

1969

**John O. Farnsworth and Sharon Annette Farnsworth v. Soter's Inc.  
: Brief of Plaintiffs and Appellants**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN O. FARNSWORTH and  
SHARON ANNETTE FARNS-  
WORTH, his wife,  
*Plaintiffs and Appellants,*

vs.

SOTER'S INC., a corporation,  
*Defendant and Third-Party*  
*Plaintiff and Respondent,*

Case No.  
11626

vs.

ROBERT B. SWANER and LOUISE  
S. SWANER, his wife, SALT LAKE  
COUNTY, a body politic, and SAM F.  
SOTER, individually,  
*Third-Party Defendants and*  
*Respondents.*

## Brief of Plaintiffs and Appellants

Appeal from a Judgment of the Third District Court of  
Salt Lake County  
HONORABLE STEWART M. HANSON, Judge

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CLERK OF SUPREME COURT

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COUNTY, a body politic, and SAM F.  
SOTER, individually,  
*Third-Party Defendants and  
Respondents.*

Case No.  
11626

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## Brief of Plaintiffs and Appellants

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### STATEMENT OF THE KIND OF CASE

This is an action for damages for the loss of removing and tearing up a well-established road from the front of plaintiffs' property and platting lots in the

road thereby denying the plaintiff access to the road leaving them landlocked with the one-acre piece. Thereby depriving the plaintiffs' of the use of two building lots abutting the road. All done without any legal process to the plaintiffs or any notice of the proposed change. The plaintiffs asked that in the alternative to damages, the road be restored for use by plaintiffs.

## DISPOSITION IN LOWER COURT

The case was tried to a judge sitting without a jury and from a judgment of dismissal against the plaintiffs, the plaintiffs now appeal.

## RELIEF SOUGHT ON APPEAL

Plaintiffs and appellants seek a reversal of the judgment and request judgment in their favor as a matter of law, or that failing, a new trial.

## STATEMENT OF FACTS

The plaintiff John Farnsworth purchased a farm of almost 120 acres (R. 3-185) from Chris and Florence Stoven in June of 1943 (R. 20 & 22 170) (Warranty Deed Exhibit P-4). That he first saw the property in May or June in 1943 (R. 14-180). At the time of purchase there was a road in front of the property (R. 29-180) which had been used for quite some time and had been established as a County Road (R. 181)



known as the Little Cottonwood Creek Road shown in aerial photograph (Exhibit P-5). (Photo taken 8-16-46) (R. 18-185).

The road in front of plaintiffs' property remained essentially the same as at time of purchase until May or June of 1964 at which time it was torn out by the defendant Soters, Inc. That in about 1959 the "bypass road" was built (R. 24-185) to avoid the bad turn to the north which was in the old road and was east of plaintiffs' property. The old road was left in front of the plaintiffs' and Jessop's property (Mrs. Jessop being the plaintiff's sister to whom he had transferred the property immediately to the west of his property and on which she lived (T. 188-11). The bypass road was used by the majority of the public but the old road abutting the plaintiffs' property was used constantly by some people including Mrs. Jessop and family until the road was torn up in May or June of 1964 (T. 187-11) and the school bus. It was impossible to use it after that.

The plaintiffs had the sewer put into their property in 1963 and a manhole was put in in the street in front of the plaintiff's property and sister was hooked on it.

The plaintiff sold the 120 acre farm he owned with the exception of the piece he sold to his sister and the piece he retained for himself to Happy Valley Incorporated (T. 193).

The property of the plaintiffs being surrounded by Willow Creek Country Club Estates (T. 193-14) which are built around the country club. There is a road south of the property which does not abutt plaintiffs' property known as Rubidoux Road, but which is separated from their property by a protective strip about three feet wide over which they were not permitted to pass (see Exhibit P-2).

The plaintiffs' land is surrounded on three sides with no access to a road and on July 29, 1964, and recorded July 30, 1964, the County Commission approved a subdivision for Soter's Incorporated for the property immediately to the north where the old road had previously run past plaintiffs' land, which closed in the land on all four sides leaving no means of ingress or egress to the land at all (Exhibit P-1).

That prior thereto, on September 17, 1958, the County Commission had authorized the issuance of a deed to Robert Swaner and wife granting him the County's interest in the old roadway in exchange for a new right of way at 8200 South and Cottonwood Creek, and he quitclaimed to the County (See minutes of meeting - Exhibit D-17). The County Commission on the 29th day of May, 1964, transferred the title to Sam F. Soter (Exhibit D-15) who, the same day, transferred the title to Soters Inc. (Exhibit D-24), the present title holder. That all of said transfers and agreements were made without any notice being received or given to the plaintiffs or the Jessops who were

the only other persons concerned with the right of way. The Jessops were left part of the road in front of their place and have means of access into their home.

Neither the County, the defendants the Sommers, nor the defendant Soter's Inc. ever gave any warning as to the removal of the road even though the County was warned by Mr. Oscar McConkie, an attorney employed by the Jessops (R. 249-256), and even though the County did not give Mr. McConkie the courtesy of an answer, Soter's Inc. just went ahead and destroyed the road (R. 187 & 208).

The plaintiffs intended to build a home on part of the property and they are now precluded from doing so because of the situation.

There is testimony as to the worth of the property given by an expert witness, Nathan Smith, which would indicate that the loss of the value of the land would be \$12,500.00 (R. 225) based on the loss of access on the highest possible use. Mr. Smith testified that the loss would be \$11,240.00 on the cost of cure basis to restore the property to its former value by repairing the roads and accesses (R. 226).

The counsel stipulated that a Mr. Verl Smart, a school bus driver, would testify that he drove around the particular area in question up until the barrier was put in in 1964.

## ARGUMENT

### Point 1. THAT THE PLAINTIFF WAS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW OR COMPENSATION.

In this particular instance the plaintiffs were deprived of access to an established highway which had abutted their property for many years, by destruction of the road by the defendant and without any notice, legal action, nor receipt of any compensation therefor contrary to the provisions of the Fifth Amendment of the Constitution of the United States providing

“Private property is not to be taken for use without just compensation.”

Am Jur 2nd 26 Eminent Domain p. 812. At page 823 of the same title and volume states

“As a general rule, there is a taking of property within the meaning of the constitutional provision ‘nor shall private property be taken for public use, without just compensation,’ where the act involves an actual interference with, or disturbance of, property rights, as distinguished from injuries which are merely consequential or incidental, . . . ”

The Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Utah Article I, Sec. 7, provide that property cannot be taken without due process of the law. This is shown at section 376 Eminent Domain of Vol. 27 Am Jur 2nd p. 241 which states, among other things,

"Inasmuch as both federal and state constitutions protect all persons from being deprived of their property without due process of the law and warrant equal protection of the law, proceedings to condemn property must be such as not to violate these guaranties."

It further points out that no particular form or method is guaranteed but "Its requirements are satisfied if he has reasonable notice and opportunity to present his claim or defense."

"That no person shall be deprived of life, liberty, or property without due process of law."

Here there was no notice or opportunity to be heard and, in fact, it was not known about until the spring of 1963 when, in truth, the Commission made the Agreement to give the street away in 1958.

The only question here remaining is whether the road taken which abutted the plaintiff's land is property for which the plaintiff should be compensated. It is contended that the right of access is a property right which must be taken by due process and the plaintiffs must be fully compensated for the taking.

It is recognized in Arizona that such a taking requires compensation as shown in *Fletcher v. State*, 367 Pac. 2nd, 272, which states:

"Fletcher alleges error in not granting severance damages for loss of access. Trial conducted on the theory that the loss of access was not compensable held 'In view of our recent holdings that either the destruction or the material im-

pairment of the access easement of an abutting property owner to a controlled access highway is compensable.' ”

In Idaho, in the case of *Johnson v. Boise City*, 390 Pac. 2nd, 291, which was a case involving an access, the court stated:

“This court has consistently held that access to a public way is one of the incidents of ownership of land bounding such right is appurtenant to the land and is a vested right.”

Quoted from *Ferris v. City of Twin Falls*, 347 Pac 2nd, 996, they cite numerous and sundry other Idaho cases in support of this position.

In Utah, the case of *J. Herbert Hansen and wife v. Utah Road Commission*, 14 U. 2nd 305, 383 Pac. 2nd 917. The court did not make an additional award for loss of access but recognized that a loss of access was a factor in the settlement of the case by stating

“Where right of access was appurtenant to the property taken, damage resulting due to loss of access from the half remaining portion of property was necessarily considered as a factor in increasing the award of the land which was taken under the instruction that property owners were entitled to the difference in the value of the remaining tract before and after taking and that there was no existing easement to the remaining land.”

There had been a separate award for this case for the severance.

In the case of *Bare v. Department of Highways*, 401 Pac. 2d, 552, in Idaho, the court stated:

“We have recognized that an abutting property owner’s right of reasonable access to a public highway is a property right which may not be taken by the state without just compensation. When such property is taken without compensation, the owner may recover in an action in inverse condemnation, the damages to his property caused by the taking.”

The 1953 Utah Code Annotated as Amended provides in Title 27, Chapter 1, Section 2 that:

“A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.”

In this particular instance, the evidence shows that this had been used for more than ten years and had become a public highway. This is supported by the case of *Morris v. Blunt*, 49 U. 243, 161 P. 1127 which states that

“Under this section, the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of 10 years, but such use must be by the public.”

While the next section provides that all highways continue until abandoned by the County Commissioners or other competent authority, it would seem that here there has been such an abandonment as the County

traded this to Sommers and subsequently to the defendant, Soter's Incorporated. This would be under the police power. However, in the case of *Hague v. Juab County*, 37 U. 290, 107 P. 249, it states

“While public may abandon street or highway insofar as it affects right of public therein, such abandonment, however, will not affect rights of abutting owner with respect to use of easement he may have in street for purposes of ingress and egress to and from his premises.”

Also, in the case of *Tuttle v. Sowadzki*, 41 U. 501, 126 P. 959.

“While highway by abandonment may pass out of jurisdiction of local authorities, rights of abutting owners will not be affected.”

In other words, even though the County deeded by quitclaim whatever right it had in the road, Soter's Incorporated took subject to all the plaintiffs' rights in the road as to right of “access” and property right.

Under Title 27, Chapter 1, Section 7, the law provides, among other things,

“A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the middle of the highway.”

In this particular instance, while the highway was not on land described in the deed to the plaintiff, but was in the area of the land which eventually came down to the Sommers, and from them to Sam Soter and Soter's Inc., still there was an established right of way for the



public use when plaintiff received this land by deed in 1943 and he had a property right to the middle of the street.

In 47 A.L.R. 902 under an Annotation - Power to Deny Abuttter Access to Street or Highway, it states

“Regardless of whether the fee of the street or highway is in the abutting owners or in the public, such an owner has a special easement therein for purposes of ingress and egress, which is property as much as the abutting lot itself, and which cannot be taken away or materially impaired or interfered with, even under legislative authority, without compensation to him therefor.”

This annotation further goes on to quote the case of *Anzalone v. Metropolitan District Commission* of the Common Wealth in Massachusetts 153 N.E. 325

“The court in the reported case declares the right of access to the highway to be one of the incidents of the ownership of the abutting property, whether the fee of the highway is in the municipality or in private ownership; and without denying the right of the commission to make reasonable regulations as to the place and size of the approach, does deny its power altogether to exclude the abutting owner from access to the highway . . . ”

This case is reported on page 897 of the same volume and further states at 902

“The exercise of a legal right may be regu-

lated but it is not to be taken away without legislative action.”

This also points out at 901

“That if land adjacent to a roadway . . . should be divided into lots in separate ownership, each owner would have a right of access from his lot to this roadway.”

This is directly comparable to the case in question where the plaintiff had sufficient land to make two lots on the north end and which abutted the roadway which was vacated. This road would have served both lots. In volume 43 A.L.R. 2d p. 1072 treats on the subject

“Abutting owner’s right to damages or other relief for loss of access . . . ”

Under section three on page 1074, it states

“Where an established ‘land-service road,’ in which the normal right of access had already come into being, is converted into a limited-access way in such a manner that the existing right of access are destroyed, the owners of such rights are entitled to compensation, exactly as they would be if such rights were destroyed by any other type of construction.”

and states, among other cases, *People v. La Macchia* quoted on page 1075

“ . . . the conversion of a highway to a freeway, the right of access from various landowners’ properties was strictly limited, the court, approving an award of compensation which included a substantial amount for impairment of the

pre-existing right of access, held that no reversible error arose from an instruction stating that the owner of abutting land had a private right in such highway, distinct from that of the public, for the purpose of access to his land."

Also, in the Department of Public Works and Buildings v. Wolf, 111 NE2d 322

"It was held that pre-existing rights of access to a highway would not be taken by the mere action of the state in declaring the highway a freeway and posting freeway signs along the boundary of the property, the court saying that such rights constituted valuable property which could not be taken without compensation."

This annotation recognizes and brings out the fact that impairment of access or circuitry of travel will not give rise to compenstaion. In this particular instance, the court cited the Springville Bank v. State of Utah as support for its position. However, this was clearly in line with the circuitry of travel for access and, in the opinion of the plaintiff, the law established was not applicable to the instant case.

As a further supplement to the annotation, in Volume 4 of the A.L.R. 2d, Later Case Service, the annotation which is found on page 903, the court cites various and sundry cases in numerous jurisdictions, among others, the following:

"Property owner abutting upon public street or highway has property right in nature of ease-

ment of ingress and egress to and from his property and such right cannot be taken from him without just compensation. Taking of easement of access to public highways is compensable in terms of severance damages, that is, in terms of diminution in value of property which formerly had easement of access. *People by Department of Public Works v Renaud*, 198 Cal App 2d 581, 17 Cal Rptr 674." Also

"Right of access in and to street or highway attached to abutting lands which is a property right and cannot be taken for public use without just compensation. Such right of access is justified upon grounds of necessity and is such as is reasonably necessary for enjoyment of the land for all purposes to which it is adapted, subject, however, to reasonable regulations of state highway commission with respect to entrances. *Riddle v. State Highway Com.*, 184 Kan 603, 339 P2d 301." Again

"Access easements appropriated by state for construction of parkway are property and are protected by state constitutions from being taken without just compensation. *Gilmore v State*, 208 Misc 427, 143 NYS2d 873." Further

"Real property consists not alone of tangible things but also of certain rights therein sanctioned by law, such as right to access, ingress, and egress, and owners of property abutting a street or highway cannot be deprived by public authorities of all access thereto without just compensation, since such deprivation amounts to a taking of the property. *Iowa State Highway Com. v Smith (Iowa)* 82 NW2d 755."

"Reconstruction of highway which renders

abutting landowner's property less accessible to highway, or approach less convenient, constitutes taking of valuable property right which is compensable. *Mississippi State Highway Com. v Finch* (Miss.) 114 So 2d 673."

"Right of owner of property abutting on public highway to ingress and egress when portion of property is taken by state under power of eminent domain as right of way for limited-access highway is property right which is protected by S 14 of the state constitution and cannot be taken or damaged without just compensation. *Chandler v Hjelle* (ND) 126 NW2d 141."

"If a free way is built in such a manner as to deny a landowner any access to such highway where he theretofore had full access to a conventional highway, then unquestionably his right of access has been taken from him, and taker must pay him for such property right. His loss is generally shown by the before-and-after market value of the property. *Pennysavers Oil Co. v State* (Tex Civ App) 334 SW2d 546, error ref."

This also cites on the impairment of access a number of cases which have given the owner of the property compensation for mere circuity of access and we cite the following:

"One whose right of access from his property to abutting highway is cut off or substantially interfered with by vacation of closing of road is entitled to damages. But if his access is not so terminated or obstructed, if he has same access to highway as he did before the closing, his damage is not special, but of same kind,

although it may be greater in degree, as that of general public, and he has lost no property right for which he is entitled to compensation. *Warren v Iowa State Highway Com.* (Iowa) 93 NW2d 60."

"Notwithstanding availability of frontage road from which property owner's abutting property had circuitous access to main thoroughfare at remote interchanges, owner suffered compensable damage if highway to which he previously had immediate and unlimited access was rebuilt on existing right of way in manner which denied him reasonably convenient and suitable access to main thoroughfare in at least 1 direction. *Hendrickson v State*, 267 Minn 436, 127 NW2d 165 (citing annotation)."

In a book put out by the American Association of State Highway Officials entitled "Acquisition for Right-of-Way," 1962 Edition, with respect to Highway Access, it states in Chapter 10, page 112

"At the earlier stages of highway development in America, the landowners bore most of the burden of constructing and maintaining public roads. Highways were built to serve the land—to provide a means of getting to and from the land. Naturally, with the shift in the character of travel, the burden of providing a highway system soon shifted to the government. However, the rights of the abutter, that were generated at the time when the provisions of roads were the responsibility of the property owner and were built to serve the landowner, still persisted.

The rights which the abutting owner or oc-

cupant has in the existing conventional highway, in addition to the right of passage shared with the general public, are the right of access, air, light and view. These rights accrue to the abutting land because the original function of the conventional highway was to serve the land as well as the motorist and his vehicle. The right of access includes the right of the abutter to ingress and egress from his premises. This right is appurtenant to the land and accrues to an occupant of abutting land as well as to the owner, and accrues even if the property is vacant. It is immaterial whether the State owns the fee in the highway or only an easement for highway purposes. The right of the abutter has been defined as an easement in the highway which is as much a property right as the land itself to which it pertains.

These cases are supported by numerous and sundry cases cited in the foot notes on pages 130 and 131. On page 114 of the same volume, states

“Under the police power, vehicular access may be reduced to a minimum; but an abutting owner may not be completely deprived of all ingress to and egress from his property.”

“As has been suggested, access may be regulated to some extent under the police power. On the other hand, the power of government to deny access altogether is limited by the constitutional requirement that compensation be paid for the taking (and in some States, the damaging) of property.

As has been indicated, the courts have considered the right of access to be a property right

appurtenant to the land abutting the highway. As the Kentucky Supreme Court has phrased it in *Elizabethtown, Lexington and Big Sand Railroad*, 17 Ky 382, 19 Am Rep. 76

‘The private right of the lot-owner in the adjacent street being conceded to be property, such appropriation or obstruction of the street as deprives him of its reasonable use deprives him to that extent of his property, and no reason is perceived why this species of property can be taken without just compensation rather than any other.’

An examination of the judicial decisions wherein the abutter has claimed compensation on constitutional grounds reveals that the courts are substantially in agreement as to the rules of law which apply, though there is some variation among the jurisdictions as to its application to particular fact situations.

Before an abutter is entitled to compensation for the impairment of his access rights, he must show that he suffers a special injury, differing in kind and not merely in degree from that suffered by the public in general.”

“The abutter is not entitled to access at all points of his property, and as long as a suitable means of access is left to him, he has suffered no legal injury. But in cases where the obstruction deprived the abutter of a ‘suitable’ means of access or where impairment of access resulted in loss of value of the property, the abutter has been awarded compensation. In such situations, the abutter is deemed to have suffered a special injury differing from that suffered by the general public. Of course, where all access is com-



pletely cut off and the owner is left landlocked, the abutter must be compensated since this is a taking of the property right of access.

It is true that a person cannot recover compensation for a loss unless he has suffered damage. Here a very experienced real estate appraiser testified to the amount of the damage. In assessment of the damages, the State Highway Officials book, as previously cited, sets forth a good guide in Chapter 4, page 33,

### Market Value

“Fair cash market value is the normally accepted standard for the measure of compensation. It is generally stated that fair cash market value is the amount of money which a purchaser, willing but not obligated to buy the property, would pay to an owner willing but not obligated to sell it, taking into consideration all uses to which the land was adopted and might in reason be applied.” Nichols on Eminent Domain, 3rd Edition, Vol. 4, Section 12.2(1)

### “Present and Anticipated Use

In determining the fair cash market value of the property taken, the owner is not limited to the value of the property for the purposes for which it was actually used. The value of property should be based upon its most profitable legal use. Any reasonable future use to which the land might be adopted or applied may be considered in arriving at the present market value. This is distinguished and separate from the owner's vague plans or hopes for the future which are completely irrelevant.” Nichols, Sec. 12.314.

“The value of property for the use to which reasonable men would devote it if owned by them must be taken as the ultimate test.”  
Nichols

“ ‘Before and After’ Rule

When only a portion of the land is taken, the better rule of valuation seems to be the ‘before and after’ method. This consists of determining the difference between the market value of the entire property before the taking and its value after the taking.” Jahr Eminent Domain, Valuation and Procedure, Section 98. “It has the advantage of eliminating the double compensation problem by simply subtracting the value of the remainder after the taking from the value of the whole before the taking. It has the disadvantage, however, of being susceptible to padding, since noncompensable items of damages can be wrongfully reflected in the estimated after value, and thus may be included as part of the purported severance damages. The other rule accepted by the courts in partial taking cases is the determination of the value of the land taken, together with the severance damage to the remainder, without going into the entire tract value before and after the taking.”

Here there was no contrary evidence presented so the evidence of damage would have to stand.

The defendants set up as a defense the doctrine of estoppel and laches and included this in their motion for dismissal. However, this would be of no force and effect as the statute provides that for a four year statute of limitations to bring the action. The defendants

have contended because the trade was originally made by Sommers with the County in 1958 that the time should start running as of that time. However, the trade and quitclaim deed as executed in 1958 were not a denial of access and the denial came in 1964 as shown by all of the evidence when there was an actual tearing up of the road and until there was an actual taking of the road, the right would not arise as there would have been no damages prior to that time.

It is noted in the cases cited previously, that the governing body can dispose of its right in a highway but this does not affect the abutting property owners' right in the highway, so mere transfer of the title would not be a denial of access and hence the judge would have been in error if he had based his motion on the doctrine of laches and estoppel.

In vacating a right of way prior to 1965, there was no specific method set forth as to how this should be done, but in 1965 the Legislature specifically set forth in Title 27, Chapter 12, Section 102.4 of the 1953 Utah Code Annotated as amended, which provides for means of notice and sets up the specific steps required, none of which were followed in this particular case. As pointed out in cases previously cited, the way it was handled does not even comply in any sense of the word with the requirement of the constitutional provision for due process.

It is noted that there was no evidence at all presented on behalf of the defendants so that all the testi-

mony for the plaintiffs would have to be assumed to be true and construed in the most liberal manner in their favor and we contend, when applying the law to the facts as presented to the court, that it is very clear that there was a property right taken without compensation and without due process.

**Point Two. THE COURT ERRED IN NOT PERMITTING THE CASE TO BE TRIED BEFORE A JURY.**

It is noted that on the 14th of February, 1969, the plaintiffs gave notice of the calling of a jury trial and paid the jury fee therefor. That thereafter the defendants gave notice of their objection to the calling of a jury and their motion was heard on the 25th of February, 1969, at which time the objection to the calling of a jury was sustained through the shortness of notice. Please note that the matter was set for February 26, 1969, and had been delayed on numerous and sundry occasions by efforts of the defendants to get all of their parties in to the point where it was hard to determine where, when and if this matter would be tried. It is noted that it was definitely set for November 25, 1968, but that the setting was changed to February 26th as shown in the notice dated the 25th day of November, 1968 (R. 132).

The plaintiffs contend that the defendants had plenty of time and notice and were aware at all times that this matter was to be tried before a jury so that it did not take them by surprise and after notice, they

had from the 14th to the 26th to prepare the case, and based upon the calendars and the crowded manner in which cases have to be pushed through in a day or two notice, this would not have been as inconvenient as a two-day notice of trial would have been and would not have discommoded them.

While the matter of jury trial is somewhat discretionary matter with the presiding judge, still it is such a fundamental procedure and right in American jurisprudence that the right to a jury trial should not be lightly denied. In some instances, parties have been required to accept a jury without any notice whatsoever and so we believe that it was error to deny plaintiffs a jury trial.

## CONCLUSION

From all of the cases cited and the law as almost universally accepted throughout the various states of the union, it is very clear and convincing that the judgment of dismissal of the District Court was in error. That the plaintiffs had a vested right in the abutting road and that they could not be deprived of the use of the road without due process of the law as a taking of a property right without due process and without compensation would be contrary to the Fifth Amendment of the Constitution of the United States and the Constitution of the State of Utah. That the case should be remanded to the District Court with instructions to continue the case and if the facts are

as they now appear to be, that an award for damages should be made to the plaintiffs for the unlawful taking in the amount of the market value of the property taken.

Respectfully submitted,

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