

1991

Lily Pond Associates; and Shopko Stores Inc., dba  
Uvalco, a Minnesota Corporation v. Lyman W.  
Hemmert, Michael Hemmert, Linda Hemmert,  
and Bushnell Motel, and John Does I Through X :  
Brief of Appellant

Utah Supreme Court

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Merrill G. Hansen; Attorney for Respondents.

Dale M. Dorius; Attorney for Appellants.

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BRIEF

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IN THE SUPREME COURT, STATE OF UTAH

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LILY POND ASSOCIATES; and (   
SHOPKO STORES INC., dba (   
UVALCO, a Minnesota Corporation, (

Plaintiff/Respondents, (

vs. ( Case No. 900362

LYMAN W. HEMMERT, MICHAEL (   
HEMMERT, LINDA HEMMERT, and (   
BUSHNELL MOTEL, and JOHN DOES (   
I THROUGH X, (

Defendant/Appellants. (

91-0227-CA

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BRIEF OF APPELLANT  
-----

Appeal from the civil Summary Judgment entered by final  
Order by the Honorable F. L. GUNNELL, District Judge of the First  
District Court for Box Elder County, State of Utah.

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MERRILL G. HANSEN  
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Salt Lake City, UT 84106

FILED

Argument Classification 14.b.

OCT 19 1990

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT, STATE OF UTAH

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LILY POND ASSOCIATES; and	(	
SHOPKO STORES INC., dba		
UVALCO, a Minnesota Corporation,	(	
Plaintiff/Respondents,	(	
vs.	(	Case No. 900362
LYMAN W. HEMMERT, MICHAEL	(	
HEMMERT, LINDA HEMMERT, and		
BUSHNELL MOTEL, and JOHN DOES	(	
I THROUGH X,	(	
Defendant/Appellants.	(	

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BRIEF OF APPELLANT

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Appeal from the civil Summary Judgment entered by final Order by the Honorable F. L. GUNNELL, District Judge of the First District Court for Box Elder County, State of Utah.

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## TABLE OF CONTENTS

Table of Authorities	2
Statement of Jurisdiction	2
Statement of the Issues and Standards of Review	2
Determinative Statutes and Constitutional Provisions	4
Statement of the Case	5
a. Nature of the Case	5
b. Course of Proceedings and Disposition at Trial Court	5
c. Relevant facts	5
Summary of the Argument	6
Argument	7
I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY RULING IN FAVOR OF PLAINTIFFS WHEN THE DEFENDANTS ESTABLISHED THAT THEIR SIGN WAS APPURTENANT TO THE PROPERTY.	7
II. THE TRIAL COURT VIOLATED DEFENDANTS' RIGHT TO A JURY TRIAL ON THE ISSUE OF POSSESSION OF THE LAND ON WHICH DEFENDANTS' SIGN WAS PLACED BY GRANTING SUMMARY JUDGMENT AND THEREBY WITHHOLDING AN ULTIMATE FACT FROM THE JURY.	9
III. SUMMARY JUDGMENT WAS IMPROPER BECAUSE THERE WAS A GENUINE ISSUE OF FACT CONCERNING WHETHER THE POSSESSION OF THE PROPERTY WHERE THE SIGN WAS POSTED CONSTITUTED ADVERSE POSSESSION.	12
Conclusion	14
Addendum	15

## TABLE OF AUTHORITIES

### UTAH APPELLATE CASES

<u>Bailey v. Call</u> , 767 P.2d 138 (Utah Ct. App. 1989)	4
<u>Finlayson v. Brady</u> , ___ Utah ___, 240 P.2d 491 (1952).	12
<u>Grow v. Marwick Development Co.</u> , 621 P.2d 1249 (Utah 1980).	14
<u>Hampton v. State Road Commission</u> , 21 Utah 2d 342, 445 P.2d 708 (1968).	9
<u>Hansen v. Stewart</u> , 761 P.2d 14, 15 (Utah 1988).	11
<u>Holland V. Wilson</u> , 8 Utah 2d 11, 327 P.2d 250, 251-2 (1958).	11
<u>Lunt v. Kitchens</u> , ___ Utah ___, 260 P.2d 535 (1953).	10
<u>Matter of Adoption of Infant Anonymous</u> , 760 P.2d 916, 918 (Utah App. 1988).	4, 5
<u>Welch Transfer &amp; Storage, Inc. v. Oldham</u> , 663 P.2d 73 (Utah 1983).	13

### UTAH STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Code Annot. Section 78-21-2 (1951).	5
Rule 38(a), Utah R. Civ. P. (1987).	6
Utah Code Annot Section 78-21-1 (1953)	5, 11
Utah Const. art I section 10	5
Utah Code Annot. Section 78-40-1 (1953)	5

### OTHER SOURCES

<u>Texas City Transp. Co v. Winter</u> , 222 S.W. 541 (Tex. App 1920).	13
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## STATEMENT OF JURISDICTION

The authority which confers jurisdiction on the Court to hear this Appeal is Article VIII, Section 3, Utah State Constitution; Utah Code Annotated section 78-2-2, Rule 3(i), Utah Rules of Appellate Procedure.

## ISSUES

1. Whether the trial court erred by ruling in favor of

Respondent/Plaintiffs on its Motion for Summary Judgment when Defendant/Appellants had established that the sign was appurtenant to the property when deeded to Respondent/Plaintiffs.

The standard of review to be applied to this issue is correctness without deference to the trial court, because where there have been no assessment of the credibility of witnesses or their competence to testify, the appellate court is in as good a position as the trial court to find the facts based upon the written record. In Re Infant Anonymous, 760 P.2d 916 (Utah Ct. App. 1989).

2. Whether the trial court erred by granting Summary Judgment in favor of Plaintiff/Respondents when the ultimate fact of easement is whether Defendant/ Appellants prescriptive or implied easement should have been given to the jury.

The standard of review to be applied to this issue is again the correctness of the trial court's decision without deference. Bailey v. Call, 767 P.2d 138 (Utah Ct. App. 1989).

3. Whether Summary Judgment was appropriate when a question of fact existed concerning the matter of the easement. The facts were raised by the pleadings and affidavits.

The standard of review to be applied is the correctness

standard. In Re Infant Anonymous, 760 P.2d 916 (Utah Ct. App. 1988).

### DETERMINATIVE STATUTES AND RULES

Utah Const. art. I Section 10:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

Utah Code Annot. section 78-21-2 (1953):

"All questions of fact, where the trial is by jury, other than those mentioned in the next section [78-21-3], are to be decided by the jury, and all evidence thereon is addressed to them except when otherwise provided."

Utah Code Annot. section 78-21-1 (1953):

"In actions for the recovery of specific real or personal property, with or without damages or for money claimed for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."

Utah Code Annot. section 78-40-1 (1953):

"An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim."

Rule 38(a), Utah R. Civ. P.:

"(a) **Right preserved.** The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties."

### STATEMENT OF THE CASE

#### **a. Nature of the Case**

This is an Appeal from a civil Order Granting Summary Judgment and Summary Judgment by the Honorable F.L. Gunnell, District Judge in the First Judicial District Court of Box Elder County.

#### **b. Course of the Proceedings and Disposition at the Trial Court**

Lily Pond Associates brought this action in the First District Court of Box Elder County to quiet title in their property against the claimed right of Defendants to maintain a sign advertising their motel on the premises. Lily Pond Associates moved for Summary Judgment, which Trial Court Judge Gunnell in his Findings and Ruling and Memorandum Decision, decided in favor of Plaintiffs.

#### **c. Relevant Facts**

1. Appellants are owners of a sign which was on the subject property for over forty years. The owners contract



of purchase specifically outlined the sign and the property on which it is situated. The sign had been used continuously, openly, hostilely and adversely at its present location for over forty years.

2. The sign was visible as an appurtenance, encroachment, hereditament and structure upon the property in question.

The Plaintiff/Respondents purchased the property subject to any appurtenances or encroachments existing thereon.

#### SUMMARY OF THE ARGUMENT

The defendants established that the easement was appurtenant by satisfying requirements of appurtenance as described by the Utah Supreme Court in Hampton v. State Road Commission, 21 Utah 2d 342, 445 P.2d 708, 710 (1968). In this case the sign was obviously permanent and it was obvious to anyone driving by or walking by that it was being used. The Land owner should have made some attempt to get rid of the sign before if they did not want it there. There is a legal presumption that there was a grant of easement in favor of defendants because the landowner had the power to remove the sign and never did.

Whether or not there was a prescriptive easement and whether the possession by defendant of the property by

placing a sign on the property was adverse is an ultimate fact upon which the jury would base a decision as to whom should prevail in this case. Ultimate facts are not to be withheld from the jury. This is a question regarding the possession of property in that the sign was on the Plaintiffs' property but had been used for forty years. This involves a right to a jury trial which was denied by the court granting summary judgment.

Summary judgment is not appropriate where there is a question of fact raised by the pleadings and affidavits that is material to the resolution of the case. Summary judgment was not appropriate here because there was an issue of material fact concerning the existence of some kind of easement, whether prescriptive or implied raised by the pleadings and affidavits.

#### ARGUMENT

**I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY RULING IN FAVOR OF PLAINTIFFS WHEN THE DEFENDANTS ESTABLISHED THAT THEIR SIGN WAS APPURTENANT TO THE PROPERTY.**

Appurtenant means that the right passes with the title to the land the right is attached to. When an easement is appurtenant it means that the right of use of one person's land for the benefit of another piece of land is a legal right that passes with title of either piece of property. The right of the owner of the "dominant estate" to use of the "servient estate" remains if title to the servient estate

changes when the easement or right to use is appurtenant.

The Utah Supreme Court has said:

" . . . All easements of a permanent character, that have been created i favor of the land sold, that have been created in favor of the land sold, and which are open and plain to be seen, and are reasonably necessary for its use and convenient enjoyment, unless expressly reserved by the grantors, pass as appurtenances to the land." Hampton v. State Road Commission, 21 Utah 2d 342, 445 P.2d 708, 710 (1968).

In the present case the sign was of a permanent nature, having been erected to stand permanently, which it did for forty or more years. The placement of the sign was open and continuous and plain to be seen. The use of the land by having the sign placed where it was located was reasonably necessary for the use and convenient enjoyment of the property where the Bushnell Motel is located, because it draws the attention of potential customers to the location of the motel and gives them directions as to how to get there, which potential customers would not know or even think of stopping there without there being a sign to direct them and let them know that there is a motel near by.

The grantors of the servient estate in this case--the U.S. Government and Brigham City--did not expressly reserve the rights in their deed, thus the easement passed with the property as an appurtenant easement.

The Utah Supreme Court has also indicated:

" . . . In order to settle rights in land to the benefit of the persons profitably using the land and to avoid the impossible burden of proving an ancient, actual grant to use the property, the courts of this country early adopted the legal fiction of a lost grant, whereby proof of continuous use for the prescriptive period, openly and with knowledge of the landowner, was sufficient to raise a presumption of grant, which in effect was a positive rule of law. The fact that the grantor with knowledge of such use, makes no protest against it is proof of his recognition of a claim of right in the grantee. In other words, it is conclusively presumed from the landowner's acquiescence for the defined period of time in the other's user of his land, he having the right and power to stop such user. Tiffany on Real Property sections 1191-1196. . . ." Lunt v. Kitchens, Utah, 260 P.2d 535, 537 (1953).

In the present case the Defendants in their Affidavit in Opposition to Summary Judgment state under oath that the sign has stood in its place on Plaintiffs' land for over 40 years. According to Utah law as cited above, it is thus presumed that the use of the land is by way of grant, because the predecessors in ownership never in 40 years, made any attempt to stop the use of their property.

II. THE TRIAL COURT VIOLATED DEFENDANTS' RIGHT TO A JURY TRIAL ON THE ISSUE OF POSSESSION OF THE LAND ON WHICH THEIR SIGN WAS PLACED BY GRANTING SUMMARY JUDGMENT AND THEREBY WITHHOLDING AN ULTIMATE FACT FROM THE JURY.

The Defendants in this case had a right to a jury trial

on the issue whether an easement in their favor existed and what type of easement it may be. The Utah Code states in pertinent part:

"In actions for the recovery of specific real or personal property, with or without damages . . . an issue of fact may be tried by a jury unless a jury trial is waived. . ." Utah Code Annot. section 78-21-1 (1953).

The Utah Supreme Court interpreted the same provision and had this to say:

". . . It is our opinion that the above language, if given a reasonable and rational construction, must be interpreted as declaring that all issues of fact relating to possession and right to possession of specific real or personal property may be determined by a jury unless a jury trial is waived . . . ." Holland v. Wilson, 8 Utah 2d 11, 14-15, 327 P.2d 250, 252 (1958).

More recently the Utah Supreme Court has said:

". . . There is a right to a jury trial on all questions of fact in any action to determine the right to possession of real property. Holland v. Wilson, 8 Utah 2d 11, 14-15, 327 P.2d 250, 252 (1958); See Utah Code Ann. section 78-21-1 (1987); Utah R. Civ. P. 38(a). The present case is clearly one to determine the right to possess real property. Therefore the Hansens were entitled to have the question of the location of the corner determined by the judge only if that question is one of law." Hansen v. Stewart, 761 P.2d 14, 15 (Utah 1988).

In the present case the main issue is one of the right

of Defendants to place a sign and maintain it on Plaintiffs' land. This is clearly a question of fact concerning an interest in real property. Thus by a straight forward reading and application of the above law, Defendants had the right to a jury trial which was denied by the Court's granting summary judgment.

The Utah Supreme Court has also said:

" . . . We are convinced from the whole record that there was substantial contradictory evidence on both sides which, in recognition of well established rights guaranteed by our state constitution, statutes and rules, and the authorities generally, required giving the case to the jury. . . ." Finlayson v. Brady, 121 Utah 204, 240 P.2d 491, 492 (1952).

In the present case Defendant maintains that his contract specifically mentions the use of the sign and property in question (See Affidavit of Michael Hemmert in Opposition to Summary Judgment), while Plaintiffs maintain that no trace can be seen on the record of title of any mention of a grant of an easement to Defendants (See Paragraph 12 of Memorandum in Support of Plaintiffs' Motion for Summary Judgment). These two pieces of facts in themselves are substantially contradictory and the question should have been sent to the jury on this basis.

The Utah Supreme Court has said:

". . . In International Harvester Credit Corp. v. Pioneer Tractor, Utah, 626 P.2d 418 (1981), we held that Article I section 10 of the Utah Constitution guarantees the right to trial by jury on legal issues in civil cases. That basic right is also codified in the Judicial Code, U.C.A. 1953, section 78-21-1. Several issues raised by appellants in their complaint were triable by jury, and if resolution of those issues were necessary to proper disposition of this case, we would be obliged to remand this case for determination by the jury. . . ." Welch Transfer and Storage v. Oldham, 663 P.2d 73, 75-76 (Utah 1983).

In the instant case the issue of whether an easement in favor of Defendants exists is triable by jury and the resolution of that issue is necessary to the proper disposition of this case because it is the central issue in the whole dispute. Thus the Supreme Court is "obliged to remand this case for trial before a jury."

An ultimate fact is one that should never be determined by the Court, in any case tried to a jury or to be tried to a jury. Texas City Transp. Co. v. Winter, 222 S.W. 541, 542 (Tex. App. 1920). In the instant case the main issue is one involving a right to use and possession of property and one for which the right to a jury trial is guaranteed. Thus the fact to be determined is an ultimate fact and should have been left to a jury to decide.

III. SUMMARY JUDGMENT WAS IMPROPER BECAUSE THERE WAS A GENUINE ISSUE OF FACT CONCERNING THE EXISTENCE OF THE EASEMENT AND WHETHER THE POSSESSION OF THE PROPERTY WHERE THE

SIGN WAS POSTED CONSTITUTED ADVERSE POSSESSION.

The Utah Supreme Court has said concerning the grant of summary judgment:

" . . . It is a well-settled principle of law that summary judgment can only be granted when there is no dispute as to a material fact. Russell v. Park City Utah Corp., 29 Utah 2d 184, 506 P.2d 1274 (1973); Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966). The purpose of summary judgment is to save the expense and time of the parties and the court, and if the party being ruled against could not prevail when the facts are looked at most favorably for his position, then summary judgment should be granted. Holbrook Co. V. Adams, Utah, 542 P.2d 191 (1975). If there is a question of fact raised by the pleadings or affidavits, the court is precluded from granting summary judgment. Hatch v. Sugarhouse Finance Co., 20 Utah 2d 156, 434 P. 2d 758 (1967)." Grow v. Marwick Development, Inc., 621 P.2d 1249, 1252 (Utah 1980).

In the present case a material fact was raised by the pleadings and affidavits concerning the existence of an easement in favor of the Defendants. Defendants' Affidavit showed that the sign sat on Plaintiffs' land for more than 40 years. Yet Plaintiffs predecessors in interest never made any effort to make Defendants move the sign.

As discussed before, Plaintiffs' Memorandum in Support of Plaintiff's Motion for Summary Judgment states that a check of the title records discloses no grant in favor of Defendants' use of the property for the sign, and Defendants'



affidavit in Opposition to Summary Judgment declares that their sales contract specifically mentions the sign. This would create as before discussed a question of fact for the jury, a material fact. It also creates a presumption of grant to the Defendants when considered with the fact that no move was ever made to make Defendants move the sign. These facts as discussed are enough to defeat a motion for summary judgment.

#### CONCLUSION


There is a presumption that some kind of easement exists in favor of the user of land owned by another when the landowner does not object or take any action to discontinue the user. This stems from the theory of lost grant. This created a question of fact to be determined by the jury which should have been granted because there is a right to jury trial guaranteed by constitution and statute for cases involving the right to possession of interests in land.

The defendants in this case had an appurtenant easement or at least the question should have been sufficiently raised by the pleadings and affidavits when defendant satisfied at least most of the requirements for an appurtenant easement as well as a presumed grant of easement.

Defendants respectfully request that the Utah Supreme

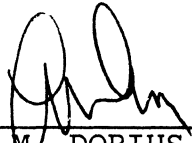
Court remand for trial by jury on the issue of whether some form of easement was created in defendants by their having had a sign for over forty years on another's property without any objection or any communication at all concerning the placing of the sign in forty plus years.

Respectfully submitted this 19th day of October, 1990.

  
\_\_\_\_\_  
DALE M. DORIUS  
Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing BRIEF OF APPELLANT to Plaintiff/Respondents' attorney, MERRILL G. HANSEN at 1245 Brickyard Road, Suite 600, Salt Lake City, UT 84106, this 19th day of October, 1990.

  
\_\_\_\_\_  
DALE M. DORIUS

ADDENDUM

Order on Summary Judgment dated May 21, 1990.

Order dated July 19, 1990.

RECEIVED

MAY 16 1990

DALE M. DORRIS  
Attorney at Law

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1245 Brickyard Road, Suite 600  
Salt Lake City, Utah 84106  
Telephone: (801) 484-3000

IN THE FIRST JUDICIAL DISTRICT COURT, IN AND FOR  
BOX ELDER COUNTY, STATE OF UTAH

---

LILY POND ASSOCIATES; and	)	
SHOPKO STORES INC., dba	)	
UVALCO, a Minnesota corporation,	)	
	)	
Plaintiffs,	)	O R D E R
	)	
vs.	)	
	)	
LYMAN W. HEMMERT, MICHAEL	)	
HEMMERT, LINDA HEMMERT, and	)	
BUSHNELL MOTEL, AND JOHN DOES	)	Civil No. 890000397QT
I THROUGH X,	)	
	)	
Defendants.	)	Judge Gunnell

---

This matter having come before the Court and pursuant to Plaintiffs' Motion For Summary Judgment, supported by a Memorandum of Points And Authorities, and a Reply Memorandum, and Defendant having objected and filed its Memorandum of Points And Authorities in support of its position, and the Court having reviewed the Motions and Memoranda, and having issued its Memorandum Decision, dated April 23, 1990, wherein Plaintiffs' Motion For Summary Judgment was granted as to all issues of law raised in Plaintiffs' Complaint, with the exception of attorney fees and Court costs,

NOW THEREFORE, and good cause appearing, it is hereby ORDERED, ADJUDGED and DECREED that all causes of action set

forth in Plaintiffs' Complaint For Quiet Title is, and the same are hereby granted.

DATED this 21 day of May, 1990.

BY THE COURT:

151  
F.L. Gunnell, District Judge

Approved As To Form:

\_\_\_\_\_  
Dale M. Dorius  
Attorney For Defendants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER, postage prepaid, this 15<sup>th</sup> day of May, 1990, to:

Dale M. Dorius, Esq.  
Attorney For Defendant  
P.O. Box U  
29 South Main Street  
Brigham City, Utah 84302

Barbara G. Jones

DALE M. DORIS #0903  
Attorney for:  
P.O. Box U  
29 South Main Street  
Brigham City, Utah 84302  
725-5219

IN THE FIRST DISTRICT COURT OF BOX ELDER COUNTY, STATE OF UTAH

-----

LILY POND ASSOCIATES; and	(	ORDER
SHOPKO STORES INC., dba		
UVALCO, a Minnesota Corporation,	(	
Plaintiff,	(	
vs.	(	
LYMAN W. HEMMERT, MICHAEL	(	
HEMMERT, LINDA HEMMERT, and		
BUSHNELL MOTEL, and JOHN DOES	(	Civil No. 890000397QT
I THROUGH X,		
	(	
Defendants.	(	

-----

The above-entitled matter having come before the Court on Defendant's Motion to Set Aside Plaintiff's Order, the Court havng reviewed the file and pleadings contained therein, hereby dismisses Defendant's Motion as of June 27, 1990. The Defendant had no notice of Plaintiff's signed Order on May 21, 1990, Defendant having filed an Objection to this Order on May 18, 1990, and Plaintiff filed a Request for Hearing. The Court, without notice or Memorandum Decision to any of the parties, signed the Order on May 21, 1990. Defendant's appeal time is to run from June 27, 1990 and the Order signed by the Court on May 21, 1990 remains in effect.

DATED this 19 day of July, 1990.

/s/ F. L. GUNNELL

\_\_\_\_\_  
F. L. GUNNELL

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order to the Plaintiffs' attorney, MERRILL G. HANSEN at 1245 Brickyard Road, Suite 600, Salt Lake City, UT 84106, this 6th day of July, 1990.

  
\_\_\_\_\_  
DALE M. DORIUS