all restrictions, easements, and rights-of-way, however evidenced, as illustrated on the plat recorded as an attachment to the Restrictive Covenants recorded November 17, 1994 in Book 470, Page 244, Grand County Recorders Office;

all as illustrated on the plat recorded as an attachment to the Restrictive Covenants recorded November 17, 1994 in Book 470, Page 244, Grand County Recorders

Office.

2. Plaintiffs are entitled to make all reasonable use of said easement for the purposes of access to and from the following described parcel of real property, also located in Grand County, State of Utah:

SE1/4NE1/4 SW1/4, less the West 66.0 feet of the SE /1/4NE1/4SW1/4, Section 35, T25S, R24E, SLBM. (Also known as Parcel "H" on the plat recorded as an attachment to the Restrictive Covenants recorded November 17, 1994 in Book 470, Page 244.)

*****

TOGETHER with a 20 foot easement on the North boundary of Parcel G and any other access rights which may be established by the Plat recorded as an attachment to the Restrictive Covenants recorded November 17, 1994 in Book 470, Page 244, Grand County Recorders Office.

3. Defendants, as a matter of law, are granted an easement by prescription along all or some portion of a roadway located on the following described parcel of real property located in Grand County, State of Utah, belonging to Plaintiffs:

4. SPAH FAMILY LTD., STAN HOLLAND AND PAGE HOLLAND are granted:

A non-exclusive 40' wide easement for being 20.0 feet right and left of the following described centerline based on Lucas Blake survey:

BEGINNING at a point on the North line of the Harrison parcel said point being South 71°49'28" East 2135.7 feet and South 89°51'00" East along the

Harrison North line 20.00 feet from the West Quarter corner of Section 35, Township 25 South, Range 24 East, Salt Lake Base and Meridian and running thence South 03°11'29" East 148.3 feet; thence with a curve to the left having a radius of 25.0 feet and an arc length of 50.8 feet, which chord bears South 61°29'25" East a length of 42.5 feet ; thence North 60°19'36" East 41.2 feet; thence with a curve to the left having a radius of 50.0 feet and an arc length of 22.6 feet , which chord bears North 47°23'57" East a length of 22.4 feet; thence North 34°28'18" East 93.3 feet; thence with a curve to the right having a radius of 50.0 feet and an arc length of 13.5 feet, which chord bears North 42°11'44" East a length of 13.4 feet; thence North 49°55'10" East 32.5 feet; thence North 31°55'14" East 28.8 feet to a point on the North line of the Harrison parcel which is the terminus point of said easement.

Attachment #1 Plat and legal description prepared by Lucas Blake

For access to the following described land of SPAH Family Ltd, Stan Holland and Page Holland:

SE1/4NE1/4 SW1/4 less the West 66.0 feet of the SE /1/4NE1/4SW1/4, Section 35, T25S, R24E, SLBM. (Also known as Parcel "H" on the plat recorded as an attachment to the Restrictive Covenants recorded November 17, 1994 in Book 470, Page 244.)

5. SPAH FAMILY LTD., STAN HOLLAND AND PAGE HOLLAND are granted a $300.00 judgment against Charlie Harrison and Trena Harrison for damage done to their gates.

END OF ORDER

Effective when digitally executed by the Court, above

Approved as to form:

_____

Vincent Rampton
Attorney for Plaintiff
Pursuant to Rule 7(j)(4), Utah Rules of Civil Procedure, the proposed Order will be submitted to the Court for signature in 7 days if no objection is filed.

CERTIFICATE OF DELIVERY

I hereby certify this 5th day of June, the foregoing ORDER OF

JUDGMENT was electronically delivered to:

Vincent Rampton, Esq.
Jessica Wilde, Esq.
Attorneys for Plaintiff

Kristine Rogers

ATTACHMENT 2

The Order of the Court is stated below:
Dated: July 28, 2017 09:54:37 AM
/s/ LYLE R ANDERSON
District Court Judge

Vincent C. Rampton (USB 2684)
Jessica P. Wilde (USB 11801)
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Attorneys for Plaintiffs

IN THE SEVENTH DISTRICT COURT FOR GRAND COUNTY

STATE OF UTAH

CHARLIE W. HARRISON and TRENA HARRISON, Plaintiffs, vs. SPAH FAMILY, LTD; STAN E. HOLLAND; and PAIGE HOLLAND, Defendants.	**ORDER ON MOTIONS FOR SUMMARY JUDGMENT** Civil No. 160700035 Judge Lyle R. Anderson

The motions of Plaintiffs Charlie W. Harrison and Trena Harrison for Partial Summary Judgment, and of Defendants Spah Family Ltd, Stan E. Holland and Page Holland for Summary Judgment, came on for hearing before the Court on Tuesday, July 11, 2017, at 1 p.m. Plaintiffs were represented by Vincent C. Rampton of Jones Waldo Holbrook & McDonough. Defendants were represented by Kristine M. Rogers.

The Court having reviewed the parties' moving papers, having heard oral argument and being fully advised in the premises, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. That Plaintiffs' Motion for Partial Summary Judgment be and hereby is granted in part and denied in part. Specifically:

a. That title is hereby quieted in Plaintiffs in and to a non-exclusive easement for access, 40 feet in width, along a portion of the western border of the following described parcel of real property located in Grand County, State of Utah:

> BEGINNING at the Center 1/4 Corner Section 35, Township 25 South, Range 24 East, SLB&M, and proceeding thence with the Center 1/4 line South 0° 10' East 661.0 feet to a Corner, thence North 89° 51' West 589.0 feet to a Corner, thence North 0° 05' West 660.9 feet to a Corner, thence with the Center 1/4 line South 89° 51' East 588.0 feet to the point of beginning, Grand County, Utah.
>
> TOGETHER with a non-exclusive easement for ingress and egress 20.0 feet on each side of the following described centerline: BEGINNING at a point which bears South 86° 34' East 1938.0 feet from the West 1/4 Corner Section 35, Township 25 South, Range 24 East, SLB&M, and proceeding thence with said centerline South 45° 00' East 161.2 feet, thence South 0° 05' East 436.2 feet to the terminus of this centerline description.
>
> SUBJECT to a non-exclusive easement over and across the west 40.0 feet.
>
> SUBJECT to all restrictions, easements, and rights-of-way, however evidenced, as illustrated on the plat recorded as an attachment to the Restrictive Covenants recorded November 17, 1994 in Book 470, Page 244, Grand County Recorder's Office;

all as illustrated on the plat recorded as an attachment to the Restrictive Covenants recorded November 17, 1994 in Book 470, Page 244, Grand County Recorder's Office;

b. That Plaintiffs are entitled to make all reasonable use of said easement for the purposes of access to and from the following described parcel of real property, also located in Grand County, State of Utah:

> SE1/4NE1/4SW1/4, LESS the West 66.0 feet of the SE1/4NE1/4SW1/4, Section 35, T25S, R24E, SLBM. (Also known as Parcel "H" on the plat recorded as an attachment to the Restrictive Covenants recorded 11/17/1994 in Book 470 at Page 244.)

***

TOGETHER with a 20 foot easement on the North boundary of Parcel G and any other access rights which may (sic) established by the Plat recorded as an attachment to the Restrictive Covenants recorded 11/17/1994 in Book 470 at Page 244.

c. That Plaintiffs' petition for an award of costs and attorney's fees is reserved for trial.

2. That Defendants' Motion for Summary Judgment is granted in part and denied in part. Specifically:

a. The Court holds that as a matter of law, Defendants have met the elements of an easement by prescription along all or some portion of a roadway located on the following described parcel of real property located in Grand County, State of Utah, belonging to Plaintiffs:

SE1/4NE1/4SW1/4, LESS the West 66.0 feet of the SE1/4NE1/4SW1/4, Section 35, T25S, R24E, SLBM. (Also known as Parcel "H" on the plat recorded as an attachment to the Restrictive Covenants recorded 11/17/1994 in Book 470 at Page 244.)

b. The Court makes no finding concerning the course, scope and/or extent of said easement by prescription, or the rights created therein, all such issues being reserved for trial; and

c. In all other respects, Defendants' Motion for Summary Judgment is denied.

END OF ORDER
Effective when digitally executed by the Court, above

APPROVED AS TO FORM:

_____

Kristine M. Rogers
Attorney for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served via electronic filing with the Clerk of the Court, which system sent notification of such filing to the following on the 18th day of July 2017:

Kristine M. Rogers (6978)
Attorney for Defendants
8 East 300 South, Suite 500
Salt Lake City, Utah 84111
Email: kristine@krisrogers.com

/s/ Vincent C. Rampton

ATTACHMENT 3

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

CHARLIE W. HARRISON and TRENA HARRISON, Plaintiffs, vs. SPAH FAMILY, LTD; STAN E. HOLLAND; and PAIGE HOLLAND, Defendants.	APPROVED STATEMENT OF PROCEEDINGS AS TO WHICH TRANSCRIPT IS UNAVAILABLE Case No. 160700035 Judge Don M. Torgerson

Plaintiffs have submitted a *Statement of Proceedings as to Which Transcript is Unavailable* under Rule 11(g) Utah R. App. P. The Statement concerns a discussion between counsel and Judge Lyle R. Anderson on May 15, 2018 that was conducted out of the presence of the jury, and not recorded. Defendants have objected to Plaintiffs' Statement. The Court has reviewed the Statement, objection, and reply memoranda. Based on that review, the Court approves the following statement of proceedings:

STATEMENT

The discussion between counsel and the Court occurred during the off-record discussion noted at 270:11 of the official transcript.

Plaintiffs' counsel notified the Court that they intended to call rebuttal witness Brad Bunker, P.E., a certified land surveyor. Mr. Bunker did not offer a competing survey and was only expected to rebut the methodology used by Defendants' expert, Lucas Blake. Counsel advised that Mr. Bunker would not submit a competing survey and his testimony would be limited to challenging Mr. Blake's methodology. Specifically, he would testify that Mr. Blake's survey was not based on historic use of the easement

claimed by Defendants, but was formulated by (1) measuring the edges of the road across Plaintiff's property as it existed in October 2016, and (2) establishing a centerline of that road by "eyeballing" a mid-point line along the 2016 road.

The Court ruled that Mr. Bunker would not be permitted to testify because the testimony usurped the Court's responsibility in instructing the jury.

Dated: 1/10/19

By: Don Torgerson
Don M. Torgerson
District Court Judge

STATE OF UTAH
SEVENTH DISTRICT COURT

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160700035 by the method and on the date specified.

EMAIL: VINCENT C RAMPTON vrampton@joneswaldo.com
EMAIL: KRISTINE M ROGERS kristine@krisrogers.com
EMAIL: JESSICA P WILDE jwilde@joneswaldo.com
EMAIL: COURT OF APPEALS courtofappeals@utcourts.gov

Date: 01/10/2019

/s/ MELISSA PARRIOTT

Deputy Court Clerk