

2005

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEON J. WHITE,

Plaintiff/Appellant,

Appeal No. 20050980-CA

vs.

ORAL ARGUMENT REQUESTED

JERRY RANDALL,

Defendant/Appellee.

OPENING BRIEF OF APPELLANT LEON J. WHITE

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

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j)(2004) and Rules 3, 4, and 42 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Did the trial court err in relying on certain maps that it located through its own research, and that were not introduced as evidence at trial?

Standard of Review: The issue of whether it was legal error for the trial court to rely on certain maps that it located through its own research, and that were not introduced at trial, is a legal issue that is reviewed for correctness. See Bradley v. Payson City Corp., 2003 UT 16, ¶ 9, 70 P.3d 47; State ex rel. A.C.C., 2002 UT 22, ¶ 12, 44 P.3d 708.

2. Did the trial court err in allowing Randall to obliterate the historic water delivery system, including the total destruction of the holding pond and the ditches that delivered water to White's property, and in substituting an alternative system crafted by the trial court?

Standard of Review: The trial court's findings of fact are reviewed under a clearly erroneous standard. See Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993). Its conclusions of law are reviewed for correctness. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

3. Does Utah law allow a recovery of attorney's fees and costs as an element of a punitive damage award?

Standard of Review: The issue of whether attorney's fees and costs may be recovered under Utah law as an element of a punitive damage award is a legal issue that is reviewed for correctness. See Bradley v. Payson City Corp., 2003 UT 16, ¶ 9, 70 P.3d 47; State ex rel. A.C.C., 2002 UT 22, ¶ 12, 44 P.3d 708.

STATEMENT OF THE CASE

Appellant Leon J. White ("White") filed this lawsuit on August 29, 2003, requesting that appellee Jerry Randall ("Randall") be required to restore the pond and ditches destroyed by him, and that he be enjoined from threatening to shoot White or members of White's family and from shooting animals. White also asked for an award of punitive damages (R. at 1-5).

At a hearing on White's Motion for an Order to Show Cause on September 24, 2003, the trial court did not have time to take testimony and instead set the case for trial (R. at 31, 272). The trial commenced on October 9, 2003, and was concluded on November 26, 2003 (R. at 36-37, 41-46, 269-270), at which time the trial court heard arguments of counsel and made preliminary findings with respect only to the foal and the alleged loss of chickens (R. at 45).

The trial court requested that counsel submit proposed Findings of Fact and Conclusions of Law by January 23, 2004 (R. at 45). Due to problems getting copies of the CD's and audio tapes from the Clerk's office that were ordered by both counsel, White's

counsel requested two extensions and submitted proposed Findings of Fact and Conclusions of Law on March 5, 2004 (R. at 53-64, 65-77).

Randall filed a Motion to Strike Plaintiff's Proposed Findings of Fact and Conclusions of Law, which White opposed (R. at 78-99). More than six months later, on September 14, 2004, the trial court, having been provided an unofficial transcript of the trial, and having listened to the trial testimony, approved and entered the Findings of Fact and Conclusions of Law submitted by White (R. at 105-115). On September 30, 2004, the trial court entered the Judgment submitted by White notwithstanding Randall's Objection to the Proposed Judgment, a Second Motion to Strike Findings of Fact and Conclusions of Law and a Third Motion to Alter, Amend or Supplement Findings of Fact and Conclusions of Law that had been filed on September 27, 2004 by Randall (R. at 117-155).

Almost six months later, following inquiries to the Clerk's office, at a further hearing on April 4, 2005, the case was again argued to the trial court and additional documents were requested by the court (R. at 229-231).

On July 26, 2005, Amended Findings of Fact and Conclusions of Law were entered by the trial court and on September 19, 2005, a Judgment was entered, neither of which were consistent with prior rulings of the trial court (R. at 238-247, 254-56).

White filed his Notice of Appeal on October 13, 2005 (R. at 262-63).

STATEMENT OF FACTS

White's Purchase of Land and Water Rights

1. In July 1995, appellant Leon J. White purchased a 16-acre parcel of land together with an existing well and one share of stock in the Indianola Irrigation Company ("Irrigation Company") from Kaziah May Hancock ("Hancock") and her husband Ivan Douglas Hancock (R. at 269, pp. 6-8).

2. In early November 1995, some three months later, White purchased from the Hancocks an additional 10-acre parcel together with an additional 10 shares of stock in the Indianola Irrigation Company (R. at 269, p. 9).

3. The acquired parcels consisted of flat irrigated farmland and a hill located in the northeast corner upon which White intended to, and later did, build a home (R. at 269, pp. 9-10).

Hancock's Purchase and Use of the Property

4. The land and water rights held by Hancock at the time of the sale to White in 1995, including those sold to White, were purchased by her in 1988. Following acquisition of the land and water rights, she built a log home on the hill and devoted the balance to farming and livestock grazing (R. at 269, pp. 81-82).

Water Delivery System to White Property

5. A pond was located on the 11-acre parcel still owned by Hancock (the "Pond") after the sale to White. The Pond had been used by Hancock and her predecessor's lessee,

Don Tibbs (“Tibbs”), for collection of spring runoff and to collect and deliver water that came through an existing ditch from the Irrigation Company system upstream for downstream irrigation of adjacent crop land, including the property later sold to White (R. at 269, pp. 10-11, 447-48). The Pond had been destroyed by floods that overran the property in the summer of 1983 and was reconstructed and enlarged by Tibbs in the 1983-85 time period with a grant from the U.S. Soil Conservation Service (R. at 269, pp. 191-92).

6. Following its enlargement, the Pond dike reached a height of 10-12 feet and was equipped with a pipe outlet which featured a valve to control the outflow from the Pond (R. at 269, pp. 192-93). After exiting the Pond, the water entered a ditch that delivered the water in a westerly direction to the property sold to White and then around the base of the hill on that property to flood irrigate the flat crop land that extended on west to U.S. Highway 89 (R. at 269, p. 10).

7. At the time of the sale to White, he and Hancock walked the property and she showed him how the irrigation system worked; how the water came through a ditch to the Pond and then flowed in another ditch from the Pond to the White property. Hancock assured White that he would be able to continue to enjoy the permanent system of the ditches and the Pond to get water to his property, just the same as she had used them since 1988 and the same as they had been used before that (R. at 269, pp. 13-16). In fact, in 1988, Don Tibbs showed Hancock how the system worked; how to get water from the Pond to the Condley land that she later conveyed to White (R. at 269, p. 105).

8. Hancock and White understood and agreed that he was to have a permanent easement in the existing system of ditches and the Pond to receive, store and use his water (R. at 269, pp. 13-16, 96-97, 452-53).

9. That system, which had been in existence and in use for a number of years before 1988 (R. at 13), was not changed during her ownership and was unchanged when White received title to his property and thereafter (R. at 269, pp. 105, 447-48).

10. White and Hancock both testified that there was no other means of delivery of water to the White property (R. at 269, pp. 17, 447-48).

11. Based upon this understanding and agreement the sale was closed and White began at that time and thereafter to take his water through that system, which remained unchanged, to flood irrigate his crop land, and he continued to do so until Randall destroyed the Pond in July of 2003 (R. at 269, pp. 12-13, 16-18).

12. In 1998, Hancock sold the remaining 11-acre parcel with the home and a culinary well right to Randall (R. at 269, pp. 18-19). Randall purchased no stock in the Irrigation Company and, other than the well permit, has never owned any other water rights (R. at 269, p. 361).

13. According to Hancock, she advised Randall or his real estate agent at the time of the sale to him of the then ongoing use by White of the irrigation system. She testified that, in response to an objection by Randall that the Pond was of no benefit to him, she reduced the purchase price from \$130,000 to \$125,000 (R. at 269, pp. 448-450).

14. Randall walked the property when he bought it, walked around the Pond, saw that the water discharged from the Pond into a ditch that “went down to the White place” and “around the brow of the hill . . . toward the northwest . . . the same one that’s there today . . . the one that he’s [White’s] used to irrigate the property to the west” (R. at 269, pp. 366-67).

Randall’s Interference with White’s Water Rights

15. In the two or three-year period prior to 2003, White would at times find that the water was not flowing from the Pond because someone had shut off the valve. When this occurred, White would go to the Pond and open the valve. This interruption of the flow became more frequent in the 2002 and 2003 period (R. at 269, p. 19).

16. In the early 2000 period, White “noticed a new ditch being dug around the pond” (R. at 269, pp. 20-21). Upon making inquiry to Randall, White was told, “That’s the ditch we was going to have to start taking our water from.” White responded by stating that “[i]t’s illegal to try to change any ditches or the way water comes without getting authorization from everybody down below you” (*Id.*). White tried to be polite and tried to talk to Randall about this in a peaceful manner but Randall became angry and told White that he was not going to store White’s “blankety blank water” (*Id.*). White refused to change his water delivery and continued to use the Pond and the ditches to and from the Pond just as he and as Hancock and Tibbs had used them before.

17. In May of 2003, White again found the flow had stopped again and upon inspecting the valve found that it had been turned off and that a lock had been installed to prevent the valve from being opened (R. at 269, p. 21). White testified:

A. So I -- we undid the locks and that, and we're taking the valves off so he can't sit there and keep turning them off, . . . because I'm the only one that should be getting the water, because I had the shares of water and not him. So I -- we was taking the valves off, and all of a sudden he comes down.

Q. Now, did he have any water shares?

A. Mr. Randall didn't have any water shares, irrigation water shares.

Q. Okay, go ahead.

A. So Mr. Randall come down, and he starts confronting us about that, and telling us to get off of his property and that. I told him at that time, I says, "You know, this is the irrigation ditch. You know, we have -- there's a right-of-way through here that we, you know, take our water and get our water. We have that right. Why would you lock the gate?

* * *

. . . because I had no other way to get my water.

So he indicated to me then -- again he told me he ain't gonna store my water and that. We talked about a few other things, you know, because I -- I tried to calm him, . . .

* * *

He didn't want to talk about stuff. Like he turned to my boy, and he goes, "And this little son-of-a --" to my boy -- "shot at me." To me, when he brought that up, because there was nothing -- there was no reason for me to bring that up. I think he was trying to get me, you know, mad or something. To call my boy that and in front of me, was a very insult and that.

I said to him, "Jerry, he wasn't even the one over in the field, you know, shooting," you know, that he was indicating that they was shooting in the field and shot at him. He wasn't even the one.¹

So that confrontation got over; and he started to go up the hill and that. Then he turned and told -- and said to me the next time I'd be talking to him, he'd be talking to me with a gun. I said to him, "So you're threatening to shoot me?" He goes, "No, I'm not threatening to shoot. I'm telling you I'm going to return fire."

I goes, "I've never done nothing to you. I've never done a thing to you. I've never shot at you." I've never tried to do anything, tried to make his life miserable in any way.

So me and my boy, we left, and about a week later -- well, he did threaten me right then and there, too, that he was going to not store my water anymore. He was going to tear (inaudible) the pond out.

(R. at 269, pp. 22-24). This testimony was not disputed by Randall.

18. White again continued to take his water turn in the same way as before (R. at 269, p. 24).

19. On July 3, 2003, without further discussion with or notice to White, a contractor employed by Randall leveled and obliterated the Pond and the ditch (R24-25), thereby destroying White's only means of receiving, storing or using his water rights. As a result, he was unable to irrigate his crop lands for the balance of the 2003 season or the 2004 and 2005 seasons (R. at 269, pp. 24-26).

The Alleged Shooting Incident

20. Randall alleged that White's son fired a gun at him (R. at 269, pp. 135).

¹White's son was not even in the area when the supposed shot was fired (R. at 269, pp. 136-37).

21. On December 2, 2002, Sanpete County Deputy Sheriff Gary Larsen was called by Randall to investigate a claim that he had been shot at and he had “heard a round go over his head.” Randall believed “it was Mr. White’s son” who had shot the round (R. at 269, pp. 151-54).

22. Larsen measured only part way (“over 1000 feet”) to where the shots had been fired, which from where he measured, “was still quite a ways out.” He testified that the shots were taken far beyond 600 feet, the distance from any residence that a firearm cannot be discharged under state law (R. at 269, pp. 154).

23. The second witness called by Randall to support his claim was a supposed expert, Rick Allshouse, who claimed to have been at Randall’s home and heard the shot go by (R. at 269, p. 259). He gave his opinion that the shot was made from a distance of 800-900 yards (2,400-2,700 feet) by a .22 caliber rifle and that the round could have ricocheted off an object before going over his head (R. at 269, p. 259-260, 262, 264). He further testified that he could tell the bullet was “tumbling” as it went by within 15 or 20 feet (R. at 269, p. 270). His claim that the gun used was a .22 caliber rifle was based solely on his observation through binoculars from the distance of some 900 yards (R. at 269, p. 265-66). He never saw or ever asked to actually see the firearm involved or to talk to the boys involved (Id.). Neither of the boys involved in this alleged incident were the boy that Randall confronted and accused at the Pond.

24. The gun involved was actually a 12-gauge shotgun in the hands of White's son-in-law, Sam Gonzales, who was hunting rabbits with a friend two fields away from the Randall residence (R. at 269, p. 139).

Randall Shot Dogs Owned by the White Family and Neighbors

25. Deputy Larsen was called on May 10, 2001, by White because his dog had been shot in the stomach by Pamela Randall, appellee's wife, two days earlier. He talked to Mrs. Randall who claimed the dog had one of her chickens down so she shot a .22 rifle to scare it but apparently hit it instead. No claim was made that the dog had killed the chicken or that she had let the Whites know about it (R. at 269, pp. 156-57).

Allegations Involving White's Dog

26. Randall claimed that White's dog had killed a colt sometime earlier, and more than 50 chickens in the 2002 time period. On cross examination, however, Randall testified with respect to the colt that he "assumed" White's dog killed the colt because he had seen it in the corral with the horses in the early morning and "there was quite a bit of confusion" and the colt was "sweated up and lathered up" (R. at 270, pp. 310-11). Randall claimed that later in the afternoon he saw the same dog back in the corral standing over the dying colt (R. at 270, p. 314).

27. Randall testified that he "then went down and confronted Mr. White in regards to the dog chasing the fold [foal] to death," but then backtracked by stating that "I've got to put that on the telephone. I don't remember having gone down and talked face to face." (R.

at 270, pp. 314-15). White told him the foal wasn't killed by his dog, that he had been outside working in the field and yard all day and the dog had been right there by his side all the time, never left his side." Randall then told White "Okay, if that dog comes back on my property, I will shoot it for what it had done to the fold [foal]." (Id.). "I [Randall] told him that I would kill any of the dogs that was threatening and killing my animals" (R. at 270, p. 360).

28. Randall was aware that there were other dogs in the neighborhood and testified that he owned two other dogs at that time (R. at 270, p. 357). He admitted that he did not see White's dog between early morning and his finding the dying foal at the end of the day, did not hear any more barking all day, did not see the dog chase the foal again, did not have the foal examined, took no photos of the dead foal, saw no teeth marks on it, did not see the foal killed, nor did anyone else, and did not report it to the sheriff. He produced no other evidence to show what caused the foal's death (R. at 270, pp. 359-360, 368-69).

29. With respect to the chickens, Randall testified, as noted above, that his wife claimed she saw that White's dog had a chicken down, but did not kill it. Otherwise he admitted on cross examination he made no claim relating to the supposed killing of his chickens before this case was filed over a year later, he took no photos, did not discuss any of the supposed dozens of killed chickens with White, knew of no witnesses to any chicken being killed, saw no other chicken being attacked or killed and never called the sheriff as to any further problems (R. at 270, pp. 371-72).

30. White filed this lawsuit on August 29, 2003 (R. at 262-63).

SUMMARY OF ARGUMENT

When White filed this lawsuit on August 29, 2003, all he wanted was to be restored back to the position he was in before Randall unlawfully obliterated his water delivery system. Two and a half years later, and after spending thousands of dollars on legal fees and court costs, White is still without the benefit of his water delivery system.

The Judgment that the trial court entered in this case must be reversed because the trial court committed the following critical errors:

First, the trial court violated the fundamental rule of law that neither a judge nor a jury is permitted to go outside of the evidence presented at trial to make a finding. See Salt Lake City v. United Park City Mines Co., 503 P.2d 850 (Utah 1972). The trial court's actions in researching, locating, modifying and relying upon certain maps that it located through its own independent research, and that were not introduced into evidence at trial, constitutes legal error.

Second, the trial court correctly found that White had an easement across Randall's land. However, the trial court erred when it considered and relied upon certain maps that it located through its own research, and that were not presented at trial, to craft an alternate water delivery system. If 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. It was legal

error for the trial court to exclude the Pond and other aspects of the historic water delivery system.

For these reasons, the Judgment of the trial court must be reversed and the Court should instruct the trial court to enter judgment consistent with its initial Findings of Fact and Conclusion of Law, which required Randall to pay the costs of restoring the water delivery system. Additionally, as part of its decision remanding the case, the Court should affirmatively instruct the trial court that it should award White his attorney's fees and costs as an element of punitive damages, because punitive damages are warranted.

ARGUMENT

I. THE TRIAL COURT ERRED IN RELYING ON CERTAIN MAPS THAT IT LOCATED THROUGH ITS OWN INDEPENDENT RESEARCH, AND THAT WERE NOT INTRODUCED AS EVIDENCE AT TRIAL.

In its Amended Findings of Fact and Conclusions of Law dated July 21, 2005, the trial court relied on certain maps that it located through its own independent research, and that were not introduced into evidence at trial (R. at 238-247) . The trial court's actions in considering and relying on those maps was in direct conflict with the Utah Supreme Court's decision in Salt Lake City v. United Park City Mines Co., 503 P.2d 850 (Utah 1972), and constitutes legal error.

Following the trial in this matter, the trial court scheduled a hearing on the parties' motions to amend the Judgment and Findings of Fact and Conclusions of Law. During that April 4, 2005 hearing, Judge Mower showed counsel certain USGS topographical maps that

he had located through his own independent research. Judge Mower took two of those maps, attached them together and drew the relevant parcels of land on the maps based on the legal descriptions.² (R. at 273, pp. 2-12).

The maps used by the trial court were not introduced as evidence at trial, were not part of the record in the case, and the parties did not have an opportunity to effectively review or respond to them. Rather, they were maps that the trial court found and modified as part of its own independent research following trial. Neither of the parties stipulated to the admission of such maps, and the trial court's *sua sponte* discussion of the maps during the April 4th hearing did not result in them becoming part of the trial record.³ In fact, the trial court went so far as to acknowledge that it was violating the rule of law that neither a judge nor a jury is permitted to go outside of the evidence presented at trial to make a finding of fact. After first showing the maps to counsel, Judge Mower stated as follows:

The lawyers and I have been around long enough that we've tried a few jury trial[s], and we all remember that jury instruction that says, "Make sure your decision is based only on the evidence, and don't look for information in law books, dictionaries, or other sources of information that are not presented to the Court."

²Judge Mower noted that the mapping software he used "gives lots of disclaimers saying, 'Don't settle your lawsuits based on what you draw on these maps.'" (R. at 273, pp. 8-9). Nevertheless, Judge Mower did just that and relied on the mapping software's representation of the properties based on the legal descriptions.

³During the April 4, 2005 hearing, the parties did stipulate to supplement the record with a relevant trust deed that was not entered into evidence at trial. (R. at 273, pp. 110-11). In stark contrast, the parties did not stipulate to the admission of the trial court's USGS topographical maps.

I'm here to tell you that I have violated that instruction. I have looked for things in places that are not presented in Court about this case; and I want to tell you what I've looked at. I think we are going to be okay and I think my explanation is going to be helpful. At least it was for me, but I want to tell you what I've looked at.

(R. at 273, p. 3) (emphasis added).

Then on July 21, 2005, the trial court issued its Amended Findings of Fact and Conclusions of Law, which were entirely inconsistent with the trial court's prior rulings. In its Amended Findings of Fact and Conclusions of Law, the trial court relied heavily on the maps that it presented during the April 4th hearing. The Amended Findings of Fact provide in relevant part as follows:

3. The United States Geologic Survey publishes maps. The maps used here are portions of two USGS 7-1/2-minute quadrangle maps which have been "stitched" together to make a single map. USGS 7-1/2-minute maps contain contour lines and locations of water sources, courses and storage facilities, both natural and man-made. **The maps used here were not presented by the parties. They are part of my own mapping software. I used the maps to help familiarize myself with the area. I showed the maps to counsel during oral argument on April 4, 2005.**

* * *

5. I have modified the above map by highlighting the contour lines.
...

6. There is a pond of particular interest in this case. It is highlighted in blue on this map. . . .

* * *

10. Here is a map showing the pond, the contour lines, and the property owned by White and Randall.

* * *

12. The 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.
 - a. These contour lines are very close together in the vicinity of the residences on [stet] the parties.
 - i. The White home is just below the 5,920-foot contour line.
 - ii. The Randall home is on a hill just above the 5,940-foot contour line.

* * *

18. It should be physically and geographically possible for water to flow across Mr. Randall's property and onto Mr. White's property.

(R. at 238-245) (emphasis added). It should be noted that the trial court's Amended Findings of Fact and Conclusions of Law contain seven different images of maps from the trial court's mapping software. Counsel for White is not even sure if these are the same maps that the Court showed the parties during the April 4th hearing.

The trial court violated the fundamental rule of law that neither a judge nor a jury is permitted to go outside of the evidence presented at trial to make a finding. The trial court's actions in researching, locating, modifying and relying upon such maps constitutes legal error.

In Salt Lake City v. United Park City Mines Co., 503 P.2d 850 (Utah 1972), the Utah Supreme Court reversed a decision by a district court judge who did exactly what Judge Mower did in this case. In that case, Salt Lake City brought suit to quiet title to the flow of water from a tunnel which had been constructed by the defendant and which the City contended diminished creek flow, most of which was owned by the City. On appeal, the Utah Supreme Court held that the trial court's use of information outside of the evidence presented at trial to reject evidence presented at trial was improper and necessitated a new trial upon all issues. The court described the trial court's improprieties as follows:

Had the court based his ruling upon the evidence before him, we do not know what the judgment might have been. However, instead of confining himself to the testimony and exhibits given in evidence, he used a book not in evidence, by the use of which he made for his own consideration nine exhibits which were never seen by counsel at trial, and then by the use of a computer at the University of Utah, operated by a student whose skill in programming was, and is, unknown, arrived at what he called a "proper slope" which he says is 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.

The 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 and, therefore, the City had not sustained its burden of showing an unnatural decrease in the flow of the waters of Big Cottonwood Creek since the driving of the Spiro Tunnel. By making this determination, the court did not feel required to consider the other issues reserved for trial.

Id. at 852. The court went on to state that "[i]n deciding a case tried without the aid of a jury, the court has great leeway in deciding what are the facts as presented by the evidence before him. **However, neither a judge nor a jury is permitted to go outside the evidence to**

make a finding.” Id. (emphasis added). See also Provo River Water Users’ Ass’n v. Carlson, 133 P.2d 777, 782 (Utah 1943) (“The purpose of a trial of the issues is to have the facts determined impartially and fairly by a court or jury. Jurors as well as judges must base their verdicts or decisions on the evidence presented during the trial, not on the basis of some independent personal investigation or determination of the facts outside of court.”).

The Utah Supreme Court then noted that the trial court’s error was so egregious in that the case that would be unfair to simply remand the case for further proceedings:

In view of the fact that we have found it necessary to reverse the findings and judgment because of impropriety of the methods used as discussed herein, we can appreciate that the appellant City, as the losing party who was obliged to take this appeal and obtain the reversal, may have apprehensions about a fair and impartial determination if the case were simply remanded for further consideration.

Id.

In this case, the trial court committed the very legal error addressed by the Utah Supreme Court in Salt Lake City v. United Park City Mines Co., 503 P.2d 850 (Utah 1972). The trial court conducted its own independent research and relied on maps that were not introduced at trial to craft an entirely new water delivery system. Moreover, the trial court’s Finding that “[i]t should be physically and geographically possible for water to flow across Mr. Randall’s property and onto Mr. White’s property” by way of a new ditch crafted by the trial court (R. at 245) is in direct conflict with the unrebutted trial testimony of both White and Hancock that there was no other means to deliver water to the White property other than the system that Randall obliterated (R. at 269, pp. 17, 447-48). Therefore, the trial court’s

Amended Findings of Fact and Conclusions of Law and Judgment, which fundamentally rely on Judge Mower's personal maps, must not be considered.

Accordingly, the Court should set aside the trial court's Amended Findings of Fact and Conclusions of Law and Judgment, and instruct the trial court to enter judgment consistent with its initial Findings of Fact and Conclusions of Law, which ordered Randall to pay the costs to restore the Pond and water delivery system back to their original condition. In the alternative, the case should be remanded to the trial court for a new trial on all issues. In the event that the case is remanded for new trial, White respectfully requests that the case be assigned to a different trial judge so that he can obtain a fair and impartial trial.

II. THE TRIAL COURT ERRED BY SUBSTITUTING AN ALTERNATIVE WATER DELIVERY SYSTEM CRAFTED BY THE COURT IN THE PLACE OF THE HISTORIC WATER DELIVERY SYSTEM, WHICH INCLUDED THE HOLDING POND AND THE DITCHES THAT DELIVERED WATER TO THE POND AND WHITE'S PROPERTY.

When White filed this lawsuit, all he wanted was to be put back into the position he was in before Randall willfully and maliciously destroyed the water delivery system. In its initial Findings of Fact and Conclusions of Law, the trial court did just that—it ordered Randall to pay the costs to restore the Pond and water delivery system back to their original condition. The trial court initially reached the following legal conclusions:

CONCLUSIONS OF LAW

1. White holds a valid easement for the use and enjoyment of the System across Randall's property for the conveyance, storage and delivery of his water rights as heretofore used and enjoyed by Jordan and by him.

2. Randall had and has no right to obstruct or change the System “without first receiving written permission for the change” from White. U.C.A. § 73-1-15 (1953). No such permission was ever requested or received.

3. Randall is charged with notice and knowledge of the System and White’s right to the use and enjoyment thereof as heretofore enjoyed.

* * *

5. Randall is obligated to pay the cost of restoration of the pond and the System to their condition at the time they were destroyed and/or rendered useless.

(R. at 133-14). These initial legal conclusions were supported by the underlying facts and the relevant law, and would have restored White back into the position he was in before Randall obliterated the water delivery system. The trial court, however, subsequently reversed course and amended its Findings and Conclusions.

In its Amended Findings of Fact and Conclusions of Law dated July 21, 2005, the trial court backed away from its initial ruling, which ordered White to “pay the cost of restoration of the pond and the System to their condition at the time they were destroyed and/or rendered useless.” Instead, the trial court relied on certain maps that it located through its own independent research, and that were not introduced into evidence at trial, to craft an entirely new water delivery system, which did not include the original Pond. As shown above, it was legal error for the trial court to consider and rely on those materials in the first place. Additionally, the trial court’s decision to craft an alternative water delivery system deprived White of the right he had to use and enjoy the historical water delivery system.

In its amended decision, the trial court relied on the Utah Supreme Court's decision in Adamson v. Brockbank, 185 P.2d 264 Utah (1947), to grant White an easement across White's property (R. at 246-47). However, the trial court's ruling only included a rerouted easement for a ditch. The Court did not include an easement for the entire water delivery system, including the Pond that Randall had destroyed. See id. It was an error for the trial court to find that White was entitled to an easement but to limit that easement to a simple ditch that was not the same water delivery system that White and his predecessors had used historically.

In Adamson v. Brockbank, supra, the Utah Supreme Court upheld a trial court's decision finding that the plaintiffs had the right to the use of a ditch that the defendants had destroyed while subdividing their property. See id. at 269-274. The facts in the Brockbank case were quite similar to those in this case. The irrigation ditch in question in Brockbank had existed and been in use for nearly 30 years prior to the time that the property was divided and sold to the litigants. See id. at 269. The original owner of the land, severed the properties and sold them to different buyers without mentioning a right of way or easement in the deeds. See id. There was evidence that both parties were aware of the existence and necessity of the ditch prior to purchasing their respective properties. See id. Sometime later, the defendants destroyed the ditch and prevented the plaintiffs from bringing water through the ditch to their property. See id. Based on these facts, the Utah Supreme Court upheld the trial court's finding of an easement.

The Utah Supreme Court considered the following factors in finding an easement by implication:

- (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.

See id. at 270-71. A careful review of these factors in light of the facts of this case demonstrates that the trial court was correct in finding an easement by implication in favor of White.

First, White is a conveyee and therefore any doubts in construing the conveyance should be resolved in his favor. Second, although the deed may not reflect an express easement, the evidence is undisputed that prior to purchasing the property, Hancock showed White how the water delivery system worked and assured White that he would be able to continue to enjoy the permanent system of the ditches and the Pond to get water to his property, just the same as she had used them since 1988 and the same as they had been used before that (R. at 269, pp. 13-16). Hancock and White understood and agreed that White was to have a permanent easement in the existing system of ditches and the Pond to receive, store and use his water (R. at 269, pp. 13- 16, 96-97, 452-53). Third, White paid Hancock fair and adequate consideration for the property he purchased, which included a right to use the

historic water delivery system. White's property is of little or no value without water and the ability to properly receive, store and use that water. See supra. Fourth, it is important to note that White purchased his property, including the right to use the water delivery system, approximately three years before Randall purchased his property from Hancock (R. at 269, pp. 9-10, 18-19). Fifth, the use of the historical water delivery system was reasonably necessary, and in fact essential, in order for White to use his land for the purpose for which it was purchased. Both White and Hancock testified that there was no other means to deliver water to the White property other than the system that Randall obliterated (R. at 269, pp. 17, 447-48). Sixth, White's use of the land and the water delivery system is wholly consistent with the use made by the land's prior owners, including Hancock (R. at 269, pp. 10-18, 81-82, 105, 447-48). Finally, there is undisputed evidence that Randall was not only aware of White's use of the water delivery system at the time Randall purchased his property, but that he actually received a \$5,000 reduction in the purchase price to compensate him for White's use of the system (R. at 269, pp. 18-19, 366-67, 448-450).

In this case, the relevant factors overwhelmingly suggest that White has an easement by implication in the historical water delivery system. However, the Court erred limiting that easement to a rerouted ditch across Randall's land. If 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. It was legal error for the trial court to exclude the Pond and other critical aspects

of the historic water delivery system. This is especially true given that the Court went outside the evidence presented at trial and relied on its own topographical maps in order to craft an entirely new water delivery system. If White was entitled to an easement, then it had to be an easement for the water delivery system as it existed and was used historically. This is especially true given that White and Hancock both testified that there was no other means to deliver water to the White property (R. at 269, pp. 17, 447-48).

The Pond was a critical component of the historic water delivery system. The Pond allowed White to receive and store his irrigation water until he needed it (R. at 269, pp. 11-12). White testified that he could close the gate on the Pond and store his water, building up a four day supply. This is vastly different than the simple ditch ordered by the trial court that provides no storage and requires White to take his water when it is available. The Pond also allowed White to gather and store spring runoff and natural seepage that flowed into the Pond (R. at 269, pp. 10-11, 48-49, 447-48). Despite these key facts, the trial court limited the easement to a ditch across Randall's land and excluded the Pond from its amended decision.

The trial court appears to have relied on the fact that White presented no evidence concerning what it would cost to restore the Pond, nor any detailed evidence concerning the exact dimensions of the Pond, as a basis to exclude the restoration of the Pond from its decision (R. at 245). Nevertheless, counsel for White explained during oral argument that those details could easily be supplemented after the trial court entered its judgment (R. at

273, pp. 45-46). Moreover, White should not be punished or prejudiced by the fact that he did not think to take exact measurements of the Pond prior to Randall's unilateral decision to obliterate it. White is entitled to have the Pond restored to its original condition, or as close to that original condition as possible.

Finally, Randall violated Utah law by unilaterally obliterating the historical water delivery system relied upon by White. Section 73-1-14 provided as follows:

Any person, who in any way unlawfully interferes with, injures, destroys or removes any dam, head gate, weir, casing, valve, cap or other appliance for the diversion, apportionment, measurement or regulation of water . . . is also liable in damages to any person injured by such unlawful act.

Id. Likewise, Section 73-1-15 provided:

Whenever any person . . . has a right of way of any established type or title for any canal or other watercourse it shall be unlawful for any person . . . to place or maintain in place any obstruction, or change of the water flow by fence or otherwise, along or across or in such canal or watercourse . . . without first receiving written permission for the change and providing gates sufficient for the passage of the owner or owners of such canal or watercourse. That the vested rights in the established canals and watercourse shall be protected against all encroachments. . . . Any person, partnership, company or corporation violating the provisions of this section is guilty of a misdemeanor and is subject to damages and costs.

Id.⁴ Randall's actions in destroying the water delivery system violated both of these statutes.

First, Randall violated Section 14 by obliterating the dam that formed the Pond. Second, Randall violated Section 15 by destroying the delivery system and changing the water flow

⁴The Utah State Legislature amended Utah Code Ann. §§ 73-1-14 and 15 in 2005. Appellant's citations to these statutes are to the prior versions that were in effect at the time Randall obliterated the water delivery system and White filed his lawsuit.

without first receiving White's written permission. The Utah Supreme Court has recognized that "Utah law provides that anyone who obstructs or changes a watercourse without the permission of the right-of-way owner is guilty of a misdemeanor and subject to damages." Morgan v. Quailbrook Condominium Co., 704 P.2d 573, 578 (Utah 1985). Therefore, Randall's actions were in clear violation of Utah law.

In summary, the trial court correctly found that White had an easement across Randall's land. However, the trial court erred when it considered and relied upon topographical maps that it located through its own research, and that were not presented at trial, to craft an alternate water delivery system. If 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. It was legal error for the trial court to exclude the Pond and other aspects of the historic water delivery system. The trial court's decision therefore should be reversed and the trial court should be instructed to enter judgment consistent with its initial Findings of Fact and Conclusions of Law.

III. UTAH LAW ALLOWS FOR A RECOVERY OF ATTORNEY'S FEES AND COSTS AS AN ELEMENT OF A PUNITIVE DAMAGE AWARD.

Although there is no applicable contract or statute allowing the recovery of attorney's fees in this case, Utah law suggests that attorney's fees may be awarded as an element of punitive damages. The Court should clarify this rule of law prior to remanding this case to the trial court.

“Utah adheres to the prevailing common-law rule that attorney fees are not recoverable in the absence of a contractual or statutory basis.” Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 965 (Utah Ct. App. 1989). However, “[i]t is generally held that counsel fees and expenses of litigation are to be taken into consideration in some jurisdictions, when estimating exemplary or punitive damages, to encourage plaintiffs to bring wrongdoers to trial.” 22 Am. Jur. 2d *Damages* § 608 (2003). Utah is one of those jurisdictions where attorney’s fees and expenses can be taken into consideration when calculating punitive damages. Several Utah appellate court decisions have suggested that this is the case. For instance, in Amica Mut. Ins. Co., *supra*, this Court noted that “Utah courts have also permitted the amount of attorney fees expended to be considered in calculating punitive damages when punitive damages are warranted.” *Id.* at 966.

In several other cases, the Utah Supreme Court has hinted that attorney’s fees may be recoverable as an element of punitive damages, but those particular cases did not warrant such an award based on the facts. *See Jorgensen v. John Clay and Co.*, 660 P.2d 229, 233 (Utah 1983) (reversing an award of attorney’s fees as an element of punitive damages on the basis that punitive damages were not properly awarded in that case); DeBry & Hilton Travel Servs., Inc. v. Capitol Intern. Airways, Inc., 583 P.2d 1181, 1185 (Utah 1978) (“Counsel fees . . . can be considered as an element of damages only in those cases in which exemplary damages are or can be awarded.”); Dahl v. Prince, 230 P.2d 328, 329 (Utah 1951) (reversing

a judgment awarding attorney's fees as an element of damages because "there was no basis for an award of punitive damages.").

While these decisions each suggest that attorney's fees and costs may be recoverable as an element of punitive damages, they do not contain an affirmative holding to that effect. Accordingly, the Court should address this issue and clarify in its instructions on remand that the trial court should award White his attorney's fees and costs as an element of punitive damages.

White pled a punitive damage claim in his Complaint (R. at 3) and presented evidence at trial to support the Court's initial finding that Randall's conduct was "wilful and malicious" (R. at 112).⁵ In its initial Findings of Fact and Conclusions of Law, the trial court awarded White his attorney's fees and costs (R. at 114). Because there was no applicable contract or statute allowing the recovery of attorney's fees, counsel for White recognized that the attorney's fees could only be recovered as an element of punitive damages. Therefore, White requested that the Court amend the Judgment to award him punitive damages in the amount of \$1,000 plus the amount of his attorney's fees (R. at 159-168).⁶

⁵In Falkenburg v. Neff, 269 P. 1008 (Utah 1928), the Utah Supreme Court held that the evidence in that case supported a punitive damage award where the defendants had destroyed the plaintiffs' dam and diverting works. See id. at 1011 ("That the destruction of the diverting works, in the manner and under the circumstances shown by respondents' evidence, is a sufficient legal basis for awarding exemplary damages is a proposition too plain for argument.").

⁶Although the exact amount of White's attorney's fees was not known at that time, White suggested that the amount could be incorporated into a supplemental judgment at the conclusion of the litigation.

During the April 4, 2005 hearing, counsel for Randall responded to White's request for attorney's fees and costs by arguing that Utah law does not allow for such a recovery. Specifically, counsel argued that "our Appellate Courts and our Legislature have never adopted a rule that if punitive damages are awarded, attorney's fees can be awarded in connection with that" (R. at 273, p. 75). Following the April 4th hearing, the trial court issued its Amended Findings of Fact and Conclusions of Law and concluded that "[t]he parties should be ordered to pay their own attorney fees and costs" (R. at 247).

A more appropriate case for awarding punitive damages than the present case would be hard to find. Randall's conduct was without excuse or reason. The total destruction of White's water delivery system was of no benefit to him and the injury to White was obvious and intended. The intended effect was and has been to deprive White of the use and enjoyment of his water rights since July 2003. That Randall's actions were "willful and malicious," as stated in the trial court's initial Findings of Fact and Conclusions of Law (R. at 112), is clear in the record.

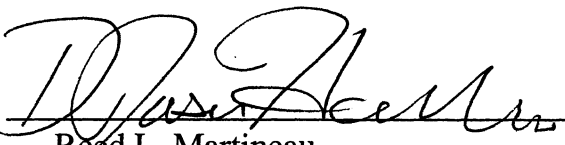
The issue of whether attorney's fees and costs can properly be awarded as an element of a punitive damage award should be clarified by this Court prior to remand. This Court should affirmatively instruct the trial court that it should award White his attorney's fees and costs as an element of punitive damages, because punitive damages are warranted.

CONCLUSION

For these reasons, the trial court's Amended Findings of Fact and Conclusions of Law and Judgment should be set aside, and the Court should instruct the trial court to enter judgment consistent with its initial Findings of Fact and Conclusions of Law, which ordered Randall to pay the costs to restore the Pond and water delivery system back to their original condition. Additionally, the Court should instruct the trial court that the trial court should award White his attorney's fees and costs as an element of punitive damages.

DATED this 24th day of February, 2006.

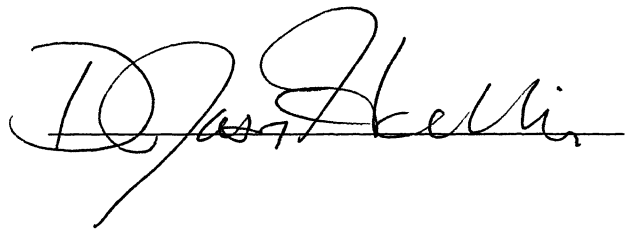
SNOW, CHRISTENSEN & MARTINEAU

By 
Reed L. Martineau
D. Jason Hawkins
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of February, 2006, I caused a true and correct copy of the foregoing **OPENING BRIEF OF APPELLANT LEON J. WHITE** to be mailed to the following:

James G. Clark
LAW OFFICE OF JAMES CLARK
Attorney for Defendant/Appellee
96 East 100 South
Provo, Utah 84606

A handwritten signature in black ink, appearing to read "David H. Helli", written over a horizontal line.

ADDENDUM

A. The trial court's initial Findings of Fact and Conclusions of Law entered on September 14, 2004 (R. at 105-116).

B. The trial court's initial Judgment entered on September 30, 2004 (R. at 153-57).

C. The trial court's Amended Findings of Fact and Conclusions of Law entered on July 26, 2005 (R. at 238-247).

D. The trial court's final Judgment Following Bench Trial entered on September 19, 2005 (R. at 254-57).

A

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

LEON J. WHITE,
Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.

JERRY RANDALL,
Defendant.

Case No. 030600302

Judge David L. Mower

This matter having come on for trial on October 10, 2003, and on November 26, 2003, before the Honorable David K. Mower, and plaintiff being present and represented by Reed L. Martineau, and defendant being present and represented by James G. Clark, and the Court having heard testimony and having admitted trial exhibits, and the Court being fully advised in the premises, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In 1988, Kaziah May Jordan Hancock, referred to herein as "May Jordan" or "Jordan," and her husband purchased approximately

38 acres, in two separate parcels, together with 34 shares of stock in the Indianola Irrigation Company. When Jordan bought the property in 1988, Don Tibbs, a neighbor who had leased the property, showed her how everything worked and how to bring water from the pond to the property later purchased by White.¹ Jordans built a residence on the property and resided there until 1997. During that period of some 8 years, they used the pond and the ditches to and from the pond to irrigate the fields formerly owned by Condley south and west of the present White homesite.

2. On July 28, 1995, a 16-acre parcel of that property, the Condley Parcel, and one share of stock in Indianola Irrigation Company were sold by Jordan to Leon White. A second parcel consisting of approximately 9 acres was sold to White on November 1, 1995, together with an additional 10 shares of Indianola Irrigation Company stock.

3. In the spring of 1997 another parcel of that property including the residence, consisting of approximately 11½ acres, was sold to Randall.

4. At the time of the sale to White, Jordan showed the property to him and explained how she and her husband used the irrigation delivery system to deliver water to the irrigable portion of

¹ Jordan testified that the property she sold to White had been purchased by her in 1988 from Clyde Condley (the "Condley Parcel") and that the ditch from the pond to and around the base of the hill below and west of White's home was the only way to get delivery of water to that land.

the property purchased by White.

5. Heavy flooding in the spring and early summer of 1983 caused the pond to overflow and wash out the dike on the west side of the pond. The water released by the breach in the dike flowed directly west to U.S. Highway 89 in a low depression as shown on trial exhibit 8.

6. Soon after the rupture of the dam Don Tibbs, a neighbor who was then leasing the property, rebuilt the dam and enlarged the pond. The dam was reconstructed to an elevation of approximately 10-12 feet. It was equipped with a discharge pipe approximately 10 inches in diameter and a control valve. The reconstruction cost was paid for in part by the U.S. Soil Conservation Service.

7. At the same time, Mr. Tibbs enlarged an existing ditch, originally constructed by the Spencer family many years before, from the pond to and around the base of the hill below White's present home. This ditch carried water to flood irrigate the approximately 15-acre Condley Parcel that extended from the bottom of the hill west of and below White's home and adjacent to the Indianola Road, to the east side of U.S. Highway 89.

8. That delivery system, including the pond and the ditches to and from the pond (the "System"), were constructed by Tibbs in the 1983-1984 period, and remained unchanged to the time the property was purchased by Jordan. And that System was used continuously by Jordan and then by White unchanged until July 2003 when

the pond was destroyed by Randall.

9. At the time of the purchase by White, that System had been in existence and unchanged for a period of some 10 years. The System was open, notorious and obvious to persons looking at the property.

10. At the time White purchased the property, Jordan assured him that he would have a permanent easement to use that same System, including the ditches and the pond located on her reserved property, to irrigate the White property.

11. Leon White in the summer of 1995 began his use of that same System, including the ditches and the pond, to irrigate his property in the same way Jordan had done. Jordan was aware of that use and approved of it. That same use continued following Randall's purchase in 1997 and through the 2003 irrigation season.

12. The pond was built initially for stock watering in the late 1930s or early 1940s.

13. In approximately 2001, Randall attempted to change the course of delivery of White's water around the pond by constructing a ditch along his east-west fenceline south of the pond. He told White he would have to use that new ditch in place of the existing ditches then in use and that he would no longer allow White to store water in the pond. That ditch, however, could not deliver irrigation water to White's property, which was at a higher level than the ditch. In fact, the ditches and the pond as constructed

by Don Tibbs and as used unchanged by both Jordans and White were the only means by which the irrigation flow could be delivered to White's property. White continued to use the ditches and pond the same as before and the ditch constructed by Randall was never put to use. White's use of the System was reasonably necessary, in fact essential to his use and enjoyment of his property and his water rights.

14. The ditch to the pond as well as the ditch from the pond to White's property were open and plain to be seen as evidenced by the following facts:²

² The extent to which the prior use was or might have been known to Randall is only one of eight factors to be considered as bearing on an easement by implication. As set out in Adamson v. Brockbank, 185 P.2d 264 (Utah 1947) those factors are:

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.

a. The testimony of both Jordan and White was clear and definite that the System was open, visible, and, in the words of Jordan, "It was plain as day."

b. Other witnesses called by Randall were unable to testify concerning the System for lack of knowledge:

i. Mr. Spencer did not go on the property or see the dam, etc., after Tibbs rebuilt the dam and completed the System but recalled that in the '40s or '50s they had plowed a ditch around the base of the hill to water two trees next to the Indianola Road.

ii. Mr. Bigler was aware Tibbs was working on the dam but never inspected it because it was beyond the jurisdiction of the irrigation company.

iii. Mrs. Tibbs, although generally aware of the reconstruction, paid no attention to the System or its use by Jordan and White.

c. Randall testified that in 1997 or 1998 he helped White clean the ditch that delivered water to the pond.

d. Randall tried to change the long-established means of delivery of the water to the pond by a ditch along his south fence line. That ditch was never used and, in any event, could not have delivered water to White's property.

Citing Restatement of the Law of Property, paragraph No. 476, page 2977.

e. The System had been in existence and continuous use since 1983 or 1984 without change.

f. Significantly, Mr. Tibbs, who constructed and used the System, did not appear to testify at either day of the trial either in person or by deposition.

g. Although disputed by Randall, Jordan testified on direct and on recall that the subject of the pond and White's right to the use of it and the System came up with Randall prior to the sale and that she reduced the purchase price at his request by \$5,000 to account for that easement.

h. In view of the foregoing facts, Randall's testimony that he was not aware of White's right to use of the System and Jordan's prior use of the System is not credible. White had a duty to notice and see what was plain to be seen.

15. Randall's claim as to destruction of his many chickens lacks credible support in that:

a. Except for the one occasion when he told the sheriff that a dog had his chicken down but not dead, he never called Whites to advise them of any further problems.

b. He never called the sheriff as to any further problems.

c. He took no photos of any dead birds.

d. He didn't ever see any other chickens being attacked or killed.

e. He produced no other witnesses to verify his claim.

f. In view of the foregoing facts, Randall's claim is unsupported and not credible.

16. Randall's claim as to the death of his foal lacks credible support in that:

a. Neither he nor anyone else witnessed the death of the foal.

b. No tests were made to determine the cause of the foal's death.

c. The dog claimed to have caused the problem was in the Whites' pasture with them at the time the supposed attack by dog took place.

d. In view of the foregoing facts, Randall's claim has not been established by a preponderance of the evidence.

17. Randall's conduct by engaging in self-help in destroying the pond, rendering the entire System unusable and leaving White with no means to use and enjoy his property and water rights was without right and was willful and malicious as shown by the following facts:

a. His conduct in attempting to force White to abandon his right to use the System and to use a ditch constructed by him along his south fenceline which could not deliver White's water to his property, and which White would not agree to;

b. His conduct toward White in locking the valve to the pond;

c. His conduct toward White and his young son in name calling and inappropriate and wholly unsupported claims that White or his son had shot at him;

d. His inappropriate and careless threat to meet White with a gun when in fact no shots had been fired at him;

e. His statement that he would no longer store White's water in his pond;

f. His destruction of the dam and the pond;

g. His conceded conduct in killing not one or two, but an inordinate number of dogs belonging to White and his neighbors and his announced intention to continue to do so; and

h. His careless, unsupported and inappropriate claims made in this suit that White or his family had shot at him, which was inconsistent with his prior confrontation with 17-year-old Taylor White with the charge that it was the boy who shot at him and White's explanation that neither he nor his son had even been in the area when the shots were supposedly fired.³

CONCLUSIONS OF LAW

1. White holds a valid easement for the use and enjoyment of the System across Randall's property for the conveyance, storage

³ Adamson v. Brockbank, supra, at p. 278.

and delivery of his water rights as heretofore used and enjoyed by Jordan and by him.

2. Randall had and has no right to obstruct or change the System "without first receiving written permission for the change" from White. U.C.A. § 73-1-15 (1953). No such permission was ever requested or received.

3. Randall is charged with notice and knowledge of the System and White's right to the use and enjoyment thereof as heretofore enjoyed.

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

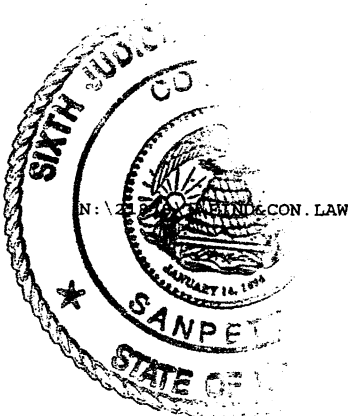
5. Randall is obligated to pay the cost of restoration of the pond and the System to their condition at the time they were destroyed and/or rendered useless.

6. White is entitled to an order enjoining Randall from threatening bodily harm to White or other members of his family.

7. White is entitled to recover his costs, including reasonable attorney's fees incurred herein.

DATED this 2 day of ^{September}~~March~~, 2004.

BY THE COURT:




David L. Mower, District Court Judge

by Sandy Neill
as per phone call
9/14/04

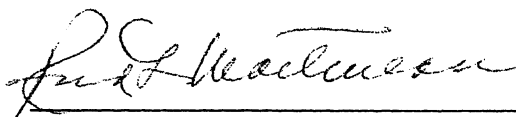
Certificate of Service

Reed L. Martineau states:

That he is attorney for plaintiff herein; that she served the attached proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case No. 030600302, Sixth Judicial District Court, Sanpete County, State of Utah, upon the following parties by placing a true and correct copy thereof in an envelope to:

Mr. James G. Clark
96 East 100 South
Provo, Utah 84606
Attorneys for Defendant

and causing the same to be hand delivered on the 5th day of March, 2004.

A handwritten signature in cursive script, appearing to read "Reed L. Martineau", is written over a horizontal line.

Reed L. Martineau

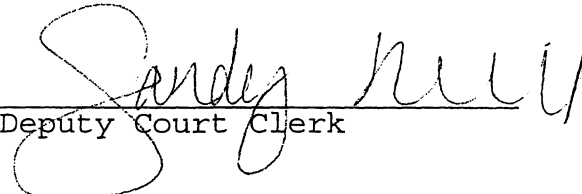
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030600302 by the method and on the date specified.

METHOD NAME

Mail	JAMES G CLARK ATTORNEY DEF 60 E 100 S #100 PROVO, UT 84606-4652
Mail	REED L. MARTINEAU ATTORNEY PLA 10 EXCHANGE PLACE, 11TH FLOOR P.O. BOX 45000 SALT LAKE CITY UT 84110-0000

Dated this 14 day of September, 2004.


Deputy Court Clerk

B

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 FRIEDMAN
SANPETE COUNTY CLERK
BY *[Signature]* DEPUTY

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:



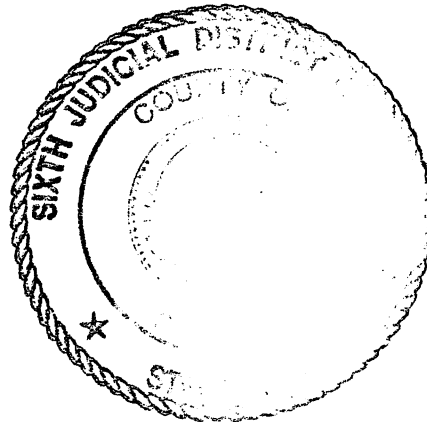
David K. Mower, District Court Judge

Approved as to form:

JAMES G. CLARK

Counsel for Defendant

Date _____



N:\21878\1\JUDGMENT

Certificate of Service

Alison M. Wood states:

That she is employed in the law offices of Snow, Christensen & Martineau, attorneys for plaintiff herein; that she served the attached proposed JUDGMENT, Case No. 030600302, Sixth Judicial District Court, Sanpete County, State of Utah, upon the following parties by placing a true and correct copy thereof in an envelope to:

Mr. James G. Clark
96 East 100 South
Provo, Utah 84606
Attorneys for Defendant

and causing the same to be mailed first class, postage pre-paid, on the 14th day of September, 2004.

A handwritten signature in cursive script that reads "Alison M. Wood". The signature is written in dark ink and is positioned above a horizontal line.

Alison M. Wood

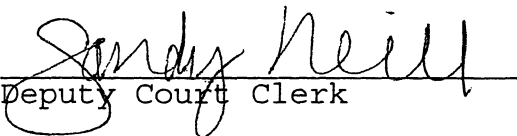
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030600302 by the method and on the date specified.

METHOD NAME

Mail	JAMES G CLARK ATTORNEY DEF 60 E 100 S #100 PROVO, UT 84606-4652
Mail	REED L. MARTINEAU ATTORNEY PLA 10 EXCHANGE PLACE, 11TH FLOOR P.O. BOX 45000 SALT LAKE CITY UT 84110-0000

Dated this 30 day of Sept, 2004.


Deputy Court Clerk

C

2005 JUL 26 09 05 52

CLERK
dnelson

DISTRICT COURT, SANPETE COUNTY, UTAH

160 NORTH MAIN

MANTI, UTAH 84642

Telephone: 435-835-2131 Fax: 435-835-2135

LEON J. WHITE,

Plaintiff,

vs.

JERRY RANDALL,

Defendant.

**AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Case No. 030600302

Assigned Judge: DAVID L. MOWER

INTRODUCTION

Trial was held in this case on October 9, 2003 and November 26, 2003 in Manti, Utah. The parties were present with their respective lawyers, Mr. Martineau for the plaintiff and Mr. Clark for the defendant. Witnesses testified, namely: Leon White, Kaziah May Hancock, Teesha Gonzalez, Taylor White, Samuel Gonzalez, Gary Larsen, Kent Spencer, Cheryl Tibbs, John Bigler, Norma Bigler, Ricky Allshouse, Jerry Randall, Pamela Randall, and John R. LaChance.

The case was taken under advisement. Unfortunately there was an unintentional delay in issuing a decision. The Court accepted the proposed findings of fact and conclusions of law submitted by the plaintiff on September 14, 2004. Thereafter, the defendant filed a motion to alter, amend, or supplement the findings of fact and conclusions of law arguing that they were not in harmony with the findings at the end of trial on November 26, 2003. The Court granted

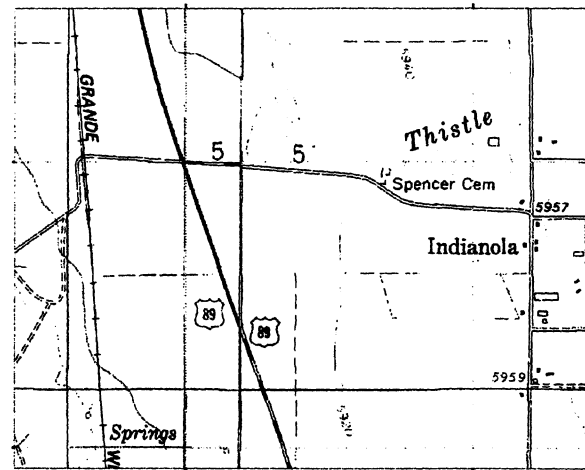
that motion following oral argument on April 4, 2005 but took the case under advisement as to how the findings of fact and conclusions of law would be amended. The Court has reviewed the trial transcripts and now issues the following decision.

FINDINGS OF FACT

1. There is a place called Indianola, Utah. It is shown on the accompanying map.

2. It is in northern Sanpete County. The main land use is agricultural. Water flows from east to west and from south to north.

3. The United States Geologic Survey publishes maps. The maps used here are portions of two USGS 7-1/2-minute



#1.

- quadrangle maps which have been "stitched" together to make a single map. USGS 7-1/2-minute maps contain contour lines and locations of water sources, courses and storage facilities, both natural and man-made. The maps used here were not presented by the parties. They are part of my own mapping software. I used the maps to help familiarize myself with the area. I showed the maps to counsel during oral argument on April 4, 2005.
4. Each 7-1/2-minute map has a title which is shown on the map itself. The title portion of

the two maps used here shows:

INDIANOLA, UTAH
N3945—W11122.5/7.5

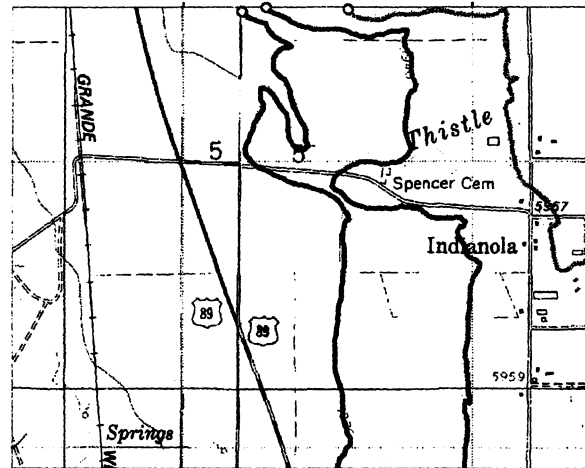
1967
AMS 3763 IV SW—SERIES V897

SPENCER CANYON, UTAH
364 BANTAGUIN PEAK 5' QUADRANGLE
39111-05-1F-024

1978
DMA 3663 I SE—SERIES V897

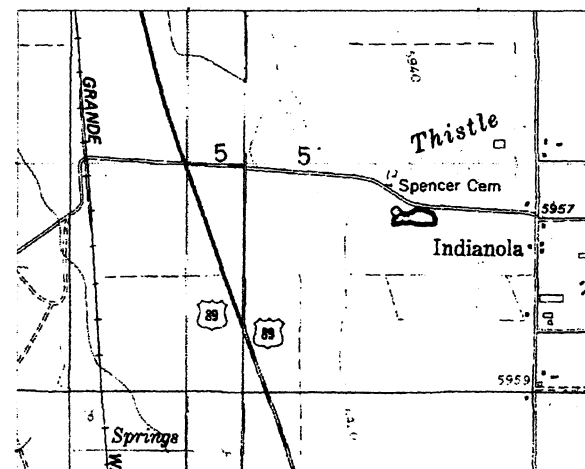
#4.

5. I have modified the above map by highlighting the contour lines.
- The green line represents an elevation of 5,960 feet above sea level;
 - The red line, 5,940 feet; and
 - The blue line, 5,920 feet.



#5.

6. There is a pond which is of particular interest in this case. It is highlighted in blue on this map.
- The pond was either natural or of long-ago construction.
 - Water in the pond came from nearby springs and seeps.
 - Before 1987 there were no water outflow controls on the pond.



#6.

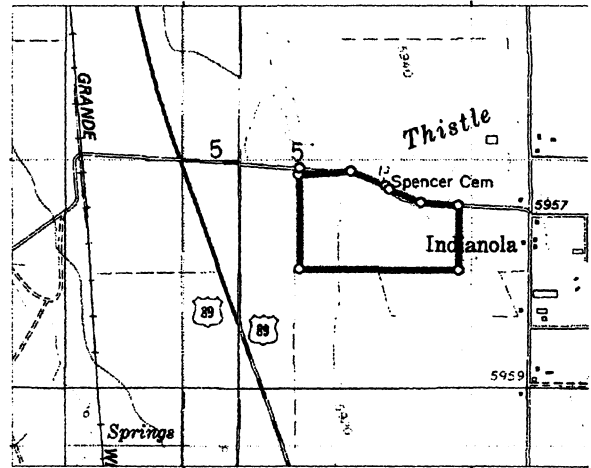
7. There is a person named Kaziah May Hancock. She has also been known as Kaziah May Jordan, Kaziah Jordan and May Jordan.

- a. She is the immediate predecessor in interest to the parties in this case
- b. Her immediate predecessor, one Spencer, was an absentee owner who leased the land for many years to a relative, one Tibbs, who in 1987 expanded the pond and installed a head gate and a valve to control the outflow of water.

- c. The legal description of a portion of her land is shown in green on this map. This legal description is found in trial exhibit number 17.

- d. The pond is within this legal description.

- e. Neither Tibbs, nor Spencer, nor Hancock ever owned any rights to

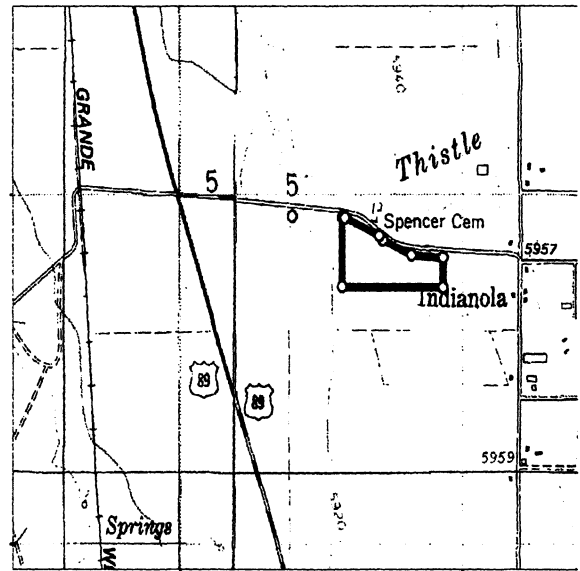


#7. C.

- f. No easements are shown in any of the documents presented in Court.
- g. Tibbs' lease expired when Spencer sold to Hancock in 1988. Thereafter Hancock had no contact with Tibbs.

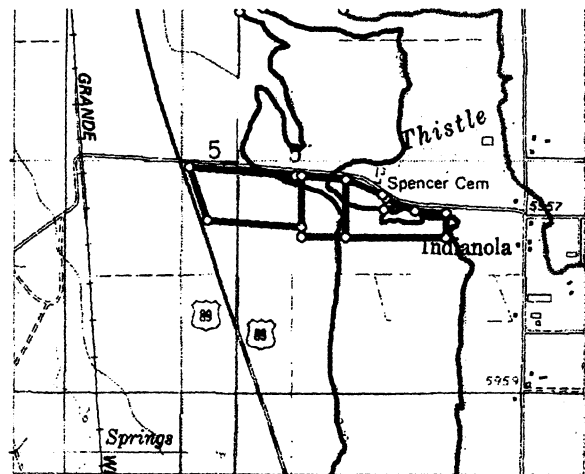
- c. Ms. Hancock told Mr. White that he could trespass on her land in order to open the valve at the pond and divert water to the parcels she sold to him.

9. In 1996 the defendant, Mr. Randall, acquired land from Ms. Hancock. This map shows what he acquired.



#9.

10. Here is a map showing the pond, the contour lines, and the property owned by White and Randall.



#10.

11. Between 1995 and 1996 White and Hancock were neighbors.
 - a. White moved a mobile home onto his west parcel (next to the one later sold to Randall).
 - b. Hancock lived in the home on the parcel that she later sold to Randall.
 - c. White used water from the pond to flood irrigate his eastern-most parcel.
12. The only way water can possibly flow from the pond onto the NE corner of White's property is for it flow below the 5,940 contour line and above the 5,920 contour line.
 - a. These contour lines are very close together in the vicinity of the residences on the parties.
 - i. The White home is just below the 5,920-foot contour line.
 - ii. The Randall home is on a hill just above the 5,940-foot contour line.
 - b. Water released through the valve at the pond would flow toward the northeast corner of Mr. White's property.
 - c. May Hancock used water from the pond for that very purpose during the time that she owned all the property. However, when she released water from the pond she took care not to drain it; in fact, she took care to maintain parity between the water inflow and outflow rates.
13. The Indianola Irrigation Company owns water rights and supplies water to its stockholders.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, Case number 030600302, Page -8-

- a. Its distribution system consists of pipelines, valves, ditches and head gates.
 - b. Most of the stockholders receive water through the pipelines.
 - c. There is a ditch that will transport irrigation-company-water into the pond.
14. Mr. White is a stockholder in the Indianola Irrigation Company. His stock certificates were issued on July 27, 1995 and March 2, 1996.
15. White continued to use the water from the pond after he and Randall became neighbors.
- a. He trespassed on Randall's land to operate the water-flow controls.
 - b. He trespassed to clean and maintain the ditch.
16. Randall became convinced that White had no right to trespass nor to release water from the pond.
- a. He chained and locked the water-flow controls.
 - b. He confronted Mr. White and challenged his claimed right to trespass and to remove water from the pond.
 - c. Eventually he caused the pond to be removed.
17. Mr. White has asked the Court to order the restoration of the pond. However, he presented no evidence about the cost to do so, nor any evidence about the dimensions of the pond.
18. It should be physically and geographically possible for water to flow across Mr. Randall's property and onto Mr. White's property.

19. In 1947 the Utah Supreme Court issued an opinion in the case of Adamson v. Brockbank.

The case is reported at 112 Utah 52, 185 P.2d 264.

20. The definition of a warranty deed is found in statutory law, namely, Section 57-1-12, Utah Code, which provides, in part, as follows:

A warranty deed when executed as required by law shall have the effect of a conveyance ... of ... all the appurtenances

21. As I read Adamson v. Brockbank, a warranty deed can be construed to convey an easement, even when the deed contains no easement description, because an easement is an appurtenance.

22. Mr. Randall owned chickens.

23. The chickens were killed by dogs owned by or under the control of Mr. White.

24. The value of the chickens is \$198.00.

25. Mr. Randall owned a very young horse called a foal.

26. It was killed by a dog owned by or under the control of Mr. White.

27. No evidence was presented about the value of the foal on the date of death.

CONCLUSIONS OF LAW

A. Mr. White should be awarded a judgment granting him an easement across Mr. Randall's land.

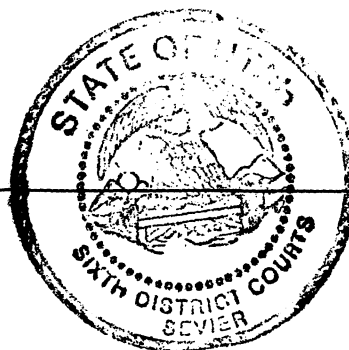
1. The easement will be exactly equal in both length and width to the existing ditch which conveyed water both to and from the now non-existent pond.

2. The ditch will be reasonably connected in the space where the pond once was.
 3. The easement will include the right to trespass on Mr. Randall's land for reasonable ditch maintenance and for controlling the flow of water.
- B. Mr. Randall should be awarded judgment against Mr. White for \$198.00.
- C. The parties should be ordered to pay their own attorney fees and costs.
- D. The parties should be advised that no water rights of any kind are included in this order.

Mr. Clark is directed to draft an appropriate judgment and to submit it for execution by following the procedure set forth in Rule 7, Utah Rules of Civil Procedure.

Date 21 Jul, 2005

David L. Mower
David L. Mower
District Court Judge



Certificate of Notification

On July 21, 2005, a copy of the above Amended Findings of Fact and Conclusions of Law was sent as follows:

Mr. Reed Martineau
Snow, Christensen & Martineau
10 Exchange Place
Salt Lake City, UT 84145

Mr. James G. Clark
96 East 100 South
Provo, UT 84606

Gandy Heil

D

2005 FEB 18 10 11 40



JAMES G. CLARK, USB #3637
Attorney for
43 East 200 North
Provo, UT 84606
Telephone: (801) 375-1717
Facsimile: (801) 375-1172

**IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR
UTAH COUNTY, STATE OF UTAH**

LEON J. WHITE,)	
)	JUDGEMENT FOLLOWING BENCH
Petitioner,)	TRIAL
)	
vs.)	
)	
JERRY RANDALL,)	Civil No. 030600302
)	Judge: David L. Mower
Respondent.)	
)	

The Above entitled matter came on before the Court for trial on October 9, 2003 and November 26, 2003 in the above entitled Court. The parties were present and represented by their respective attorneys. The Court previously adopted proposed finding of fact and conclusions of law submitted by the Plaintiff on September 14, 2004. Defendant filed a timely motion to alter, amend, or clarify and to set aside the prior judgement which was entered. On April 4, 2005 the Court heard oral arguments on the motion and granted the motion and took under advisement the appropriate findings, conclusion and judgement to be entered.

On July 21, 2005, the Court made and entered its amended Findings of Fact and

Conclusions of Law, and good cause appearing therefore, now makes and enters the following judgement.

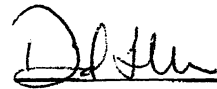
JUDGEMENT:

1. Plaintiffs claim for a judgement by implication in a irrigation ditch running through and across the Randall property is granted. The easement will be exactly equal in length, width, and depth to the existing ditch which conveyed water both to and from the now non-existent pond.
2. The irrigation ditch will be reasonably connected between the area where it entered the pond and it exited the pond with sufficient width, depth and length to allow it to convey irrigation water across the real property previously occupied by the pond.
3. The ditch will constitute an easement for irrigation purposes only, and shall include a right of access by Mr. White including the right to trespass on Mr. Randall's land for reasonable ditch maintenance and for controlling the flow of water.
4. That Defendant Jerry Randall is awarded judgement against Mr. White for \$198 for the value of domestic fowl killed by Mr. Whites' dog or dogs.
5. That each of the parties shall pay their own attorneys fees and bear their own costs.
6. No water rights of any kind are included in this order.
7. That the Court has carefully considered the additional claims and causes of action

of the parties, finds them to be without merit, and orders them dismissed with no cause for action.

DATED AND SIGNED this 14 day of September, 2005.

BY THE COURT:



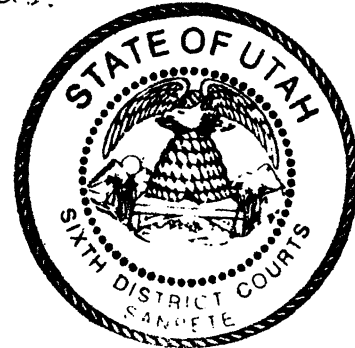
Hon. David L. Mower
District Court Judge

Approved as to form:

MR. MARTINEAU'S OBJECTION
IS OVERRULED.



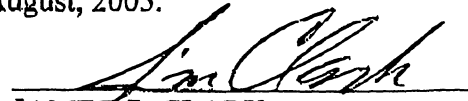
Reed L. Martineau



NOTICE TO PARTIES

PLEASE TAKE NOTICE that the undersigned, attorney for the Plaintiff, will submit the above and foregoing, to a District Court Judge, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 7(f), Utah Rules of Civil Procedure.

DATED AND SIGNED this 10TH day of August, 2005.


JAMES G. CLARK
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above and foregoing document as follows:

☒ mailed a true and correct copy of the foregoing first class 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 10TH day of August, 2005.

