

2005

Leon J. White v. Jerry Randall : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Reed L. Martineau; D. Jason Hawkins; Snow, Christensen & Martineau; Attorneys for Plaintiff/Appellant.

Law Office of James Clark; James G. Clark; Attorney for Defendant/Appellee.

Recommended Citation

Brief of Appellee, *White v. Randall*, No. 20050980 (Utah Court of Appeals, 2005).

https://digitalcommons.law.byu.edu/byu_ca2/6111

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

LEON J. WHITE, :

Plaintiff/Appellant, : Case No. 20050980-CA

vs. : ORAL ARGUMENT REQUESTED

JERRY RANDALL, :

Defendant/Appellee. :

OPENING BRIEF OF APPELLEE JERRY RANDALL

APPEAL FROM A JUDGEMENT ENTERED BY THE
SIXTH JUDICIAL DISTRICT COURT
SANPETE COUNTY, STATE OF UTAH
JUDGE DAVID L. MOWER
TRIAL COURT CASE NO. 030600302

REED L. MARTINEAU (2106)
D. JASON HAWKINS (9182)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Tel: (801) 521-9000

Attorneys for Plaintiff /Appellant

LAW OFFICE OF JAMES CLARK
JAMES G. CLARK (3637)
43 East 200 North
Provo, Utah 84606
Tel: (801) 375-1717

Attorney for Defendant /Appellee

FILED
UTAH APPELLATE COURT

APR 28 2006

IN THE UTAH COURT OF APPEALS

LEON J. WHITE,

:

Plaintiff/Appellant,

:

Case No. 20050980-CA

vs.

:

ORAL ARGUMENT REQUESTED

JERRY RANDALL,

:

Defendant/Appellee.

:

OPENING BRIEF OF APPELLEE JERRY RANDALL

APPEAL FROM A JUDGEMENT ENTERED BY THE
SIXTH JUDICIAL DISTRICT COURT
SANPETE COUNTY, STATE OF UTAH
JUDGE DAVID L. MOWER
TRIAL COURT CASE NO. 030600302

REED L. MARTINEAU (2106)
D. JASON HAWKINS (9182)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Tel: (801) 521-9000

LAW OFFICE OF JAMES CLARK
JAMES G. CLARK (3637)
43 East 200 North
Provo, Utah 84606
Tel: (801) 375-1717

Attorneys for Plaintiff/Appellant

Attorney for Defendant /Appellee

TABLE OF CONTENTS

STATEMENT OF THE CASE	1
ISSUES PRESENTED	2
PROCEDURAL HISTORY	2
STATEMENT OF THE FACTS	5
THE HISTORY OF THE “POND”	6
THE POND PROBLEM	7
SUMMARY OF ARGUMENT	10
ARGUMENT	11
I. THE TRIAL COURT’S RULING MUST BE UPHELD BECAUSE THE USE OF U.S. GEOLOGIC SURVEY MAPS WERE PROPER AND DID NOT VIOLATE ANY RULE OF LAW	11
i. <i>The trial court did not go outside of the evidence presented at trial to make a finding of fact because the U.S. Geologic Survey maps were assembled by using maps submitted by counsel and legal descriptions of the property presented as evidence at trial</i>	12
ii. <i>In failing to object to the trial court’s use of the maps during a motion hearing, White waived his right to appeal the use of such maps </i>	15
iii. <i>The court may take judicial notice of the maps published by the United States Geologic Survey used by the trial court</i>	17
iv. <i>Even if the trial court did error by referencing maps, use of such extrinsic evidence is not ipso facto reversible error</i>	19
II. THE TRIAL COURT PROPERLY ORDERED THAT A WATER DELIVERY SYSTEM BE CONSTRUCTED THAT DOES NOT INCLUDE A POND IN WHICH TO STORE AND IMPOUND WATER	20

i.	<i>Utah law permits the trial court, in finding an implied easement, to construct an alternative route by which to bring water to White's land</i>	21
ii.	<i>In Utah, the court must limit an easement to the most reasonable and least burdensome easement that is required under the circumstances</i>	22
III.	WHITE HAD FAILED TO MARSHALL EVIDENCE IN SUPPORT OF HIS CLAIM TO VACATE THE JUDGMENT AGAINST HIM	24
IV.	AS THE TRIAL COURT CORRECTLY OBSERVED, WHITE IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES OR PUNITIVE DAMAGES	25
i.	Because no contract or statute exists in this case allowing for the recovery of attorney's fees, White may not recover attorney's fees under Utah law	25
ii.	<i>Punitive damages are not appropriate as a means to award attorney's fees to White</i>	26
iii.	Appellant's claim for punitive damages was and is procedurally and substantively improper.	27
iv.	Punitive damages are only appropriate where the conduct was willful, malicious, and violated the right of another	28
v.	Punitive damages may not be awarded in the absence of a tort and compensatory damages	30
vi.	The U.S. Supreme Court has limited punitive damages to cases where the defendant's conduct is reprehensible and compensatory damages are ordered	31
CONCLUSION		33

TABLE OF AUTHORITIES

CASE LAW

<i>Adamson v. Brockbank</i> , 185 P.2d 264 (Utah 1947)	21
<i>Amica Mutual Ins. Co. v. Schettler</i> , 768 P.2d 950, 965 (Utah Ct. App. 1989)	25
<i>Amica Mutual Insurance Co. v. Schettler</i> , 768 P.2d 950, 966 (Utah Ct. App. 1989) .	27
<i>Badger v. Brooklyn Canal Co.</i> , 966 P.2d 844, 847 (Utah 1998))	4
<i>Big Cottonwood Tanner Ditch Co. v. Moyle</i> , 174 P.2d 148, 158 (Utah 1946)	23
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559, 575-577 (1996)	31
<i>Bradley v. Payson City Corp.</i> , 70 P.3d 47, 50 (Utah, 2003)	25
<i>Canyon Country Store v. Bracey</i> , 781 P.2d 414, 419 (Utah 1989)	25
<i>Chase v. Scott</i> , 38 P.3d 1001 (Utah App. 2001)	26
<i>Davis v. Grand County Serv. Area</i> , 905 P.2d 888 (Ut App 1995)	27
<i>Elkington v. Foust</i> , 618 P.2d 37 (Utah 1980)	29
<i>Esnernia v. Overland Moving Co.</i> , 115 Utah 519, 523 (1949)	17
<i>Falkenburg v. Neff</i> , 269 P. 1008 (Utah 1928)	29
<i>Farmers New World Life Ins. Co. v. Bountiful City</i> , 803 P.2d 1241, 1249 (Utah 1990)	23
<i>First Security Bank of Utah v. J.B.J. Feedyards, Inc.</i> , 653 P.2d 591, 598 (Utah 1982)	26, 29
<i>Gilham v. Devereaux</i> , 214 P. 606 (Mont. 1923)	30
<i>Graham v. Street</i> , 270 P.2d 456, 459 (Utah 1954)	30
<i>Graves v. Florida</i> , 587 So.2d 633 (Fla. Dist. Ct. App. 1991)	18
<i>Jenkins v. Depoyster</i> , 186 S.W.2d 14, 15 (Ky 1945)	23

<i>Moon v. Moon</i> , 1999 UT App 12, 973 P.2d 431, P24, 973 P.2d 431	24
<i>New Mexico v. Texas</i> , 275 U.S. 279, 298 (1928)	18
<i>Richins v. Delbert Chipman & Sons Co.</i> , 817 P.2d 382, 387 (Utah App. 1991)	27
<i>Ringwood v. Foreign Auto Works</i> , 786 P.2d 1350, 1357 (Utah App. 1990)	19
<i>Ross v. Cagley</i> , 670 P.2d 190 (Or. App. 1983)	26
<i>Salt Lake City v. United Park City Mines Co.</i> , 503 P.2d 850, 853 (Utah 1972) 13, 15, 19	
<i>Savage v. Educators Ins. Co.</i> , 908 P.2d 862, 864-865 (Utah 1995).	12
<i>Smith v. Fairfax Realty, Inc.</i> , 82 P.3d 1064(Utah 2003)	24
<i>South Shore Land Co. v. Petersen</i> , 226 Cal. App. 2d 725, 745 (Cal. App. 1964)	18
<i>St. Joseph Stock Yards Co. v. Love</i> , 195 P. 305 (Utah 1921)	26
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	25, 31, 32
<i>State v. Bailey</i> , 3 Utah 2d. 254, 255 (1955)	17
<i>State v. Cram</i> , 46 P.3d 230, 232 (Utah 2002)	16, 17
<i>State v. Dibello</i> , 780 P.2d 1221, 1226-27 (Utah 1989)	16
<i>State v. Emmett</i> , 839 P.2d 781, 783-84 (Utah 1992)	16
<i>State v. Holgate</i> , 10 P.3d 346 (Utah 2000)	16, 17
<i>State v. Mabe</i> , 864 P.2d 890, 892 (Utah 1993)	21
<i>State v. Vincent</i> , 883 P.2d 278, 281 (Utah 1994)	12
<i>Turtle Mgmt., Inc. v. Haggis Mgmt.</i> , 645 P.2d 667, 671 (Utah 1982)	25
<i>U.S. v. Burch</i> , 169 F.3d 666 (Colo. 1999)	18
<i>U.S. v. Crescent Amusement Co.</i> , 323 U.S. 173, 184 (1944)	20
<i>Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311, 1315 (Utah Ct. App. 1991)	24

VanDyke v. Mountain Coin Mach. Dist., 758 P.2d 962, 965 (Utah Ct. App. 1988) 28

RULES

Utah R. Evid. § 201(b)-(c) 17, 18

Rule 52(b), Utah Rules of Civil Procedure 27

Utah R. Evid. 201(f) 19

STATUTES

Utah Code Ann. § 78-18-1 30

OTHER AUTHORITIES

89 C.J.S. *Trial* § 1018 (2005) 18

STATEMENT OF THE CASE

This case is another in the continuing succession of discordant neighbors battling over whatever issues provide a cause. Who is actually at fault is a matter of some dispute, with Appellee Defendant Randall (Randall) claiming that Appellant Plaintiff Leon “Lumpy” White (White) trespassed on Randall’s land, stole the water in Randall’s pond, and allowed his dogs to run free and kill Randall’s chickens and a foal (baby horse), and ultimately White’s son allegedly shot at Randall and Randall threatened to “return fire.” White’s position, as you may guess, is somewhat different.

This case is really about Appellant White seeking water to which he has no right. This case is not about Appellant obtaining an appropriate easement for the delivery of his irrigation water, for the trial Court already resolved that issue by awarding White an easement over and across Randall’s land. Plaintiff primarily seeks an “easement” consisting of a large pond on Randall’s property to impound water in excess of White’s recognized water rights, and then to use that water to supplement his irrigation rights and to flood irrigate his swampy pasture. No such water right has ever existed on this property, the irrigation company claims no right to impound or store water on Randall’s land, and White has no water rights registered with the State Engineer allowing him to impound or store water. No express easements appear of record.

While Appellee Randall does not completely agree with the Trial Court, the ruling and judgment is reasonable and should be affirmed.

ISSUES PRESENTED

1. Was it proper for the trial court to reference certain maps that it located through its own computer mapping software and that corresponded to and were consistent with maps and legal descriptions of the property already submitted to the court?

2. Did the trial court properly order that White has an implied easement in a ditch to be constructed in the place of the unauthorized pond on Randall's property where White only had rights to a limited amount of irrigation water and no right to store it in Randall's pond?

3. Was the trial court correct in ordering the parties to pay their own attorney's fees and costs and in awarding no punitive damages where no tort was established and no compensatory damages were ordered?

PROCEDURAL HISTORY

Leon J. "Lumpy" White filed this lawsuit against Jerry Randall on August 29, 2003 (R. at 1). He requested that Randall restore the ditch and pond on Randall's property to their "prior condition," though no specifications were ever provided as to what exact "prior condition" White was referring (R. at 1-3). White also asked for an award of attorney's fees and punitive damages (R. at 3).

The trial began on October 9, 2003 and ended on November 26, 2003 (R. at 35, 41-46). Following closing argument, the trial Court made certain findings of fact, including a finding that Randall's chickens valued at \$198.00 were killed by White's dogs (R. at 270, pp. 534, 535), and that "It's more likely than not that the horse (Randall's foal) was killed by the actions of the dog. The problem is that I don't have a value I can rely

on. . . . So I'm not going to award any damages for the loss of the horse.” (R. at 270, pp. 534 - 535). (See Addendum Exhibit 1)

The trial court also requested that counsel each prepare and submit Proposed Findings of Facts and Conclusions of Law, along with an 8 ½” x 11” map or scaled drawing of the property (R. 45). The Court set a deadline and Ordered a simultaneous exchange of the pleadings.

Counsel for White submitted two requests for extensions of time to file the proposed findings of fact. After granting the first Motion for Extension, the trial court denied the second extension (R. 81). Counsel for Randall filed his Proposed Findings of Fact and Conclusions of Law with two scaled diagrams and a map on the deadline, February 27, 2004. Counsel for Randall also sent White's counsel a copy of the pleading on the same day (R. 82). Counsel for Randall filed his Proposed Findings of Fact and Conclusions of Law, along with a “poster-size” (as opposed to an 8 ½” X 11” as requested by the Court) scaled aerial photograph seven days later on March 5, 2004 (R. 82).

Randall filed a Motion to Strike Plaintiff's Proposed Finding of Fact and Conclusions of Law due to White's violations of the Court ordered deadline. Despite White's untimely filing and disregard of the court's orders, on or about September 3, 2004 the trial Court sent a letter to counsel, apologizing for the delay and stating that “Apparently we allowed the file to become lost.” The Court had signed White's proposed

findings and directed White's counsel to prepare an appropriate Judgment.¹ (See: Exhibit 2 to Addendum).

The trial court signed and entered the judgment on September 22, 2004. On September 28, 2004, in anticipation of a possible appeal, and to give the Trial Court an opportunity to correct its legal errors,² Randall filed a Notice of Objection to Judgment and a Motion to Alter, Amend or Supplement Findings of Fact and Conclusions of Law on the grounds that the findings adopted by the court were inconsistent with prior findings made by the court following trial (R. 117-120).³

On April 4, 2005, the court held a further motion hearing at which time it conducted oral argument and requested additional documents (R. 229-231, 273). The Court granted Randall's motion subject to a review and the entry of new findings and conclusions. The trial court filed its Amended Findings of Fact and Conclusions of Law on July 26, 2005, and Judgment was filed on September 19, 2005 (R. 238-247, 254-256).

The trial court held that White is entitled to an easement across Randall's land. The easement is to be "exactly equal in both length and width to the existing ditch which conveyed water both to and from the now non-existent pond." The ditch will be

¹ The court was likely unaware of the procedural errors made by White, and was possibly unaware of Appellee Randall's filing altogether, as a result of the lost file. (See Court's letter September 3, 2004; not indexed as part of record).

² "This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)).

³ White now asks this Court to reinstate the prior Findings of Fact, Conclusions of Law and Judgment (Exhibit 3), Randall attaches his motion and memorandum hereto as exhibit 4, and incorporates the arguments herein by this reference.

connected in the space where the pond once existed, and the easement provides White the right to trespass on Randall's land for the purpose of maintaining the ditch and controlling the flow of water. No water rights were included in the decision, and the parties were ordered to pay their own attorney's fees and costs. White filed a Notice of Appeal on October 14, 2005 (R. 262).

STATEMENT OF THE FACTS

1. On June 3, 1988, Kaziah May Jordan Hancock ("Hancock") and her husband purchased approximately 40 acres of land in Indianola, Utah, from Kent Spencer and 28 adjoining acres from Clyde Condley. (Exhibit #17). Hancock also purchased six (6) shares of stock in the Indianola Irrigation Company from Kent Spencer and 28 shares of stock in the Indianola Irrigation Company from Clyde Condley (R. at 269, pp. 81-82).

2. On July 28, 1995, Hancock sold 16 acres of her land to Leon J. White, along with an existing well and one share of stock in the Indianola Irrigation Company (R. at 269, pp. 6-9; Exhibit #2). Later on that year, White bought approximately 9-10 acres of adjoining property from Hancock. On March 2, 1996, White bought ten (10) additional shares of stock in the Indianola Irrigation Company from Hancock (R. at 269, p. 9; Exhibit 15).

3. In 1996, Hancock sold a final adjoining parcel of 11 ½ acres of land to Jerry Randall (R. at 269, p. 19; Exhibit #16). Randall had water rights to a well on the property, but did not purchase any shares of stock in the Indianola Irrigation Company (R. at 270, p. 361). Randall's property was the eastern-most parcel of the three contiguous properties conveyed by Hancock. A pond of indeterminate size was located on the land

sold to Randall (R. at 269, p. 100). See exhibit 5 to this brief for a plat of the properties (Exhibit #1 at Trial).

THE HISTORY OF THE “POND”

4. The history of the pond on Randall’s property was as a stock watering pond. (R. at 269, p. 179, line 10 -11; R.269, p. 215, line2 - 4), but in 1983 the pond was obliterated by flooding (See Exhibit #6 to the Addendum, photo of dam bursting). In or about 1985, Don Tibbs, Kent Spencer’s lessee, rebuilt and expanded the pond, installed a head gate and a valve to allow the connection of a pump (R. at 269, pp. 179-180), and then pumped water off the property to other properties he was farming north of the highway (R. at 269, p. 17, line 11 - 13). Tibbs never used the pond for flood irrigation of the property now owned by White, nor did he flood irrigate any other property from the pond (R.269, p. 219, line 20 - 22). Tibbs’ lease on the property expired when Spencer sold the 38-acres to Hancock in 1988.

5. From 1988 to 1995, Hancock used the pond to transport water to her land (R. at 270 pp. 447-448). The water would remain in the pond until the pond’s valve was opened and water flowed through the ditch to the property to the west (what is now White’s property) (R. at 269, p. 10).

6. The Indianola Irrigation Company transported water through an existing ditch that led down to the pond (R. at 269, p. 10-11). The irrigation ditch emptied irrigation water into the pond. Another ditch had developed where the “head gate” exited the dam, allowing water to exit the pond. The ditch was initially used to water two trees on the White’s property: after Tibbs constructed the pond and ditch. However, Tibbs

never used the pond to impound or distribute water for flood irrigation (R. at 269, pp. 163-165, 173). The pond stored and discharged water originating from both the irrigation ditch and from multiple springs and seeps (R. at 269, p. 10; 270 p. 361). Some of the spring water originated on Randall's property, but most of the spring runoff came from springs on Mrs. Terry's land to the east of Randall's land (R. at 270 pp. 361, 368).

7. When he purchased his parcel of land in 1996, Randall walked the property and noticed a ditch from the pond to the White property (R. at 270, pp. 366-367). Hancock made no mention to Randall of White's rights to any of the water in the pond (R. at 270, p. 294). From his conversations with Hancock regarding the rights to the water in the pond, Randall believed that he could use some of the pond water to "sprinkle and water around the area" because the water in the pond accrued there from springs and from runoff from the property (R. at 270, p. 294). He was also told by Mrs. Terry, from whose land the spring water flowed into the pond, that he could use the spring water (R. at 270, p. 368).

THE POND PROBLEM

8. Sometime around 1998, after White moved to the property and after Randall had purchased his property, White asked Randall to help him dig a ditch to deliver his irrigation water, Randall took his tractor "and put forth the effort to help him do so; but I never did see water come through the ditch down into the pond. (Transcript p. 297, line14 - 23). Shortly thereafter, and in 1998, Appellant White used the Pond to irrigate his property, lowering its level but leaving some water R. at 270, p. 296, 16 - 19). Each and every year, following the 1998 incident, White would enter upon Randall's

property during irrigation season and drain the pond and leave it dry. (R. at 270, p. 300, line 6 - 11). White made no attempt to use the same amount of water he put into the pond. (R. at 269, p. 65, line 9 - 21).

9. One such year in which White drained the pond was 2002, a year in which White had leased his water rights to another person (R. at 269, p. 243 line 22 - 25, R. at 270, p. 300 line 9 - 25). White continued to go onto Randall's land from 1998-2003 to open the valves to the pond so he could flood irrigate his land, despite being told by Randall that he was taking water without any right to do so (R. at 270, pp. 299-301).

10. To preserve his right to use the spring water in the pond and to prevent White from continuing to drain his pond, Randall constructed a ditch on the edge of his property to transport water to the White property (R. at 270, p. 302). The new ditch was located on the site where Randall believed a historical easement previously existed, and connected to the ditch providing the irrigation water to the pond (R. at 270, pp. 302, 306). Randall also put a chain and padlock on the valves of the pond to keep White from taking water to which he had no right (R. at 270, pp. 367-368). However, White refused to use the newly constructed ditch and trespassed onto Randall's property, diverted the irrigation, cut off and disposed of the chain and padlock, opened the valve and again drained the pond (R. at 270, pp. 343-344). This was a year of severe drought and all water in the valley had been preserved solely for stock watering purposes.

11. Further evidence of White's desire to expand his water rights comes from John Bigler, water master of the Indianola Irrigation Co., who testified that White's water right was at most, 15 minutes per share (11 shares) every 10 days during irrigation

season. (P. 231, line 11 - 12). Irrigation season varies, but begins when the farmers get greedy, generally about July 1, and water is in short supply. (R. at 269, p. 231, line 1-3). In 2003, due to a shortage of water, irrigation was terminated on July 1 and water was only allowed for stock watering. However, Appellant testified that when the pond was full, it would provide him with a four (4) day continuous flow of water to his land. (R. at 269, p. 11, line 23-25). In 2003, when irrigation was terminated on July 1, Lumpy White testified that he had four continuous days of irrigation from the pond (R. at 269, p. 66, line 6 - 10, Id. p. 16, line 22 - 23).

12. In an attempt to determine the historic path of the water used to irrigate White's land, and to determine any rights to the water in the pond for his own use since the pond accumulated water from the ditch, from springs, and from seeps, Randall checked with the Division of Water Sources in Salt Lake to check the records regarding the pond (R. at 270, p. 301). He learned that the Indianola Water Irrigation Company had no storage rights, water rights, or easements of any sort on his property (R. at 270, pp. 301-302; R. at 269, p. 252; See also Addendum exhibit # 7). The Indianola Irrigation Company has a separate holding pond in which it stores water. Because the State law does not permit the Indianola Irrigation Company to store water, the holding pond must be able to drain within 24 hours (R. at 269, pp. 232-233).

13. Randall caused the pond to be removed in July 2003 after being informed by the state water engineer that he had no right to water storage on his property, either for himself or for any other individual (R. 26).

14. While White and the immediate predecessor to his property, Hancock, used the pond to impound and provide water to their fields, the pond was not essential for their full use and enjoyment of those water rights because they could have tapped into the pressurized irrigation system to obtain water (R. at 270, p.427), or used historic easements. In fact, only two stockholders of Indianola Irrigation Company who own property in Indianola are not on the pressure irrigation system (R. 237), and Appellant White is one of the two.

SUMMARY OF ARGUMENT

This court should affirm the trial court's decision granting White an easement across Randall's land in the form of a ditch reasonably connected in the space where the pond once was that is equal in length and width to the existing ditch which conveyed water both to and from the now non-existent pond (R. at 246-247). The easement includes White's right to "trespass on Mr. Randall's land for reasonable ditch maintenance and for controlling the flow of water" (R. at 247).

The easement ordered by the trial court should be upheld because: 1) the trial court's referencing of USGS maps did not go outside the evidence presented at trial because the maps were based on maps and legal descriptions of property submitted to the court during trial; 2) White failed to object to the use of the maps when they were presented to counsel on April 4, 2005 and thus waived his right to bring the issue up on appeal; 3) the trial court may take judicial notice of the maps as an adjudicative fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"; 4) the ditch to be constructed is the least burdensome and

most reasonable easement required under the circumstances; and 5) the reconstruction of the pond would promote unlawful storage of water, as neither Randall, White, Spencer nor Hancock ever owned any rights to divert or store water.

White has failed to marshal the evidence necessary to refute the findings of fact made by the trial Court regarding damages for his dogs killing Randall's chickens.

This court should also uphold the order that the parties pay their own attorney's fees (R. 247) by finding that: 1) Utah courts do not award attorney's fees unless they are expressly provided for by statute or contract; and 2) punitive damages may not be granted in this case because the conduct was not tortious, reprehensible, and did not willfully and maliciously violate the right of another.

ARGUMENT

I. THE TRIAL COURT'S RULING MUST BE UPHELD BECAUSE THE USE OF U.S. GEOLOGIC SURVEY MAPS WERE PROPER AND DID NOT VIOLATE ANY RULE OF LAW

The trial court did not error in referencing certain U.S. Geologic Survey maps in its findings of fact because: 1) the maps included only information already presented to the court at trial; 2) White waived its right to raise this issue on appeal by failing to object to the maps when they were presented by the trial court during a motion hearing; and 3) the trial court did not abuse its discretion in taking judicial notice of the maps. Furthermore, even if the trial court did error in referencing the maps, it was harmless error because the findings of fact were inferable from other evidence presented at trial and the evidence demands the same judgment.

Whether the maps used in the trial court's findings of fact included only information already presented to the court at trial is a question of fact to be reviewed under a clearly erroneous standard. *See State v. Vincent*, 883 P.2d 278, 281 (Utah 1994). The issues of whether the court may use and take judicial notice of maps it located on its own and whether White waived his right to raise this issue on appeal are questions of law to be reviewed for correctness. *See Savage v. Educators Ins. Co.*, 908 P.2d 862, 864-865 (Utah 1995).

- i. The trial court did not go outside of the evidence presented at trial to make a finding of fact because the U.S. Geologic Survey maps were assembled by using maps submitted by counsel and legal descriptions of the property presented as evidence at trial*

On appeal, White contends that the trial court based its ruling on independent research and facts not in evidence, thereby constituting legal error. The trial court used a map computer program to construct comprehensive, easy-to-read maps of the property in question. These maps simply re-depicted those maps and legal descriptions of the property already submitted into evidence and thus did not constitute facts not submitted into evidence. During trial, both White and Randall submitted to the court various maps, accounts of the geographical features, and legal descriptions of the property in question. Defendant's Exhibit 1 is a plat map of the property and contains numerous map coordinates as well as an outline of the property owned by White and Randall—comparable to some of the maps in the trial court's findings of fact. Defendant's Exhibits 2, 3, 9, 16 were all admitted into evidence at trial and all set forth the legal description or geographical location of the property involved.

Further, at the trial court's request, Randall submitted a map with his Proposed Findings of Fact and Conclusions of Law that contains all of the contour lines, locations of water sources, and coordinates used by and highlighted on the maps presented by the trial court. Randall also submitted two scaled diagrams depicting the relative location of the parcels.

The trial court used the maps submitted to the trial court along with evidence containing legal descriptions of the property to construct a cohesive picture of the geographical features of the property in question (R. 273, pp. 9-10). The maps contain no information or depiction not previously presented to the court and seen by both parties. The trial court even explained to those present at the motion hearing a step-by-step account of how he constructed the maps used in his findings of fact (R. 273, pp. 9-13). The Court invited the attorneys to object and neither did.

In *Salt Lake City v. United Park City Mines Company*, 503 P.2d 850 (Utah 1972), Salt Lake City brought suit to quiet title to the flow of water from a tunnel constructed by the defendant, which the city argued reduced the flow of a creek. On appeal, the Utah Supreme Court reversed the trial court's decision because the judge used a book not in evidence to produce nine exhibits for his consideration which were never seen by counsel at trial. *Id.* at 852. In addition, the judge used a "proper slope" as derived by a student using a computer at the University of Utah which was "at variance with that used by the City in calculating the base line of a double mass curve used to compare variance in comparative stream flows." *Id.* The court further explained that because "[t]he computer gave the judge a slope not in accord with the evidence given by the experts; yet he used

this slope to decide that the exhibits of the City were in error. . . ” the trial court went outside the evidence in making its finding. *Id.*

In *Salt Lake City v. United City Mines Company*, the trial court’s exhibits and outside calculations of the proper slope directly contradicted the evidence submitted at trial. Such was not the case here. The trial court’s use of computer-generated maps did not contradict any expert testimony given at trial. When White testified that the ditch and the pond was the only way the water could get to White’s property, he explained that “[t]here’s a highway on one side of us; and we’re a little higher than the rest of the land. So that would be the only way we could get [the water]” (R. at 269, p. 17). White’s testimony corresponds with the trial court’s findings of fact and provides a basis for the trial court’s findings that “[t]he only way water can possibly flow from the pond onto the NE corner of White’s property is for it [to] flow below the 5,940 contour line and above the 5,920 contour line,” and that “[i]t should be physically and geographically possible for water to flow across Mr. Randall’s property and onto Mr. White’s property” (R. 238-246).

Furthermore, though both White and Hancock testified that the only means by which water could get to White’s land was through the ditch and the pond, they were indisputably limiting the scope of the opinions to means of water delivery to “right now”—given the current conditions of the property and not taking into consideration alternative methods (R. 260, 17; R. at 270, p. 428). On cross-examination, White himself acknowledged that taking water from Randall’s pond was not the only way he could get water to his property, for at the very least, he could have connected into the pressurized

system to obtain his water (R. at 270, pp. 427-28). Additionally, Kent Spencer testified that when he owned the property, he used a different canal, called the “meetinghouse wash,” to flood irrigate the land (R. at 269, p. 161). Thus, the trial court’s use of the maps published by the U.S. Geologic Survey did not conflict with any established facts presented during trial.

The trial court complied with the rule that “the findings of all triers of fact, either court or jury, must be *based upon testimony of witnesses or other evidence made a part of the record....*” *Salt Lake City v. United Park City Mines Company*, 503 P.2d 850, 852 (Utah 1972) (emphasis added). The maps included in the trial court’s decision reflect the descriptions of the property as presented by the witnesses and as established by the maps and trust deeds presented by the parties at trial. The trial court used a computer program to synthesize an easy-to-read map of the area—an inference it was capable of making on its own as a result of the maps and property descriptions already submitted to the court.

ii. In failing to object to the trial court’s use of the maps during a motion hearing, White waived his right to appeal the use of such maps

Counsel for both White and Randall were shown the U.S. Geologic Survey maps during a motion hearing held on April 4, 2005. At that hearing, the court showed the parties the topographic maps referred to in its final finding of fact (R. 273, pp. 4-6). In doing so, the judge “invite[d] [counsel] to challenge me on what I’ve done, because if I’ve made mistakes, I don’t want them to be the basis for a decision in this case. So if that quit claim deed is something that’s in your evidence, and I’ve got the wrong point of beginning, or if I’ve done something wrong with the meets and bounds description, then I

want to know about it" (R. 273, p. 10). The judge talked to the parties in detail about the maps he presented at that hearing (and later used in his opinion), and at no time did counsel for White make any objection (R. 273, pp. 3-18). In direct contrast, counsel for White did object later on during the hearing to the trial court's asking Randall to explain the "meetinghouse wash" (R. 273, p. 32).

The Utah Supreme Court has stated that for an issue to be raised on appeal, a party must make a timely objection to the claimed error:

We noted in *State v. Holgate* that, "[a]s a general rule, claims not raised before the trial court may not be raised on appeal." 2000 UT 74, ¶ 11, 10 P.3d 346. We held further "that the preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *Id.* at 350. In *State v. Emmett*, 839 P.2d 781, 783-84 (Utah 1992), we wrote that "our case law establishes that the doctrine of waiver has application if defendants fail to raise claims at the appropriate time at the trial level, so the judge has an opportunity to rule on the issue." Other cases note that in order to preserve a claim or an objection for appellate review, the defendant must raise a timely or contemporaneous claim or objection. *See State v. Dibello*, 780 P.2d 1221, 1226-27 (Utah 1989) (explaining that issue not properly preserved for appeal where defense fails to make objection to remarks at trial)
State v. Cram, 46 P.3d 230, 232 (Utah 2002).

The Utah Supreme Court then went on to explain the policy considerations behind requiring a contemporaneous objection to preserve a claimed error for appeal:

The two policy reasons for the preservation rule are, first, to give the trial court an opportunity to "address the claimed error, and if appropriate, correct it," and second, that "a defendant should not be permitted to forego making an objection with the strategy of enhanc[ing] the defendant's chances of acquittal and then, if that strategy fails, ... claim[ing] on appeal that the Court should reverse." As we said in *State v. Brown*, "defendants are thus not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal.

State v. Cram, 46 P.3d 230, 233 (Utah 2002), *citing Holgate*, 10 P.3d 346 (Utah 2000) and *State v. Brown*, 948 P.2d 337, 343 (Utah 1997).

In failing to object to the use of the maps presented by the trial court during the motion hearing, White waived his right to raise the issue on appeal. Despite being prompted by the trial court to challenge the maps if he was making an error or mistake, White did not voice any objection to the maps at any point during the hearing. It was not until the trial court made its ruling with which White was not satisfied that any claim of error was made regarding the trial court's use of the maps.

iii. The court may take judicial notice of the maps published by the United States Geologic Survey used by the trial court

White wrongly argues that the trial court cannot “go outside of the evidence presented at trial to make a finding” (A.B. at 13). Utah has adopted Federal Rule of Evidence 201, which states that a court can take judicial notice of adjudicative facts, whether requested or not, that are either “(1) generally known within the territorial jurisdiction of the trial court or (2) *capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.*” Utah R. Evid. § 201(b)-(c)(emphasis added).

In alleging that the trial court improperly referred to certain maps published by United States Geologic Survey in making its findings of fact, White has not challenged the accuracy of the maps or the validity of the source. Furthermore, several Utah courts have taken judicial notice of geographic facts. (See *e.g.*, *State v. Bailey*, 3 Utah 2d. 254, 255 (1955) (taking judicial notice that Panguitch is located in Garfield county); *Esnernia v. Overland Moving Co.*, 115 Utah 519, 523 (1949) (taking judicial notice of the towns

between Elko, Nevada and point of accident.)) In *U.S. v. Burch*, the court noted that “official government maps are generally an acceptable source for taking judicial notice.” 169 F.3d 666 (D. Colo. 1999).

Courts in other states adopting similar language as is in section 201(b) of the Federal Rules of Evidence have taken judicial notice of maps and surveys: Judicial notice of a survey map was taken in Florida (*Graves v. Florida*, 587 So.2d 633 (Fla. Dist. Ct. App. 1991)) and California has taken judicial notice of a current system of surveys in the state, government surveys of public lands, and official maps. *South Shore Land Co. v. Petersen*, 226 Cal. App. 2d 725, 745 (Cal. App. 1964). Thus the trial court was within its discretion to take judicial notice of the United States Geologic Survey maps as “sources whose accuracy cannot reasonably be questioned.” Utah R. Evid. § 201(b).

The court need not wait for a party to introduce a fact into evidence before it can take judicial notice of that fact. “*Except for those matters of which the court may take judicial notice*, the deliberations of the trial judge are limited to the record made before him or her” 89 C.J.S. *Trial* § 1018 (2005) (emphasis added). The U.S. Supreme Court has upheld this principle in *New Mexico v. Texas* by affirming the special master’s finding that “the Salazar-Diaz Survey was corroborated by certain of the maps of the surveys made for the Joint Boundary Commissions and the War Department . . . and that all these maps—as well as certain other maps that had not been introduced into evidence, but of which he thought judicial notice might be taken—sustained the contention of Texas as to the course of the Rio Grande in 1850” *New Mexico v. Texas*, 275 U.S. 279, 298 (1928)(emphasis added). Similarly, the Utah Court of Appeals upheld a trial court’s

taking judicial notice sua sponte of a prior Supreme Court decision that was neither admitted into evidence nor formally brought to the attention of either counsel. *Ringwood v. Foreign Auto Works*, 786 P.2d 1350, 1357 (Utah App. 1990).

The trial court was also well within its discretion to take judicial notice of the maps during a motion hearing following the actual trial because “[j]udicial notice may be taken at any stage of the proceeding.” Utah R. Evid. 201(f). The court’s presentation of the maps during the hearing also gave both parties the opportunity to be heard as to the “propriety of taking judicial notice and the tenor of the matter noticed” as required section (e) of the rule.

iv. Even if the trial court did error by referencing maps, use of such extrinsic evidence is not ipso facto reversible error

Even if it were determined that the trial court erred by referencing the U.S. Geologic Survey maps in its findings of fact, such error is harmless and does not constitute reversible error. In his dissent in *Salt Lake City v. United Park City Mines Co.*, Justice Henriod argued that “[u]se of such extrinsic evidence by the trial court may be error of some sort but is not ipso facto reversible error. . . even erroneous findings ipso facto would not constitute such error.” 503 P.2d 850, 853 (Henriod, J., dissenting). He further explained, “[s]uch extra curriculum research should be ignored, if, but for such work, the evidence demands the same judgment.” *Id.*

Though *Salt Lake City v. United Park City Mines Co.* is clearly distinguishable from this case in that the trial court there used outside information that was never seen by counsel to come up with evidence contrary to that which was produced at trial (whereas

here, counsel did see the maps prior to the trial court's findings, and the maps simply re-depicted those maps and property descriptions produced during trial), Justice Henriod's point is nonetheless valid and applicable to the present circumstances.

Similarly, the U.S. Supreme Court has stated that a court's legal error in admitting certain evidence is not necessarily reversible error, where "other evidence was sufficient to establish [what the improper evidence declared]; the purpose, character, and extent of the combination are inferable from [the other evidence] alone." *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 184 (1944). The Court went on to explain that "even if error be assumed in the introduction of the letters and reports, the burden of showing prejudice has not been sustained." *Id.*

White has not been prejudiced by the trial court's use of the U.S. Geologic Survey maps because the evidence presented by the parties is capable of establishing those things which are referenced in the U.S. Geologic Survey maps: the location of the various properties, the contour lines, and the approximate location of the pond. Thus the evidence demands the same judgment, regardless of any error that may have occurred.

Accordingly, the appellate court should uphold the district court's ruling and find that the implied easement granted to White shall be a ditch reasonably connecting the irrigation ditch to the ditch previously used to transport the pond water to White's land.

II. THE TRIAL COURT PROPERLY ORDERED THAT A WATER DELIVERY SYSTEM BE CONSTRUCTED THAT DOES NOT INCLUDE A POND IN WHICH TO STORE AND IMPOUND WATER

In finding an easement by implication, a court is not restricted to limiting that easement to the “historical” pathway, especially where to do so would be to create an unnecessary and unreasonable burden on the servient landowner. Thus, the trial court correctly ruled that the appropriate scope of the implied easement in favor of White is a ditch used for the transportation of irrigation water across Randall’s land.

The trial court’s finding of fact that a ditch would provide a workable route by which to bring water to White’s property is a question of fact that should not be set aside unless found to be clearly erroneous. *See State v. Mabe*, 864 P.2d 890, 892 (Utah 1993). Whether the trial court may order an implied easement in favor of White that does not include Randall’s pond is a question of law that is reviewed for correctness. *Id.*

- i. *Utah law permits the trial court, in finding an implied easement, to construct an alternative route by which to bring water to White’s land*

On appeal, White contests the form of the easement granted to White by the trial court. In addition to arguing that the trial court relied on its independent research to construct an alternate water delivery system, White contends that “[i]f White was entitled to an easement by implication pursuant to *Adamson v. Brockbank*, 185 P.2d 264 (Utah 1947), then the trial court should have granted White an easement in the entire water delivery system as it existed historically” (A.B. 13). However, a close reading of *Adamson v. Brockbank* would indicate that a court *may* grant an implied easement in a different route than previously used by the owner of the easement.

In *Adamson v. Brockbank*, 185 P.2d 264 (Utah, 1947), property known as “Chipman Farm” was divided and sold to Adamson and Brockbank. For over 30 years an

irrigation ditch crossed the portion of the farm sold to Brockbank and was used to irrigate certain portions of the farm sold to Adamson, but the deeds made no mention of a right of way or easement. *Id.* at 269. Brockbank destroyed the ditch while constructing homes on his property, thereby preventing Adamson from bringing water through the ditch to their property. *Id.* After considering multiple factors in determining whether the circumstances of the conveyance of the land implied an easement, the Utah Supreme Court held that Adamson had an easement by implication. *Id.* at 274.

In weighing the various factors and finding an implied easement, the court did not discount the possibility of crafting a new ditch over a different course. Rather, the court noted that this particular ditch, rather than a different route, constituted an implied easement because “the evidence supports the [trial] court’s finding that it was not feasible to bring water to the land over a course different from the one already existing at the time of purchase.” *Id.* at 271. The Court further stated, “[i]f an alternate way permits a grantee to make use of his land at little or no cost, the availability of this means might be a factor in determining the necessity of the easement.” *Id.* at 274. Thus it follows that the court is not limited to preserving the historical water delivery system in granting an easement by implication.

ii. In Utah, the court must limit an easement to the most reasonable and least burdensome easement that is required under the circumstances

The trial court properly ordered that the easement granted to White be the size of the existing ditch which conveyed water to and from the now non-existent pond, and that it be reasonably connected in the space where the pond was located. Utah law suggests

that the dominant owner's (White's) right to use an implied easement should not unreasonable or go beyond what is necessary for the purposes for which it was granted.

The Supreme Court of Utah has stated the following:

Utah law provides that the rights of the dominant owner of an easement are impliedly limited by the rights of the servient owner. *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 158 (Utah 1946). "The use of an easement must be as reasonable and as little burdensome to the servient estate as the nature of the easement and its purpose will permit." *Id.* quoting *Jenkins v. Depoyster*, 186 S.W.2d 14, 15 (Ky 1945). *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1249 (Utah 1990),

White argues that the alternative water delivery system ordered by the court deprives him of his right to "use and enjoy the historical water delivery system" (A.B. 21). However, testimony presented at trial showed not only that the pond was not historically used to deliver irrigation water to the property now owned by White, but that neither White nor Randall had the right to impound irrigation water in the pond (R. 273, p. 73).

White's water shares only entitled him to irrigation water flowing from the irrigation ditch into the pond: he has never had any rights to the spring water comprising much of the water in the pond. Thus, the purpose of the implied easement is to allow White to access the irrigation ditch that previously delivered irrigation water into the pond. The ditch ordered by the court adequately fulfils the easement's purpose and does not impose on Randall, the servient owner, the unreasonable burden of reconstructing a pond of undetermined size and composition, maintaining and servicing the pond, and

keeping strict tabs on the water level and on White's use of the pond so as to prevent White from taking water to which he had no right.

III. WHITE HAD FAILED TO MARSHALL EVIDENCE IN SUPPORT OF HIS CLAIM TO VACATE THE JUDGMENT AGAINST HIM

White has addressed the judgment against him, but has not clearly requested that the Court set it aside. And apparently for good reason. While he argues the evidence of his dogs killing Randall's chickens, and killing Randall's foal, he argues only the evidence that supports his position. He fails to marshal any evidence contrary to his position. See *Moon v. Moon*, 1999 UT App 12, 973 P.2d 431, P24, 973 P.2d 431 "In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." (quoting *W. Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)). *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064 (Utah 2003).

Pamela Randall testified: "We was out - we had gone out to the corral to feed and the dogs had - the two dogs had come over and was chasing the chickens in the corral." (R. at 270, p. 389). . . . "Jerry was yelling at them; and they just kept chasing and kept chasing. ... When I cam out, the dog had the chicken down." ... "[W]e seen the dog on the chicken, had it down, biting it." (Id. At pp. 390, 391)

The Trial Court's ruling on the White dogs killing the Randall chickens is well documented and supported by the evidence heard at the time of trial.

IV. AS THE TRIAL COURT CORRECTLY OBSERVED, WHITE IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES OR PUNITIVE DAMAGES

This court should affirm the trial court's ruling that no attorney's fees or punitive damages be awarded because Utah courts do not award attorney's fees unless expressly provided for by a contract or statute. *See Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 965 (Utah Ct. App. 1989). Likewise, punitive damages are not appropriate absent tortious conduct that willfully and maliciously violates the rights of another for which compensatory damages have already been awarded. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In addition to the fact that no compensatory damages were granted to White by the trial court, White is not entitled to punitive damages because in removing his pond, Randall did not commit a tort, was not acting maliciously or reprehensibly, and did not know he was interfering with any of White's rights.

Whether White is entitled to punitive damages or attorneys fees is a question of law to be reviewed for correctness. *Bradley v. Payson City Corp.*, 70 P.3d 47, 50 (Utah, 2003).

i. Because no contract or statute exists in this case allowing for the recovery of attorney's fees, White may not recover attorney's fees under Utah law

Utah adheres to the prevailing common-law rule that attorney fees are not recoverable in the absence of a contractual or statutory basis." *Amica Mutual Insurance Co. v. Schettler*, 768 P.2d 950, 965 (Utah Ct. App. 1989); *see also Canyon Country Store v. Bracey*, 781 P.2d 414, 419 (Utah 1989) (*citing Turtle Mgmt., Inc. v. Haggis Mgmt.*, 645 P.2d 667, 671 (Utah 1982)). The Utah Supreme Court has enforced this principle by

holding that “[t]he courts of this state . . . should refrain from allowing the imposition of costs and expenses upon the losing party except such as are provided for by statute and such as by the consensus of the opinions of the courts by long and uniform usage have been allowed in certain cases as necessary for the protection of legal right.” *First Security Bank of Utah v. J.B.J. Feedyards, Inc.*, 653 P.2d 591, 597 (Utah 1982), *quoting St. Joseph Stock Yards Co. v. Love*, 195 P. 305 (Utah 1921). White admits that there is no applicable contract or statute allowing the recovery of attorney’s fees in this case. (Memo in Support of Plaintiff’s Motion to Amend the Judgment, 2). Because no statute or court “consensus” exists on which to base an award of attorney fees, White is not entitled to attorney’s fees under Utah law.

Additionally, the Utah Court of Appeals favorably cited to *Ross v. Cagley*, 670 P.2d 190 (Or. App. 1983), for the proposition that attorney’s fees cannot be awarded in an “easement by implication” case. *See Chase v. Scott*, 38 P.3d 1001 (Utah App. 2001). In *Ross*, the court held that a party could not obtain attorney fees under a contract provision since plaintiff was awarded an easement by implication and had “sought neither enforcement of the contract nor damages for its breach, but to have certain rights declared which had not been made part of the contract.” *Id.*, *quoting Ross v. Cagley*, 670 P.2d 190, 192 (Or. App. 1983).

ii. *Punitive damages are not appropriate as a means to award attorney’s fees to White*

White contends that “plaintiff’s attorney’s fees may be recovered as an element of punitive damages” (A.B. 28). But he actually asks this Court to adopt a new rule that

once the Court awards punitive damages, it should then, automatically, award attorney's fees in addition to the punitives awarded.

While Utah decisions have addressed, in dicta, that "the amount of attorney's fees expanded may be considered in calculating punitive damages, when punitive damages are warranted" *Amica Mutual Insurance Co. v. Schettler*, 768 P.2d 950, 966 (Utah Ct. App. 1989), punitive damages are not warranted in this case and thus it would be legal error for the court to award White attorney's fees as an element of punitive damages. But even if they were, they would have to be "wrapped" into the punitive damage award, not the other way around.

iii. Appellant's claim for punitive damages was and is procedurally and substantively improper.

Plaintiff's initial proposed Findings of Fact and Conclusions of Law, which was adopted by the Court before granting Randall's motion to alter or amend, granted attorney's fees. There was, admittedly, no contract or statute upon which such an award could be based.

In opposition to Randall's motion to strike the award of attorney's fees or to supplement findings, White filed an untimely motion to amend the Judgment to include an award of nominal punitive damages, in order to bootstrap an award of attorney's fees onto the Judgment. (R. at 163 - 168). Pursuant to Rule 52(b), Utah Rules of Civil Procedure, such motions must be "made not later than 10 days after entry of judgment." The Trial Court is without jurisdiction to consider the merits of an untimely motion. Davis v. Grand County Serv. Area, 905 P.2d 888 (Ut App 1995), citing Richins v. Delbert

Chipman & Sons Co., 817 P.2d 382, 387 (Utah App. 1991) (Interpreting Rule 59 Motions for a new trial).

In addition, our appellate courts have held that certain evidence and findings are necessary before punitive damages can be awarded.

‘A trial court should consider seven factors in assessing the amount of punitive damages: (1) the relative wealth of the defendant, (2) the nature of the alleged misconduct, (3) the facts and circumstances surrounding the misconduct, (4) the effect thereof upon the lives of the plaintiff and others, (5) the probability of future recurrence of the misconduct, (6) the relationship between the parties, and (7) the amount of actual damages awarded.

VanDyke v. Mountain Coin Mach. Dist., 758 P.2d 962, 965 (Utah Ct. App. 1988).

In the trial of this case, there was no evidence presented at the time of trial on Defendant’s relative wealth. No evidence was presented of his monthly income, nature of any income producing enterprises or labors, nor any evidence of any personal assets or holdings. Any award of punitive damages would have to be either based upon a guess, or without considering this factor. This factor alone should be enough to preclude an award of punitive damages, although Plaintiff failed to also put on any evidence of any of the factors contained in elements 4, 5 and 7 of the *VanDyke* decision.

Finally, it should be noted that the Court granted no compensatory damages to White. Only Randall was awarded compensatory damages.

iv. Punitive damages are only appropriate where the conduct was willful, malicious, and violated the right of another

Punitive damages are not appropriate here because in Utah, punitive damages may be awarded only “where the nature of the wrong complained of and the injury inflicted

goes beyond merely violating the rights of another in that it is found to be willful and malicious.” *First Security Bank of Utah v. J.B.J. Feedyards, Inc.*, 653 P.2d 591, 598 (Utah 1982), *quoting Elkington v. Foust*, 618 P.2d 37 (Utah 1980). When he destroyed his pond, Randall did not know he was violating the rights of another, and thus his actions can not be considered willful and malicious. At that time, White had not established that he was entitled to any sort of easement—implied or express—onto the property. No express easement was included in any of the deeds of sale of the parcels made from Hancock to White or Randall (R. at 269, pp. 93-94). Though Hancock testified that Randall knew about White’s use of the pond when she sold Randall the property, she admitted that because it was so long ago, she could not remember whether she discussed the White’s use of the pond and water with Randall or with the real estate agent (R. at 269, p. 89). Therefore, it can not be assumed that Randall knew or should have known of an implied easement on the property.

White cites *Falkenburg v. Neff* as a case in which the court stated “that the destruction of the diverting works . . . is a sufficient legal basis for awarding exemplary damages is a proposition too plain for argument.” *Falkenburg v. Neff*, 269 P. 1008 (Utah 1928). That case is clearly distinguishable and inapplicable to these facts: there, the plaintiff had gone to considerable cost and labor constructing a dam and diverting works in a canyon of difficult access. The defendants, despite having no claim or right to the water being diverted, demolished the dam and then went to the plaintiff’s home to warn him against rebuilding the structure. *Id.* at 1012.

Randall removed a pond which was situated on his own property. White had no rights in the pond, other than his rights to the irrigation water which flowed through the pond and a ditch down to his property; the State Engineer had granted him no rights to store or impound his irrigation water in Randall's pond. Randall had gone out of his way to help White access his irrigation water from the ditch flowing into the pond by constructing a new ditch through which to divert the water. Randall's conduct exhibited a diligent attempt to reach a workable solution with White and is not analogous to the "willful and malicious" conduct present in *Falkenburg*.

v. Punitive damages may not be awarded in the absence of a tort and compensatory damages

The trial court did not award White any compensatory damages, which are a necessary prerequisite to punitive damages. Nor did the court find any tortious conduct by Randall, without which punitive damages cannot be awarded:

Except as otherwise provided by statute, punitive damages may be awarded *only if compensatory or general damages are awarded* and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.
Utah Code Ann. § 78-18-1 (emphasis added).

The Utah Supreme Court has enforced the Utah statute by stating, "the general rule is that there can be no punitive damages without compensatory damages based on the tort . . . the failure to allege and prove a tort giving rise to compensatory damage vitiates the claim for punitive damage." *Graham v. Street*, 270 P.2d 456, 459 (Utah 1954), citing *Gilham v. Devereaux*, 214 P. 606 (Mont. 1923). In this case, both the tort requirement

and the necessary compensatory damages are conspicuously absent, and thus punitive damages are not justifiable.

vi. The U.S. Supreme Court has limited punitive damages to cases where the defendant's conduct is reprehensible and compensatory damages are ordered

To award punitive damages in favor of White would violate the instruction of the United States Supreme Court. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court explained that the reprehensibility of the defendant's conduct is the foremost element to be considered in determining if punitive damages are reasonable. *Id.* at 419. The Court outlined the factors to be considered in evaluating the reprehensibility of an action and suggested that any action lacking any aspect of reprehensibility should not be awarded punitive damages:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the *tortious conduct* evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and *the absence of all of them renders any award suspect*. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id. at 419, citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-577 (1996) (emphasis added).

Randall's action of leveling the pond was in no way reprehensible and thus punitive damages are not justified. First, the harm allegedly caused to White was purely economic, in the form of White not being able to flood irrigate his property. No physical harm was inflicted on White as a result of Randall destroying his pond. Second, Randall's action was not "tortious conduct" and was not performed in a reckless or unsafe manner. Third, there is no evidence suggesting that alleged target of the conduct, White, had financial vulnerability. Both parties involved in this dispute are individuals and thus no significant disparity in financial condition exists. Fourth, the conduct was clearly an isolated incident, as there was only one pond on Randall's property. Finally, while the destruction of the pond was intentional, it was not done with malice, trickery or deceit. The pond was located on Randall's property and no easement of any kind had been established in favor of White. To his knowledge, Randall was not infringing on any rights of White; thus by removing the pond on his own property, Randall had no malice or intent to infringe upon White's rights. Furthermore, Randall had recently learned from the Division of Water Sources that he had no right to store water on his property; therefore in leveling the pond he was simply attempting to adhere to the law. For these reasons, Randall's actions were not reprehensible and punitive damages should not be awarded to White.

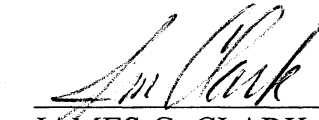
In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court also laid out a second element to be considered in determining punitive damages after the reprehensibility component—the amount of compensatory damages. The Court explained that "few awards exceeding a single-digit ratio between punitive and

compensatory damages, to a significant degree, will satisfy due process.” *Id.* at 425. Because the trial court has not awarded White any compensatory damages, any amount of punitive damages would exceed the reasonable ratio requirement provided by the Supreme Court.

CONCLUSION

For all the foregoing reasons, this court should uphold the trial court’s judgment and find that: 1) White is entitled to an implied easement in the space where the pond once was, limited to the size of the ditch which conveyed water both to and from the now non-existent pond; 2) White is not entitled to an award of attorney’s fees; and 3) White is not entitled to punitive damages; and 4) Randall’s compensatory damage award was proper and supported by competent evidence.

DATED and signed this 25th day of April, 2006.



JAMES G. CLARK, Attorney
For Defendant Jerry Randall

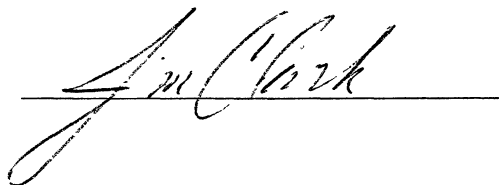
CERTIFICATE OF SERVICE

I hereby certify that I:

✓ ^{two} mailed a true and correct copy of the foregoing, Brief of Appellee, postage prepaid and addressed as follows:

REED L. MARTINEAU (2106)
D. JASON HAWKINS (9182)
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
PO BOX 45000
S.L.C., UT. 84145

DATED AND SIGNED this 25th day of April, 2006.

A handwritten signature in cursive script, appearing to read "J. M. Clark", is written over a horizontal line.

ADDENDUM TO BRIEF OF APPELLEE JERRY RANDALL

1. Transcript of Judges partial findings of fact and conclusion issued orally following closing argument
2. Letter from the Judge referencing loss of file and adoption of White's proposed findings and conclusions.
3. Judgement prepared by White's counsel.
4. Randall's notice of objection to proposed judgment and Randall's motion and memorandum to alter, amend, or supplement findings of fact and conclusions of law.
5. Trial exhibit #1 plat map of the properties with witness additions.
6. Trial exhibit #8 aerial photograph of the dam failures of the upper and lower ponds during 1983 floods.
7. Trial exhibits #4 and 5 State of Utah Division of Water Rights data printout of Leon J and Eileen H. White water rights.

Exhibit 1.

**Transcript of Judges partial findings of fact and conclusion issued orally following
closing argument**

1 granted that by implication and verbally to Mr. White. I don't
2 think there can be any doubt about that. That easement had
3 been created out of conduct that had preceded this by many
4 years.

5 Let me say this, too. Mr. Clark takes us to task
6 for not fully investigating the history of this water delivery
7 system. That's not an issue in this case. Just look at this
8 case. The historical access is not only not an issue, but it
9 was not proven by any means.

10 What happened was -- and even Mr. Randall agreed,
11 that the way Whites were using the water was the same way that
12 Jordan had used it, and that was the same way that Tibbs had
13 used it. That's it, your Honor.

14 THE COURT: Okay.

15 MR. CLARK: Your Honor, if I may approach?

16 THE COURT: Sure. Thanks. Let me start by finding
17 facts, and see where that leads me. I kind of think I'm going
18 to have to read this out of some case, but let's see where the
19 facts lead. So make your notes, and if you think I'm missing
20 anything, let me know.

21 There's one plaintiff named in this case, Leon J.
22 White. He's an individual, and he resides in Sanpete County.
23 There's one defendant, and that's Jerry Randall, and he's an
24 individual, and he resides in Sanpete County.

25 I've heard from other witnesses in this case, and one

1 of them, who was a representative of the irrigation company,
2 and I think there is an irrigation company called the Indianola
3 Irrigation Company that's presently organized and operating,
4 and has the authority to operate as an irrigation company.
5 I've also heard from a person named Kaziah May Hancock, and
6 she's an individual.

7 On July 27th, 1995 Kaziah May Hancock, who was then
8 known as Kaziah May Jordan, owned some property in Sanpete
9 County. The property she owned, the best I can say is that
10 there are three different legal descriptions of property which
11 are all contiguous, all next to each other, and she and her
12 former husband, Ivan Douglas Jordan owned this property in
13 Sanpete County.

14 One of the parcels is described in Exhibit No. 2. The
15 other parcels I don't know that I've got descriptions for, but
16 the three parcels could be lined up so that they proceed from
17 the east to west. If we call the eastern most parcel No. 1,
18 then there's a middle parcel No. 2 and a western parcel No. 3.

19 On July 28th, 1995 Hancock conveyed to the plaintiff
20 what I've just referred to as parcel No. 2, the middle of the
21 three parcels. Hancock continued to own parcel No. 1. Parcel
22 No. 3, I don't know about. Maybe I don't need to know about
23 parcel No. 3. I don't see anything in the exhibits about
24 parcel No. 3.

25 There's another person whose name is important, and

1 that name is Don Tibbs. In 1967 he caused the irrigation pond
2 to be built on the plat known as parcel No. 1. Water was
3 introduced into the pond and he used it.

4 MR. CLARK: I'm sorry, your Honor, what year again?

5 THE COURT: I think 1967, because I think Mrs. Tibbs
6 talked about this check that she --

7 MR. CLARK: 1987?

8 THE COURT: You're right.

9 MR. CLARK: Okay. I'm sorry, I --

10 THE COURT: You are right. When this irrigation pond
11 was constructed it included the earthwork for a dam to restrain
12 the flow of water, and in the dam there were some parts that
13 would allow mechanisms to be moved and the valve to be opened
14 so that water could be released.

15 Tibbs used the water that was impounded by the dam.
16 Sometimes he used it by opening the structure and allowing the
17 water to flow out by gravity. Sometimes he used it by opening
18 the structure and allowing the water to flow into a pump. He
19 took the water off site by either of those two methods.

20 I think he did that until -- well, I have to tell you,
21 I don't know how long he did that. Hancock bought the property
22 in 1988, and I don't know whether Tibbs kept using the water
23 after she bought it or not. Put a question mark by that, and
24 let me keep my train of thought going here, and maybe you can
25 come back and enlighten me about how you remember the evidence.

1 Hancock said parcel No. 2 was irrigated by a method
2 which many people call sub-irrigation, which I think is a
3 shortcut way of saying subterranean irrigation.

4 MR. MARTINEAU: I'm sorry, I didn't hear the last --

5 THE COURT: I think that the term "sub-irrigation"
6 stands for subterranean irrigation, and I think that term
7 means that water flows under the surface of the earth through
8 subterranean channels, and if they're -- if it comes in contact
9 with the roots of plants growing on the surface, then the roots
10 make use of the water. When water was released from the pond
11 and allowed to run by way of gravity, it somehow fostered this
12 subterranean irrigation.

13 In 1996 and every year thereafter, including 2003,
14 Mr. White went to the pond, operated the mechanism that caused
15 the valve to open and water to be released, and allowed the
16 water to flow.

17 Mr. White is an owner of shares in the irrigation
18 company. I have to admit, I've got to put a question mark by
19 that, too. I've got evidence that he bought shares from
20 Hancock, but I've also got Mrs. Bigler who came and testified
21 and couldn't produce any proof that shows that Mr. White's a
22 shareholder. So I'd like the Whites to tell me about that.

23 Mr. Randall bought parcel No. 1 in 1996 from Ms.
24 Hancock and he inspected the property before he bought it and
25 saw the earthen dam and the structure that had moving parts

1 that allowed a valve to be open.

2 I think those are the facts that I've got from the
3 evidence. What do you think about that list, Mr. Martineau?

4 MR. MARTINEAU: Well, May Jordan did say that before
5 the sub-irrigation began that she needed to flood the property
6 and then she would put in the sub-irrigation.

7 THE COURT: What do you think about that, Mr. Clark?

8 MR. CLARK: Are you keeping me from doing what the
9 Judge is doing? I'm just -- okay. Your Honor, I'm not sure,
10 but I think you said that Mr. Randall bought this property in
11 1991.

12 THE COURT: I meant to say 1996.

13 MR. CLARK: '96, okay. Otherwise, your Honor, I think
14 those are fair statements. Frankly, I think you've made a
15 finding that starting in or about 1996, Mr. White manipulated
16 the mechanisms and opened the valves and allowed water to flow.
17 I don't know that -- I mean, I suppose the Court could find
18 that. I don't know that that's an uncontested fact. We think
19 that he started -- he don't think he acquired the water rights
20 until '97. He didn't move onto the property until '97.
21 Frankly, probably didn't start irrigating until '98. So--

22 THE COURT: What do you think about that, Mr.
23 Martineau?

24 MR. MARTINEAU: I didn't get that completely. I'm
25 really sorry, your Honor.

1 MR. CLARK: I'm sorry. I'd be glad to speak up. Do
2 you want me to do it again?

3 THE COURT: Let me ask Mr. Martineau.

4 MR. CLARK: Okay.

5 THE COURT: What do you think was the first year that
6 Mr. White went to the valve and opened it?

7 MR. MARTINEAU: 1985 -- 1995, when he bought the
8 property. That was his testimony several times.

9 THE COURT: So that's contested.

10 MR. CLARK: Yeah. He didn't have the water rights at
11 that time, but I don't know if he was leasing them or whatever.
12 I don't think we have any evidence of that one way or the
13 other.

14 MR. MARTINEAU: I would like, if I could, to augment
15 the record, if the Court would allow, and indicate these are
16 the (inaudible) certificates.

17 THE COURT: Show them to Mr. Clark.

18 MR. MARTINEAU: I think those indicate the dates.

19 THE COURT: Have you seen these before, Mr. Clark?

20 MR. CLARK: No, your Honor.

21 THE COURT: How did they get here, Mr. Martineau?

22 MR. MARTINEAU: They got here from Mr. White. I asked
23 him to bring them today.

24 MR. CLARK: This is -- I think this is clearly the --
25 well, the well water that was conveyed with the original deed.

1 MR. MARTINEAU: I don't know if it's well water or if
2 it's an additional share, but it is the share that went with
3 the original conveyance, your Honor. I think this is in
4 evidence.

5 THE COURT: Hang on. Let me ask Mr. Clark a question.

6 MR. MARTINEAU: Okay. This is the original deed and
7 there is the --

8 MR. CLARK: Yeah, I think that is this one share right
9 here. It's probably even dated the same. My guess would be 5
10 -- somewhere around the time of 5/12 of '95?

11 MR. MARTINEAU: This one?

12 MR. CLARK: Oops, no. The 28th of July '95.

13 MR. MARTINEAU: Well, it took awhile to get them --

14 MR. CLARK: 24, yea. So that's -- yeah, just took
15 a few days to do the closing. So I think that goes with this
16 conveyance. We don't have any problem with that, your Honor.

17 MR. MARTINEAU: The testimony was clear that
18 thereafter Mr. White bought 10 more shares and that was in
19 these.

20 THE COURT: Mr. Clark, I think what Mr. Martineau
21 wants to have done is have these marked as exhibits, and have
22 them received in evidence.

23 MR. CLARK: Your Honor, I -- unfortunately I'm -- I
24 would love to be able to just stipulate to that, but I'm
25 somewhat uncomfortable with it in light of the fact that the

1 evidence is closed. We no longer have -- we don't even have
2 anybody to set a foundation for them of any kind.

3 MR. MARTINEAU: I'll be glad to --

4 MR. CLARK: I would assume that Mr. White should be in
5 possession of the originals. Do we -- if we had the originals
6 for me to look at I might be more comfortable with it.

7 MR. MARTINEAU: These are the originals, aren't they?

8 MR. WHITE: No, these are copies.

9 MR. MARTINEAU: Oh, your Honor. Mr. White could get -
10 - could connect them, though.

11 THE COURT: Both of these items can be marked as
12 exhibits, and the foundation's been proffered by Mr. Martineau.
13 It would be Mr. White testifying. They're both received in
14 evidence.

15 MR. CLARK: Okay.

16 THE COURT: Thank you.

17 (Exhibit Nos. 15 and 16 received into evidence)

18 THE COURT: I did think of some other facts that I
19 should find. Chickens were killed by dogs under the control of
20 Mr. White. They were worth whatever Mr. Clark said. I forget
21 --

22 MR. CLARK: \$178, I think, your Honor.

23 MR. MARTINEAU: I didn't hear that, I'm sorry.

24 THE COURT: The value is the number that Mr. Clark
25 said. I forget, except it ended in 8.

1 MR. CLARK: \$198.

2 THE COURT: \$198.

3 MR. MARTINEAU: \$198 for the chickens.

4 THE COURT: It's more likely than not that the horse
5 was killed by the actions of the dog. The problem is that I
6 don't have a value I can rely on. The only evidence I've got
7 is that the horse would be worth \$1,000 if it was alive at some
8 future date. I don't have any evidence about what it was worth
9 on the day that it died. At least that's how I view the
10 evidence. So I'm not going to award any damages for the loss
11 of the horse.

12 I have to tell you, Mr. Martineau, I'm still troubled
13 by the idea of imposing on Mr. Randall the knowledge of the
14 easement that's implied, and having that knowledge have to
15 arise in his mind based on what he could see on the property in
16 July of 1996.

17 I mean, he could see the pond and he could see the
18 diversion works, but how does he know that that's in Mr.
19 White's favor, or that it benefits a certain a piece of
20 property?

21 MR. MARTINEAU: In this case, to answer that, it says
22 all that needs to be is it needs to -- that -- I think it --
23 there has to be a reasonable connection between the use and
24 what was there. I asked him. He walked the property. He had
25 to know that the pond was there. He had to know the ditches

1 were there.

2 So with that in mind, even if you don't believe
3 Mrs. Hancock's testimony that she told either the agent or him
4 about Mr. White having that facility, he had to know that just
5 from what was there, and he had a duty in inquire whether that
6 system was then in place. It didn't serve anything on his
7 property. The pond didn't serve anything on his property.

8 There's no doubt either that he raised the issue of
9 the pond in connection with the negotiation of the purchase
10 price.

11 So I think it's covered in this case he was on the property; he
12 knew what was there; he admitted that. He walked the property.
13 He knew what was there. It was open, obvious.

14 THE COURT: Okay. Mr. Martineau, if I asked you to
15 prepare for me a map of this parcel No. 1 that I've talked
16 about, and to locate on it the pond and the house, and to label
17 the various sides with dimensions, you could probably do that
18 with your own resources or somebody in your office to help you
19 do that?

20 MR. MARTINEAU: Sure, I could.

21 THE COURT: And you could probably do the same thing,
22 couldn't you, Mr. Clark?

23 MR. CLARK: I believe so.

24 THE COURT: That would sure help me answer the
25 question about how much knowledge I can have implied on Mr.

1 Randall, because it seems like the positioning of those things
2 may be important. So --

3 MR. CLARK: Do you need this in some kind of
4 topographical form?

5 THE COURT: No.

6 MR. CLARK: Okay.

7 THE COURT: No, I don't care about that, because then
8 you'd have to go survey and show the contour lines, and I --

9 MR. CLARK: Okay. We've got one of those. We just
10 download it off the Internet. I'll share it with everybody.

11 MR. MARTINEAU: I (inaudible) photograph, and to put
12 it all on there in the photograph. Get some kind of a scale
13 that indicates the distance.

14 THE COURT: Okay. This is what I'm going to do, since
15 we're out of time again. I've given my findings of facts. I'm
16 going to impose on both the lawyers to give me a (inaudible)
17 and findings of fact.

18 I'm going to impose on both lawyers to provide for me
19 a map of what I've described as parcel No. 1, and to give me
20 that map so that it fits on an 8-and-a-half by 11 inch piece of
21 paper, and it's got original dimensions of the various calls
22 and the legal description, plus it places the pond and the
23 house in relation to the boundaries and in relation to each
24 other. So it's got to be a scaled drawing that shows me those
25 things.

1 Then submit those to me along with a proposed conclusions of
2 law.

3 In the meantime I'm going to be reading Adamson vs.
4 Brockbank with a close eye, and if you want to submit with your
5 documents particular quotes from Adamson vs. Brockbank, feel
6 free.

7 I'd like to have those papers from each of you by the
8 24th of December. I'm picking a day that's about a month from
9 today, but I'm negotiable on that.

10 MR. MARTINEAU: When, your Honor?

11 THE COURT: The 24th of December, but I'm negotiable on
12 that.

13 MR. MARTINEAU: I have no trouble on that, because I
14 have an important hearing in Grand Junction on next week, all
15 next week. I might not -- then I've to have another trial in
16 early December, your Honor.

17 THE COURT: What about the 10th of January?

18 MR. MARTINEAU: The 10th of January would be better.

19 THE COURT: What about for you, Mr. Clark?

20 MR. CLARK: Your Honor, I'm sorry. If you could give
21 me just a moment. This whole thing's a nightmare. I'm going
22 on my first family vacation in forever the last week in
23 December. It looks like I won't be back until like the 4th --
24 5th.

25 THE COURT: How about the 20th of January? You pick a

1 day.

2 MR. CLARK: Your Honor, the 20 -- frankly, that ought
3 to be good. I don't see a reason why that shouldn't be doable.
4 The 20th of January ought to be fine. Could we do it the end of
5 the week, maybe the 23rd?

6 THE COURT: Okay. I want simultaneous submissions. I
7 want you both to --

8 MR. CLARK: Oh, okay.

9 THE COURT: I want you both to fax your documents so
10 they both come in on the 23rd of January, and you don't have a
11 chance to see each other's until that day.

12 MR. CLARK: Mr. Martineau, does that work okay for
13 you, the 23rd?

14 MR. MARTINEAU: Yes.

15 MR. CLARK: Okay. I just -- I don't want to extend it
16 too long, your Honor, and yet I want to make sure we have an
17 adequate opportunity to do this. Okay.

18 THE COURT: Okay. I think we're done for today.

19 MR. CLARK: Thank you, your Honor. I appreciate your
20 --

21 MR. MARTINEAU: The Court has entered an order that
22 these people not get in each other's hair in the meantime. Can
23 that continue in effect?

24 THE COURT: The parties are ordered to keep the peace,
25 ordered to be obedient to all laws. You're ordered not to

1 speak disrespectfully of each other to anybody. You're not to
2 make rude gestures. I think that's all I intend do
3 (inaudible).

4 MR. CLARK: Okay. Thank you, your Honor. That sounds
5 appropriate.

6 MR. MARTINEAU: Shall I prepare a formal order on
7 that?

8 THE COURT: If you would I would appreciate it.

9 MR. MARTINEAU: Thank you.

10 THE COURT: Mr. Morgan's (inaudible).

11 MR. CLARK: Thank you, your Honor.

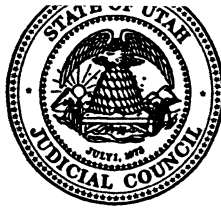
12 MR. MARTINEAU: Thank you.

13 THE COURT: Thank you. The Court's in recess.

14 (Trial concluded)

Exhibit 2.

Letter from the Judge referencing loss of file and adoption of
White's proposed findings and conclusions.



SIXTH JUDICIAL DISTRICT

District Judge David L. Mower
District Judge K. L. McIlff
Juvenile Judge Paul D. Lyman

Brent Bowcutt, Court Executive
Peggy K. Johnson, Clerk of Court

September 3, 2004

Mr. Reed L. Martineau
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145

Mr. James G. Clark
Attorney at Law
The Robley Building
90 East 100 South
Provo, UT 84606

Gentlemen:

RE: Sanpete Co. Case No. 030600302, White vs. Randall

My apologies to you and to your clients for the delay in issuing a decision in this case. Apparently we allowed the file to become lost. After it was brought to my attention, I spent some time reviewing the file and listening to the record or the witnesses who testified.

In the process I have become convinced that the Findings of Fact and Conclusions of Law prepared by Mr. Martineau reflect the decision that I desire to make. Hence, I have signed that pleading. A copy of it with my signature is enclosed.

I am instructing the clerk to file the Findings of Fact and Conclusions of Law.

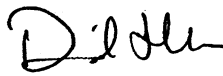
030600302

September 3, 2004

Page 2

Mr. Martineau, would you please prepare an appropriate Judgment or instruct the clerk as to what should happen next in this case.

Very truly yours,



David L. Mower
District Court Judge

cc: Sanpete County Clerk

Exhibit 3.

Judgement prepared by White's counsel.

REED L. MARTINEAU (A2106)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Telecopy: (801) 363-0400

2004 SEP 30 PM 4 31

KRISTINE L. ...
SANPETE COUNTY CLERK
BY *[Signature]* DEPUT.

IN THE SIXTH JUDICIAL DISTRICT COURT

SANPETE COUNTY, STATE OF UTAH

LEON J. WHITE,

Plaintiff,

vs.

JERRY RANDALL,

Defendant.

JUDGMENT

Case No. 030600302

Judge David L. Mower

This action came on for trial before the Court sitting without a jury beginning on October 10, 2003, and concluding on November 26, 2003, before the Honorable David K. Mower. The Court now having reviewed the file, and having listened to the record of the testimony of the witnesses and reviewed the exhibits, and having considered the law applicable to this matter, and the Court having entered its Findings of Fact and Conclusions of Law herein, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED and judgment is hereby entered against defendant Jerry Randall and in favor of plaintiff Leon J. White as follows:

1. Plaintiff Leon J. White holds a valid easement for the use and enjoyment of the delivery system, including the pond and the ditches to and from the pond, as used and enjoyed previously by Kaziah May Jordan Hancock and by Leon J. White, without change, for the delivery of his water rights, until July 2003 when the pond was destroyed by Jerry Randall.

2. Defendant Jerry Randall's conduct in obstructing and changing the water delivery system was without permission of Leon J. White, which permission was never requested or received.

3. Defendant Jerry Randall's conduct in destroying the pond, rendering the entire water delivery system unusable and leaving plaintiff Leon J. White with no means to use and enjoy his property and water rights was without right and was willful and malicious.

4. Defendant Jerry Randall is not entitled to recover for his alleged loss of a foal or chickens.

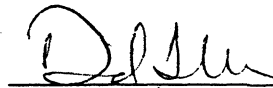
5. Defendant Jerry Randall is obligated to pay to Leon J. White the cost of restoration of the ponds and the water delivery system to their condition at the time they were destroyed and/or render useless.

6. Defendant Jerry Randall is hereby enjoined from threatening or causing bodily harm to Leon J. White or other members of his family.

7. Leon J. White is entitled to recover from Jerry Randall his costs, including reasonable attorney's fees incurred herein.

DATED AND ENTERED this 22 day of September, 2004.

BY THE COURT:



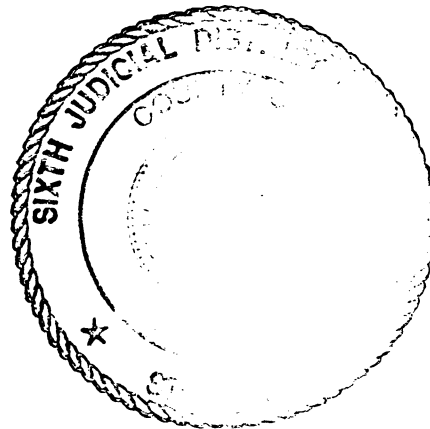
David K. Mower, District Court Judge

Approved as to form:

JAMES G. CLARK

Counsel for Defendant

Date _____



N:\21878\1\JUDGMENT

Exhibit 4.

Randall's notice of objection to proposed judgment and Randall's motion and memorandum to alter, amend, or supplement findings of fact and conclusions of law.

JAMES G. CLARK, USB #3637
Attorney for Defendant Jerry Randall
Utah County Executive Bldg
60 E 100 S, STE 100
Provo, UT 84606
Telephone: (801) 375-1717
Facsimile: (801) 375-1172

FILED
2004 SEP 28 PM 12 37

KRISTINE F. JOHNSON
SANPETE COUNTY CLERK
BY Bennett DEPUTY

**IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY
STATE OF UTAH**

LEON J. WHITE,

Plaintiff,

v.

JERRY RANDALL,

Defendant.

**NOTICE OF OBJECTION TO
JUDGMENT**

Civil No. 030600302

Judge: David L. Mower

COMES NOW the Defendant, by and through his counsel, and files this objection to the proposed Judgment filed by Plaintiff in this matter with regard to the Trial of October 10, 2003. Defendant received a proposed Judgment on or about September 15, 2004. Pursuant to the provisions of Rule 4-504 (2) Utah Rules Judicial Administration, Defendant hereby files a Notice of Objection regarding the proposed Judgment.

NOTICE OF OBJECTIONS

1. The findings adopted by the Court are insufficient to justify the proposed Judgment and must be supplemented prior to the entry of Judgment. This Court needs to articulate, in greater detail, the steps by which he reached his ultimate conclusions.

2. The Judgment and Findings of Fact appears to make an award of money damages to Plaintiff, in paragraph 5, but has indicated the damage sum. No evidence of damages was put on, and no issue in this case was bifurcated. The award of money damages is ambiguous and open ended and must be struck from any judgment in its present form.

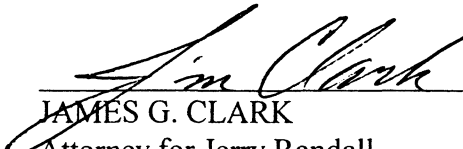
3. The Judgment in this case, grants an easement for the passage of irrigation water across Randall's land and also grants Plaintiff an easement in the Randall pond. Both were found to exist as "easements by implication." This Court needs to articulate, in greater detail, the steps by which he reached his ultimate conclusions not only in the ditches and canals, but also in the pond itself. In addition, the Court needs to make specific findings with regard to the volume of the pond, the length of time during which water may be impounded, the volume that can be withdrawn from the pond, the source of water that Plaintiff can use for irrigation purposes, responsibility to maintain the easement, and other specifics necessary to govern the relationship between the parties after this case is over with.

4. The Judgment prepared by Plaintiff includes an award of Attorney fees to the Plaintiff. The Court has recognized no cause of action which provides for attorney's fees and has made no findings or conclusions supporting such an award. The law in Utah is that attorney's fees are not recoverable absent a statute or contract which provides for such an award. This Court must articulate, in greater detail, the steps by which he reached his ultimate conclusions regarding an award of attorney's fees in this case.

5. The Court made specific findings of fact on the record, and entered a partial judgment for the Defendant at the time of Trial, that are not contained in Plaintiff's Judgment. The judgment prepared does not comply with the Court's prior Judgment and ruling.

6. The Defendant objects to Judgment, and respectfully requests that the Court deny the entry of the proposed Judgment until the Findings of Fact and Conclusions of Law can be supplemented, or in the alternative, that it set this matter for further hearings before the Court.

DATED AND SIGNED this 27th day of September, 2004.



JAMES G. CLARK
Attorney for Jerry Randall

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, **Notice of Objection to Judgment**, postage prepaid, addressed as follows:

Reed L. Martineau
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145

DATED AND SIGNED this 27th day of September, 2004.



FILED
SANPETE COUNTY, UTAH

2004 SEP 28 PM 12 37

KRISTINE FRISCHBRECHT
SANPETE COUNTY CLERK
BY ADENWALT DEPUTY

JAMES G. CLARK, #3637
Utah County Executive Bldg.
60 East 100 South, Ste 100
Provo, UT 84606
Telephone: (801) 375-1717
Facsimile: (801) 375-1172

**IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY
STATE OF UTAH**

LEON J. WHITE,

Plaintiff,

vs.

JERRY RANDALL,

Defendant.


**MOTION TO ALTER, AMEND OR
SUPPLEMENT FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Civil No. 030600302

Judge: David L. Mower

COMES NOW the Defendant, Jerry Randall, by and through counsel, James G. Clark, and moves this Court to alter or amend the Findings of Fact and Conclusions of Law, or to make additional findings and supplement the record thereby. This Motion is made pursuant to Rule 52, Utah Rules Civil Procedure and is supported by the attached Memorandum of Points and Authorities.

DATED and SIGNED this 27th day of September, 2004.


JAMES G. CLARK
Attorney for Jerry Randall

CERTIFICATE OF SERVICE

I hereby certify that I:

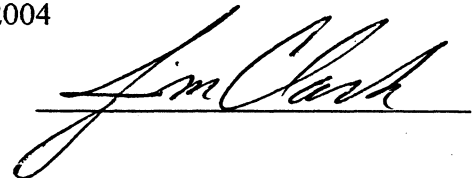
☒ mailed a true and correct copy of the foregoing, **Motion to Alter, Amend, or Supplement the Findings of Fact and Conclusions of Law**, postage prepaid and addressed as follows; or

☐ hand-delivered to the following: or

☐ sent by facsimile to the following:

REED L. MARTINEAU
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
PO BOX 45000
S.L.C., UT. 84145

DATED AND SIGNED this 27th day of September, 2004

A handwritten signature in cursive script, appearing to read "Jim Clark", is written over a horizontal line.

FILED
SANPETE COUNTY CLERK

2004 SEP 28 PM 12 37

KRISTINE FRIEDMAN
SANPETE COUNTY CLERK
BY RENNER DEPUTY

JAMES G. CLARK, #3637
Utah County Executive Bldg.
60 East 100 South, Ste 100
Provo, UT 84606
Telephone: (801) 375-1717
Facsimile: (801) 375-1172

**IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY
STATE OF UTAH**

LEON J. WHITE,

Plaintiff,

vs.

JERRY RANDALL,

Defendant.

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO ALTER,
AMEND OR SUPPLEMENT FINDINGS
OF FACT AND CONCLUSIONS OF
LAW**

Civil No. 030600302

Judge: David L. Mower

COMES NOW Defendant, by and through counsel James G. Clark, and files this Memorandum in support of Defendant's Motion to Alter, Amend and/or Supplement Findings previously adopted by the Court. It is Defendant's position, in part, that this Court needs to articulate, in greater detail, the steps by which he reached his ultimate conclusions that an easement by implication exists in the pond, that Plaintiff be awarded attorney's fees, and that the Court's prior findings and judgment should not be entered.

MEMORANDUM

FACTS:

1. On or about September 3rd, 2004 the Court sent a letter to the Attorney's indicating that the Courts file had become lost or misplaced, that the Court had started to review the tapes of the proceedings, and had decided to adopt the proposed findings filed by Mr. Martineau.
2. A motion was previously made by the Defendant on or about March 12th, 2004, to Strike the Proposed Finding filed by Mr. Martineau. That Motion has not been ruled on by the Court and remains outstanding.
3. That at the time of the Trial in this case, and particularly on November 26, 2003, the Court made a decision and cited on record partial Findings of Fact and Conclusions of Law.
4. The Proposed Findings adopted by the Court are on file herein, and will not be recited in connection with this Motion.

ARGUMENT

POINT 1

THE FINDINGS ADOPTED BY THE COURT ARE INSUFFICIENT TO JUSTIFY THE JUDGMENT AND MUST BE SUPPLEMENTED

In this case, the Court adopted wholesale the proposed findings of fact prepared by Plaintiff's counsel and directed counsel to prepare a judgment in connection therewith. The Judgment prepared by Plaintiff's counsel grants relief that is not fully supported by the Court's findings and is inconsistent with prior findings made by this Court.

Any Judgment made by the Court must be supported by sufficient findings. As our Supreme Court has provided:

"[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶¶ 14, 48 P.3d 968 (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)). This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. Badger, 966 P.2d at 847. For a trial court to be afforded an opportunity to correct the error "(1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority." Brookside, 2002 UT 48 at ¶¶ 14 (quoting Badger, 966 P.2d at 847).

438 Main Street v. Easy Heat, Inc., No. 20010629, Filed August 24, 2004, 2004 UT 72

There are some aspects of the Findings of Fact which the Defendant believes to be either inconsistent with the evidence which was submitted at the time of trial, or not adequately supported by factual findings in connection with the trial itself. In addition, the defendant believes that the Court has adopted partial facts which paint a false light of the evidence presented at the time of trial.

FACTS NOT IN EVIDENCE:

In ¶ 1, May Jordan testified that she and her husband allowed water to flow from the pond at approximately the same rate the water came into the pond. The pond was not used for the purpose of impounding, storing, and flood irrigating the Connally property. May Jordan referred to her irrigation technique as subterranean irrigation, and indicated that it was more than adequate. In addition, the Jordans conveyed the real property to White in 1995. The Jordans did not irrigate the Connally

property from 1995 thru 1997. Therefore, the period of time during which the Jordans used the pond for irrigation was approximately seven (7) years.

The findings in ¶ 2 indicate that White acquired his irrigation rights in November, 1995. However, the documents filed with the Court as exhibits indicate that the water rights were acquired in March, 1996 or 1997, after the Randalls signed a purchase agreement with Jordans for "Parcel 1."

That the water rights acquired in 1997 by White were the Connally water rights which had been historically delivered by way of the meeting house wash. The Jordans were the first to use these rights on the old Spencer property, directly west of White's house.

That Mr. White testified that he built his house on the property and completed the house and moved in the year 2000. Prior to that he had a trailer on the property but did not maintain primary residence there. Mr. White did not remember specifically when he began to irrigate the western Spencer property with the Connally water rights, but it was not later than the year 2000. In 2002 White did not use his irrigation water rights as he had leased them to another party.

THE OMITTED COURT'S FINDINGS:

That at the time of the trial the Court made specific findings of fact on the record which are not contained in Plaintiff's findings. The Court specifically found that in July, 1995 May Hancock nka Jordan owned property with three(3) legal parcels in Sanpete County. Pursuant to exhibit no.2, the Court referred to those parcels as the Eastern no. 1, the middle no. 2, and the Western no. 3. After the

conveyance to White in July of '95, Jordan continued to own parcel no. 1 which was subsequently sold to the Randall's in March '96. The Court also found that Don Tibbs in 1987 built a pond on parcel no. 1 consisting of an earth work dam and some mechanism to allow the release of water ("head gate"). Tibbs used impounded water, sometimes by gravity and sometimes by pump and took water off site to other parcels he was farming. Tibbs continued to do this until 1988 when the property was sold to Jordans.

The Court reports specifically found that May Jordan used the water in the pond for subterranean irrigation of parcel 2 and parcel 3, not flood irrigation.

The Court specifically found that Randall bought his property in 1996 and at the time of the purchase was able to see the dam and the moving structures or mechanism that could be used to control water level and there was an apparent ditch or canal of some kind which flowed into the pond and an apparent ditch or canal of some kind that flowed out of the pond to the west however, at the time of contracting to purchase the property there were no water rights in use to the west of parcel no. 1.

The Court specifically found that the Randalls' chickens were killed by dogs under the control of White and that the value of the chickens was as testified to by Randalls. The court found that 50 chickens were killed and 2 turkeys. Of the chickens that were killed, 8 were polish, 6 were silkis, 6 were malaflair, and two foul were turkeys. That a farm chicken has a reasonable value of five dollars, a

polish eight dollars, a silkis eight dollars, a malaflair six dollars, and a turkey twenty dollars.

Randall also claimed that one of White's dogs caused the death of a new born colt. The Court found it more likely than not that the horse was killed by a dog owned by or in control of White. However, the Court found that Randall had failed to establish the value of the loss and therefor denied any damages.

The Court also specifically found that the question of whether an easement by implication exists is a problem in this case. It is clear that the pond was apparent, the diversion works were apparent, and some type of canal or trench ran into and out of the pond.

In ¶ 6, the findings indicate that Tibbs rebuilt the dam and enlarged the pond "soon after" the early summer of 1983. The Court specifically found in its decision that the dam had been built, based on invoices provided by Mrs. Tibbs, in 1987.

Paragraph 15 is expressly contrary to the decision made by the Court on the record following the trial.

UNSUPPORTED FINDINGS AND INSUFFICIENT FINDINGS:

In this case, the Judgment grants an easement for the passage of irrigation water across Randalls' land and also grants Plaintiff an easement in the Randall pond. Both were found to exist as "easements by implication." In order to find an easement by implication, the Court must find, at the least:

"In determining whether the circumstances under which a conveyance of land is made imply an easement, the following factors are important:

- (a) Whether the claimant is the conveyor or the conveyee,
- (b) The terms of the conveyance,

- (c) The consideration given for it,
- (d) Whether the claim is made against a simultaneous conveyee,
- (e) The extent of necessity of the easement to the claimant,
- (f) Whether reciprocal benefits result to the conveyor and the conveyee,
- (g) The manner in which the land was used prior to its conveyance,
- (h) The extent to which the manner of prior use was or might have been known to the parties.”

Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (Utah 1947).

In the Court’s findings, in ¶ 7, the Court indicated that Mr. Tibbs enlarged an existing ditch and “ this ditch carried water to flood irrigate the approximately fifteen (15) acre Connally parcel...”

Defendant believes there was no such evidence. The evidence at trial was that the ditch constructed by the Spencer family was never used and had never been able to carry water to the western parcel.

There was further substantial evidence that at no time had the water in the pond been used for flood irrigation.

As previously referenced, ¶ 8 is inconsistent with the Courts previous finding that the dam was built in 1987. ¶ 8 also fails to note that the easement for irrigation purposes was not used between 1995 and 1997 and was not used in 2002. The use, therefore, was sporadic.

While the Court found that the ditches which ran through the Randall property were open, and obvious, the Court has not made any specific finding with regard to the use of the pond for the purpose of impounding, storing, and metering water for irrigation purposes. The Court must make specific findings regarding the easement not only in the ditches and canals, but also in the pond itself.

The Court also failed to make any findings with regard to perfected water rights issues, statutory easements and water rights, and whether the statutory enactments supercede the common law doctrine and the failure of White to hold a perfected water storage right under Utah water law.

Paragraph 10 is inconsistent with the evidence introduced at trial, as White did not purchase his water rights until 1997. Paragraph 11 is inconsistent with the evidence and Court for the same reason, as White did not start irrigation 1995 because he did not have any water rights at that time. As previously indicated, the evidence of continuous, as to opposed to sporadic use is an element of this claim. Therefore, the provisions in ¶ 11 need to correctly cite the time when such irrigation water was run through the Randall Property.

Paragraph 16 is expressly contrary to the decision of the Court rendered on the record following the trial. The Court in fact found that the White dog more probably than not killed the Randall horse, but that the defendant had been unable to establish value and therefore no damages were awarded. The Court did award the damages requested by Defendant for the value of his chickens which the Court found had been killed by the White dog.

As previously mentioned, The Court has granted findings that not only grant an easement in an irrigation canal or ditch, but also that requires the Defendant to build a pond for the benefit of Plaintiff's easement. Therefore, the Court must make findings sufficient to support each element of the easement granted. No finding in this case support an award of an easement of Plaintiff in the pond on

Defendant's property, for the purpose of impounding and storing water. The Court should make such findings. In support thereof, Defendant provides the following:

Utah law provides that the rights of the dominant owner of an easement are impliedly limited by the rights of the servient owner. *Big Cottonwood Tanner Ditch Co. v. Moyle*, 109 Utah 213, 174 P.2d 148, 158 (Utah 1946). "The use of an easement must be as reasonable and as little burdensome to the servient estate as the nature of the easement and its purpose will permit." *Id.* (quoting *Jenkins v. Depoyster*, 299 Ky. 500, 186 S.W.2d 14, 15 (1945)). *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990)

Therefore, the Court needs to make an express finding with regard to the most reasonable and least burdensome easement that is required under the circumstances. The plaintiff has claimed an easement by implication pursuant to the authority of *Adamson V. Brockbank*, 112 Utah 52 185 P.2b 264 (Utah 1947), primarily on the basis that at the time that Randall purchased the property, the ditch running from the pond towards the White property was open, apparent, and obvious. This simple finding is not sufficient to establish an easement by implication and the Court needs to make express findings with regard to the following elements:

(1) unity of title followed by severance; (2) at the time of severance the servitude was apparent, obvious, and visible; (3) the easement is reasonably necessary to enjoy the dominant estate; and (4) use of the easement was continuous rather than sporadic. See *Butler v. Lee*, 774 P.2d 1150, 1152 (Utah Ct.App.1989). *Potter v. Chadaz*, 977 P.2d 533, 536 (Utah App. 1999).

LACK OF FINDINGS TO SUPPORT AN AWARD OF ATTORNEY'S FEES:

The findings, conclusion and judgment issued by the Court includes an award of attorney's fees to the Plaintiff. The Court has made no findings or conclusions supporting such an award. The Law in Utah is that attorney's fees are not recoverable absent a statute or contract which provides for them. "Utah adheres to the well-established rule that attorney fees generally cannot be recovered unless provided for by statute or by contract." *Canyon Country Store v. Bracey*, 781 P.2d 414, 419 (Utah 1989) (citing *Turtle Mgmt., Inc. v. Haggis Mgmt.*, 645 P.2d 667, 671 (Utah 1982)). Attorney's fees must be allocated to the issues, both prevailed upon and not prevailed upon. a party seeking fees must allocate its fee request according to its underlying claims. Indeed, the party must categorize the time and fees expended for "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998) (citation omitted) (quoting *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992)). In addition, "while a trial court may, in its discretion, deny fees altogether for failure to allocate, it may not award wholesale all attorney fees requested if they have not been allocated as to separate claims and/or parties." *Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998).

In fact, the Utah Court of appeals favorably cited the Ross case for the proposition that attorney's fees cannot be awarded in an "easement by implication" case. In Ross v. Cagley, 65 Ore.

App. 79, 670 P.2d 190, 192 (Or. Ct. App. 1983), the Court held that party could not obtain attorney fees under contract provision since plaintiff was awarded an easement by implication, and had "sought neither enforcement of the contract nor damages for its breach, but to have certain rights declared which had not been made part of the contract." Cited with approval, Chase v. Scott, 2001 UT App 404.

This Court must make express finding of any basis for an award of attorney's fees in connection with this case. The proposed findings do not state whether the claim is based on contract, statute, or some common law claim. Specific findings are necessary on this issue to support the judgment.

CONCLUSION


Pursuant to the provisions of Rule 52, it is respectfully requested that the Court make specific findings on the issue of Easement by Implication, including necessity, continuity of use, and knowledge or imputed knowledge of the presence of the easement not just in the canals and ditches, but also in the pond for storage purposes. The Court needs to make specific findings of fact regarding White's right to store water on the Randall property particularly in light of the Smith Decree which adjudicates the rights of the waters of Thistle Creek from Indianola down Spanish Fork Canyon.

This Court needs to make express findings on allowing and authorizing the Plaintiff to own and maintain a dam on Defendant's property for the purpose of impounding irrigation water without filing an application therefore with the State Engineer.

This Court must enter specific findings of fact which establish the volume of water the Plaintiff is entitled to impound, the period of time for which that water can be stored or retained, and the legal or statutory basis upon which that water storage is recognized.

It is respectfully requested that the Court alter or amend the Findings to support the Court's prior decision, and further, that the Court supplement the Findings of Fact to support the various claims, causes of action, and remedies which have been proposed in the Conclusions of Law.

DATED AND SIGNED this 27th day of September, 2004.



JAMES G. CLARK
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I:

☒ mailed a true and correct copy of the foregoing, **Memorandum in Support of Motion to Alter, Amend, or Supplement Findings of Fact and Conclusions of Law**, postage prepaid and addressed as follows; or

☐ hand-delivered to the following: or

☐ sent by facsimile to the following:

REED L. MARTINEAU
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
PO BOX 45000
S.L.C., UT. 84145

DATED AND SIGNED this 27th day of September, 2004.

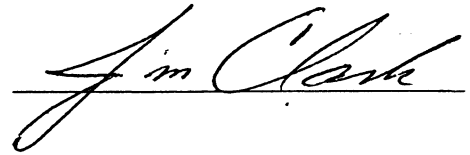
A handwritten signature in cursive script, appearing to read "Jim Clark", is written over a horizontal line.

Exhibit 5.

Trial exhibit #1 plat map of the properties with witness additions.

[illegible]

Exhibit 6.

Trial exhibit #8 aerial photograph of the dam failures of the
upper and lower ponds during 1983 floods
(Lower pond is stock watering pond on Randall property)



Exhibit 7.

Trial exhibits #4 and 5 State of Utah Division of Water Rights data printout of
Leon J and Eileen H. White water rights

STATE OF UTAH – DIVISION OF WATER RIGHTS – DATA PRINT OUT for a21263(51-6583)

(WARNING: Water Rights makes NO claims as to the accuracy of this data.) RUN DATE: 09/03/2003 Page 1

CHANGE: a21263 WATER RIGHT: 51-6583 CERT. NO.: AMENDATORY? No

BASE WATER RIGHTS: 51-6583

RIGHT EVIDENCED BY: 51-6583 (a17724) (a portion of 51-224)

CHANGES: Point of Diversion [], Place of Use [], Nature of Use [X], Reservoir Storage [].

NAME: White, Leon J. and Eileen H.
ADDR: P.O. Box 309
CITY: Fairview
PHONE: - - - EMAIL:

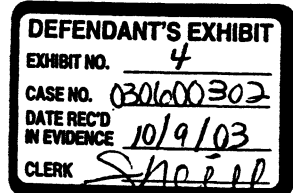
OWNER MISC:

STATE: UT ZIP: 84629

NAME: White, Leon J. and Eileen H.
ADDR: HC13 Box 4006
CITY: Fairview
PHONE: - - - EMAIL:

OWNER MISC:

STATE: UT ZIP: 84629-9613



FILING: 06/27/1997|RECVD BY: []|PRIORITY: 06/27/1997|ADV DESIG: 06/27/1997|BY: [DGB]|PAPER: Mt. Pleasant Py
PUB BEGAN: 07/16/1997|PUB ENDED: 07/23/1997|PRTST END: 08/12/1997|PROTESTED: [No]|PROOF PUB: 08/12/1997|BY: [DD]
A/R DESIG: [Approved]|DESIG DATE: 08/14/1997|REG ENG: [JER]|APPROP: [KLJ]|MEMO DEC: [No]|APPR/REJECT: [Approved]
APPR/REJ: 08/15/1997|PROOF DUE: 08/31/2004|EXTENSION: []|ELEC/PROOF: []|ELEC/PROOF: []|ROUGH DRAFT: []
CERT/WUC: [LAP, ETC]|PROV LETR: [RENOVATE]|RECON REQ: [TYPE: []]

Date Verified: 06/27/1997 Initials: DGB Status: Approved

***** HERETOFORE *****
***** HEREAFTER *****

FLOW: 1.0 acre-feet	FLOW: 1.0 acre-feet
SOURCE: Underground Water Well	SOURCE: Underground Water Well
COUNTY: Sanpete	COUNTY: Sanpete COM DESC: 0.5 miles West of Indianola
Actual irrigation is 0.1025 acres	The purpose of this change application is to convert the irrigation and a portion of the stockwatering to cover a trailer, which will be used as a guest house .
POINT(S) OF DIVERSION ----->	SAME AS HERETOFORE
Point Underground: (1) S 200 ft E 2200 ft from W4 cor, Sec 05, T 12S, R 4E, SLBM Diameter: 6 ins. Depth: 100 to 500 ft. COMMENT:	
PLACE OF USE ----->	SAME AS HERETOFORE
--NW-- --NE-- --SW-- --SE-- N N S S N N S S N N S S N N S S W E W E W E W E W E W E W E W E Sec 05 T 12S R 4E SLBM * : : * : : * : X : * : : *	
NATURE OF USE ----->	CHANGED as follows:
SUPPLEMENTAL to Other Water Rights: No	SUPPLEMENTAL to Other Water Rights: No

IRR: 0.1000 acs Sol/Sup:	acs USED 04/01 - 10/31		
STK: 5 Cattle or Equivalent	USED 01/01 - 12/31	STK: 3 Cattle or Equivalent	USED 01/01 - 12/31
DOM: 1 Family	USED 01/01 - 12/31	DOM: 2 Families	USED 01/01 - 12/31

EXTENSIONS OF TIME WITHIN WHICH TO FILE PROOF*****

FILING: 01/05/1998	ADV DESIG:	BY: []	PUB BEGAN:	PUB ENDED:	PAPER:
PROTST END:	PROTESTED: []	PROOF PUB:	BY: []	A/R DESIG: [Approved]	DESIG DATE: 01/08/1998
REGION ENG: [JER]	APPROP: []	MEMO DEC: [Yes]	APPR/REJECT [Approved]	APPR/REJ: 02/23/1998	PROOF DUE: 01/31/2003

FILING: 01/29/2003	ADV DESIG:	BY: []	PUB BEGAN:	PUB ENDED:	PAPER:
PROTST END:	PROTESTED: [No]	PROOF PUB:	BY: []	A/R DESIG: [Approved]	DESIG DATE: 02/20/2003
REGION ENG: [MHANDY]	APPROP: []	MEMO DEC: [Yes]	APPR/REJECT [Approved]	APPR/REJ: 06/26/2003	PROOF DUE: 08/31/2004

*****E N D O F D A T A*****

