2018

CHARLIE W. HARRISON AND TRENA HARRISON, Appellants, v. SPAH FAMILY LTD., STAN E. HOLLAND, AND PAGE HOLLAND, Appellees. : Brief of Appellee

Utah Supreme Court

No. 20180537-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

CHARLIE W. HARRISON AND TRENA HARRISON,
Appellants,
v.
SPAH FAMILY LTD., STAN E. HOLLAND, AND PAGE HOLLAND,
Appellees.

BRIEF OF APPELLEES

On appeal from the Seventh Judicial District Court, Grand County,
Honorable Lyle R. Anderson, District Court No. 160700035

Vincent C. Rampton
Jessica P. Wilde
JONES WALDO HOLBROOK & MCDONOUGH, PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Attorneys for Appellants Charlie W. Harrison and Trena Harrison

Troy L. Booher (9419)
Freyja R. Johnson (13762)
ZIMMERMAN BOOHER
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, Utah 84111
tbooher@zbappeals.com
fjohnson@zbappeals.com
(801) 924-0200

Attorneys for Appellees SPAH Family Ltd., Stan E. Holland, and Page Holland

---

Current and Former Parties

Appellants

Plaintiffs Charlie W. Harrison and Trena Harrison

Represented by:
Vincent C. Rampton
Jessica P. Wilde
Jones Waldo Holbrook & McDonough, PC

Appellees

Defendants SPAH Family Ltd., Stan E. Holland, and Page Holland

Represented by:
Troy L. Booher
Freyja R. Johnson
Zimmerman Booher

Parties Below Not Parties to the Appeal

None

Table of Contents

Addenda

Table of Authorities

Cases

Rules

Other

Introduction

This is a dispute between neighbors, the Hollands and the Harrisons. The issues on appeal concern the Hollands' easement by prescription to use a road to access their parcel. The road crosses the Harrisons' parcel, and it is that portion of the road where the Hollands' easement is located that is in dispute on appeal.

Under Utah law, one is entitled to a prescriptive easement where the use of another's land was open, continuous, and adverse under a claim of right for 20 years. *See, e.g.*, *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998). The trial court resolved on summary judgment the issue of whether the Hollands satisfied these elements, but reserved for the jury the issue of the easement's scope. The jury found that the easement is 40 feet wide.

The Harrisons challenge the summary judgment ruling on the ground that the Hollands' use was neither continuous nor adverse. And the Harrisons contest the jury's finding based on a jury instruction and two evidentiary rulings.

As to the requirement that use be continuous, the Harrisons assert that a conversation in June 2016 interrupted the Hollands' use. The Harrisons did not raise this argument in opposing the motion for summary judgment. Regardless, the majority rule is that a landowner's oral objection does not interrupt a claimant's adverse use. The court did not err, even if the issue were preserved.

As to the requirement that the use be adverse, the Harrisons assert that a prior owner of their parcel, Janice, gave permission to the prior owner of the Hollands' parcel, Torres, to use the road for the limited purpose of marketing the

Torres parcel. But that permission ended when the marketing ended—i.e., when Torres sold the parcel to the Hollands. The Hollands had no permission to use the road once they purchased the parcel, and, even if the prior permission included the Hollands, they never used the road for marketing their parcel.

As to the challenged jury instruction, the Harrisons assert, for the first time on appeal, that the court erred in instructing the jury to determine the easement's scope by finding a width that is "reasonably necessary" for the Hollands to continue their historic use of the road. The issue is not preserved, and jury instruction is not erroneous, let alone prejudicial. The scope of an easement is set by past use. The Harrisons assert only that no Utah case has used this precise language. This assertion is irrelevant because the particular wording is not dispositive. And the assertion is incorrect because that language is found in *Judd v. Bowen*, 2017 UT App 56, ¶ 58, 397 P.3d 686.

As to the two evidentiary issues, the Harrisons assert that the trial court abused its discretion in allowing the testimony of the Hollands' expert and excluding the testimony of the Harrisons' expert. But the court properly allowed the testimony of the Hollands' expert because he provided an accurate survey of the road and drew no legal conclusions for the jury. And the court properly excluded the testimony of the Harrisons' expert because his proffered testimony was cumulative and not rebuttal testimony.

This court should affirm.

Statement of the Issues

Issue 1: Whether the trial court correctly ruled that the Hollands' use of the road where it crosses the Harrisons' parcel was adverse and uninterrupted.

Standard of Review: A summary judgment ruling is reviewed for correctness, viewing the facts and inferences in the light most favorable to the nonmoving party. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600.

Preservation: To the extent the Harrisons challenge the ruling that the Hollands' use was uninterrupted during the 20-year period based upon a June 2016 discussion, the issue is not preserved. The Harrisons did not present this argument to the court in opposing the motion for summary judgment. The Harrisons first presented this argument in a motion to reconsider. [R.564-76,646.] And the Harrisons have not challenged the trial court's refusal to reconsider. [Op. Br. at 7-8.] Even if they had, the trial court's decision not to address the merits of the motion to reconsider is afforded considerable discretion. *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 15, 163 P.3d 615.

The Harrisons did preserve their argument that the Hollands' use was not adverse. [R.278-79,523,1372.]

Issue 2: Whether the trial court erred in instructing the jury to determine the scope of the easement by reference to the width that is "reasonably necessary" for the Hollands to continue their historic use of the road.

Standard of Review: This court will review challenges to jury instructions for correctness. *Green v. Louder*, 2001 UT 62, ¶ 14, 29 P.3d 638. "If a party does not

object and articulate the grounds with sufficient specificity such that the issue is presented before the trial court for consideration, that issue cannot be raised on appeal." *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 10, 40 P.3d 1119.

Preservation: The Harrisons claim they preserved this issue by submitting a jury instruction. [Op. Br. at 8,47; R.930.] But when the court held a colloquy with the attorneys concerning the instruction crafted by the court, the Harrisons' counsel reported that he was "[l]argely happy" with the instruction and asked only that the court add one additional line. [R.1749.] The Harrisons' counsel did not argue that the instruction was an improper statement of law without the additional line and did not ask the court to strike anything, including the "reasonably necessary" language challenged on appeal. [R.1749-51.]

Issue 3: Whether the trial court abused its discretion in allowing the testimony from the Hollands' expert (Mr. Blake).

Issue 4: Whether the trial court abused its discretion in excluding testimony from the Harrisons' expert (Mr. Bunker).

Standard of Review for Issues 3 and 4: "The trial court has wide discretion in determining the admissibility of expert testimony." *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993). This court will not reverse for an abuse of discretion "unless the decision exceeds the limits of reasonability." *Id.*

Statement of the Case

1. Statement of Facts

The Hollands have used a road that cuts across the Harrisons' adjoining parcel since the Hollands purchased their parcel on August 9, 1996. [R.197-98, 533,1509,1527; Add.B.] That day, they crossed the Harrisons' parcel, pulling a four-horse trailer, and set up camp on their parcel. [R.197,226,1370,1527.]

When the Hollands acquired their parcel, the Harrisons' parcel was owned by Janice,[1] who owned all the land in the basin prior to her subdividing the property. [R.309.] While Janice still owned the Harrisons' parcel, Janice sold what would later become the Hollands' parcel to Torres. [R.50,310.]

Janice gave Torres his parcel, and in exchange Torres built a cabin for Janice on one of her other parcels. [R.310,1652.] Torres arranged to have the road cut to take prospective buyers to his parcel. [R.310.] Torres did this without Janice's knowledge. [R.310.] Although Janice did not authorize the road in advance, she subsequently gave Torres temporary permission to use the road for the limited purpose of marketing his parcel to prospective buyers. [R.310-11.]

Importantly, Janice did not give Torres permission to use the road for permanent residential access. [R.310-11.] Instead, Janice's permission to Torres was temporary and for a limited purpose. [R.310-11.] It was her intention at all

[1] In the record, Janice is known both as "Janice Hawley," at the time she subdivided the property, and later by "Janice Kirk Gustafson," including in her declaration for this litigation. [R.309; Add.C.]

times that the roads on the plat map (not the road at issue) were to be used for permanent access. [R.310.]

Torres sold his parcel to the Hollands about six months after he acquired it. [R.1509-10.] The road was in place and had been used. [R.198,209,368.] The road was a single lane, like other roads in the subdivision, but the Hollands could drive it without any trouble. [R.363,368.] The road looked about the same as it does in current pictures of the road. [R.198.] The road shown in post-2013 satellite images was "the road that has existed since [the Hollands] first went to the property" on August 9, 1996. [R.1530.] The road was penciled onto the map of the subdivision that the Hollands saw prior to purchasing their parcel. [R.195.]

The Hollands did not discuss their right to use the road with Janice, but Mr. Holland understood from talking to Torres when they purchased that they were paying more for the parcel than surrounding parcels because of the road Torres had cut and the power pole he had put in. [R.197-98.]

Janice did not give the Hollands permission to use the road on what would become the Harrisons' parcel, but she was aware that the Hollands bought their parcel and were using the road to access their parcel. [R.197-98,310-11.]

As the Hollands developed their parcel, they had cement and dump trucks travel the road. [R.1559.] In addition, the Hollands maintained the road on what would become the Harrisons' parcel—e.g., by moving rocks, smoothing the road,

adding gravel, and adding water berms to allow for drainage and thereby decrease erosion. [R.200,1535-36,1558-60.]

In October of 1997, the Hollands transferred the title for their parcel to their family limited partnership, SPAH Family Ltd. [R.406-07,1510.]

In 2008, Janice sold to the Harrisons their parcel. [R.11,62.] The Harrisons built a spur off the road to their cabin, and Mr. Harrison widened the turning point to allow for clearance when turning the corner to the spur. [R.1530-31,1607-08.] The Hollands testified that Mr. Harrison widened the turning point for the spur to his cabin, but that he had done little to the rest of the road. [R.1530-31,1536-37.] In contrast, Mr. Harrison estimated that the road was 9- to 12-feet wide when he purchased the parcel, and he testified that the width of the road was now "upwards of 30 feet wide." [R.1607-08.]

In addition to using the road on the Harrisons' parcel, the Harrisons used the portion of the road extending across the Hollands' parcel, which is consistent with an express easement designated on the plat map. [R.522.] The Hollands placed decorative gates across the road crossing their property. [R.1550-51.] Mr. Harrison was unhappy with the gates because he disliked getting out to open them. [R.1554.] After Mr. Holland gave Mr. Harrison permission to unbolt one of the gates to get some trucks through, he found the gate cut into pieces on the side of the road, and Mr. Harrison refused to put it back up. [R.1552-53,1560, 1613-16.] Mr. Harrison pushed another gate with his car. [R.1555,1557,1612.]

In June 2016, Mr. Holland and Mr. Harrison had a verbal disagreement concerning the road. [R.211,586.] In his deposition, Mr. Holland testified that this discussion was about the road across the Hollands' parcel, which is not the easement at issue in this appeal. [R.211.] He testified Mr. Harrison had threatened to widen the road on the Hollands' parcel and tear down the Hollands' pump shed in the process. [R.211.]

On September 13, 2016, Mr. Harrison parked a bulldozer to block the Hollands from using the road to reach their parcel. [R.138,1358.] Ms. Holland contacted police about Mr. Harrison blocking the road, and then filed the police statement that mentioned the discussion in June 2016. [R.586,1540.] She said: "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." [R.586.] The police did not intervene or take any action. [Op. Br. at 23.]

2. Procedural History

On September 15, 2016, the Harrisons filed this lawsuit, seeking to have title quieted to the express easement across the road on the Hollands' parcel—the easement that is not at issue on appeal. [R.1-5,11,13.] The Harrisons sued the Hollands for trespass based on the Hollands' use of the road where it cut across the Harrisons' property. [R.14-15.]

The Hollands counterclaimed, seeking to quiet title to a prescriptive easement over the portion of the road on the Harrisons' parcel, which they had

been openly using for permanent residential access without interruption for more than 20 years.[2] [R.19-21,23,30.]

The Harrisons filed a motion for summary judgment. [R.173-84,223-245.] The trial court granted partial summary judgment in favor of the Harrisons, ruling that the Harrisons had a 40-foot nonexclusive access easement over the Hollands' parcel. [R.521-23.] That ruling is not at issue on appeal.

The Hollands also moved for summary judgment with respect to their use of the road over the Harrisons' parcel. The court ruled that the Hollands had established a prescriptive easement by showing open, continuous, and adverse use of the road for more than 20 years. [R.523,1365-66,1372.] The trial court reserved the scope of the Hollands' prescriptive easement for trial. [R.523.]

The Harrisons filed a motion to reconsider, asserting for the first time that Ms. Holland's police statement referring to a discussion in June 2016 was evidence that the Harrisons had interrupted the Hollands' use of the road before the end of the 20 years. [R.564-76.] The court refused to reconsider. [R.646.]

Before trial, the parties submitted proposed instructions and objections. [R.896-943,1011-16,1017-22,1041-43.] But the instruction at issue on appeal (Instruction No. 27) was crafted by the court. [R.1011-1016,1749.] During a colloquy between the court and counsel, the Harrisons' counsel reported that he

[2] The Hollands also sought compensation for the gates Mr. Harrison had damaged. [R.31.] The Harrisons do not challenge on appeal the jury's award of damages for the gates. [R.1096; Op. Br. at 7-9.]

was "[l]argely happy" with Instruction No. 27. [R.1749.] He asked to have a line added, but did not ask the court to strike any language (including the "reasonably necessary" language at issue on appeal); nor did he argue that any language from the instruction was unsupported by Utah case law. [R.1749-51.]

At trial, the jury heard testimony from various witnesses concerning the road. The realtor who sold the parcel to the Hollands testified that the road provided access to the Hollands' parcel by looping through the Harrisons' parcel because of "outcropping of rock or something that they couldn't get through" otherwise. [R.1653.] He also testified that the road was cut in the mid-1990s using a dozer blade that was eight feet wide. [R.1653,1659.] He testified that to cut the road, the driver had to use the bulldozer the length of the road multiple times, "[p]robably several times up and back." [R.1659.] He testified that the road's being cut with an eight-foot blade did not make a road eight feet wide, because "[i]t can take several cuts to put a road in." [R.1660.]

Prior to the Hollands' visiting the parcel, a utility pole was placed there. An employee from Rocky Mountain Power testified that the pole had a tag indicating placement in 1995. [R.1585,1590-91.] He testified that in 1995 the power company would have used the same equipment as now to install power poles. [R.1595-96.] He testified that "the two pieces of equipment that are absolutely necessary in order to install a power pole" are a "derrick digger," used to auger a hole and set the pole in the ground, and a "bucket truck," used to

raise the lineman to reach the lines. [R1592-93.] Derrick diggers weigh over 26,000 pounds, are "50-plus foot long" and typically have six wheels. [R.1593.] Bucket trucks are similarly large pieces of equipment, but vary somewhat in size, with those at the small end, called squirt booms, weighing under 26,000 pounds, but still over 10,000 pounds. [R.1594-95.] A helicopter would not have been used in place of the trucks to place the pole because of the terrain. [R.1597.]

Before trial, the court denied the Harrisons' motion in limine seeking to exclude testimony from the Hollands' expert, Mr. Blake. [R.839.] The court ruled, "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." [R.839.] "If [the Hollands] establish the existence of a right of way, it 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.]

At trial, Mr. Blake testified concerning his survey of the road in 2016. [R.1581.] Mr. Blake testified about how he surveyed the road, including estimating its edges, mapping points along the road, generating a legal description, and working backward to estimate the centerline of the road. [R.1576-79.] He acknowledged that he had not consulted historical photographs and that he did not "have any information at all" on the road in 1996. [R.1584.]

The trial court did not permit testimony from the Harrisons' expert, Mr. Bunker. [Op. Br. Add. 3 at 1-2.] Mr. Bunker did not plan to present a competing survey or other evidence. [Op. Br. Add. 3 at 1.] The expert designation indicated that the Mr. Bunker would testify as to "the procedure for determining the location of a prescriptive easement" (rather than the procedure for surveying a road). [R.664.] The Harrisons' counsel proffered that the expert would repeat undisputed facts from the testimony of Mr. Blake (the Hollands' expert) including that Mr. Blake did not consult historical photographs in conducting his survey. [Op. Br. Add. 3 at 2-3.] The trial court ruled that the Harrisons' expert would not be permitted to testify because his intended testimony "usurped the Court's responsibility in instructing the jury." [Op. Br. Add. 3 at 2.]

3. Disposition Below

The jury awarded the Hollands a 40-foot easement. [R.1094-95.] The Harrisons appeal. [R.1299.]

Summary of the Argument

The Harrisons first assert that the trial court erred in ruling on summary judgment that the Hollands established uninterrupted adverse use of the road for a 20-year period. But the undisputed facts establish uninterrupted adverse use from August 9, 1996, to August 9, 2016.

The Harrisons claim the Hollands' use was interrupted by a discussion in June 2016, but they did not present this argument in opposing summary judgment. They presented this argument only in a motion to reconsider, the denial of which they have not challenged on appeal.

Even if they had challenged that ruling, the court did not abuse its discretion in refusing to reconsider. In addition, the Harrisons' argument concerning the June 2016 discussion fails on its merits. The majority rule is that a landowner's filing a lawsuit or physical interference with a claimant's use of the land interrupts the adverse use, but an oral objection does not. Consistent with this, Utah appellate courts have never held that oral objections, even those clearly evincing an intent to end acquiescence, interrupt adverse use. The cases cited by the Harrisons do not say otherwise, as they deal with physical barriers. If this court reaches the merits, it should affirm.

The Harrisons next challenge the summary judgment ruling on the ground that the Hollands' use was not adverse because Janice (the prior owner of the Harrisons' parcel) gave permission to Torres (the prior owner of the Hollands'

parcel) to use the road for marketing his parcel. But Janice's permission and the permitted use ended when the Hollands acquired title. From that day forward, the Hollands' use of the road was adverse.

The Harrisons also challenge the jury determination of the easement's scope. The Harrisons first assert that the trial court improperly instructed the jury to find that the scope of the easement is the width "reasonably necessary" for the Hollands to continue their historic use of the road. This objection was not preserved. Regardless, the language is nearly identical to language set forth in *Judd v. Bowen*, which quotes prior cases. 2017 UT App 56, ¶ 58, , 397 P.3d 686. Even if the argument had been preserved, the instruction was not erroneous, and the Harrisons have demonstrated no prejudice.

Finally, the Harrisons challenge two evidentiary rulings. The Harrisons assert that the trial court abused its discretion in allowing the testimony of the Hollands' expert and excluding the testimony of the Harrisons' expert. But the court properly allowed the testimony of the Hollands' expert because he provided an accurate survey of the road and drew no legal conclusions for the jury. And the court properly excluded the testimony of the Harrisons' expert because his proffered testimony was cumulative and not rebuttal testimony.

This court should affirm.

Argument

1. The Trial Court Correctly Ruled that the Hollands' Adverse Use of the Road Satisfied the 20-Year Prescriptive Period

The Hollands' use of the road was both adverse and uninterrupted for more than 20 years. Under Utah law, "[a] party claiming a prescriptive easement must prove that his use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years." *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998). The Hollands began using the road, without permission, when they acquired title on August 9, 1996, and continued to use the road through August 9, 2016. [R.196-98,202-03,208,211.] A month later, in September 2016, the Harrisons filed a lawsuit and blocked the road, but it was too late. [R.1-5,138,202-03.]

1.1 The court correctly ruled that the Harrisons did not interrupt the 20-year period

The Harrisons argue that they interrupted the 20-year period with a verbal discussion in June 2016. [Op. Br. at 34-35.] The argument fails for a number of reasons, some procedural and some on the merits.

1.1.1 The Harrisons do not appeal from the order denying the motion to reconsider, the order addressing their argument on appeal

The Harrisons argue that a discussion between the parties in June 2016 interrupted the 20-year period before it ended. The argument is not properly before the court, and in any event, the Harrisons are incorrect on the merits.

This court should decline to consider the argument. In opposing summary judgment, the Harrisons did not raise the June 2016 discussion or argue that it interrupted the prescriptive period. Instead, they raised this argument for the first time in their motion to reconsider. [R.564-76.] The trial court refused to reconsider. [R.646.] On appeal, the Harrisons have not challenged the trial court's refusal to reconsider, and therefore have not challenged the applicable order concerning the June 2016 discussion. [R.646; Op. Br. at 7-8, 33-35.]

Because they have not appealed from the order on the motion for reconsideration, the Harrisons have not addressed the applicable standard of review or demonstrated an abuse of discretion. [Op. Br. at 7-8.] Trial courts have discretion to refuse to reconsider, except "(1) when there has been an intervening change of authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *McLaughlin v. Schenk*, 2013 UT 20, ¶ 24, 299 P.3d 1139 (internal quotation marks omitted). Absent these limited circumstances, the court's ruling will not be overturned unless "there is no reasonable basis for the decision." *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615 (internal quotation marks omitted).

The Harrisons did not argue below or in the opening brief that the trial court was required to reconsider its summary judgment ruling. To the contrary, the Harrisons informed the court that it had discretion to consider their motion,

but was not required to do so. [R.607.] The Harrisons initially sought to persuade the court to exercise its discretion in their favor by asserting that they had not received the sheriff's report containing Ms. Holland's statement until after the summary judgment ruling. [R.566,569.] But when the Hollands pointed out that the June 2016 discussion was not newly discovered evidence, the Harrisons conceded that "before the summary judgment motion was argued" they were aware of the "June 2016 face-off" and that law enforcement was summoned. [R.606.] The Harrisons stated that "[w]hether or not the sheriff's report is 'new evidence' . . . misses the point," because rule 54(b) "permits a court to revisit and revise any interim order before final judgment" and "that right is *entirely discretionary* with the court." [R.607 (emphasis added).] The Harrisons do not challenge on appeal the trial court's refusal to reconsider. [Op. Br. at 7-8; R.1299.].

The operative order denying the motion to reconsider is therefore not before this court, and even if it were, it would be reviewed for abuse of discretion. *McLaughlin*, 2013 UT 20, ¶ 22; *Tschaggeny*, 2007 UT 37, ¶ 16. The Harrisons have not argued the court abused its discretion by refusing to reconsider. This court should decline to consider the argument.

1.1.2 The Harrisons have not demonstrated that the trial court applied the wrong legal standard

Even if the June 2016 discussion had been properly raised, the Harrisons have demonstrated no error. In discussing whether an oral objection could interrupt adverse use, the trial court was correct in saying that "forbidding the

use has no legal affect at all."[3] [R.1372.] To the contrary, as the court noted, objecting to the use is what makes the use adverse, and therefore, "forbidding them [would] start the period running if it hadn't already started." [R.1366.]

The trial court's ruling is in accord with a majority of jurisdictions. And the majority rule comports with Utah case law and the doctrine of prescriptive easement. Under the majority rule, a landowner must file a lawsuit or physically interfere with the adverse use. Indeed, most jurisdictions require "actual physical interference with the claimant's use," "in such a way as to prevent, at least temporarily, the adverse use." Jon W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land*, § 5:16 (2019). [Add.E.] "It is not sufficient merely to attempt an interruption or to render the use less convenient. The obstruction must in fact interfere with the claimant's usage." *Id.* (footnotes omitted).

The Harrisons acknowledge "[t]he weight of authority is . . . that mere remonstrances or protests by the landowner will not prevent the acquisition of a

[3] In the summary judgment proceedings, Mr. Harrison asserted in his affidavit that he had notified the Hollands, "well before August 1 of 2016, that we forbad Defendants' use of the roadway," but he provided no specifics. [R.304,1365.] To overcome summary judgment, an affidavit "must set forth specific facts that would be admissible in evidence." *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 50, 70 P.3d 904 (internal quotation marks omitted). A "bare assertion[]" is "insufficient to create an issue of fact." *Anderton v. Boren*, 2017 UT App 232, ¶ 28, 414 P.3d 508. On appeal, the Harrisons have not argued that the trial court's ruling was wrong in light of Mr. Harrison's bare assertion that he "forbade" the use. [Op. Br. at 16.] Issues "not presented in the opening brief are considered waived and will not be considered by the appellate court." *Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903 (internal quotation marks omitted). In any event, for the reasons set forth in this section, the trial court was correct in ruling that Mr. Harrison's forbidding the use had no legal effect. [R.1366,1372.]

right by prescription, in the absence of any physical interference with the user, or legal proceedings based thereon." [Op. Br. at 39 (quoting *4 Tiffany on Real Property* (2017 ed.), § 1206).] This rule makes sense, as a landowner's objection or "complaints may strengthen the conclusion that the claimant's use was hostile." *The Law of Easements & Licenses in Land*, § 5:16.

This court has previously treated a claimant's persistent use in the face of a landowner's opposition as evidence of adverse use, not interruption. This court upheld a determination that a grazing association's use of a road was adverse "in view of the association president's insistence during the 1950's that they had a right to use the trail and would force their way through if necessary and in view of the testimony that the association riders in fact forced their way through the fence or gate when they did not have a key during the period from 1950 to 1980." *Crane v. Crane*, 683 P.2d 1062, 1065 (Utah 1984).

Although *Crane* did not directly address the question before this court, it is consistent with the majority rule that actual interruption is necessary to interrupt adverse use. *The Law of Easements & Licenses in Land*, § 5:16. It also supports that a landowner's ineffective opposition, such as oral objections, is evidence of adverseness rather than interruption. *Id.*

This approach makes sense in light of the doctrine of prescriptive easement. A claimant's use is either under the landowner (permissive) or against the landowner (adverse). *Lunt v. Kitchens,* 260 P.2d 535, 537 (1953). If the use is by

permission, the landowner may generally revoke the license at any time. Restatement (Third) of Property (Servitudes) § 2.16 (2000). But where the use is adverse, further objections only reinforce the fact that the use is adverse.

The majority rule makes sense and is not called into question by any of the four cases cited by the Harrisons. The issue ruled on in the four cases was not whether an oral objection interrupts the prescriptive period, but whether *ineffective physical barriers* interrupt the prescriptive period. In each case, the courts determined that the landowner's conduct, which included repeatedly erecting physical barriers, was sufficient to interrupt the period even if the claimant circumvented the barriers. *Allen v. Thomas*, 209 S.W.3d 475, 481 (Ky. Ct. App. 2006); *Pittman v. Lowther*, 610 S.E.2d 479, 481-82 (S.C. 2005); *Kelley v. Westover*, 938 S.W.2d 235, 235-37 (Ark. Ct. App. 1997); *Rice v. Miller*, 238 N.W.2d 609, 611 (Minn. 1976).

None of the Harrisons' cases hold that a single oral objection interrupts the prescriptive period. Nor do they express relevant policy considerations. The Harrisons argue that this court should avoid a "law of the range mentality" urging "self-help remedies" that "compel[] landowners to engage in potentially-violent confrontations, as a prerequisite to the defense of property rights." [Op. Br. at 38.] The Harrisons quote one of their cases as being in favor of a rule that "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." [Op. Br. at 37 (quoting *Allen*, 209 S.W.3d at 481).]

But in that case, that court was not suggesting that a rule requiring the landowner to erect a physical barrier or initiate a lawsuit could result in violent confrontations; the court was suggesting that requiring landowners to do *more* than erecting physical barriers—perhaps defend the barriers—could lead to violent confrontations. *Allen,* 209 S.W.3d at 481; *see also Pittman*, 610 S.E.2d at 481.

An oral objection is not sufficient to interrupt a prescriptive period. Instead, it confirms that the use is adverse. Even if the argument concerning interruption were preserved, this court should affirm.

1.1.3 The record does not indicate that the Harrisons took overt action clearly evincing an intent to end their acquiescence

Even if this court were to reach the issue and adopt the rule urged by the Harrisons that an oral objection "clearly evincing an intent to end . . . acquiescence" should be deemed to interrupt a claimant's use [Op. Br. at 38], the record does not indicate that the Harrisons made such an objection.

The Harrisons base their argument on Ms. Holland's police statement, which said: "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." [R.586.] The only evidence this provides concerning the Harrisons' conduct is that Mr. Harrison "argued" about "an access road." [R.586.]

In their briefing, the Harrisons state that "the Harrisons . . . summoned law enforcement to prevent Hollands' use of the road" and that "[b]ased on Page Holland's account in the Sheriff's Report, it is clear that in June 2016 . . . Charlie Harrison and Stan Holland had a confrontation on the property in which Mr. Harrison challenged Mr. Holland's use of the road." [Op. Br. at 23, 34.] But Ms. Holland did not state that the Harrisons summoned law enforcement to prevent the Hollands' use of the road; she did not identify who summoned law enforcement or the road about which the parties argued. [R.586.]

Without any support, the Harrisons assert that "the Harrisons timely challenged the Hollands' continued trespass onto the Harrison parcel 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." [Op. Br. at 57.] The Harrisons suggest that based on Ms. Holland's police statement, "As of June 2016, there could be no doubt that the Harrisons did not acquiescence in the Hollands' continued use of the Harrisons' property." [Op. Br. at 39.] But Ms. Holland's police statement that the parties "argued" about an access road does not support the Hollands' characterization, and the Harrisons do not point to any other record support. [R.586.]

Mr. Harrison was a party to the June 2016 discussion. But Mr. Harrison provided no account of that conversation. Mr. Holland testified about the June 2016 discussion in his deposition, explaining that the discussion was about

Mr. Harrison's threatening to knock down the Hollands' pump house in order to widen the road on the Hollands' parcel to the full 40 feet designated on the plat map. [R.751.] In other words, the discussion was about the Harrisons' express easement over the Hollands' parcel; it was not about the easement at issue on appeal—the Hollands' easement over the Harrisons' parcel. [R.598,751.]

Ms. Holland's secondhand police statement does not contradict Mr. Holland's deposition testimony or create a disputed issue of fact. She testified that the two men argued about "an access road in Willow Basin" and "Deputy Black called out—talked to both parties." [R.586.] Thus, the trial court was presented with undisputed testimony from the Hollands that the discussion in June 2016 was about the road on the Hollands' parcel, not on the Harrisons' parcel.

This court has three ways to affirm. This court should not address whether the June 2016 discussion interrupted the prescriptive period because the issue is not properly before the court. If the court does address it, the court should adopt the majority rule that supports the Hollands' position that verbal discussions do not interrupt the period. And if the court does not adopt the majority rule, the court should hold that the record does not support a verbal interruption here.

1.2 The Hollands' use of the road was adverse

The Harrisons also argue that the Hollands' use of the road was not adverse based on a temporary limited permission that Janice (the prior owner of

the Harrisons' parcel) gave to Torres (the prior owner of the Hollands' parcel) [Op. Br. at 43; R.310-11.] This argument, while preserved, also fails.

Regardless of whether Torres' use was permissive, the undisputed evidence demonstrates that the Hollands' use was adverse from the day they acquired title because their use was inconsistent with the permission granted by Janice to Torres. Where a landowner has given license for the property's use, and the licensee's use is consistent with that license, the use will not be presumed to be adverse. *Lunt v. Kitchens*, 260 P.2d 535, 537–38 (Utah 1953). But adverse use can be demonstrated by showing a use that is inconsistent with the license. *Id.* Where "the use is in fact adverse and appears to be so, that is all that is required" to demonstrate adverse use. *Richins v. Struhs*, 412 P.2d 314, 316 (Utah 1966).

Here, Janice gave Torres permission to use the road "not as permanent access to Parcel A," but "to take prospective purchasers to the property for marketing purposes." [R.310-11.] While the Harrisons concede that Janice gave Torres permission only "for the use specified," they nonetheless assert that the Harrisons' general use of the road was permissive while Janice owned the parcel. [Op. Br. at 43.] But the "use specified" was for Torres to "take prospective purchasers to the property for marketing purposes," a use that ended as soon as Torres sold his parcel to the Hollands. [R.310-11.]

The Harrisons assert that "[t]he 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." [Op Br. at 43.] But the Hollands' use of the road for permanent access to their parcel is a use Janice never intended or permitted. [R.310-11.] The Hollands' use was adverse from the day they acquired title on August 9, 1996.

After closing on August 9, 1996, the Hollands used the road to pull a four-horse trailer to their parcel and set up camp. [R.197,226,1370.] The Hollands continued using the road "all the time from then on," including driving the road with a Jeep, a Lincoln, trucks, campers, and trailers. [R.197-99,203,226,363,368, 1370.] They also maintained the road by adding gravel and water berms, as if they had a right to continue using it. [R.199.] Indeed, the Hollands thought they had a right to use the road. The realtor who took them to the parcel showed them a plat map with the road penciled in, and they understood from Torres that their parcel cost more than other parcels because of the road. [R.195,197.]

Janice knew when the Hollands purchased the parcel and was aware that they were using the road. [R.197-98.] It would have been obvious to Janice from August 9, 1996, onward that the Hollands were using the road for a purpose she had not authorized. Janice could have ended the Hollands' use, but never did. Neither did the Harrisons once they purchased the property until expiration of the 20-year period. The Hollands' use was inconsistent with Janice's permission from the beginning and therefore was both "adverse" and "appeared to be

[adverse]," which satisfies the test for adverse use for a prescriptive easement. *Richins*, 412 P.2d at 316.

The trial court correctly ruled that the Hollands' use was adverse.

2. The Trial Court Did Not Err in Instructing the Jury

The Harrisons also challenge the jury's determination of the scope of the easement based upon the wording of a jury instruction. The challenged instruction, Instruction No. 27, states:

> 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 road during its 20 years of use. You may express your decision in terms of the survey, or by determining the width of the easement.

[R.1085; Op. Br. at 47.] On appeal, the Harrisons take issue with the "reasonably necessary" language in the instruction. [Op. Br. at 47-48.] But the Harrisons did not preserve this issue, and even if they had, the instruction is correct.

2.1 The Harrisons did not preserve their objection to the jury instruction

Before addressing the merits, the Hollands show that the jury instruction issue is not preserved and is inadequately briefed.

As background, after the parties submitted proposed instructions and objections, the court crafted Instruction No. 27. During a colloquy between the court and counsel discussing the instruction, the Harrisons' counsel reported that he was "[l]argely happy" with Instruction No. 27. [R.1749; Add.D.] Counsel

asked to have a sentence added to the instruction,[4] but counsel did not otherwise object to the instruction. [R.1749-51.]

But counsel did not just fail to object. When the trial court explained the instruction properly asked the jury to "tak[e] into account the historic use and shape of the road during its 20 years of use," the Harrisons counsel *agreed* that "it covers the substance of it," although counsel again requested the additional sentence. [R.1750.] Indeed, in objecting to a different proposed jury instruction (which was not given at trial), the Harrisons endorsed the "reasonably necessary" language by asserting that the proposed instruction "disregards recent law concerning the limitation of prescriptive easements to that *reasonably necessary for historic use*." [R.1041 (emphasis added).]

Because the Harrisons did not preserve their objection to the jury instruction, and indeed invited any error, this court should decline to address the issue on appeal. *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 10, 40 P.3d 1119.

In addition, this court should decline to address the argument because the Harrisons do not attempt to demonstrate that the "reasonably necessary" language is inconsistent with Utah law. Instead, the Harrisons assert that the language does not appear in Utah case law. But this is incorrect.

[4] Counsel requested that the court add the sentence, "The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period." [R.1749.]

In *Judd v. Bowen*, the Utah Court of Appeals noted that "the 'purpose for which the easement was acquired' limits both the extent of the easement right granted as well as the physical boundaries of the easement itself." 2017 UT App 56, ¶ 58, 397 P.3d 686 (quoting *Whitesides v. Green*, 44 P. 1032, 1033 (Utah 1896)). The court then used the language included in the instruction here: the scope of an easement is a "'question of reasonable necessity.'" *Id.* (quoting *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 158 (Utah 1946)). "And what is reasonably necessary to effectuate the prescriptive right 'must be determined from a consideration of the facts and circumstances peculiar to the case.'" *Id.* (quoting *Whitesides*, 44 P. at 1033).

The trial court's language does stem from Utah case law. And that case law has been endorsed by this court, albeit indirectly. The Harrisons fail to recognize this because they misunderstand *Judd*. The Harrisons claim that, in *Judd*, "the court of appeals reversed the trial court's finding and order as they related to the widths of the claimants' prescriptive rights, holding that 'these orders were inconsistent with the usage that forms the basis of the Judd's prescriptive right—using the Driveway for ingress and egress purposes.'" [Op. Br. at 46-47.]

But the court of appeals' decision did not concern the width of the prescriptive easement. Its decision concerned the trial court's order that the landowner remove a walkway and decorative border. *Id.* ¶ 64. The court of appeals held that "[t]hese orders are inconsistent with the usage that forms the

basis of the Judds' prescriptive right—using the Driveway for ingress and egress purposes" because "neither the walkway nor the decorative border impedes the Judds from using the Driveway for access purposes." *Id.* ¶ 65. The court of appeals went on to "vacate the [trial] court's orders that the Bowens remove the decorative rock border and the walkway as those orders do not appear to be reasonably necessary to the Judds' enjoyment of their access easement." *Id.* ¶ 69.

This court granted certiorari in *Judd v. Bowen* on the questions of "whether the court of appeals erred in its construction and application of the elements of the legal standard for establishing a prescriptive easement for access" and "whether the court of appeals erred in its ruling concerning the scope of the easement." *Judd v. Bowen*, 2018 UT 47, ¶ 8, 428 P.3d 1032. This court subsequently dismissed certiorari as improvidently granted because "the court of appeals' decision is not in conflict with any prior court of appeals decision or any decision of this court"; the court "relied upon well-established case law from both this court and the court of appeals"; its "decision did not alter or amend the standard"; and the court's "application of these principles was in conformity with Utah Supreme Court and court of appeals caselaw." *Id.* ¶¶ 2, 12-13. "Nothing the court of appeals did was unusual." *Id.* ¶ 13.

The trial court correctly relied upon the language in *Judd*. Regardless, the Harrisons have not explained how the language is inconsistent with Utah law, let

alone how *Judd* was wrongly decided. This court should decline to address the issue as unpreserved and inadequately briefed.

2.2 The jury instruction was correct

Instruction No. 27 is also correct. All parties agree that the scope of the easement is determined by historic use. And the jury instruction reflects the fact that the scope of the easement here was determined by its historic use.

Indeed, the Harrisons never explain the difference between Instruction No. 27 and the instruction they prefer. Instruction No. 27 defines the width of the easement as the width reasonably necessary to continue the historic use. The instruction the Harrisons prefer defines the width of the easement by the historic use. The Harrisons' argument is that the trial court erred in failing to use different words that mean the same thing.

Without explanation, the Harrisons complain that the instruction told the jury to disregard the evidence in support of the Harrisons' favored outcome. [Op. Br. at 47-48.] But the instruction told the jury to "determine what is reasonably necessary . . . for SPAH and the Hollands to access their property." [R.1085.] And the instruction told the jury to base that determination on "the facts and circumstances of the case . . . taking into account the historic use and shape of the road during its 20 years of use." [R.1085.] Accordingly, in addition to failing to show that the reasonably necessary standard is unsupported by Utah law, the Harrisons have also failed to show any legal error in the instruction.

The Harrisons also appear to misunderstand the facts of the case. The Harrisons state that "it was established . . . that, 20 years before this action started, the road across the Harrison parcel was a single blade, or 8 feet, in width." [Op. Br. at 47.] But the evidence established that, while the width of the dozer blade used to cut the road was eight feet, it takes "several cuts to get the road in." [R.1659-60.] The evidence also established that prior to the Hollands' beginning their use, a power pole had been placed on the Hollands' parcel, and placement of the pole would have required large power trucks to traverse the road to reach the site. [R.1592-97.]

In any event, the relevant question is not the width of the actual road, but the Hollands' historic use. The Hollands' "historic use" of the road was their use "during the prescriptive period," which was from 1996 to 2016. *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998). Their historic use was using the road to access their parcel with their large vehicles, including the Jeep, truck, tent trailer, horse trailer, and fifth-wheel trailer, as well as the cement trucks, dump trucks, and bobtail trucks used to develop their property. [R.1527-28,1534,1545-46,1559, 1568.]

The Harrisons also wrongly assert that "[n]o competent evidence of any sort was offered of [the road's] original course." [Op. Br. at 47.] But again, the relevant question is the Hollands' historic use during the prescriptive period. Ms. Holland testified that they had used the road on the Harrisons' parcel to

access their parcel from August 9, 1996 to the present, and that the road shown in post-2013 satellite images was "the road that has existed since we first went to the property." [R.1526-27,1530.] Mr. Blake surveyed the course of that road. [R.1576.] The Harrisons did not present evidence to contradict Ms. Holland's testimony or demonstrate that the course ever changed.

The Harrisons' argument is not preserved, fails to demonstrate an error, and mischaracterizes the record. And even if there were an error, the Harrisons have not carried their burden to show prejudice. This court should affirm.

3. The Trial Court Did Not Abuse Its Discretion in Allowing Testimony from the Hollands' Expert

The Hollands' expert (Mr. Blake) surveyed the road in 2016 and testified as to his survey. The Harrisons assert that his testimony should have been excluded as irrelevant and unduly prejudicial under rule 403, as well as unreliable under rule 702(b). [Op. Br. at 51-55.] The Harrisons are incorrect.

3.1 Mr. Blake's testimony was relevant and not unduly prejudicial

The Harrisons argue that Mr. Blake's testimony was irrelevant because "the location of the road in 2016 is of no consequence in determining the scope of a prescriptive right." [Op. Br. at 53-54.] But evidence is relevant if "it has any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action." Utah R. Evid. 401. The rules of evidence "establish a very low bar that deems even evidence with the slightest probative value

relevant and presumptively admissible." *State v. Richardson*, 2013 UT 50, ¶ 24, 308 P.3d 526 (internal quotation marks omitted).

Mr. Blake's survey was relevant evidence. As the court said in denying the Harrisons' motion in limine, "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." [R.839.]

Ms. Holland testified that they had used the road on the Harrisons' parcel to access their parcel from August 9, 1996 to the present, and that the road shown in post-2013 satellite images was "the road that has existed since we first went to the property." [R.1526-1530.] Mr. Blake's survey in 2016 therefore reflects the road as it existed during the prescriptive period. [R.1576.] While witnesses differed regarding whether the road had been widened before or during the prescriptive period, and if so, how much or what portions of the road had been widened, the jury was entitled to assess the credibility of the witnesses. The survey was relevant to the jury given their credibility determinations. The court did not abuse its discretion in admitting the testimony about the survey.

Mr. Blake's relevant testimony also was not unduly prejudicial. The Harrisons claim that Mr. Blake's testimony should have been excluded as unduly prejudicial because the jury received "testimony regarding the location of the easement's supposed historic centerline, which they clearly took as gospel." [Op.

Br. at 54.] But Mr. Blake never purported to testify to a "historic centerline." His testimony was limited to describing the process by which he surveyed the road in 2016, estimated the edges of the dirt road, created a legal description, and worked backwards from the description to estimate a centerline. [R.1577-79.] He informed the jury that he had not looked at historical photographs of the road, had not seen the road in the past, and did not "have any information at all on where that road went or how big it was in 1996." [R.1583-84.]

Mr. Blake's testimony was relevant and not prejudicial.

3.2 Mr. Blake's testimony was reliable

The trial court also did not abuse its discretion in allowing Mr. Blake to testify as an expert. Under rule 702(b), the principles and methods underlying Mr. Blake's testimony were reliable, based on sufficient facts or data, and were reliably applied to the facts. The Harrisons have not shown otherwise. To the contrary, they effectively concede all three prongs are met under 702(b).

Rule 702(b) provides that expert testimony is admissible if "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." Utah R. Evid. 702(b). The Harrisons acknowledge that they "did not challenge Mr. Blake's credentials as a land surveyor; nor did they contend that his survey methodology was flawed or incorrectly performed." [Op. Br. at 52.] Thus, the "principles and methods" underlying Mr. Blake's testimony are "reliable" and

"based upon sufficient facts or data," and therefore satisfy the first two prongs under 702(b). [Op. Br. at 52.]

The Harrisons suggest that Mr. Blake's principles and methods have not been reliably applied to the facts of the case. [Op. Br. at 52.] They argue that for purposes of a prescriptive easement, Mr. Blake measured "the wrong thing" by measuring the road as it existed in 2016. [Op. Br. at 52-53.] They claim he improperly calculated the centerline of the "easement" and failed to establish "the historic, 20-year long use of the easement." [Op. Br. at 53.]

But the Harrisons misunderstand Mr. Blake's testimony. Mr. Blake did not survey the "easement." Mr. Blake surveyed the road. He testified that he "surveyed the road that [sic] - - - way that goes through the Harrison property." [R.1576.] And he described to the jury the process of measuring and surveying the road that was physically present on the parcel when he visited. [R.1576-59.] The Harrisons concede that Mr. Blake correctly and accurately performed this survey. [Op. Br. at 52.] It was for the jury to weigh Mr. Blake's testimony regarding the survey of the road, along with all the other trial testimony, in determining the scope of the easement.

Mr. Blake's "principles and methods" were "reliably applied to the facts" because his survey of the road was accurate, as the Harrisons concede. [Op. Br. at 52.] The trial court did not abuse its discretion in allowing Mr. Blake's testimony.

4. The Trial Court Did Not Abuse Its Discretion in Excluding Testimony from the Harrisons' Expert

The trial court also did not abuse its discretion in excluding testimony from the Harrisons' expert (Mr. Bunker). This court "grant[s] a trial court broad discretion to admit or exclude evidence" and will "not reverse a trial court's ruling on evidence unless the ruling was beyond the limits of reasonability." *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 43, 221 P.3d 205 (internal quotation marks omitted).

Mr. Bunker's proffered testimony was not rebuttal testimony. "Rebuttal evidence is evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence." *Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993). Mr. Bunker sought to 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 the Plaintiff's property as it existed in October 2016, and (2) establishing a centerline of that road by 'eyeballing a mid-point line." [Op. Br. Add 3 at 1-2.] But Mr. Blake testified to these facts and never represented anything to the contrary. [R.1576-79,1584.] Because Mr. Bunker's proffered testimony would have "wast[ed] time" and "needlessly present[ed] cumulative evidence," the court's ruling excluding it was not beyond the limits of reasonability. Utah R. Evid. 403; *Ferguson*, 2009 UT 49, ¶ 43.

For the same reason, the Harrisons have not shown prejudice. As Mr. Bunker's proffered testimony merely repeated facts already testified to by

Mr. Blake, his testimony was "sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the case." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 22, 70 P.3d 35 (internal quotation marks omitted); *see also* Utah R. Civ. P. 61.

Finally, the Harrisons do not challenge the trial court's ruling that Mr. Bunker's testimony would usurp the court's responsibility in instructing the jury. [Op. Br. Add. 3 at 2.] *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2013 UT 24, ¶ 16, 309 P.3d 201. Mr. Bunker's expert designation stated that Mr. Bunker would testify "to the procedure for determining the location of a prescriptive easement." [R.664.] Unlike the physical existence of the road, the doctrine of prescriptive easement is a matter of property law, and the procedure for determining the location or scope of a prescriptive easement is a legal question. *See, e.g.*, *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998).

The Utah Rules of Evidence do not permit a witness to "give legal conclusions," which create "a danger that a juror may turn to the expert rather than the judge for guidance on the applicable law." *Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1347-48 (Utah 1993). For that reason, the court of appeals has noted that experts should not be permitted to "tie their opinions to the requirements of Utah law." *Colosimo v. Gateway Cmty. Church*, 2016 UT App 195, ¶ 33, 382 P.3d 667 (internal quotation marks and citation omitted), *aff'd*, 2018 UT 26, 424 P.3d 866. The Harrisons have failed to demonstrate that Mr. Bunker's

testimony would not have usurped the court's responsibility in instructing the jury. [Op. Br. Add. 3 at 2.]

The trial court did not abuse its discretion in excluding Mr. Bunker's testimony, and the Harrisons have not shown any prejudice.

Conclusion

The Harrisons have not demonstrated that the trial court erred in its partial summary judgment ruling, instruction of the jury, or evidentiary rulings. This court should affirm the lower court's rulings.

DATED this 17th day of April, 2019.

ZIMMERMAN BOOHER

/s/ Freyja R. Johnson
Troy L. Booher
Freyja R. Johnson
Attorneys for Appellees SPAH Family Ltd., Stan E. Holland, and Page Holland

Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 9,443 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 17th day of April, 2019.

/s/ Freyja R. Johnson

Certificate of Service

This is to certify that on the 17th day of April, 2019, I caused two true and correct copies of the Brief of Appellees to be served via first-class mail, postage prepaid, with a copy by email, on:

Vincent C. Rampton
Jessica P. Wilde
JONES WALDO HOLBROOK & MCDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, UT 84101
vrampton@joneswaldo.com
jwilde@joneswaldo.com

Attorneys for Appellants Charlie W. Harrison and Trena Harrison

/s/ Freyja R. Johnson

Addendum A

Vincent C. Rampton (USB 2684)
Jessica P. Wilde (USB 11801)
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.
170 South Main, Suite 1500
Salt Lake City, Utah 84101
Telephone: 801-521-3200
Email: vrampton@joneswaldo.com
jwilde@joneswaldo.com
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 CONTINUING PRETRIAL CONFERENCE, DENYING MOTION TO RECONSIDER AND SETTING HEARING ON MOTION TO EXCLUDE** Civil No. 160700035 Judge Lyle R. Anderson

Based on the stipulation and joint motion of the parties, and good cause appearing,

IT IS HEREBY ORDERED as follows:

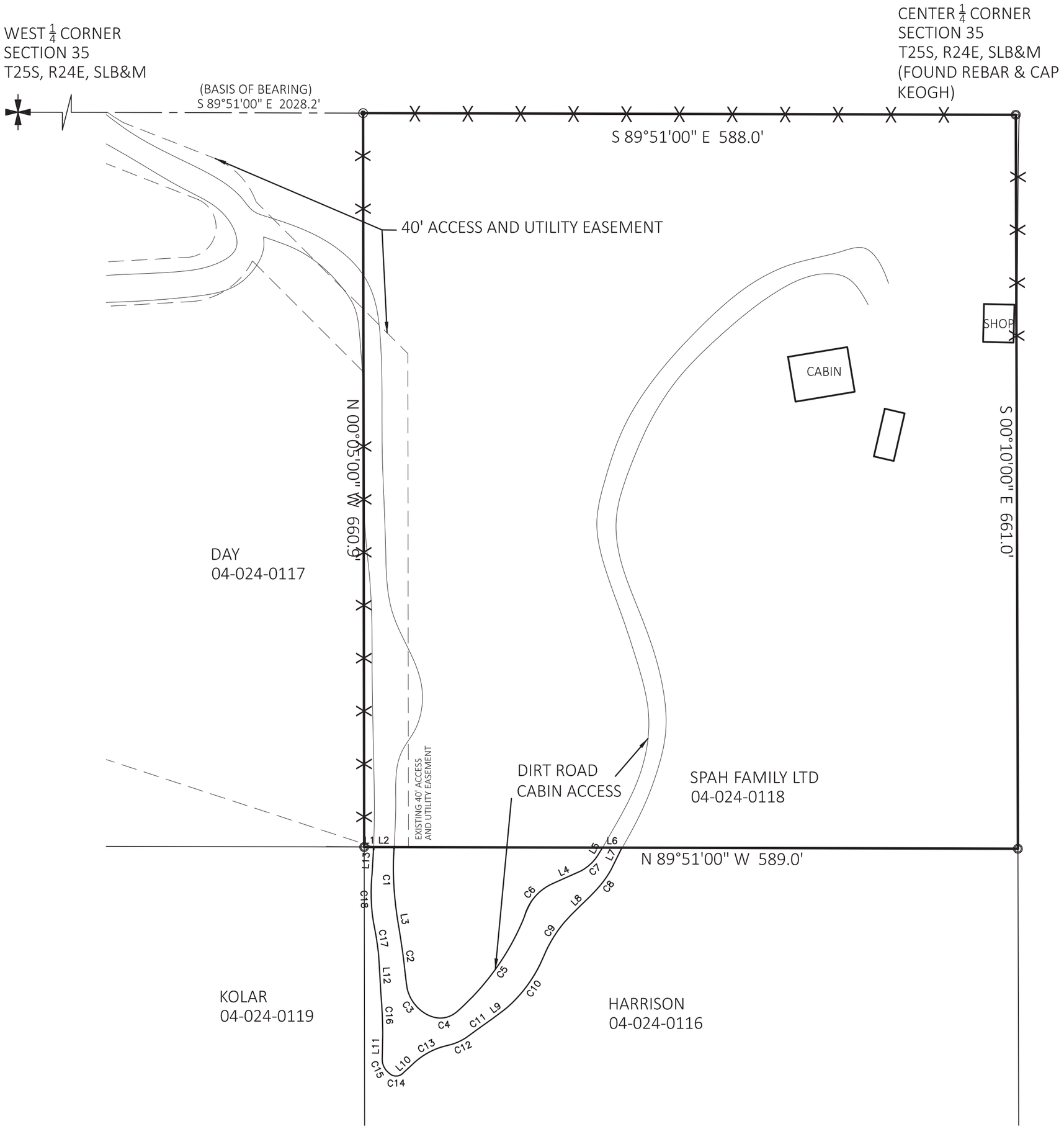
1. That the pretrial scheduling conference in the above-entitled matter currently set for 9 a.m. on October 24, 2017, be and hereby is continued to November 14, 2017, at 9:00 am.

2. That Plaintiffs' pending Motion to Reconsider Order of Summary Judgment (Defendants' Claim of Easement by Prescription), is hereby denied, and Plaintiffs' Motion to Exclude Defendants' Expert Witnesses, will be heard on November 14, 2017, at 9:00 am.

END OF ORDER

Effective when digitally executed by the Court, above

Addendum B



SURVEYOR'S CERTIFICATE

I, Lucas Blake, certify that I am a Professional Land Surveyor as prescribed under the laws of the State of Utah and that I hold license no. 7540504. I further certify that a land survey was made of the property described below, and the findings of that survey are as shown hereon.

Lucas Blake
License No. 7540504

LICENSED PROFESSIONAL LAND SURVEYOR
NO. 7540504
LUCAS
BLAKE
9/28/2017
STATE OF UTAH

BOUNDARY DESCRIPTION

BEGINNING AT THE CENTER ¼ CORNER OF 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, T25S, R24E, SLB&M, AND PROCEEDING THENCE WITH SAID CENTERLINE SO'(]TH 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 Atso A 10 FOOT WIDE ACCESS EAS NT TO A SPRING THAT EXTENDS NORTHERLY TO THE NORTHWESTERLY AREA FROM THE ROADWAY.

SUBJECT TO ALL RESTRICTIONS, EASEMENTS, AND RIGHTS-OF-WAY, HOWEVER EVIDENCED.

ROADWAY DESCRIPTION

A portion of an access road to the Spah Family Cabin being located within the Harrison parcel. The edge of road as surveyed summer of 2016 being more particularly described as:

Beginning at a point being South 89°51'00" East 8.60 feet from the Southwest Corner of the Spah family parcel, said point also being South 71°53'27" East from the West Quarter corner of Section 35, Township 25 South, Range 24 East, Salt Lake Base and Meridian, and running thence along parcel line thence South 89°51'00" East 18.5 feet; thence with a curve having a radius of 265.9 feet, to the left with an arc length of 58.0 feet, (a chord bearing of South 02°02'12" East 57.9 feet); thence South 08°41'30" East 15.9 feet; thence with a curve having a radius of 903.7 feet, to the right with an arc length of 51.3 feet, (a chord bearing of South 07°29'55" East 51.3 feet); thence with a reverse curve having a radius of 35.5 feet, to the left with an arc length of 34.4 feet, (a chord bearing of South 36°00'35" East 33.0 feet);
thence with a compound curve having a radius of 23.0 feet, to the left with an arc length of 28.2 feet, (a chord bearing of North 82°48'00" East 26.5 feet); thence with a compound curve having a radius of 228.4 feet, to the left with an arc length of 105.4 feet, (a chord bearing of North 35°21'45" East 104.4 feet); thence with a reverse curve having a radius of 45.1 feet, to the right with an arc length of 41.0 feet, (a chord bearing of North 40°38'11" East 39.6 feet); thence North 65°51'16" East 27.5 feet;
thence with a curve having a radius of 40.9 feet, to the left with an arc length of 20.3 feet, (a chord bearing of North 47°42'11" East 20.1 feet); thence North 31°54'16" East 8.8 feet; thence along a parcel line South 89°51'00" East 17.5 feet; thence South 26°16'42" West 20.3 feet; thence with a curve having a radius of 96.0 feet, to the right with an arc length of 30.4 feet, (a chord bearing of South 37°16'11" West 30.3 feet); thence South 45°20'49" West 26.1 feet; thence with a curve having a radius of 116.0 feet, to the left with an arc length of 45.1 feet, (a chord bearing of South 33°25'25" West 44.8 feet);
thence with a reverse curve having a radius of 124.6 feet, to the right with an arc length of 57.6 feet, (a chord bearing of South 35°47'02" West 57.1 feet); thence South 52°43'44" West 15.3 feet; thence with a curve having a radius of 698.8 feet, to the left with an arc length of 26.1 feet, (a chord bearing of South 54°15'58" West 26.1 feet); thence with a reverse curve having a radius of 51.5 feet, to the right with an arc length of 20.3 feet, (a chord bearing of South 64°05'35" West 20.2 feet); thence with a reverse curve having a radius of 65.5 feet, to the left with an arc length of 38.0 feet, (a chord bearing of South 62°21'25" West 37.4 feet); thence South 47°25'49" West 11.1 feet; thence with a curve having a radius of 8.8 feet, to the right with an arc length of 14.7 feet, (a chord bearing of South 88°59'02" West 13.0 feet); thence with a compound curve having a radius of 15.6 feet, to the right with an arc length of 15.0 feet, (a chord bearing of North 24°50'21" West 14.4 feet); thence North 01°23'11" East 21.0 feet;
thence with a curve having a radius of 468.0 feet, to the left with an arc length of 35.1 feet, (a chord bearing of North 02°30'03" West 35.1 feet); thence North 03°23'12" West 36.4 feet; thence with a curve having a radius of 274.7 feet, to the left with an arc length of 29.5 feet, (a chord bearing of North 08°50'33" West 29.5 feet); thence with a reverse curve having a radius of 169.0 feet, to the right with an arc length of 44.1 feet, (a chord bearing of North 01°56'10" West 44.0 feet); thence North 03°28'17" East 24.8 feet to the point of beginning.

NARRATIVE

The Basis of Bearings is N 89°51' W Between the Center Quarter Corner and West Quarter Corner of Section 35, Township 25 South, Range 24 East, Salt Lake Base and Meridian.

The purpose of this survey is to retrace and monument the boundary of the above described property according to the official records and the location of pertinent existing improvements located on the ground.

LINE	BEARING	DISTANCE
L1	S 89°51'00" E	8.60'
L2	S 89°51'00" E	18.48'
L3	S 08°41'30" E	15.94'
L4	N 65°51'16" E	27.53'
L5	N 31°54'16" E	8.77'
L6	S 89°51'00" E	17.46'
L7	S 26°16'42" W	20.33'
L8	S 45°20'49" W	26.10'
L9	S 52°43'44" W	15.34'
L10	S 47°25'49" W	11.13'
L11	N 01°23'11" E	21.00'
L12	N 03°23'12" W	36.43'
L13	N 03°28'17" E	24.84'

CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	58.05'	265.93'	12°30'23"	S 02°02'12" E	57.93'
C2	51.34'	903.69'	3°15'19"	S 07°29'55" E	51.34'
C3	34.35'	35.47'	55°29'41"	S 36°00'35" E	33.03'
C4	28.24'	23.05'	70°12'29"	N 82°48'00" E	26.51'
C5	105.36'	228.39'	26°25'56"	N 35°21'45" E	104.43'
C6	41.00'	45.14'	52°02'32"	N 40°38'11" E	39.60'
C7	20.30'	40.92'	28°25'30"	N 47°42'11" E	20.09'
C8	30.43'	95.98'	18°10'00"	S 37°16'11" W	30.31'
C9	45.10'	116.02'	22°16'22"	S 33°25'25" W	44.82'
C10	57.59'	124.55'	26°29'26"	S 35°47'02" W	57.08'
C11	26.06'	698.84'	2°08'11"	S 54°15'58" W	26.06'
C12	20.32'	51.51'	22°36'02"	S 64°05'35" W	20.19'
C13	37.98'	65.48'	33°13'51"	S 62°21'25" W	37.45'
C14	14.70'	8.79'	95°53'24"	S 88°59'02" W	13.05'
C15	15.01'	15.63'	55°01'22"	N 24°50'21" W	14.44'
C16	35.11'	467.98'	4°17'54"	N 02°30'03" W	35.10'
C17	29.50'	274.67'	6°09'13"	N 08°50'33" W	29.49'
C18	44.13'	168.99'	14°57'50"	N 01°56'10" W	44.01'

LEGEND

- Property Corner
- Found Property Corner
- Section Corner Monument
- Fence Line
- DIRT ROAD

N

GRAPHIC SCALE

80 0 40 80

1" (INCH) = 80' (FEET)

LOCATED IN THE SW QUARTER OF
SECTION 35,
TOWNSHIP 25 SOUTH, RANGE 24 EAST,
SALT LAKE BASE AND MERIDIAN

BOUNDARY SURVEY

WILLOW BASIN
LA SAL MOUNTAIN

PAGE HOLLAND

RED DESERT Land Surveying
4290 Zimmerman Lane
Moab, UT 84532
435.260.0104

Project	140-16
Date	9/28/2017
Sheet	1 OF 1

Addendum C

Vincent C. Rampton (USB 2684)
Jessica P. Wilde (USB 11801)
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.
170 South Main, Suite 1500
Salt Lake City, Utah 84101
Telephone: 801-521-3200
Email: vrampton@joneswaldo.com
jwilde@joneswaldo.com
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.	**DECLARATION OF JANICE KIRK GUSTAFSON** Civil No. 160700035 Judge Lyle R. Anderson

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, JANICE KIRK GUSTAFSON, hereby declare as follows:

1. I am an individual over the age of 21 years and am competent to testify as to the matters set out herein.

2. I was at one time the owner of all property located within what is now known as Willow Basin Subdivision in Grand County, State of Utah, which I held and owned in the name of Janice Hawley.

3. I authorized the preparation by Keogh Land Surveying of a subdivision plat of Willow Basin Subdivision in November of 1994.

4. As illustrated by Keogh Land Surveying, the subdivision consisted of eight lots, each accessible by roads drawn within the subdivision, all as reflected on the subdivision plat attached to this Declaration as Exhibit 1.

5. It was at all times my intention that the lots within the subdivision be accessed by the roads shown on the plat map.

6. After Willow Basin Subdivision was approved by necessary government agencies, I retained Randy Day and Raymond Tibbetts of Canyon County Realty to list and market the lots therein.

7. I thereafter entered into an agreement with Manuel and Ginger Torres under which I conveyed my 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 me on Parcel G, a title which I retained.

8. I became aware that, at some time before or after the summer of 1996 (during which I was in Moab and would have known of its creation had it been during that time), Manuel Torres arranged for the grading of a narrow road connecting Parcel A with adjacent roads by means of a road looping over Parcel H (a title to which I had retained).

9. It was my understanding that the purpose of the road crossing Parcel H was not as permanent access to Parcel A, but as a means of permitting Manuel and Ginger Torres to take prospective purchasers to the property for marketing purposes.

10. While I neither knew of nor authorized the creation of the road in advance, its use thereafter for the purpose stated at paragraph 9 was pursuant to permission from me.

I declare under the perjury laws of the State of Utah and the United States of America that the foregoing is true and correct.

DATED this _____ day of May 2017.

Janice Kirk Gustafson

JANICE KIRK GUSTAFSON

Addendum D

IN THE SEVENTH JUDICIAL DISTRICT COURT, MOAB

GRAND COUNTY, STATE OF UTAH

-o0o-

CHARLIE W. HARRISON and TRENA HARRISON, Plaintiffs,	)	Case No. 160700035
vs.	)	JURY TRIAL
SPAH FAMILY LTD, STAN E. HOLLAND and PAIGE HOLLAND, Defendants.	)	(Volume Two)

-o0o-

BE IT REMEMBERED that on the 15th day of May, 2018, commencing at the hour of 8:09 a.m., the above-entitled matter came on for further hearing before the HONORABLE LYLE R.

Rogers? You're--you're comfortable with the say it is?
MS. ROGERS: It's fine.
THE COURT: Okay.
MS. ROGERS: It's fine.
THE COURT: And--but you still want me to do something to No. 27?
MS. ROGERS: No.
THE COURT: Okay.
MS. ROGERS: Just leave it like it is.
MR. RAMPTON: Could I speak to No. 27, your Honor?
THE COURT: Yes.
MR. RAMPTON: Largely happy. I would ask that the second paragraph commence with the standard stated in the case law of the general rules to the extent of a prescriptive easement is measured and limited by its historical use during the prescriptive period. That's from Valcarce vs. Fitzgerald, that's from the Judd decision that's kind of the black letter standard in this area and I'd like to be able to argue it.
THE COURT: I'm sorry. What do you want me to add? What are the words you want me to add?
MR. RAMPTON: The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period. (Inaudible)
THE COURT: Well, I thought I got that with taking in the third paragraph, taking into account the historic use

and shape of the roadway during its 20 years of use.

MR. RAMPTON: I understand that and it--it--I agree it covers the substance of it but I think the jury ought to hear the legal standard that they're operating under, because I'd like to be able to read that, too, and--and argue it.

THE COURT: Well, sorry. And there are--there are lots of words and lots of opinions over the years and I--I don't think I can give them every one of those words. So I've done the best I could to--to cull from each opinion that you presented to me and maybe--

MS. ROGERS: I am going to object to that because I don't think that it is the only legal standard. And we go back to this Lent vs. Lance case--

THE COURT: Which is why I also say you should determine what is reasonably necessary from the facts and circumstances of this case for Spah and Hollands to access their property.

MS. ROGERS: Right.

THE COURT: I'm--I'm giving this jury two--two different things that the Courts of Appeals have said in this state in different cases and letting them run with it. Now, maybe what I could do is I could say, this is it, this is what you're supposed to do, you're supposed to--I could--Mr. Rampton would be thrilled if I would say you must determine what is the smallest width of the roadway that they--that they

used during the entire 20-year period. That's it. That's the roadway.

Or I could say what you want me to say, which is you should determine what is the largest width that they need in order to be able to do whatever they have ever done and what are they likely to need to do in the future.

MS. ROGERS: Well I just don't want one or the other to be more emphasized. And I think you--

THE COURT: I've given them both in the same sentence.

MS. ROGERS: --I think you--

THE COURT: To determine what is reasonably necessary from the facts and circumstances of this case, which I get from one opinion for the Spahs and Hollands to access their property and then from another case, taking into account the historic use and shape of the roadway during its 20 years of use.

MS. ROGERS: But now, Mr. Rampton wants more.

THE COURT: And I'm not going to give it to him.

MS. ROGERS: Okay. If you don't give him more then you don't have to give us more.

THE COURT: Okay. 28--

MS. ROGERS: Good things you had a million kids to settle disputes amongst; right?

THE COURT: --I think has not--has not changed from

Addendum E

The Law of Easements & Licenses in Land § 5:16

The Law of Easements and Licenses in Land | March 2019 Update
Jon W. Bruce and James W. Ely, Jr.

Chapter 5. Creation of Easements by Prescription

§ 5:16. Continuous and uninterrupted use—Uninterrupted use

References

West's Key Number Digest

- West's Key Number Digest, Easements 7

The landowner may interrupt an adverse usage by asserting ownership before the prescriptive period has expired.[1] Actions by a third person do not interrupt an adverse usage because they do not represent an assertion of dominion by the owner.[2] Moreover, brief interruptions caused by natural forces or construction projects do not negate continuity of usage.[3]

In jurisdictions adhering to the adverse use theory of prescription,[4] there must be an actual physical interference with the claimant's use.[5] The landowner must erect physical obstacles or otherwise use the servient parcel in such a way as to prevent, at least temporarily, the adverse use.[6] It is not sufficient merely to attempt an interruption[7] or to render the use less convenient.[8] The obstruction must in fact interfere with the claimant's usage.[9] Thus, the erection of gates during the prescriptive period is immaterial where they do not prevent a claimant from using a road.[10] Moreover, use of land by the owner for the same purpose as the claimant does not constitute an interruption.[11] A number of jurisdictions, however, have taken the position that action by the servient owner, such as erecting physical barriers, amounts to sufficient interruption even if such action ultimately failed to halt the adverse use.[12]

The prevailing view is that a mere protest by the owner, whether oral or written, will not interrupt an adverse usage.[13] Indeed, complaints may strengthen the conclusion that the claimant's use was hostile.[14]

There is also authority that a belated grant of permission by the owner after the adverse use has commenced does not affect the running of the prescriptive period.[15] It is arguable, however, that such a grant of permission undercuts the adverse character of a claimant's usage.[16] This is certainly the case if the adverse claimant accepts the landowner's permission to use the servient property.[17] Similarly, it has been held that an express agreement giving permission to

use a driveway interrupted adverse usage. [18] Clearly, permission granted after the prescriptive period has expired has no legal effect. [19]

Several jurisdictions have enacted statutes that enable a landowner to give persons using the owner's land written notice of an intention to dispute any claim arising from such use. [20] This notice constitutes an interruption, preventing the acquisition of any prescriptive right. [21] Upon receiving such a notice, the claimant may bring an action against the landowner for disturbing the claimant's right to use the land. [22] Legislation of this character is an appropriate solution to the landowner's dilemma in obtaining protection against prescriptive easements. [23] It avoids both the potential for violent confrontation and the uncertainty implicit in the requirement of actual interruption [24] as well as the expense of instituting a lawsuit. Of course, a statutory notice of interruption filed after the prescriptive period has run cannot divest the claimant of a prescriptive easement. [25]

In addition to actually obstructing adverse usage or giving notice pursuant to a statutory scheme, a landowner may interrupt the use by instituting successful legal proceedings. The filing of an action by a landowner against whom the statute of limitations is running will interrupt the prescriptive period if the lawsuit results in a judgment that the use was improper. [26] Such judgment relates back to the start of the proceedings, and it is irrelevant that no cessation of use actually occurs. [27] A dismissed or abandoned action, however, does not toll the running of the statute of limitations. [28] Similarly, the finding of a petition to register title to a parcel of land interrupts the riping of a claimed prescriptive easement. [29]

The conveyance of the servient estate does not interrupt the prescriptive period. [30] A subsequent owner takes the land subject to the ripening easement. [31]

Footnotes

1 Stiefel v. Lindemann, 33 Conn. App. 799, 811, 638 A.2d 642, 649 (1994) ("The owner of the servient estate over which the right-of-way is used may interrupt the use by committing an act that breaks its continuity."); O'Dell v. Stegall, 226 W. Va. 590, 617, 703 S.E.2d 561, 588 (2010) (quoting this treatise). The servient owner must interrupt the adverse use during the prescriptive period. Westpac Aspen Investments, LLC v. Residences at Little Nell Development, LLC, 284 P.3d 131, 136 (Colo. App. 2011), cert. denied, 2012 WL 3292842 (Colo. 2012) (prescriptive footpath easement established before alleged interruption); Smith v. Chamblin Properties, LLC, 201 S.W.3d 582, 587 (Mo. Ct. App. W.D. 2006) (actions to block access to parking lot did not occur until prescriptive period had passed); Fyfe v. Tabor Turnpost, L.L.C., 22 Neb. App. 711, 720, 860 N.W.2d 415, 424–425 (2015) (interruption of water through irrigation lateral took place after prescriptive period had passed); Kessinger v. Sharpe, 71 A.D.3d 1377, 898 N.Y.S.2d 381, 382-383 (4th Dep't 2010) (fence blocking use of driveway erected after prescriptive period had run); Rotenberger v. Burghduff, 2007 SD 19, 729 N.W.2d 175, 180 (S.D. 2007) (interruption of trail usage after prescriptive period had passed was ineffective). See §§ 5:17 to 5:22 (defining prescriptive period).

2 Shuggars v. Brake, 248 Md. 38, 46, 234 A.2d 752, 758 (1967) (placing posts across driveway by person other than servient owner did not constitute interruption); Tuf Flight Industries, Inc. v. Harris, 129 S.W.3d 486, 489 (Mo. Ct. App. W.D. 2004); O'Dell v. Stegall, 226 W. Va. 590, 617, 703 S.E.2d 561, 588 (2010) (quoting this treatise). See 4 Tiffany, Law of Real Property (3d ed.) § 1205.

3 Jordan v. Bailey, 113 Nev. 1038, 1047, 944 P.2d 828, 834 (1997); O'Dell v. Stegall, 226 W. Va. 590, 617, 703 S.E.2d 561, 588 (2010) (quoting this treatise).

4 See § 5:1 (differentiating between lost grant and adverse use theories of prescription).

5 Jesurum v. WBTSCC Limited Partnership, 169 N.H. 469, 151 A.3d 949, 959 (2016); Margoline v. Holefelder, 420 Pa. 544, 546, 218 A.2d 227, 228 (1966) ("In order for the continuity of adverse use to be interrupted, the obstruction must be in fact an interruption and must be accomplished with that intent."); see also Wehde v. Regional Transp. Authority, 237 Ill. App. 3d 664, 680, 178 Ill. Dec. 190, 604 N.E.2d 446, 458 (2d Dist. 1992). For subsequent history, see Wehde v. Regional Transp. Authority, 284 Ill. App. 3d 297, 220 Ill. Dec. 26, 672 N.E.2d 843 (2d Dist. 1996). See generally What will disprove acquiescence by owner essential to easement by prescription in case of known use, 5 A.L.R. 1325, 1328–1330.

6 Kelley v. Westover, 56 Ark. App. 56, 58–60, 938 S.W.2d 235, 235–237 (1997) (landowner protested verbally and engaged in a series of overt acts, such as placing barbed wire across road, to interrupt adverse usage); Serrano v. Grissom, 213 Cal. App. 2d 300, 305–306, 28 Cal. Rptr. 579, 582 (5th Dist. 1963) (servient owner plowed up road and farmed land); Trask v. Nozisko, 134 P.3d 544, 550-552 (Colo. Ct. App. 2006) (landowner interrupted adverse use of driveway by construction of large earthen berm which prevented use for three days); Stiefel v. Lindemann, 33 Conn. App. 799, 811, 638 A.2d 642, 649–650 (1994) (servient owner interrupted adverse use by installing fence across right-of-way and planting shrubbery); Denardo v. Stanton, 74 Mass. App. Ct. 358, 365, 906 N.E.2d 1024, 1029 (2009), review denied, 454 Mass. 1108, 910 N.E.2d 909 (2009) (landowner placed boulders across road which blocked vehicle access but not foot traffic, and such action was insufficient to prevent acquisition of prescriptive easement for pedestrian travel on road); Biddix v. McConnell, 911 So. 2d 468, 477-478 (Miss. 2005) (landowners interrupted adverse use by removal of boundary stakes); Ray v. Nansel, 2002 MT 191, 311 Mont. 135, 144, 53 P.3d 870, 876 (2002) (landowner interrupted adverse use of wastewater ditch by blocking ditch); Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes, 329 N.C. 37, 49-54, 404 S.E.2d 677, 686–687 (1991); Pittman v. Lowther, 363 S.C. 47, 52, 610 S.E.2d 479, 481 (2005) ("We conclude actions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief."); Schilling v. Backer, 2004 SD 45, 678 N.W.2d 802, 803 (S.D. 2004) (landowner interrupted adverse use of road by erecting fence); Ormiston v. Boast, 68 Wash. 2d 548, 551, 413 P.2d 969, 971 (1966) (landowner interrupted adverse use by placing fence across road). See also Rice v. Miller, 306 Minn. 523, 525–526, 238 N.W.2d 609, 611 (1976) (finding continuity broken when landowner erected barriers across beach access road for several months each year and engaged in other acts asserting dominion that effectively halted vehicular traffic, although not stopping pedestrians entirely); Weir v. Gibbs, 46 A.D.3d 1192, 1194, 849 N.Y.S.2d 97, 99 (3d Dep't 2007) (landowner erected successive obstacles to impede vehicular and pedestrian traffic on roadway); Bouton v. Williams, 42 A.D.3d 795, 795–796, 839 N.Y.S.2d 350, 351–352 (3d Dep't 2007) (noting that "a substantial physical barrier that successfully interrupts use for any period of time stops the running of the prescriptive period").

7 Frech v. Piontkowski, 296 Conn. 43, 58, 994 A.2d 84, 94 (2010) (intermittent attempts by landowner to prevent recreational use of reservoir and posting "No Trespassing" signs which claimants removed were not sufficient to interrupt continuous use); Margoline v. Holefelder, 420 Pa. 544, 546, 218 A.2d 227, 228 (1966) (blockade of driveway for two days did not constitute actual interruption when there was no evidence of attempted use).

8 Brown v. Ware, 129 Ariz. 249, 251 n.2, 630 P.2d 545, 547 n.2 (Ct. App. Div. 2 1981) (stringing barbed wire across a roadway deemed insufficient to interrupt usage when barrier was knocked down one day later); South Norwalk Lodge, No. 709, Benev. & Protective Order of Elks, Inc. v. Palco Hats, Inc., 140 Conn. 370, 374, 100 A.2d 735, 737 (1953) (claimant repeatedly removed barriers from right-of-way and continued use); King v. Corsini, 32 Ill. App. 3d 461, 466, 335 N.E.2d 561, 565 (3d Dist. 1975) (acts by landowner blocking road for short periods did not interrupt public use); Posnick v. Herd, 241 A.D.2d 783, 784–785, 660 N.Y.S.2d 756, 757 (3d Dep't 1997) (temporary parking of vehicles across right-of-way did not effectively interfere with claimant's use).

9 Jesurum v. WBTSCC Limited Partnership, 169 N.H. 469, 481, 151 A.3d 949, 959 (2016) (finding no evidence that landowner interrupted adverse use of parking area); Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes, 329 N.C. 37, 54, 404 S.E.2d 677, 687 (1991); Reed v.

Piedimonte, 138 A.D.2d 937, 937, 526 N.Y.S.2d 273, 274 (4th Dep't 1988) (no evidence that erection of temporary barriers "ever effectively interfered with, or disturbed, plaintiff's continuous use of the driveway").

10 Wilkins v. Nieberger, 303 Ky. 662, 666, 198 S.W.2d 986, 989 (1947) (erection of gates across passway "in itself is not inconsistent with the acquiring of an easement"); Brown v. Redfern, 541 S.W.2d 725, 728 (Mo. Ct. App. 1976); Keefer v. Jones, 467 Pa. 544, 548, 359 A.2d 735, 738 (1976). There is authority, however, that the installation of locked gates during the prescriptive period by the landowner interrupts adverse use. Amerimont, Inc. v. Gannett, 278 Mont. 314, 324, 924 P.2d 1326, 1333 (1996) (erection of locked gate by landowner interrupted claim of adverse use because claimant requested key to continue usage); Garrett v. Mueller, 144 Or. App. 330, 337–340, 927 P.2d 612, 616–618 (1996) (finding that erection of locked gate was sufficient to interrupt adverse use of roadway, and expressing concern that requiring physical action to halt adverse usage would invite breaches of peace).

11 Elmer v. Rodgers, 106 N.H. 512, 515, 214 A.2d 750, 752 (1965); see also Wehde v. Regional Transp. Authority, 237 Ill. App. 3d 664, 680, 178 Ill. Dec. 190, 604 N.E.2d 446, 458 (2d Dist. 1992). For subsequent history, see Wehde v. Regional Transp. Authority, 284 Ill. App. 3d 297, 220 Ill. Dec. 26, 672 N.E.2d 843 (2d Dist. 1996).

12 Trask v. Nozisko, 134 P.3d 544, 550-552 (Colo. Ct. App. 2006) (declaring that "a barrier established for the purpose of, and in fact, interrupting an adverse claimant's use is effective even if it is ultimately removed by the adverse claimant", and asserting that this approach "comports with Colorado's policy of favoring the record owner"); Allen v. Thomas, 209 S.W.3d 475, 480–481 (Ky. Ct. App. 2006), review denied, (Jan. 18, 2007) (erecting fences and placing large rocks at roadway entrance to block access, and posting “No Trespassing” signs constituted interruption of prescriptive period even if efforts were ignored); Pittman v. Lowther, 363 S.C. 47, 51-52, 610 S.E.2d 479, 481 (2005) (declining to adopt approach adopted in *Concerned Citizens*, and holding that landowner's repeated attempts to prevent claimant's use of roadway were sufficient to constitute interruption, despite fact claimant drove around or destroyed obstacles).

13 Jackson v. City of Auburn, 971 So. 2d 696, 704 n.2 (Ala. Civ. App. 2006), judgment aff'd, 971 So. 2d 712 (Ala. 2007) (finding that protest letters were not sufficient to interrupt adverse use, and declaring that “failing to do anything other than send letters or make ‘ineffective protests’ would likely not be sufficient in most jurisdictions”); Trask v. Nozisko, 134 P.3d 544, 553 (Colo. Ct. App. 2006) ("[I]nterruption does not occur where a landowner merely gives notice to the occupant of land that he or she is not entitled to use the land."); City of Derby v. Di Yanno, 142 Conn. 708, 711, 118 A.2d 308, 310 (1955) (prescriptive easement established where roadway was used in disregard of "No Trespassing" sign); Hoffman v. United Iron and Metal Co., Inc., 108 Md. App. 117, 137, 671 A.2d 55, 65 (1996) ("Mere complaints, however, will not prevent the acquisition of a right by prescription without an abandonment or interruption in the use."); Johnston v. Bates, 778 S.W.2d 357, 364 (Mo. Ct. App. E.D. 1989); Ellison v. Fellows, 121 N.H. 978, 982, 437 A.2d 278, 280 (1981); Thompson v. Schuh, 286 Or. 201, 209 n.5, 593 P.2d 1138, 1143 n.5 (1979); Huff v. Northern Pac. Ry. Co., 38 Wash. 2d 103, 113, 228 P.2d 121, 127 (1951); O'Dell v. Stegall, 226 W. Va. 590, 618, 703 S.E.2d 561, 589 (2010) ("[M]ere unheeded requests, protests, objections, or threats of prosecution or litigation by a landowner that the claimant stop are insufficient to interrupt an adverse usage."). See also 4 Tiffany, Law of Real Property (3d ed.) § 1206; Note, Establishment of Prescriptive Easements in Arizona, 23 Ariz. L. Rev. 1487, 1496–1497 (1981). But see § 5:24 (treating protest under lost grant theory of prescription).
Rhode Island adheres to the position that a landowner can halt the prescriptive period from running by affirmatively communicating objections to the adverse use. Gianfrancesco v. A.R. Bilodeau, Inc., 112 A.3d 703, 710 (R.I. 2015) (landowner's continuous objections to adverse use of property defeated claimed prescriptive easement); Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 832 (R.I. 2001).

14 Lehigh Val. R. Co. v. McFarlan, 43 N.J.L. 605, 629-631, 1881 WL 8341 (N.J. Ct. Err. & App. 1881); Sieber v. White, 1961 OK 220, 366 P.2d 755, 759 (Okla. 1961); Pedersen v. Washington State Dept. of Transp., 43 Wash. App. 413, 418, 717 P.2d 773, 776 (Div. 1 1986); O'Dell v. Stegall, 226 W. Va. 590, 618, 703 S.E.2d 561, 589 (2010) (quoting this treatise).

15 Huff v. Northern Pac. Ry. Co., 38 Wash. 2d 103, 113, 228 P.2d 121, 127 (1951). See also Wilson v. McElyea, 815 So. 2d 462, 464-465 (Miss. Ct. App. 2002) (declaring that "the owner of the servient estate may not change the character of use that began as hostile under a claim of right by the simple act of unilaterally granting permission for future use since the character of the use is more properly determined from the standpoint of the use and not the owner of the servient estate").

16 See Bookchin v. Maraconda, 162 A.D.2d 393, 394, 557 N.Y.S.2d 46, 47 (1st Dep't 1990) (letter granting permission to use driveway ended running of prescriptive period); Granston v. Callahan, 52 Wash. App. 288, 296, 759 P.2d 462, 466–467 (Div. 1 1988).

17 J.F. Gioia, Inc. v. Cardinal American Corp., 23 Ohio App. 3d 33, 38, 491 N.E.2d 325, 331 (8th Dist. Cuyahoga County 1985) ("By accepting its neighbor's permission to use the drive, plaintiff accepted the neighbor's superior right and abandoned adversity for that property … . That action extinguished any maturing prescriptive right by destroying the continuity between any prior adverse use and any subsequent adverse use.").

18 Granston v. Callahan, 52 Wash. App. 288, 296, 759 P.2d 462, 466–467 (Div. 1 1988). See also Bookchin v. Maraconda, 162 A.D.2d 393, 394, 557 N.Y.S.2d 46, 47 (1st Dep't 1990) (letter granting permission to use driveway ended running of prescriptive period).

19 Arrechea Family Trust v. Adams, 960 So. 2d 501, 503–506 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051 (Miss. 2007) (permission to use driveway granted after prescriptive period had run was ineffective); Phillips v. Sommerer, 917 S.W.2d 636, 640 (Mo. Ct. App. W.D. 1996) (request for permission does not destroy prescriptive right already established); Gault v. Bahm, 826 S.W.2d 875, 882 (Mo. Ct. App. S.D. 1992) (requests for permission have no effect after acquisition of prescriptive easement); Behen v. Elliott, 791 S.W.2d 475, 478 (Mo. Ct. App. E.D. 1990); Bonardi v. Kazmirchuk, 146 N.H. 640, 643, 776 A.2d 1282, 1285 (2001); Sander v. McKinley, 241 Or. App. 297, 307, 250 P.3d 939, 946 (2011); Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 161, 559 A.2d 1068, 1073 (1989).

20 Conn. Gen. Stat. Ann. § 47-38; Ind. Code Ann. §§ 32-5-1-2 to 32-5-1-4; Iowa Code Ann. §§ 564.4–564.7; Me. Rev. Stat. Ann. tit. 14 § 812; Mass. Gen. Laws Ann. ch. 187 § 3; RI Gen. Laws § 34-7-6. See Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 127-131, 881 A.2d 937, 953-955 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006) (discussing Conn. Stat. § 47-38, and holding that boundary line agreement did not constitute notice of intent to prevent acquisition of prescriptive easement); Crandall v. Gould, 244 Conn. 583, 593–596, 711 A.2d 682, 687–688 (1998) (discussing Conn. Stat. § 47-38, and finding that injunction against claimant should have same effect as statutory notice scheme and preclude acquisition of prescriptive easement); Dowley v. Morency, 1999 ME 137, 737 A.2d 1061, 1069–1070 (Me. 1999) (discussing statutory method for preventing acquisition of prescriptive easement); see also South Norwalk Lodge, No. 709, Benev. & Protective Order of Elks, Inc. v. Palco Hats, Inc., 140 Conn. 370, 374, 100 A.2d 735, 737 (1953) (landowner's failure to utilize statutory notice to prevent prescriptive right noted as factor in establishing easement); Bowers v. Andrews, 557 A.2d 606, 607 (Me. 1989) (landowner served notice to halt acquisition of prescriptive easement to use sewer pipe); O'Connell v. Larkin, 532 A.2d 1039, 1041 n.2 (Me. 1987) (landowner posted notice to prevent acquisition of prescriptive easement).

Rhode Island adheres to the position that a landowner can halt the prescriptive period from running by affirmatively communicating objections to the adverse use. Gianfrancesco v. A.R. Bilodeau, Inc., 112 A.3d 703, 710 (R.I. 2015) (landowner's continuous objections to adverse use of property defeated claimed prescriptive easement); Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 832 (R.I. 2001).

21 See sources cited note 19.

22 Conn. Gen. Stat. Ann. § 47-41; Iowa Code Ann. § 564.8; Mass. Gen. Laws Ann. ch. 187, § 4; RI Gen. Laws § 34-7-7.

23 Questioning the soundness of the actual interference doctrine, one commentator has observed: "An oral or written complaint, however, might very well suffice to notify the user of this intention. If notification is properly proven in court, it should be no less convincing than showing one has placed debris in the road." Note, Establishment of Prescriptive Easements in Arizona, 23 Ariz. L. Rev. 1487, 1497 (1981).

24 See, e.g., Trask v. Nozisko, 134 P.3d 544, 552 (Colo. Ct. App. 2006) ("[R]equiring owners to preserve a sufficient barrier for any extended period of time against the efforts of the adverse user to remove and defeat it invites confrontation, which can be unpleasant, violent, dangerous, and in some instances even deadly."); Thomas v. Barnum, 211 Mont. 137, 141, 684 P.2d 1106, 1109 (1984) (overruled by, Warnack v. Coneen Family Trust, 266 Mont. 203, 879 P.2d 715 (1994)) (landowner threatened claimant); Smith v. Bixby, 196 Neb. 235, 237, 242 N.W.2d 115, 117 (1976) (landowner fired shotgun at claimant's vehicle); Garrett v. Mueller, 144 Or. App. 330, 337–340, 927 P.2d 612, 616–618 (1996) (expressing concern that requiring physical action by landowner to interrupt adverse usage would invite breaches of peace); Pittman v. Lowther, 363 S.C. 47, 52, 610 S.E.2d 479, 481 (2005) (voicing concern that requiring "a servient landowner to take actions in addition to erecting barriers like fences and cables, would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes").

25 Faught v. Edgewood Corners, Inc., 63 Conn. App. 164, 171 n.7, 772 A.2d 1142, 1148 n.7 (2001); Burke-Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1020 (R.I. 1999).

26 RKO-Stanley Warner Theatres, Inc. v. Mellon Nat. Bank & Trust Co., 436 F.2d 1297, 1301 n.14 (3d Cir. 1970) ("An adverse use is uninterrupted when those against whom the use is adverse do not initiate and bring to successful conclusion legal proceedings or otherwise cause a cessation of the use."); Miller v. Grossman Shoes, Inc., 186 Conn. 229, 234, 440 A.2d 302, 305 (1982) (lawsuit "interrupted the period of necessary continuous use"). See also 3 Powell, Powell on Real Property § 34.10.

27 Restatement of Property § 459 cmt. c.

28 Yorba v. Anaheim Union Water Co., 41 Cal. 2d 265, 270, 259 P.2d 2, 5 (1953). See also Thompson v. Ratcliff, 245 S.W.2d 592, 594 (Ky. 1952) (abandoned lawsuit does not affect continuity of adverse possession).

29 Gifford v. Otis, 70 Mass. App. Ct. 211, 214, 873 N.E.2d 792, 795 (2007), review denied, 450 Mass. 1104, 877 N.E.2d 599 (2007).

30 Lindquist v. Weber, 404 N.W.2d 884, 887 (Minn. Ct. App. 1987) (servient property conveyed during period in which prescriptive easement ripened); Matthews v. Dennis, 365 S.C. 245, 250, 616 S.E.2d 437, 440 (Ct. App. 2005); Zollinger v. Frank, 110 Utah 514, 521–522, 175 P.2d 714, 718, 170 A.L.R. 770 (1946). See also Hoffman v. United Iron and Metal Co., Inc., 108 Md. App. 117, 137–138, 671 A.2d 55, 65-66 (1996) (discussing but not resolving whether change in ownership of servient estate affects prescriptive period).

31 See § 5:22 (discussing effect of transfer of servient estate on running of prescriptive period).

End of Document