

2005

## Leon J. White v. Jerry Randall : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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LEON J. WHITE,

Plaintiff/Appellant,

Appeal No. 20050980-CA

vs.

ORAL ARGUMENT REQUESTED

JERRY RANDALL,

Defendant/Appellee.

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**REPLY BRIEF OF APPELLANT LEON J. WHITE**

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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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## **RESPONSE TO APPELLEE'S STATEMENT OF FACTS**

The opening brief of Appellant Leon J. White ("Mr. White") sets forth the facts that are relevant to this appeal. The brief of appellee Jerry Randall ("Mr. Randall") contains its own statement of facts. Without waiving his other objections, Mr. White specifically disputes the following paragraphs of Mr Randall's statement of facts.

1. Mr. White disputes paragraph 3 in part. Mr. Randall states that the pond covered 1.2 acres, and it was between eight and ten feet deep. Based on these figures, the pond could hold no more than twelve acre-feet of water. (R. at 270, pp. 296, 365).

2. Mr. White disputes paragraph 4. Mr. Tibbs did not use the canal for flood irrigation. However, he did use it to water his land. At the time of the conveyances, Ms. Hancock, Mr. White, and Mr. Randall knew that Mr. White relied on the pond as part of his irrigation system. (R. at 270, pp. 447-48).

3. Mr. White disputes paragraph 7. The evidence establishes that in addition to being on notice of Mr. White's use at the time of conveyance, Mr. Randall was also aware of Mr. White and Ms. Hancock's arrangement. Mr. Randall saw the canal before he purchased the land. He described it as "the one that [Mr. White] used to irrigate." (R. at 270, p. 367) (emphasis added). Ms. Hancock informed Mr. Randall or his agent of the easement before the sale. Mr. Randall actually negotiated a discount because the pond was "absolutely worthless to him." (R. at 270, p. 450).



4. Mr. White also disputes paragraphs 10 through 14. Under Utah law, Mr. Randall had no right to destroy the irrigation system. Mr. Randall's allegations that Mr. White could not impound water are factually and legally incorrect. The water was impounded in the same way by both Mr. Tibbs and Ms. Hancock before Mr. White. The pond was reconstructed in 1984 with funds and specifications provided by the Soil Conservation Service. Mr. Randall's animals had access to the pond to drink the water.

### **ARGUMENT**

#### **I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT BASED ITS DECISION ON INDEPENDENT RESEARCH NEVER SUBMITTED AS EVIDENCE.**

Judge Mower recognized a foundational principle of the American legal system before he introduced his patchwork of self-created maps, i.e. that courts must decide cases based solely on the evidence in the record. He then stated bluntly, "I'm here to tell you I have violated that [rule]." (R. at 273, p. 3). The maps were never introduced into the record. The trial court even conceded that his mapping software "[gave] lots of disclaimers saying, 'don't settle your lawsuits based on what you draw on these maps.'" (R. at 273, pp. 8-9). The trial court should not have considered these maps, much less relied upon them to overturn its initial decision, and this Court must reverse the trial court's Amended Findings of Facts and Conclusions of Law.

A trier of fact may only consider evidence in the trial record and may not conduct outside research. *See Salt Lake City v. United Park City Mines Co.*, 503 P.2d 850, 852

(Utah 1972). The Utah Supreme Court has noted that only evidence in the trial record may be considered:

It is elementary that in matters outside of the field of general knowledge and in cases where the testimony of experts or those particularly familiar with matters at issue is necessary, 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

*Id.* This principle clearly bars the trial court from considering its own maps. They were not part of the trial record, and the judge found them while conducting his own independent research. Mr. Randall asserts several alleged exceptions to the general rule in an effort to excuse the trial court's actions. As will be shown below, each of these alleged exceptions are inapplicable and should be rejected by this Court.

**A. The maps went far beyond the evidence in the record and contradicted unrebutted trial testimony.**

The maps — which contained rudimentary contour lines — were not a collection of the evidence already presented at trial. They were a drastic departure from the evidence in the trial record and must be excluded. In *United Park City Mines*, the Utah Supreme Court held that a judge erred when he considered a book and a computer model not in the record. *See id.* The court noted, “the findings of all triers of fact . . . must be based upon testimony of witnesses or evidence made a part of the record.” *Id.* As noted above, the evidence was without dispute that the historic pond and delivery system were the only way to get water to the White property.

Mr. Randall argues that the maps should be allowed because they amounted to a collection of information already in evidence. However, nothing in the record revealed such exact information about the land's subtle elevation changes. For instance, the map submitted by Mr. Randall focuses on his property's legal description; it has no contour lines. (Def.'s Ex. 1). Mr. White's and Ms. Hancock's testimony also contradicts the maps. They testified that the irrigation of Mr. White's land was impossible without the pond. (R. at 269, p. 17; R. at 270, pp. 447-48). In fact, Mr. White's testimony that the land was "flat" is the only evidence that addresses the land's topography. (R. at 269, p. 9). Indeed, the trial court's maps conflict with the evidence in the trial record.

Judge Mower also acknowledged that the maps provided additional information that was independent of the evidence presented at trial:

... the other things that I found by looking at this map are these numbers right here. Here's 59-59, and a 59-57, and I think there's a number right there that's 59-40 that's kind of standing of its edge, and there's a 59-20 right there ... I think these are all contour marks or elevation.

(R. at 273, pp. 11-12) (emphasis added). The maps' contour lines were the only support for the trial court's conclusion that "it should be physically and geographically possible for water to flow across Mr. Randall's property and onto Mr. White's property [without the use of the pond]." (R. at 238-45; R. at 270, p. 447). Since a trier of fact may not consider such "found" information when they decide a case, the trial court's judgment must be reversed.

**B. The preservation rule allows this appeal because the court committed plain error and the exceptional circumstances doctrine applies.**

The trial court admitted its own legal error immediately before it displayed the maps during the April 4, 2005 hearing. In such a bizarre situation, any objection would have been pointless, since the trial court had already considered its substance and expressly rejected it. Moreover, a party may appeal a legal error even if that party did not object when the trial court committed plain error, or the party's inaction was excused by exceptional circumstances. Two policy considerations underlie these rules of law. First, an objection provides the trial court an opportunity to consider his or her actions and possibly correct them. Second, litigants should not be allowed to omit objections as part of a strategy to prevail on appeal. *See State v. Cram*, 2002 UT 37, ¶ 11, 46 P.3d 230.

This Court will probably never encounter a more obvious example of plain error. A trial court commits plain error when its mistake was or should have been apparent at the time of decision, regardless of whether the parties should have objected. *See State v. Holgate*, 2000 UT 74, ¶¶ 17-18, 10 P.3d 346. Judge Mower's legal error was obviously apparent to him at the time of his decision; he admitted that his actions were illegal and improper. (R. at 273, pp. 2-12; Appellant's Br. at 15-17).

The exceptional circumstances rule also applies. An appellate court must allow an appeal that was not properly preserved if a party did not object because of "procedural anomalies." *State v. Malaga*, 2006 UT App 103, ¶ 9, 132 P.3d 703. There are two such anomalies in this case. First, a judge rarely admits that he is violating a cardinal rule of

law, especially as the basis for its ruling on a key issue in the case as occurred here. (R. at 273, pp. 9-10), (Appellant's Br. at 16). In these rare instances, objections are pointless because the trial court has already considered and rejected their merits. The only reason to object is to dodge the preservation rule. However, that rule is meant to encourage meaningful objections, not to waste the court's time and force parties to jump through procedural hoops.

Second, counsel for Mr. White did not know that the trial court would base its decision on these improper maps at the time that it first presented them simply as a casual reference. The trial court suggested that the maps were merely illustrations. (R. at 273, p. 3). Additionally, Judge Mower acknowledged the maps' illegality before he improperly accepted them as having probative value. *See id.* Counsel had no way of knowing what the trial court intended to do with the maps. It was not until the trial court issued its Amended Findings of Fact and Conclusions of Law that counsel realized the gravity of the trial court's legal error.

**C. The maps were not proper subjects of judicial notice because they were admittedly unreliable.**

This Court must trust the mapping software manufacturer's assessment of its product over the trial court's own decision. Judge Mower concedes that his mapping software "gives lots of disclaimers saying, 'Don't settle your lawsuits based on what you draw on these maps.'" (R. at 273, pp. 8-9). However, the trial court then ignored those warnings and did exactly that. A court may only take judicial notice of a map if it is

“capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>1</sup> See Utah R. Evid. § 201(b).

In *U.S. v. Burch*, 169 F.3d 666 (D. Colo. 1999), a case on which Mr. Randall relies, a federal district court applied the identical federal rule to maps. The court noted the general rule that courts may take notice of official maps. However, the court held that the map in question, which was allegedly based on an official survey, was not sufficiently reliable. *Id.* at 671-72. The map in question had been photocopied and annotated with a city’s boundaries. “This,” the court notes, “is not a source whose accuracy cannot be questioned.” *Id.* at 672.

This case is stunningly similar. First, the mapping software, much like photocopying, does not guarantee accuracy. Mr. Randall tries to characterize these as official United States Geological Survey (“USGS”) maps, but they are not. Instead, they came as a part of a software package marketed by the “I-Gauge Mapping Corporation.” (R. at 273, p. 4). If the software did use USGS maps as a starting point, no evidence suggests that the software exactly reproduced the official surveys. In fact, only one piece of evidence speaks to the software’s reliability and credibility, i.e. its manufacturer’s warning that the maps were not reliable enough for use in litigation. (R. at 273, pp. 8-9).

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<sup>1</sup>Courts may also take judicial notice of facts which are generally known in the community. However, the general public certainly has no knowledge of the precise topographical intricacies of two small tracts of land in rural Utah. See Utah R. Evid. § 201(b).

Second, Judge Mower's map-making technique is also unreliable. The judge was forced to assemble large maps from multiple smaller ones because of his software's limited capabilities.<sup>2</sup> Additionally, the judge himself annotated the maps using the rudimentary tools that accompanied this ten-year-old software. (R. at 273, pp. 5, 9-13). Neither this Court nor the litigants can verify this jigsaw puzzle-like process because there is no record of the maps as they originally existed. In fact, nothing suggests that this technique is accepted among cartographers. The parties do not even know whether the maps presented at the April 4, 2005 hearing are the same ones used in the Amended Findings of Fact and Conclusions of Law.

Mr. Randall attempts to support Judge Mower's cartography skills by analogizing his maps to obvious geographical facts and survey maps prepared by well-trained professionals. However, a terrain feature's location is more reliable than these homemade maps. A mountain's location can be verified. Often, the general public knows of the very features discussed. Here, as in *Burch*, the public has no knowledge of the information, and maps cannot be verified because they are not the product of a reliable process.

Additionally, in *Graves v. Florida*, 587 So. 2d 633, 633-634 (Fla. Dist. Ct. App. 1991), and *South Shore Land Co. v. Petersen*, 226 Cal. App. 2d 725, 745 (Cal. Ct. App.

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<sup>2</sup>In his Amended Findings of Fact, the judge notes that "the maps used here . . . have been 'stitched' together to make a single map." (R. at 238).

1964), courts took judicial notice of official surveys, not annotated reproductions.<sup>3</sup> The maps used here are clearly less reliable and they are definitely subject to dispute. (R. at 269, pp. 17, 447-48; R at 273, pp. 8-9).

**D. The trial court's use of its own independent maps is reversible error.**

Mr. Randall cites the dissent in *Salt Lake City v. United Park City Mines* to suggest that the introduction of extrinsic evidence is not “ipso facto reversible error.” 503 P.2d 850, 853 (Utah 1972). However, the dissent itself concedes that the majority’s central holding in that case was that “[ipso facto reversible] error is committed as soon as the trial judge indulged in [outside research] irrespective of the weight, credibility and sufficiency extant up to the time the case is closed.” *Id.* at 853. The Utah Supreme Court reversed the trial court’s judgment not because of the sufficiency of the evidence, but because of “the impropriety of the methods used.” *Id.* at 852. The court then remanded the case for a new trial.<sup>4</sup>

The trial court here committed this exact same error. In both cases, the court relied heavily on the probative weight of their own outside, independent research. Judge Mower relied on his mapping software, and the *United Park City Mines* court relied on

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<sup>3</sup>Like the court in *Burch*, the court in *South Shore Land Co.* makes a point to limit their holding to “official” surveys, not reproductions. *See South Shore Land Co.*, 226 Cal. App. 2d at 745.

<sup>4</sup>The Utah Supreme Court determined that remand for further consideration was not appropriate, because it was unlikely that the appealing party would receive “fair and impartial” consideration of their claims. *United Park City Mines Co.*, 503 P.3d at 852.



books and a computer model. In both cases, the courts' error raises the same serious doubts about whether the trial court could disregard the evidence and adjudicate the case fairly on remand.

Even if the error was not *per se* reversible, Mr. Randall fails to show that without the maps, "believable evidence preponderates in [his] favor . . . ." *Id.* at 853. Mr. White and Ms. Hancock both testified without contradiction that the land could not be irrigated without the pond, and White claimed that the land was "flat." (R. at 269, pp. 3, 10-11, 48-49; R. at 270, pp. 447-48). In the absence of the trial court's improperly considered maps, no evidence supports the trial court's proposition that water could flow from Mr. Randall's land to Mr. White's as outlined in the Amended Findings of Fact and Conclusions of Law.

The trial court committed reversible error. However, unlike *United Park City Mines*, this Court is not limited to ordering a new trial. In that case, the court only ordered a new trial because it did "not know what the judgment might have been [had the trial court based their opinion on the record]." 503 P.2d at 852. Here, however, the Court has a written opinion that represents the trial court's original findings and conclusions before they were tainted by the maps. Thus, the trial court's initial Findings of Fact and Conclusions of Law must be reinstated. This Court should order a new trial only if it finds this remedy inappropriate.

**II. THE TRIAL COURT ERRED WHEN IT CHANGED MR. WHITE'S EASEMENT BY DRAMATICALLY ALTERING THE WATER DELIVERY SYSTEM IN WAYS THAT FUNDAMENTALLY TRANSFORMED ITS UTILITY.**

A trial court's wholly unsupportable amateur engineering cannot alter the scope of an easement by implication. Thus, this Court must order Mr. Randall to restore the historical water delivery system. Easements by implication "[arise] as an inference of the intention of the parties to a conveyance of land." *Adamson v. Brockbank*, 185 P.2d 264, 270 (Utah 1947). This inference is "an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words." *Id.* This Court should draw two principles from the general rule. First, easements are derived from an inference created before the conveyance. Second, parties' intentions and expectations determine an easement's scope. In this case, there can be no question as to the scope, purpose or need served by Mr. White's easement as it existed before being destroyed. That easement had been in existence and constant use at least since the pond was reconstructed with Soil Conservation Service funds by Mr. Tibbs, Ms. Hancock and Mr. White.

Mr. Randall argues two propositions. First, he suggests that a trial court, with no evidence in the record and no known irrigation expertise, can fundamentally alter an easement. Second, he contends that the trial court's ruling was correct because Mr. White had no right to store his water in the pond. Mr. Randall is wrong on both counts. This section first analyzes Mr. White's undisputed easement, then disproves each of Mr. Randall's contentions.

**A. Mr. White's right to an easement is undisputed.**

All parties agree that Mr. White has the right to receive water from the canal. The trial court, in both its initial and amended rulings, held that an easement exists. It first noted that Mr. White was entitled to “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 . . . .” (R. at 113-14). In its amended decision, which improperly relied on the maps, the trial court still held that “Mr. White should be awarded a judgment granting him an easement across Mr. Randall’s land . . . . The easement will be exactly equal in both length and width to the existing ditch . . . .” (R. at 246). Mr. Randall accepts this conclusion. He claims “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.” (Appellee’s Br. at 21).

Since the easement’s existence is unquestioned, this Court must determine its appropriate scope by determining what the parties knew at the time they purchased their land, and what inference the Court can draw about their intentions. As the facts show, both parties knew that Mr. White had the right to use the pond to store water. Mr. White testified that when he purchased his tract from Ms. Hancock, water flowed through what is now Mr. Randall’s property “and came across down into [the] pond. Then there’s a valve and everything in the pond, [and] it would come through that.” (R. at 269, p. 10). Before he purchased the property, he was “concerned” that the water flow would be shut

off at some future time. Ms. Hancock ensured him that his rights were permanent. *See id.* at 13-14.

Mr. Randall also understood Mr. White's rights when he purchased his tract. When asked whether he knew of the historical use of the water system, Mr. Randall answered in the affirmative:

- Q. Okay. When you bought the property, you walked the property, did you?  
A. I bought the property, yes.  
Q. You walked the property that you bought?  
A. I walked it, yes.  
Q. Before you bought it?  
A. I did.  
Q. And you walked around the pond?  
A. I did.  
Q. And you saw the discharge from the pond and where it went to?  
A. I did.  
Q. And you saw the ditch that went down to the White place?  
A. I did see that ditch?  
Q. You did see it?  
A. I did.

(R. at 270, p. 366). In fact, Mr. Randall negotiated a discounted price because he felt the pond burdened his estate.<sup>5</sup> Ms. Hancock stated, "it seems to me I was standing there, and we were just looking at the pond, and saying, 'Well, you know . . . that pond is absolutely worthless to him. So I can understand how [Mr. Randall and his realtor] would want the price lowered.'" (R. at 270, pp. 448-50). The pond was worthless to Mr. Randall only

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<sup>5</sup>Mr. White was also a conveyee, and reciprocal benefits accrued to both parties because of the discount price that Mr. Randall was able to negotiate. The easement was not mentioned in either conveyance, but that is not required. *See Adamson*, 185 P.2d at 270-71.

because he had no water rights and he recognized that the easement was a burden on his land.

The other *Adamson* factors support the historical water system as well. The pond is vital to Mr. White's use and enjoyment of the land, and it is consistent with the land's past agricultural use. Additionally, both parties relied on their knowledge of Mr. White's rights when they purchased the land. The systems are critically different. Without the pond, Mr. White is unable to collect and use both the early stream runoff and natural flows for use at times when beneficial to the land and crops. As he testified, "When I--I could fill [the pond], and I could shut [the valve] off . . . I could have about four days of water storage in it." (R. at 269, p. 11). However, since Mr. Randall destroyed the pond "it's been really, you know, bad." (R. at 269, p. 12).

**B. The trial court erred when it attempted to rewrite the easement in a way that did not reflect the parties' intention at the time of conveyance.**

This Court must craft an easement that allows Mr. White to store water in the pond in order to give meaning to each parties' intentions. Mr. Randall claims that the trial court's decision ought to be affirmed because it may craft an easement that is "the least burdensome" upon the servient estate.

However, Mr. Randall cites no authority that allows a judge to weigh the burden of an easement against a potential alternative delivery system or to fundamentally alter an easement after the time of conveyance. *Adamson* held only that alternatives to a historical system are mundane "in determining the necessity of the easement." Necessity is but one

factor in a court's "[attempt] to ascribe an intention to the parties who had not thought or who had not bothered to put the intention into words." *Adamson*, 185 P.2d at 270. Thus, a court may consider an easement's questionable necessity only insofar as it only speaks to what the parties intended to convey. *See id.* In this case, there is no question regarding intent. Ms. Hancock and Mr. 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; R at 270, pp. 452-53).

Similarly, both Mr. White and Mr. Randall knew of the pond and agreed to its use when they purchased their land. Thus, Mr. White's easement is appurtenant to both pieces of property. At the time of the conveyances, both parties understood that water would flow across Mr. Randall's land and would be stored in the pond. Mr. White and Mr. Randall's predecessor in interest agreed that the pond system of water delivery is the only way to facilitate the full use of the irrigation easement. (R. at 270, pp. 447-48).

More important still, Mr. Randall's position is also inconsistent with the statutory law at the time of the initial decision.<sup>6</sup> "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 . . . without first receiving permission for the change . . . ." Utah Code Ann.

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<sup>6</sup>The legislature amended §§ 73-1-14 and 15 in 2005. The statutes quoted above are those that were in effect when Mr. Randall destroyed the pond.

§ 73-1-15 (1953). Further, one may not tamper with or injure any “dam . . . or other appliance for the diversion, apportionment, measurement or regulation of water . . . .”

Utah Code Ann. § 73-1-14 (1953). Mr. Randall’s wanton destruction of the pond violated § 73-1-14 and 15. He is, therefore, liable for damages under both statutes.

**C. The easement must include the ability to store water.**

Mr. Randall relies on *Farmers New World Life Insurance Co. v. Bountiful City*, 803 P.2d 1241, 1249 (Utah 1990), to argue that Mr. White’s rights must be limited because “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.” Mr. Randall claims that the pond is not necessary to the easement because Mr. White has no storage rights registered with the State Engineer. However, this approach confuses two distinct questions, only one of which is relevant to this case. First, while it is true that Mr. White has no registered storage rights, that in no way limits his easement rights. This Court must determine what rights were appurtenant to the lands as they were conveyed by Ms. Hancock. This, and only this, determines the easement’s appropriate scope.

Appellee’s position would allow Mr. Randall to smash Mr. White’s glass so long as he could still drink from the tap. As demonstrated above, Mr. White acquired a right to store water in the pond from Ms. Hancock–Randall’s predecessor in interest. Whether or not Mr. White needs to take additional steps to perfect that right with the State Engineer is a completely separate inquiry that does not involve Mr. Randall.

The pond had been in existence and use for decades. It was legally reconstructed in 1984 with the approval and assistance of the Soil Conservation Service. Under the controlling law both at the time the pond was first used for irrigation and when it was destroyed, the State Engineer did not need to approve the construction or repair of a pond that impounded less than twenty acre feet of water and does not constitute a threat to human life. *See* Utah Code Ann. § 73-5a-202 (1990).<sup>7</sup> By Mr. Randall's own figures, the pond held twelve acre feet of water, at most.<sup>8</sup> The pond was also not a threat to human life. If the dam failed, the water that escaped would flow West. The only home to the West of the pond is Mr. and Ms. White's, and it is built on a hill. (R. at 270, p. 365, 495).

### **III. MR. WHITE EFFECTIVELY CHALLENGED THE JUDGMENT AGAINST HIM AND PROPERLY MARSHALED THE EVIDENCE.**

Mr. White's opening brief spends nearly one quarter of its facts section marshaling evidence of the judgment against him. Nevertheless, Mr. Randall mistakenly claims that he has not properly marshaled the evidence. An appellant must present all evidence that supported the judge's decision when he or she challenges a trial court's findings. *See Moon v. Moon*, 1999 UT App.12, ¶ 24, 973 P.2d 431. Mr. White has clearly fulfilled this requirement. Mr. Randall argues that he omitted Pamela Randall's statement that "[Mr.

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<sup>7</sup>*See also* Utah Code Ann. § 73-5-5 (1953) (repealed 1990).

<sup>8</sup>In his testimony, Mr. Randall testified that the pond was 1.2 acres in area, and between eight and ten feet in height. Thus, even if the pond had walls that extended straight from the shoreline to the bottom of the pond, it could only hold twelve acre feet (an acre foot of water is the amount needed to cover one acre, 43,560 square feet, with one foot of water). (R. at 269, pp. 296, 361, 365).



White's] two dogs had come over and was [sic] chasing the chickens in the corral."

However, this statement is directly referenced in Mr. White's opening brief: "[Randall's wife] claimed that she saw that White's dog had a chicken down, but did not kill it."

(Appellant's Br. at 12, ¶ 29). Mr. White has properly marshaled the evidence.

**IV. THIS COURT SHOULD ORDER MR. RANDALL TO PAY MR. WHITE'S ATTORNEY'S FEES AND COSTS AS AN ELEMENT OF PUNITIVE DAMAGES.**

Mr. Randall maliciously destroyed the pond on which Mr. White relied for years. This Court should impose a punitive damage award that includes Mr. White's reasonable costs and attorney's fees to punish this behavior. Punitive damages should be awarded when a party's acts are "willful and malicious" or "[manifest] a knowing and reckless indifference toward . . . the rights of others." Utah Code Ann. § 78-18-1(1)(a) (2006). It would be difficult to find a more classic example of that type of conduct. Courts award punitive damages to punish and deter wanton tortfeasors and also to encourage plaintiffs to vindicate their rights. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439-40 (2001). A court may award attorney's fees as an element of a punitive award.

**A. Attorney's fees and costs may be awarded as an element of punitive damages.**

This Court has noted that, "Utah courts [permit] the amount of attorney fees expended to be considered in calculating punitive damages . . . ." *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 965 (Utah Ct. App. 1989). Policy concerns justify this rule. In

most cases, compensatory judgements are “highly inadequate to reimburse . . . the costs of successful litigation.” Thus, courts often award attorney’s fees when a tort is willful and malicious. *See* J.L. Litwin, Attorney’s Fees or Other Expenses of Litigation as Element in Measuring Exemplary or Punitive Damages, 30 A.L.R. 3d 1445 (2002). These awards make an offended party whole and deter flagrant wrongdoing. *See* 25 C.J.S. Damages § 50 (1994).

A party may also recover attorney’s fees as an element of punitive damages. In *Debry v. Hilton Travel Servs., Inc. v. Capitol Intern Airways, Inc.*, 583 P.2d 1181, 1185 (Utah 1978), the Utah Supreme Court held that counsel fees can be awarded not only when punitive damages are actually given, but also when they are merited. *See id.* Two other cases support this proposition. In *Jorgensen v. John Clay and Co.*, 660 P.2d 229, 232-33 (Utah 1983), and *Dahl v. Prince*, 230 P.2d 328, 329 (Utah 1951), the Utah Supreme Court reversed cost awards only because punitive damages were inappropriate based on the facts of those cases.

**B. Punitive damages are appropriate in this case.**

Mr. Randall knowingly violated Mr. White’s rights when he demolished the pond. His behavior was “willful and malicious” and “manifest[ed] a knowing and reckless indifference toward . . . the rights of others.”<sup>9</sup> Utah Code Ann. § 78-18-1(1)(a) (2006).

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<sup>9</sup>Under Utah law, a court would have to award general or compensatory damages in order to award punitive damages. Utah Code Ann. § 78-18-1 (2006). This Court or a court on remand will meet this requirement when it requires Mr. Randall to restore the

The Utah Supreme Court has dealt with a nearly identical situation. In *Falkenburg v. Neff*, 269 P. 1008 (Utah 1928), the defendants obliterated the plaintiff's dam and told him not to reconstruct it. The court held that destroying a dam "is a sufficient legal basis for awarding exemplary damages . . . . [The] proposition [is] too plain for argument." *Id.* at 1012.

The *Falkenburg* case is directly on point. Mr. Randall tampered with the flow of water and ultimately destroyed the irrigation system he knew his neighbor had a right to use. Mr. Randall began closing the head gate that allowed Mr. White to irrigate his land in 1996. (R. at 269, p. 19). Mr. White informed his neighbor that it was illegal to interfere with his canal, but Mr. Randall obstinately replied that he would not "store [Mr. White's] blankety blank water." (R. at 269, p. 20). Then by use of self help Mr. Randall obliterated the pond and delivery system and left Mr. White without means by which to use his valuable water rights.

Mr. Randall's actions were mean spirited, and they harmed the interests of the State of Utah. He was concerned with collecting the spring water and natural runoff to which he felt he was entitled. The natural runoff emanated from seeps on lands East of Randall's property. He complained that Mr. White took all the water in the pond, leaving none for him. (R. at 270, p. 300). Mr. Randall had no right to use those waters. He then

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pond. See *Nash v. Craigco, Inc.*, 585 P.2d 775, 777 (Utah 1978) (holding that non-economic damages can support a claim of punitive damages).

destroyed the pond even though it made it impossible for him to store any water. Mr. Randall's actions were exacerbated by Utah's arid climate. The Utah Supreme Court has held that the "conservation of water is of the utmost importance . . . . To waste water is to injure [the public] welfare . . . ." *Brian v. Fremont Irrigation Co.*, 186 P.2d 588, 590 (Utah 1947).

Mr. Randall suggests that his behavior was not malicious because Mr. White did not have impound rights even though the pond had been in use by Mr. Tibbs, Ms. Hancock and Mr. White for over twenty years. This contention again confuses Mr. White's water rights with the rights appurtenant to his property. Mr. Randall admits that Mr. White has a right to the water that was discharged into the pond from the irrigation canal. He further testifies that anyone can retain water for up to twenty-four hours. (R. at 270, pp. 367-68). Therefore, Mr. Randall knew that Mr. White had the right to use the pond; to use the water that entered the pond; and he knew that anyone can retain water for twenty-four hours. Thus, Mr. Randall knew that Mr. White had a right to future water storage regardless of whether he had trudged through any storage right formalities with the State Engineer.

Mr. Randall's logic would negate the purpose of easements by implication. If the owner of a servient estate can obliterate a right of way because they have made an uninformed legal judgment about their neighbor's rights, those who create appurtenances without "[bothering] to put their intentions into words" would have no legal protection

until a court sanctioned their easement. *Adamson*, 185 P.2d at 270. Such an approach does not square with *Adamson* and would lead to a flood of litigation.

It would also give the owners of servient estates an incentive to resort to self-help when they believe they have been wronged. Just as in landlord-tenant disputes, these actions are likely to cause contentious litigation or “violence and quarrels and bloodshed.” *Keller v. Southwood North Medical Pavilion, Inc.*, 959 P.2d 102, 108 (Utah 1998) (citing *Lindsey v. Normet*, 406 U.S. 56, 71-72 (1972)).

**C. Mr. White’s attorney’s fees are an appropriate measure of punitive damages.**

The Court must award Mr. White attorney’s fees and costs in order to restore him to his financial position before Mr. Randall flagrantly violated his rights. Mr. Randall contends that punitive damages should not be awarded unless all the factors in *VanDyke v. Mountain Coin Mach. Dist.*, 758 P.2d 962 (Utah Ct. App. 1988), speak persuasively for the plaintiff. (Appellee’s Br. at 28). However, the court in *VanDyke* clearly notes that the seven factors listed therein should be considered. They must not all be satisfied. *See VanDyke*, 758 P.2d at 965-66.

Mr. Randall’s behavior was willful, malicious and inexcusable. His neighbor depended on the pond that he destroyed. According to the Utah Supreme Court, his actions injured the public welfare. *See Brian v. Fremont Irrigation Co.*, 186 P.2d 588, 590 (Utah 1947). If this Court awards attorney’s fees, it will make Mr. White whole and

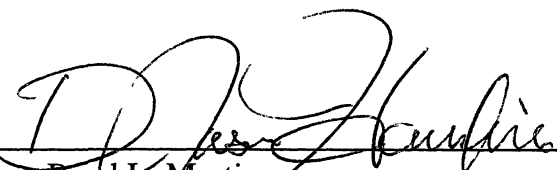
place the financial burden of this litigation where it rightfully belongs—squarely on Mr. Randall’s shoulders.

### **CONCLUSION**

The trial court agreed with the thrust of Mr. White’s arguments until it improperly considered evidence that was not part of the trial record. After considering its own independent, outside research, the trial court reversed course and excused Mr. Randall’s willful and malicious behavior. This Court must reverse the trial court’s Judgment and restore Mr. White to a position no better and no worse than before Mr. Randall obliterated the historic irrigation system that Mr. White had the right to use.

DATED this 27<sup>th</sup> day of June, 2006.

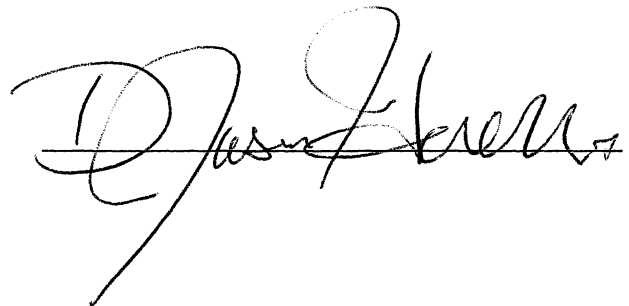
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27<sup>th</sup> day of June, 2006, I caused a true and correct copy of the foregoing **REPLY 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 "James G. Clark", written over a horizontal line.

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