

2006

Lee McElprang v. Blake Jones : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEE McELPRANG and LORIE McELPRANG,
Plaintiffs/Appellants,

v.

BLAKE JONES and WILDA JONES,
Defendants/Appellees,

BLAKE JONES and WILDA JONES,
Counterclaim Plaintiffs

v.

LEE McELPRANG and LORIE McELPRANG,
Counterclaim Defendants

BRIEF OF APPELLANTS

Utah Court of Appeals Case No.
20060165CA

Appeal from the Seventh Judicial District Court, Emery County, State of Utah
The Honorable George M. Harmond

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
TABLE OF AUTHORITIES.....	III
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES / STANDARD OF REVIEW.....	1
STATEMENT OF THE CASE	2
I. NATURE OF THE CASE	2
II. PROCEEDINGS BELOW.....	3
III. STATEMENT OF MATERIAL FACTS	4
A. <i>Western Disputed Area</i>	5
B. <i>Northern Disputed Area</i>	7
SUMMARY OF THE ARGUMENT.....	7
ARGUMENT	9
I. THIS COURT SHOULD REVERSE THE HOLDING THAT THE MCELPRANGS DID NOT OBTAIN A PRESCRIPTIVE EASEMENT ACROSS THE WDA ALONG THE CURVED ROAD.....	9
II. THIS COURT SHOULD REVERSE THE DISTRICT COURT’S LEGAL CONCLUSION THAT A PRESCRIPTIVE EASEMENT CANNOT BE ESTABLISHED FOR STORING VEHICLES AND OTHER PERSONAL PROPERTY	14
III. THE DISTRICT COURT ERRED IN HOLDING THE MCELPRANGS FAILED TO ESTABLISH BOUNDARY BY ACQUIESCENCE	17
A. <i>Evidence was Insufficient to Support the District Court’s Finding that the 1983 Conversation Took Place</i>	18
B. <i>The 1987 Conversation Was Not Sufficient to Show that the Joneses Did Not Recognize the Fence as the Boundary Line</i>	28
C. <i>The Finding that the McElprangs Plowed a Line Between the Survey Stakes Fails to Show that There Was Not Mutual Acquiescence</i>	30
IV. THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO SHOW THAT ORAL PERMISSION WAS GIVEN BY BLAKE JONES, THEREBY INTERRUPTING THE PRESCRIPTIVE PERIOD NECESSARY TO A PRESCRIPTIVE EASEMENT	31
CONCLUSION.....	33
ADDENDUM	
Tab A	January 17, 2006 Findings of Fact and Conclusions of Law
Tab B	January 17, 2006 Judgment
Tab C	Map of properties
Tab D	Aerial photograph of properties

TABLE OF AUTHORITIES

Cases

<i>Ault v. Holden</i> , 2002 UT 33, 44 P.3d 781	26, 27, 29, 30
<i>Big Cottonwood Tanner Ditch Co. v. Moyle</i> , 174 P.2d 148 (Utah 1946)	11
<i>Brown v. Jorgensen</i> , 2006 UT App 168, 136 P.3d 1252	17
<i>Brown v. Sneider</i> , 400 N.E.2d 1322 (Mass. Ct. App. 1980)	16
<i>Crane v. Crane</i> , 683 P.2d 1062 (Utah 1984)	15
<i>Gaither v. Gaither</i> , 332 P.2d 436 (Cal. Ct. App. 1958)	12
<i>Gutcheon v. Becton</i> , 585 A.2d 818 (Me. 1991)	12
<i>In re D.G.</i> , 938 P.2d 298 (Utah Ct. App. 1997)	19
<i>In re L.M.</i> , 2001 UT App 314, 37 P.3d 118	18, 27
<i>Inch v. McPherson</i> , 859 P.2d 755 (Ariz. Ct. App. 1992)	16
<i>Jacobs v. Hafen</i> , 917 P.2d 1078 (Utah 1996)	17
<i>Lutheran High School Ass'n v. Woodlands III Holdings, LLC</i> , 2003 UT App 403, 81 P.3d 792	14
<i>Nyman v. Anchor Development, L.L.C.</i> , 2003 UT 27, 73 P.3d 357	15, 16
<i>Orton v. Carter</i> , 970 P.2d 1254 (Utah 1998)	2, 10, 17, 31
<i>Pipkin v. Torosian</i> , 35 Cal. App. 3d 722 (Cal. Ct. App. 1973)	11, 13
<i>RHN Corp. v. Veibell</i> , 2004 UT 60, 96 P.3d 935	2, 17, 18, 30, 31
<i>Richins v. Struhs</i> , 412 P.2d 314 (Utah 1966)	32
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998)	1, 2, 10, 11, 13, 15, 27, 28, 32
<i>West Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311 (Utah Ct. App. 1991)	19
<i>Zollinger v. Frank</i> , 175 P.2d 714 (Utah 1946)	32

Statutes

Utah Code Ann. § 78-2-2(3)(j)	1
Utah Code Ann. § 78-2-2(4)	1
Utah Code Ann. § 78-2a-3(2)(j)	1

STATEMENT OF JURISDICTION

The Utah Supreme Court had original appellate jurisdiction of this appeal under the provisions of Utah Code Ann. § 78-2-2(3)(j). Pursuant to its authority under Utah Code Ann. § 78-2-2(4), the Utah Supreme Court transferred the case to this Court on March 14, 2006. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES / STANDARD OF REVIEW

The following issues are present in this appeal:

1. Did the trial court err as a matter of law in failing to rule that the McElprangs were entitled to a prescriptive easement to use the curved road located through the top of the Western Disputed Area to continue to access to the McElprangs' property in light of the factual finding that the McElprangs had established all of the elements for a prescriptive easement? (Issue preserved: R. 428.)

Standard of review: The scope of a prescriptive easement “is a question of law, which [appellate courts] review for correctness.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998).

2. Did the trial court err in holding as a matter of law that the McElprangs were not entitled to a prescriptive easement on the Northern Disputed Area for storing machinery, old vehicles, and power poles? (Issue preserved: R. 428.)

Standard of review: “The finding that an easement exists is a conclusion of law. Such a finding is, however, the type of highly fact-dependent question . . . which accords the trial judge a broad measure of discretion when applying the correct legal standard to given set of facts. [A Utah appellate court] therefore overturn[s] the finding of an

easement only if [the court] find[s] that the trial judge's decision exceeded the broad discretion granted." *Valcarce*, 961 P.2d at 311.

3. Did the trial court err in determining that the McElprangs had failed to establish boundary by acquiescence? (Issue preserved: R. 428.)

Standard of review: An appellate court "will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous." *RHN Corp. v. Veibell*, 2004 UT 60, ¶ 22, 96 P.3d 935 (further citations omitted). However, a trial court's conclusions of law shall be reviewed "on this issue 'for correctness, according the trial court no particular deference.'" *Id.* (quoting *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998)).

4. Did the trial court err in determining that there was sufficient evidence to show that oral permission by Blake Jones interrupted the twenty year prescriptive period necessary to establish a prescriptive easement for storage? (Issue preserved: R. 424, 428.)

Standard of review: An appellate court "will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous." *RHN Corp.*, 2004 UT 60, ¶ 22 (further citations omitted). However, a trial court's conclusions of law shall be reviewed "on this issue 'for correctness, according the trial court no particular deference.'" *Id.* (quoting *Orton*, 970 P.2d at 1256).

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises out of a lawsuit filed by Lee and Lorie McElprang ("the

McElprangs”) against Blake and Wilda Jones (“the Joneses”) seeking to quiet title to two parcels of land. Following a trial, the district court dismissed the McElprangs’ boundary by acquiescence and prescriptive easement claims and granted judgment in favor of the Joneses on their trespass claim.

II. Proceedings Below

On May 31, 2000, the McElprangs filed a Complaint with the Seventh District Court in Emery County. (*See* R. 1-11.) The Complaint listed four causes of action: (1) boundary by acquiescence; (2) prescriptive easement; (3) estoppel, laches, and waiver; and (4) trespass. (*Id.*) The Joneses filed an Answer and Counterclaim on June 21, 2000, which included three causes of action: (1) trespass, (2) assault, and (3) intentional/negligent infliction of emotional distress. (R. 15-39.) The McElprangs filed a Motion for Partial Summary Judgment on June 27, 2002, seeking summary judgment on the Joneses’ second and third causes of action. (R. 74-90.) The district court granted the partial summary judgment and dismissed those two causes of action in its October 18, 2002 Ruling on Motion for Partial Summary Judgment. (R. 173-77.) Trial was held on June 24-27, 2003, before the Honorable Bryce K. Bryner.¹ (R. 434.) On January 17, 2006, the district court entered both its Findings of Fact and Conclusions of Law (attached in the Addendum as Tab A) (R. 417-32) and its Judgment. (Attached in the Addendum as Tab B) (R. 434-38.) In the Judgment, the court dismissed with prejudice the all of the McElprangs’ causes of action, and also dismissed with prejudice

¹ Judge Bryner retired shortly after the judgment was entered in the case. The Honorable George M. Harmond presently is the judge assigned to the case.

the Joneses' causes of action for assault and intentional/negligent infliction of emotional distress. (R. 434.) The district court did, however, grant judgment in favor of the Joneses on their trespass claim against the McElprangs. (R. 434-35.) A Notice of Appeal was filed on February 15, 2006, in which the McElprangs gave notice that they intended to appeal the Judgment as well as the Findings of Fact and Conclusions of Law on which the Judgment was based. (R. 473-75.)

III. Statement of Material Facts²

The McElprangs and the Joneses are adjoining landowners in Emery County, Utah.³ (R. 419.) The McElprangs purchased their property from Douglas and Lorraine Sitterud in 1969, subject to a mortgage in favor of Farmers Home Administration ("FmHA"). (*Id.*) The Joneses purchased their property from Fawn McCandless in 1972, but had leased the property during the preceding 10 years. (*Id.*) The two properties at issue in this case are adjacent to each other and the legal descriptions do not overlap. (*Id.*) The McElprangs' property is located to the west and north of the Joneses property.⁴ (*Id.*) At issue in this case are two separate areas: the Northern Disputed Area and the Western Disputed Area.

² The Statement of Material Facts is based upon the district court's Findings of Fact and Conclusions of Law. (R. 417-32.) However, some of these facts are disputed for the reasons discussed later in this Brief.

³ For illustrative purposes, a map of the two properties is attached in the Addendum as Tab C and an aerial photograph of the properties is attached in the Addendum as Tab D.

⁴ Although paragraph 4 of the Findings of Fact states that the McElprangs' property is located to the west of the Joneses' property, the record and the testimony at trial clearly evidence that the McElprangs' property is located both north and west of the Joneses' property. (R. 419.)

A. Western Disputed Area

The Western Disputed Area (“WDA”) is a rectangular portion of property lying to the east of the McElprangs’ actual property line. It is separated from the rest of the Joneses’ property by a fence line on the east side of the WDA. Edward Geary, who was a prior owner of both properties, installed the fence between 1948 and 1950 to separate his non-irrigated land, which was used for a stackyard, from his irrigated crop land. (R. 420.) When originally constructed, the McElprang and Jones properties were one property, and the fence was not intended to serve as a boundary line fence. (*Id.*) Lee McElprang testified that when he and his wife acquired their property in 1969, an FmHA representative told them that the fence line was the eastern boundary of their property. (R. 422). Based on these representations, the McElprangs always believed that they owned up to the fence line and that the fence was jointly owned by both parties; thus, the McElprangs recognized and treated the fence as the boundary line between the two properties from 1969 forward. (R. 422.) The McElprangs occupied the WDA up to the visible fence line by grazing cattle from October to April each year from 1969 until 1999. (R. 420.) The McElprangs also raised alfalfa and/or corn on part of the WDA from 1969 until 1983. (R. 421.)

The McElprangs accessed their property located west of the WDA by using a curved road located on the McElprangs property, except for a portion of the road that crosses the northern part of the WDA. (R. 421.) The curved road was used openly and continuously to access the McElprangs’ property prior to the time that they purchased the property in 1969. (R. 421.) In 1983, the McElprangs built a silage pit on part of their

property that was also accessed using the curved road through the WDA. (R. 421.)

Although the McElprangs used the WDA for thirty years to graze cattle, raise crops, and access their property over the curved road, the district court found that Blake Jones (“Blake”) never considered the fence to be the boundary between the two properties. (R. 422.) In 1983, the Joneses had their property surveyed by Evan Hansen, a registered land surveyor, and Mr. Hansen placed rebar stakes in the north and south corners of west side of the WDA. (R. 422.) The district court found that Blake had a conversation with Lee McElprang (“Lee”) in 1983 in which Blake gave Lee permission to use the WDA for grazing purposes and to park equipment on, even though Blake was unable to remember where the conversation took place, what exactly was said, or the date on which the conversation occurred despite repeated questioning. (R. 422.) The district court also found that shortly thereafter, Lee plowed a furrow between the north and south stakes on the western edge of the WDA and never cultivated the land between the fence and the furrow after that date. (R. 422.) The district court did note that Lee, however, testified that the 1983 conversation never took place and testified that he was never given any permission by the Joneses to use the WDA or the NDA. (R. 423.)

Additionally, the district court found that in the spring of 1987, Randy Jones (“Randy”) (son of Blake and Wilda Jones) and his father were parked on the county road immediately south of the WDA when Lee came driving by. (R. 423.) Randy stated that they flagged Lee down and began discussing the 1983 survey when Blake asked Lee about the stake at the northwest corner of the WDA that had been placed there by Mr. Hansen. (R. 423.) Lee responded that he had pounded the rebar stake into the ground

because he had ruptured a tire on it, and he offered to show the Joneses where the stake was when they were ready to install a fence. (R. 423.)

In November of 1999, the McElprangs installed a culvert on the south side of the WDA along the county road and built a road northward across the WDA. (R. 422.) That same month, the Joneses caused the fence to be torn down for the purpose of constructing a building on a portion of the property where the fence was located. (R. 420.)

B. Northern Disputed Area

The Northern Disputed Area (“NDA”) is a triangular shaped property located within the property actually owned by the Joneses south of the McElprangs’ boundary with the Joneses. The NDA is bounded on the south by a fence line separating it from the rest of the Joneses’ property. The McElprangs used the north disputed area up to the fence line to store farm machinery, old vehicles, power poles, etc. since 1969. (R. 424.)

SUMMARY OF THE ARGUMENT

The district court incorrectly held that the McElprangs failed to establish their claims for boundary by acquiescence and a prescriptive easement.

First, the district court erred in denying the McElprangs’ cause of action for prescriptive easement. In its findings, the district court held that the McElprangs had established a prescriptive easement across the curved road to access the western portion of their property, but stated they did not develop a prescriptive easement across the curved road to access their silage pit built in 1983. In the judgment, however, the district court completely denied the McElprangs’ claim for prescriptive easement. The McElprangs have used the curved road across the WDA to access the western portion of

their property for agricultural purposes for thirty years. The fact that the silage pit was not built until 1983 does not prohibit the McElprangs from using the curved road to access the western portion of their property and access the silage pit. The addition of the silage pit upon the McElprangs' property did not impermissibly extend the scope of the prescriptive easement nor did it increase the burden on the servient estate. Therefore, this Court should reverse the district court and require entry of a ruling allowing the McElprangs to use the properly established prescriptive easement.

The district court also erred in holding that Utah law does not allow for a prescriptive easement to be established for the purpose of storing personal property on the real property of another. Although the Utah Supreme Court has held that a prescriptive easement cannot be established to maintain a permanent structure on the land of another, the easement sought by the McElprangs would not result in permanent exclusive occupancy of the Joneses' property. Thus, this Court should reverse the district court and require entry of a ruling granting the McElprangs a prescriptive easement to store their personal property on the NDA.

The district court further erred in holding that the McElprangs failed to establish boundary by acquiescence because they failed to establish mutual acquiescence in the fence line as a boundary. The district court found that in 1983, Blake Jones gave Lee McElprang permission to use the disputed areas. However, after marshaling all of the evidence that could support such a finding, it is clear that the finding that permission was granted was against the great weight of evidence and was therefore clearly erroneous. The district court also found that a 1987 conversation between Blake Jones, Randy Jones,

and Lee McElprang reaffirmed that there was not mutual acquiescence. Nevertheless, the conversation did not defeat mutual acquiescence because there was no unequivocal statement by the Joneses that they did not recognize the fence as the boundary line. Finally, the district court found that a line plowed between two survey stakes on the west edge of the WDA supported its holding that there was no mutual acquiescence. However, whether or not there was a plowed line does not show that there was not mutual acquiescence because both parties continued to use up to, and never over, the fence line on their respective sides of the fence. Therefore, this Court should reverse the district court and enter a ruling granting the McElprangs' establishment of boundary by acquiescence.

Finally, the district court erred in finding that there was sufficient evidence to support its finding that oral permission was given by Blake Jones to Lee McElprang, thereby interrupting the twenty-year prescriptive period necessary to establish boundary by acquiescence and a prescriptive easement. However, after marshaling all of the evidence that could support such a finding, it is clear that the finding that permission was granted was against the great weight of evidence and was therefore clearly erroneous. Therefore, this Court should reverse the district court and enter a ruling granting the McElprangs' claims for boundary by acquiescence and prescriptive easement.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE HOLDING THAT THE MCELPRANGS DID NOT OBTAIN A PRESCRIPTIVE EASEMENT ACROSS THE WDA ALONG THE CURVED ROAD

The Utah Supreme Court has held that “[a] prescriptive easement is created when

the party claiming the prescriptive easement can prove that ‘use of another’s land was open, continuous, and adverse under a claim of right for a period of twenty years.’” *Orton*, 970 P.2d at 1258 (quoting *Valcarce*, 961 P.2d at 311). The district court found that the McElprangs did precisely that. The McElprangs provided sufficient evidence to establish each of the elements of a prescriptive easement; thus, the court concluded that the McElprangs had established a prescriptive easement as a matter of law to use the curved road that crosses the WDA for the purpose of accessing their property.⁵ (R. 424-25.) However, the trial court incorrectly ruled that, although the McElprangs had established all of the elements for a prescriptive easement to utilize the curved road to access the western portion of their land, they were not entitled to a ruling granting them a prescriptive easement over the same curved road. Despite finding that the McElprangs had established a prescriptive easement over the curved road in the WDA to access their property, the trial court completely denied the McElprangs’ claim for a prescriptive easement in the Judgment. (R. 434.)

The finding of an easement is a conclusion of law; however, such a finding is highly-fact sensitive, which “accords the trial judge a broad measure of discretion when applying the correct legal standard to given set of facts.” *Valcarce*, 961 P.2d at 311. Thus, a Utah appellate court overturns a trial court’s finding of an easement only if the appellate court finds that “the trial judge’s decision exceeded the broad discretion

⁵ While paragraph 25 of the Findings of Fact states that the curved road located at the top of the WDA was used by the McElprangs for the purpose of “accessing their property that is located to the east of the WDA,” in reality, the McElprangs’ property is located to the west and north of the Joneses’ property. (R. 424-25.)

granted.” *Id.*

The district court held that the road had been in use prior to the time that the McElprangs purchased the property, and that prior to 1983, the road had been openly and continuously used to access the western portion of the land for more than twenty years. (R. 421.) Despite this finding the district court did not grant the McElprangs a prescriptive easement in its Judgment. The court reasoned that because a silage pit was built in 1983, the road had not been used to access the silage pit for a period of twenty years. Under the court’s reasoning, the McElprangs established an easement to use the road to access their land, but lost the easement by building a silage pit built on their land. (R. 421, 428.)

Unlike an express easement, whose permissible uses can usually be ascertained from the instrument creating the easement, the permissible uses of a prescriptive easement are defined by the extent of use of the easement during the prescriptive period. *See Valcarce*, 961 P.2d at 312 (“The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period.”); *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 157 (Utah 1946) (“[T]he extent of an easement acquired by prescription is measured and limited by the use made during the prescriptive period.”). “The ultimate criterion in determining the scope of a prescriptive easement is that of avoiding increased burdens upon the servient tenement while allowing some flexibility in the use of the dominant tenement.” *Pipkin v. Torosian*, 35 Cal. App. 3d 722, 729 (Cal. Ct. App. 1973) (citations omitted).

The district court made no finding that the construction of the silage pit on the

McElprangs' property resulted in a substantial increase in the use of the curved road. Indeed, there was no evidence that the use of the curved road substantially changed after the installation of the silage pit in 1983. Even Dirk Jones, one of the Joneses' sons and a witness called by the Joneses, testified that there was not a substantial increase in the use of the road after the silage pit was built. (R. 536; Tr. Vol. III, 626:3 to 627:5.) The court's ruling that the McElprangs did not establish a prescriptive easement to access their silage pit was based solely on the fact that the silage pit was not built until 1983. (R. 421, 428.) The fact that the silage pit was not built until 1983 does not, however, cut off the McElprangs from using the curved road to enter the western portion of their property and access the silage pit. The mere addition of a new use of the McElprangs' property accessed via the curved road does not impermissibly extend the scope of the prescriptive easement. Many courts have held that "a mere increase in the volume of traffic across [an easement] will not constitute a per se overburdening." *Gutcheon v. Becton*, 585 A.2d 818 (Me. 1991); *see also Gaither v. Gaither*, 332 P.2d 436, 438 (Cal. Ct. App. 1958) ("If the change is not in the kind of use, but merely one of degree imposing no greater burden on the servient estate, the right to use the easement is not affected.").

The McElprangs, as well as members of the Jones family and other witnesses, testified that the McElprangs and others used the road continuously since even before the McElprangs purchased the land to access the western portion of their land for agricultural purposes—to cultivate and water the land, plant and harvest crops, move farm equipment, check the cattle grazing on the land, and to access the silage pit built in 1983. (*See* R.

535; Tr. Vol. II., 440:5 to 440:11, 451:7 to 451:19; R. 536; Tr. Vol. III, 624:25 to 657:5; R. 537; Tr. Vol. IV, 911:20 to 912:12.) Thus, the McElprangs used the curved road for more than twenty years to access the western portion of their property for agricultural purposes. The fact that one additional improvement was built upon the dominant estate does not disqualify the McElprangs from holding a prescriptive easement or change the “nature, character, and volume” of the McElprangs’ use of the curved road during the prescriptive period. *Pipkin*, 35 Cal. App. 3d at 726-27 (“[I]t is the nature, character and volume of the usage of the easement during the prescriptive period which determines its scope and . . . the use to which the dominant tenement is being put during that period is only one factor that may be germane in defining that use.”). The district court erred when it determined that one additional activity on the McElprangs’ land vitiated their prescriptive easement.

Because the curved road was used by the McElprangs to access their property for more than thirty years, the fact that the McElprangs made an additional improvement on their own property should not limit the use of the prescriptive easement that the district court found had been established on the curved road. *See Pipkin*, 35 Cal. App. 3d at 728 (stating that it should “be of no moment” to the owners of the servient estate if the owners of the dominant estate are using the easement for the purpose of accessing a residential home or for agricultural purposes, “so long as the amount of traffic is not substantially increased.”); *Valcarce*, 961 P.2d at 312 (“The right cannot be enlarged to place a greater burden or servitude on the property.” (quotation and citation omitted)); *Lutheran High School Ass’n v. Woodlands III Holdings, LLC*, 2003 UT App 403, ¶ 15,

81 P.3d 792 (stating that an overburdening of an express easement by the dominant estate “may only occur if use of the easement substantially increases use of the servient estate”) As an example, the fact that a farmer used an easement over his neighbor’s land to access a pasture to feed horses and then some years later place a small barn in the pasture to store tack and hay for the horses, using the easement to access the pasture to reach the horses *and* the small barn does not impermissibly expand the scope of the easement or overly burden the servient estate.

The district court properly found that a prescriptive easement had been established, but erred in concluding that the easement cannot be used as it has since 1983 by the McElprangs to access their silage pit and erred in refusing to grant the McElprangs a prescriptive easement in the Judgment to the extent it had found one existed. The agricultural purpose of using the road to access the McElprangs’ western property clearly encompassed accessing the silage pit without increasing the scope of the easement or the burden on the servient estate. Therefore, this Court should reverse the district court and require entry of a ruling allowing the McElprangs to use the properly established prescriptive easement to the same level as during the prescriptive period in which it was established regardless of what the McElprangs do on their own property after using the road.

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT’S LEGAL CONCLUSION THAT A PRESCRIPTIVE EASEMENT CANNOT BE ESTABLISHED FOR STORING VEHICLES AND OTHER PERSONAL PROPERTY

In its Conclusions of Law, the district court summarily concluded that “under Utah

law a Prescriptive Easement cannot be established for the purpose of storage of Personal Property on the real property of another.” (R. 428.) However, the court offered no further authority or explanation of its basis for its assertion. The court erred in determining that granting a prescriptive easement to store personal property is not allowable or appropriate under Utah law. The finding of an easement is a conclusion of law; however, such a finding is highly-fact sensitive, which “accords the trial judge a broad measure of discretion when applying the correct legal standard to given set of facts.” *Valcarce*, 961 P.2d at 311. Thus, a Utah appellate court overturns a trial court’s finding of an easement only if the appellate court finds that “the trial judge’s decision exceeded the broad discretion granted.” *Id.*

The McElprangs claimed an easement in gross on the NDA for storage of farm machinery, vehicles, power poles, and other items as they have been since the late 1970’s. In Utah, an easement which “is not appurtenant to any particular estate is an easement in gross.” *Crane v. Crane*, 683 P.2d 1062, 1064 (Utah 1984). There is no requirement for a dominant and servient estate to establish an easement in gross; nevertheless, “an easement in gross can be acquired by prescription.” *Id.*

The Utah Supreme Court has held that granting a prescriptive easement is impossible where it would provide for “permanent exclusive occupancy of the fee title owner’s land.” *Nyman v. Anchor Development, L.L.C.*, 2003 UT 27, ¶ 18, 73 P.3d 357. In *Nyman*, Michael Nyman sought a prescriptive easement on a neighbor’s land in order to continue using part of the neighbor’s property as the location of a garage that was built partially on the neighboring land. *Id.* ¶ 17. The Court, however, noted that no prior Utah

case had recognized a prescriptive easement “to maintain a permanent structure on someone else’s property.” *Id.* ¶ 18. Thus, the Court held that Nyman was not entitled to a prescriptive easement because it would “effectively deprive [the neighbor] of all rights to which, as record owner, he is entitled.” *Id.*

Unlike *Nyman*, in this case the McElprangs do not seek to maintain a permanent structure on the NDA; they merely desire to continue to store personal property there. None of the uses for which the easement is sought by the McElprangs amount to uses providing for permanent exclusive occupancy prohibited in *Nyman*. *Id.* The personal property that has been stored on the NDA for over twenty years is not affixed to the land. Rather it is property that can—and has been—moved to different places, as necessitated by the McElprangs’ farming operations. Other states have held that prescriptive easements can be established for the purpose of parking vehicles. *See, e.g., Inch v. McPherson*, 859 P.2d 755 (Ariz. Ct. App. 1992) (affirming a trial court’s judgment awarding a prescriptive easement to park cars); *Brown v. Sneider*, 400 N.E.2d 1322 (Mass. App. Ct. 1980) (affirming a master’s judgment that the defendants acquired a prescriptive easement to park vehicles on driveway). Similarly, an easement should be granted to the McElprangs to park vehicles and equipment and to store personal property. The McElprangs are not attempting to deprive the Joneses of all of their rights associated with the NDA; rather, the McElprangs are asking for an easement to allow them to continue to park and store personal property on the NDA, just as they have done for almost thirty years.

The district court erred in concluding that under Utah law a prescriptive easement

cannot be established to store personal property on the real property of another. Because the easement sought by the McElprangs will not result in permanent exclusive occupancy of the NDA, Utah law clearly does not prohibit the McElprangs from establishing a prescriptive easement to store their personal property on the NDA. Therefore, this Court should follow other states and reverse the district court and require entry of a ruling granting the McElprangs a prescriptive easement to store their vehicles and personal property on the NDA.

III. THE DISTRICT COURT ERRED IN HOLDING THE MCELPRANGS FAILED TO ESTABLISH BOUNDARY BY ACQUIESCENCE

The Utah Supreme Court has established four elements that must be met in order to establish boundary by acquiescence: “(i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a long period of time, (iv) by adjoining landowners.” *Orton*, 970 P.2d at 1257 (quoting *Jacobs v. Hafen*, 917 P.2d 1078, 1080 (Utah 1996)). The district court found that the first, third, and fourth elements were established by the McElprangs at trial. (R. 428.) However, the court held that the McElprangs failed to establish mutual acquiescence in the line as a boundary, and therefore ruled that the McElprangs had not established boundary by acquiescence. A trial court’s conclusions of law are reviewed “on this issue ‘for correctness, according the trial court no particular deference.’” *RHN Corp.*, 2004 UT 60, ¶ 22; *see also Brown v. Jorgensen*, 2006 UT App 168, ¶ 8, 136 P.3d 1252 (stating that a determination of mutual acquiescence “is reviewable as a matter of law”). The findings of fact, as they relate to a boundary by acquiescence claim, made by

a trial court sitting without a jury will not be reversed by an appellate court “unless they are . . . clearly erroneous.” *RHN Corp.*, 2004 UT 60, ¶ 22.

The district court refused to grant the McElprangs’ claim for boundary by acquiescence because it found that the McElprangs and the Joneses did not mutually acquiesce in the fence line as the boundary between their properties for twenty years. The court’s ruling was based on its finding that Blake Jones verbally gave permission to Lee McElprang to use the disputed property in 1983. (R. 422.) As support for the ruling, the court noted its findings that Blake Jones and Randy Jones had a discussion with Lee McElprang in 1987 in which the Joneses’ survey was discussed and that Lee plowed a furrow along the western edge of the WDA between two survey stakes. (R. 422-23.) However, these findings are insufficient to support the trial court’s determination to deny the McElprangs’ claim for boundary by acquiescence.

A. Evidence was Insufficient to Support the District Court’s Finding that the 1983 Conversation Took Place

McElprangs challenge the trial court’s finding that Blake Jones gave permission to use the NDA and the WDA in 1983. (R. 422, 424.) This is the sole basis for the district court not finding boundary by acquiescence. Normally, trial court’s findings are reviewed by an appellate court for clear error. “[H]owever, when an appellant challenges the sufficiency of the evidence supporting a court’s findings of fact, we require them to first ‘marshall [sic] the evidence in support of the findings and then demonstrate that despite this evidence, the court’s findings are so lacking in support as to be against the clear weight of the evidence.’” *In re L.M.*, 2001 UT App 314, ¶ 14, 37 P.3d 118 (quoting

In re D.G., 938 P.2d 298, 301 (Utah Ct. App. 1997)). The duty to marshal requires the McElprangs to present “in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *Id.* (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)).

In order to comply with their marshaling burden, the McElprangs present the following evidence that was presented to the trial court during the course of trial:

1. On direct examination by Mr. Smith, Blake Jones made the following statements:

Mr. Smith: Now let's go from the period -- let's -- let me, if I can show you this right here, during the period that you bought the property in 1972, let's talk about 1972 to 1999 for right now, okay?

Mr. Jones: Okay.

Mr. Smith: Let's talk about this west disputed property. During that whole entire period of time Mr. McElprang was making use of the west disputed property right up to the fence line, wasn't he?

Mr. Jones: Yes.

Mr. Smith: He was keeping his cattle in there during that time wasn't he?

Mr. Jones: At times, yes.

Mr. Smith: In fact, he kept them in there every year during that period of time, didn't he?

Mr. Jones: Yes.

Mr. Smith: He didn't pay you anything for that?

Mr. Jones: No.

Mr. Smith: He didn't ask for permission about that?

Mr. Jones: Yes. I gave him permission to use that piece any way he would like. I didn't have no use for it at the time.

Mr. Smith: Oh, I see. So you have him the permission from that period of time to treat this fence as the boundary during that period of time?

Mr. Jones: No, I didn't say nothing about the boundary. I gave him permission to use that piece of ground, but nothing on boundaries or --

Mr. Smith: Well, isn't that what you told him to do? If you told him -- you say you told him he could use the property, didn't you tell him he could use the property right up to the fence?

Ms. White: Objection. That mischaracterizes the statements. The witness has answered it.

The Court: Sustained.

Mr. Smith: When you claim you gave him permission, did you give him any kind -- anything in writing?

Mr. Jones: No.

Mr. Smith: So there's no written record of this?

Mr. Jones: No.

Mr. Smith: Do you remember, was there other people there when you gave him this permission -- supposedly gave him this permission.

Mr. Jones: No, not that I remember.

Mr. Smith: Where were you at when you gave this permission to Mr. McElprang?

Mr. Jones: I can't remember. Either out on the property or -- where we were talking, whether we was in the street or --

Mr. Smith: And what year was it?

Mr. Jones: Probably from any time after '72. I can't remember the exact time.

Mr. Smith: Do you recall what your words were to Mr. McElprang at that time?

Mr. Jones: No.

Mr. Smith: Do you recall what he said to you?

Mr. Jones: No.

(R. 534; Tr. Vol. I, 164:20 to 166:22.)

2. A few lines later Mr. Jones made the following statements:

Mr. Smith: Now you didn't go and tell Mr. McElprang he couldn't use this property on the west disputed property any more, did you?

Mr. Jones: No. I did when he trespassed on it, but that's the first time.

Mr. Smith: When he trespassed? Well, he was using that this whole entire period, wasn't he?

Mr. Jones: Yes, with my permission.

Mr. Smith: Well, now you're calling it trespass. How is it a trespass if he --

Mr. Jones: I said in '99 it was a trespass.

(R. 534; Tr. Vol. I, 167:4 to 167:14.)

3. A discussion occurred concerning Mr. Jones taking down the fence dividing his property from the Western Disputed Area:

Mr. Smith: Okay. You removed the fence. Now if you had given Mr. McElprang permission to use all this property, don't you think you should have gone to him before you tore down the fence and told him that you're revoking that permission?

Mr. Jones: No.

(R. 534; Tr. Vol. I, 170:14 to 170:19.)

4. During direct examination, Mr. Smith asked Mr. Jones about a letter sent to Mr. McElprang by Mr. Joneses' attorney in November 1999. Mr. Smith read a portion of the letter to Mr. Jones.

Mr. Smith: "While Mr. Jones has granted you permission in the past to some minor uses to assist you in your day-to-day operations, he has never given you permission to enter onto his property, construct roadways, install culverts and generally turn his property into a junkyard parking lot." Do you see that statement?

Mr. Jones: Yes.

Mr. Smith: Now do you agree with that statement?

...

Mr. Jones: Yes.

Mr. Smith: You do. However, during this whole period of time that we're talking about, you just testified Mr. McElprang was parking derelict - - or was parking equipment in both the west and north disputed areas; isn't that right?

Mr. Jones: Yes.

Mr. Smith: Now did he have your permission to do that or not?

Mr. Jones: Yes.

Mr. Smith: Well, Mr. Jones, you just told me that he didn't have your permission to do that. Which is it?

Ms. White: Your Honor, I object. He's laid no foundation, so he hasn't established what happened at the time of the letter to change things. So by laying no foundation - -

The Court: Well, overruled. You can get into that on cross.

Mr. Smith: So Mr. Jones, which is it? Did you grant Mr. McElprang permission to park his equipment on the north and west disputed areas or not?

Mr. Jones: Have you got a time element there when --

Mr. Smith: From the period of 1972 until this letter came out in 1999

Mr. Jones: He had permission to park stuff on my property.
Mr. Smith: Okay. So this letter is incorrect, then?
Mr. Jones: Well, I'm misunderstanding, I guess. (Witness reads letter).
That is a different meaning to me. To enter into this property and to
construct roadways, install culverts and generally turn his property into a
junkyard. I certainly did not give him permission to do that.
Mr. Smith: Well --
Mr. Jones: If that's what you're asking now. Is that clear?
Mr. Smith: So what permission did you give Mr. McElprang?
Mr. Jones: To use that piece of property to run his cows on, what he
needed. I didn't object to any of it because I didn't need it.
Mr. Smith: How about parking equipment on the property?
Mr. Jones: I had no objection.

(R. 534; Tr. Vol. I, 182:19 to 184:19.)

6. Still in Mr. Joneses' direct testimony:

Mr. Smith: Now mr. [sic] McElprang has testified that you never gave
him ever any permission to use either the north or the west disputed areas.
You heard that testimony?
Mr. Jones: Yes.
Mr. Smith: And you can't come up with anything in writing or any
witnesses to your claim that you gave him that permission, can you?
Ms. White: To use Counsel's objection, you mean beyond his own sworn
testimony any other evidence?
The Court: Sustained. That needs to be clarified.
Mr. Smith: Okay. So other than your say so, that's the only evidence that
you have of that conversation occurring?
Mr. Jones: Yes.
Mr. Smith: You can't tell us when that conversation occurred?
Mr. Jones: Not the exact minute, no.

(R. 534; Tr. Vol. I, 193:17 to 194:7.)

7. Still in Mr. Joneses' direct testimony:

Mr. Smith: Doesn't it seem odd to you, Mr. Jones, that you would grant
him permission to use property of yours when you weren't friends of his?
Mr. Jones: We were friends as far as I was concerned at that time.

(R. 534; Tr. Vol. I, 195:11 to 195:15.)

8. Further in Mr. Joneses' direct testimony.

Mr. Smith: I guess I'm having a little bit of a problem in differentiating in my mind permission to use the property and saying you didn't believe that this was the boundary between your properties, this fence line right here.

Mr. Jones: I knew it wasn't the boundary.

Mr. Smith: But you let it be treated in every aspect as the boundary, didn't you?

Ms. White: Objection, that calls for legal conclusion about whether or not he allowed everything in every aspect to be treated.

The Court: Sustained.

Mr. Smith: Well, you allowed Mr. McElprang to graze right up to the fence with his cattle, right?

Mr. Jones: Yes.

Mr. Smith: You allowed Mr. McElprang to store equipment right up to that fence line, correct?

Ms. White: Objection, your Honor, he's testified he granted permission for what was done. That wasn't storing anything right up to the fence line. He's allowed the items to be parked that were testified to by the parties.

The Court: Overruled.

Mr. Smith: You allowed him to store equipment right up to the fence line, correct?

Mr. Jones: The west or the north fence?

Mr. Smith: Let's start with the west fence.

Mr. Jones: No, he didn't store any equipment down on -- along the north fence below the feed yard, no.

Mr. Smith: How about the equipment stored in this area here?

Mr. Jones: Very little. That old truck had been there, and there's a -- some -- a few pieces up around there, but it wasn't anything because he was farming that down there.

(R. 534; Tr. Vol. I, 196:4 to 197:9)

9. On "cross" by his counsel, Mr. Jones made the following statements.

Ms. White: Do you remember what, if anything, occurred that made you withdraw your permission for Mr. McElprang to continue to have some use of your property? Just answer yes or no. Do you remember an event occurring?

Mr. Jones: Yes.

Okay. Can you tell me when that event occurred?

Mr. Jones: In 1999.

(R. 534; Tr. Vol. I, 231:11 to 231:18.)

10. Later on in "cross" examination, Mr. Jones made the following statements:

Ms. White: Counsel has asked you if you recall where it was that you had conversations about giving him permission to do this or to do that on the property.

Mr. Jones: Yes, we did talk about that in the bath house.

Ms. White: Okay. Tell us what a bath house is.

Mr. Jones: That's down at the bottom of the -- down the processing plant of the mine, and that's where you change clothes and then go into the mine to work. We were -- I talked to him about that, and we also talked about me getting that piece of property, exiting the city, you know.

(R. 534; Tr. Vol. I, 242:4 to 242:13.)

11. Further on in this line of questioning.

Ms. White: Counsel asked you if you remembered any specific conversations on permission that you had granted Mr. McElprang. Are you able to pin down any particular conversation out of the ones you've just been describing in which you gave him any specific permission to park a tractor or a truck?

Mr. Jones: No.

Ms. White: Were there such conversations.

Mr. Jones: Yes.

Ms. White: Is it just possible for you to pin it down:

Mr. Jones: No, I can't say a certain time or anything.

(R. 534, Tr. Vol. I, 244:5 to 244:15.)

12. On redirect conducted by Mr. Smith, Mr. Jones made the following statements:

Mr. Smith: So you've always been in a dispute with McElprangs, haven't you?

Mr. Jones: Not that would affect our relationship. We -- I've given him permission to do things on my place, I'd use his machinery and so on, and we had a good relationship at that time.

(R. 534; Tr. Vol. I, 271:10 to 271:15.)

13. Later, in redirect by Mr. Smith, Mr. Jones provided the following testimony:

Mr. Smith: Well, there was no reason for you to ever give Mr. McElprang permission to do anything because you weren't friends, you didn't like each other, you felt threatened by him.

Mr. Jones: I gave him permission many times. I gave him permission to put a water line through one of my farms completely through it.

Mr. Smith: You never gave him permission to use this property.

Mr. Jones: I sure did.

Mr. Smith: The disputed western property.

Mr. Jones: My property.

Mr. Smith: But you can't tell us when it was you gave him that permission.

Mr. Jones: It was after '72 and in that area all the way through. He knew he could use that property.

Mr. Smith: And he had been using it when you came onto the property? When you bought your property in '72 he was already using it.

Ms. White: Objection, immaterial.

The Court: Overruled.

Mr. Smith: When you came onto the property -- when you bought your property in '72 Mr. McElprang was already using what we've classified today as the western disputed area and the northern disputed area, wasn't he?

Mr. Jones: Yes.

(R. 534, Tr. Vol. I, 275:16 to 276:15.)

14. In redirect, Mr. Jones also made the following statements:

Mr. Smith: And he never asked you for any permission to use the property in the disputed west area and disputed north area, did he?

Mr. Jones: I gave him --

Ms. White: Objection asked and answered.

Mr. Jones: - - permission. I don't know whether he asked.

The Court: Sustained.

(R. 535; Vol. II, 286:4 to 286:11.)

15. Finally, Mr. Jones was recalled at the end of the trial. On cross examination by Mr. Smith, Mr. Jones testified as follows:

Mr. Smith: Okay. Do you remember on the first time you testified you were talking about the McElprangs and you giving them permission to use this west disputed area, and I think your words were, as I recall, "I wasn't using it so I told them they could go ahead and use this west disputed area?"

Mr. Jones: I don't remember that, no.

Mr. Smith: You don't remember that testimony?

Mr. Jones: No.

Mr. Smith: I think that was Tuesday of trial. Would that be your testimony today?

Mr. Jones: I --

Ms. White: I'm going to object, your Honor. I don't even know what that question means. What would be his testimony.

Mr. Smith: Let me ask the question this way.

The Court: Sustained.

Mr. Smith: I'll withdraw. Thank you, your Honor.

Mr. Smith: Is your testimony today that you weren't making any use of the west disputed area so you allowed the McElprangs to come on and make use of that property.

Mr. Jones: No.

Ms. White: Objection. I was going to object it was asked and answered.

Mr. Smith: I'm seeing if he -- he didn't remember the answer, your Honor, so I'm just seeing if he's changing his testimony from Tuesday.

The Court: Yeah. Overruled. Overruled.

Mr. Smith: So today your answer would be no to that question?

Mr. Jones: Ask me the question again.

Mr. Smith: The question is this. Today would your answer be that you gave the McElprangs permission to use this west disputed area because -- and this nor the disputed area because quote "I wasn't making any use of it. I didn't need it?"

Mr. Jones: I didn't make that quote that I wasn't using it.

(R. 537; Tr. Vol. IV, 814:9 to 815:18.)

To interrupt the twenty year period for establishment of a prescriptive easement and boundary by acquiescence in the twenty seven years between 1972 and 1999, the conversation testified to by Blake Jones must have taken place before 1992. In *Ault v. Holden*, 2002 UT 33, ¶ 21, 44 P.3d 781, the Utah Supreme Court recognized that the lack of mutual acquiescence could be evidenced by mere conversations. However, such

conversations must “unequivocally” inform the other property owner that the record owner does not recognize the fence line as the boundary between the adjoining properties. *See id.* While a mere conversation may be sufficient to evidence a dispute, mere allegation that conversation took place, without more, should certainly not be sufficient to refute the allegation that the parties mutually acquiesced in a fence line as the boundary between their properties.

The testimony of Blake Jones was insufficient to allow the trial court to find that “[Blake] had a conversation with Plaintiff Lee McElprang in 1983 in which he gave Lee permission to use the disputed property for grazing purposes and to park equipment on it.” (R. 422.) Most curious is the court’s finding that the conversation took place in 1983. This finding clearly goes against the clear weight of evidence because Blake never testified that the conversation took place in 1983. *See In re L.M.*, 2001 UT App 314, ¶ 14 (stating that a trial court’s findings of fact are reversed by an appellate court “where [a] finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made.” (quotation and citation omitted)). Blake repeatedly testified that he could not remember when the conversation took place, only that it occurred “[p]robably from any time after ‘72”, (R. 534; Tr. Vol. I, 166:16), which was the year that Blake acquired his property. Thus, according to Blake’s own testimony, the conversation (if it occurred at all) could have taken place anytime between 1972 and 1999. The district court’s finding that the permission was granted in 1983 is therefore “so lacking in support” that it is “clearly erroneous.” *Valcarce*, 961 P.2d at 312. On the other hand, the district court specifically found that Lee McElprang testified

that he never received permission and that this conversation never occurred. (R. 423.)

The court itself noted that Blake's testimony was lacking by stating that "Blake cannot remember where the conversation took place, or what exactly was said, or the date on which the conversation occurred." (R. 422.) Clearly, Blake's testimony lacked the foundation and credibility to allow the court to find that such a conversation had occurred. A finding of fact so detrimental to the McElprangs' causes of action should not be based on such deficient testimony. Lee McElprang testified that Blake never gave him permission to use either of the disputed areas, (R. 534; Tr. Vol. I, 50:7 to 50:21), and this testimony should not have been overcome by the vague, inconsistent, incomplete, and unsubstantiated testimony of Blake. Indeed, it is troubling that even after the conversation took place, no further action was taken by the Joneses to support the fact that this alleged conversation took place until 1999. Because Blake's testimony is insufficient to support the district court's finding that Blake gave Lee permission to use the disputed areas during a conversation in 1983, the McElprangs ask this Court to find that the district court's findings were "against the clear weight of the evidence" and therefore "clearly erroneous." *Valcarce*, 961 P.2d at 312.

B. The 1987 Conversation Was Not Sufficient to Show that the Joneses Did Not Recognize the Fence as the Boundary Line

The district court also found that a 1987 conversation involving Lee McElprang, Randy Jones, and Blake Jones "reaffirmed" that the McElprangs knew that the Joneses did not acquiesce in the fence as the boundary. (R. 423.) However, the testimony relating to the conversation by Randy (R. 536; Tr. Vol. III, 659:8 to 663:21) and Blake

(R. 536; Tr. Vol. III, 722:22 to 725:22) does not show that a statement was made to Lee that the Joneses did not accept the fence as a boundary. The Joneses testified that they discussed the location of a rebar stake apparently used to mark the 1983 survey. Lee told them that he had pounded into the ground because he had ruptured a tire on it, but that he could show them where it was located.

The Utah Supreme Court has held that “mere conversations between the parties evidencing either an ongoing dispute as to the property line or an unwillingness by one of the adjoining landowners to accept the line as the boundary” can show that the parties did not mutually acquiesce in the visible line as the property boundary. *Ault v. Holden*, 2002 UT 33, ¶ 21, 44 P.3d 781. The Court further specified that “conversations in which a record owner unequivocally informs the other that he owns beyond the ‘visible line’ claimed as a boundary, and that the owner does not recognize that line as separating the properties” show that there was not mutual acquiescence. *Id.* However, the substance of the conversation, as related by Blake and Randy Jones, does not establish that the Joneses represented to Lee that they did not acquiesce in the fence as the boundary line. There was no unequivocal statement that the fence was not the boundary or that the Joneses did not recognize the fence as the boundary line between the two properties.

Furthermore, any knowledge that the Joneses may have had of the surveyed boundary does not defeat boundary by acquiescence. Boundary by acquiescence is still found where the parties treat a visible boundary as the property line, “regardless of whether the landowner knows where the actual boundary lies” *Id.* ¶ 19. Thus, even if the Joneses or the McElprangs knew, based on the 1983 survey, that the fence line was

not the actual boundary line, this knowledge does not defeat the mutual acquiescence element unless the Joneses show that they **unequivocally** informed the McElprangs that they did not acquiesce in the fence as the boundary line. Although the Joneses may have had knowledge of the true boundary line, the 1987 discussion regarding a rebar survey marker was not sufficient to defeat the McElprangs' boundary by acquiescence claim.

C. The Finding that the McElprangs Plowed a Line Between the Survey Stakes Fails to Show that There Was Not Mutual Acquiescence

As further support for its holding that the Joneses did not acquiesce in the fence as the boundary line, the district court found that in 1983 Lee plowed a furrow between the north and south survey stakes on the western edge of the WDA, and that the McElprangs never cultivated the land between the fence and the furrow after that date. (R. 422.) Even assuming that this finding is correct, it fails to show that the Joneses did not acquiesce in the fence as the boundary line. Whether or not there was a plowed line does not change the fact that both parties continued to use up to the fence line. Even after the line was plowed, the McElprangs continued to use the WDA to graze cattle each winter and to access their property via the curved road. (R. 421.) As the Utah Supreme Court has noted, acquiescence can be inferred from the actions of the landowners. *Ault*, 2002 UT 33, ¶ 19. Thus, because the McElprangs continued to use the WDA up to the fence line on the west side of the fence and the Joneses continued to use their land only up to the fence line on the east side of the fence, the parties' conduct shows that the parties continued to mutually acquiesce to the fence line as the boundary line. *See RHN Corp.*, 2004 UT 60, ¶ 25 ("Occupation up to, but never over, the line is evidence of

acquiescence.”).

The trial court erred as a matter of law in concluding that the McElprangs had not established boundary by acquiescence. As the evidence presented to the district court was insufficient to show that the McElprangs occupied the WDA and NDA by permission, the district court should not have found that the disputed areas were used by permission since 1983. Instead, there is only the McElprangs’ testimony that the parties acquiesced in the fence line as the boundary. Therefore, the district court’s ruling on the boundary by acquiescence claim should be reversed.

IV. THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO SHOW THAT ORAL PERMISSION WAS GIVEN BY BLAKE JONES, THEREBY INTERRUPTING THE PRESCRIPTIVE PERIOD NECESSARY TO A PRESCRIPTIVE EASEMENT

This Court should hold that the district court’s finding that Blake Jones gave oral permission to Lee McElprang to use the disputed areas was in clear error. Based on this finding, the district court held that the twenty-year period necessary to establish a prescriptive easement to use the NDA for storage was interrupted. The trial court found that the McElprangs were not entitled to a prescriptive easement for storing machinery, old vehicles, power poles, etc. (R. 424.) An appellate court “will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous.” *RHN Corp*, 2004 UT 60, ¶ 22 (further citations omitted). However, a trial court’s conclusions of law shall be reviewed “on this issue ‘for correctness, according the trial court no particular deference.’” *Id.* (quoting *Orton*, 970 P.2d at 1256).

As explained above in Section III.A, the finding of fact regarding the 1983

conversation where permission was allegedly granted was against the great weight of evidence and was therefore clearly erroneous.

Although Section III.A discussed the district courts error as it related to the McElprangs' boundary by acquiescence claim, the error is exacerbated in the context of a prescriptive easement. It is a well-established rule in Utah that

once a claimant has shown an open and continuous use of the land under claim of right for the twenty-year prescriptive period, the use will be presumed to have been adverse. To prevent the prescriptive easement from arising, the owner of the servient estate then has the burden of establishing that the use was initially permissive.

Valcarce, 961 P.2d at 311-12; *see also Richins v. Struhs*, 412 P.2d 314, 316 (Utah 1966); *Zollinger v. Frank*, 175 P.2d 714, 716 (Utah 1946). Once the McElprangs showed that they openly and continuously used the NDA for a twenty-year period, the burden of proof was upon the Joneses to show that the use was permissive. The district found that the Joneses met their burden by showing that the McElprangs use of the disputed areas was permissive. (See R. 424.) In reality, the Joneses failed to carry this burden of proof. Blake Jones's inconsistent, unclear, incomplete, and unsubstantiated testimony regarding the alleged conversation where he granted the McElprangs permission to use the disputed areas was insufficient to meet the Joneses' burden of establishing that the use was "initially permissive." Testimony about a conversation that is without information about where the conversation occurred, who was present, what was said in the conversation, or what year the conversation took place is not testimony that carries a burden of proof. Therefore, the district court erred when it concluded that the alleged 1983 conversation vitiated the element of adverse use in the McElprangs' prescriptive easement claim on the

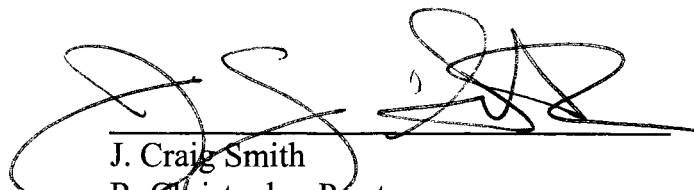
NDA. (*See* R. 424.)

CONCLUSION

The district court incorrectly concluded, after finding that a prescriptive easement existed, that the McElprangs could not use that prescriptive easement to access the silage pit on their property. The district court also erred in concluding that a prescriptive easement could not be created for the storage of equipment. In addition, the district court erred in finding that the McElprangs had not established boundary by acquiescence, as the evidence in support of its findings of permissive use since 1983 was not supported by trial testimony. Finally, the district court erred by determining that the McElprangs could not establish a prescriptive easement in the Northern Disputed Area. Therefore, the McElprangs respectfully request that this court reverse the trial court on these issues and direct entry of judgment in favor of the McElprangs.

Dated this 28th day of July, 2006,

SMITH HARTVIGSEN, PLLC

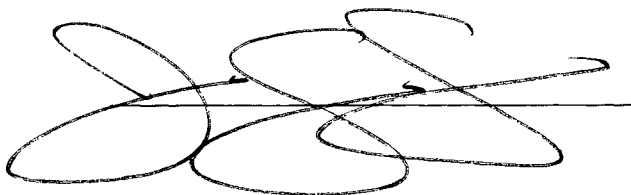


J. Craig Smith
R. Christopher Preston
Attorneys for Lee and Lorie McElprang

CERTIFICATE OF SERVICE

On the 28th day of July, 2006, two true and correct copies of the foregoing **BRIEF OF APPELLANTS** was mailed, first-class United States mail, postage prepaid, to:

Joane Pappas White
475 East Main Street #1
Price, Utah 84501

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line extending to the right.

ADDENDUM

Tab A	January 17, 2006 Findings of Fact and Conclusions of Law
Tab B	January 17, 2006 Judgment
Tab C	Map of properties
Tab D	Aerial photograph of properties

Tab A

Court will refer to the Defendants as "Joneses" and to Defendant Blake Jones as "Blake". Other witnesses may be referred to by their first name only if they have been given sufficient identification.

2. The Court will use the abbreviation "WDA" when it is referring to the western disputed area and will refer to the northern disputed area as "NDA".

3. Before addressing the specific findings in this case, the Court provides the following overview of the actions taken prior to and during the trial in this matter:

A. Plaintiffs' Complaint asserted Causes of action for (1) boundary by acquiescence, (2) prescriptive easement, (3) estoppel waiver, and laches; and (4) trespass. The Plaintiffs requested the Court to quiet title in the Plaintiffs' to the WDA and the NDA. [In the alternative, they are asking that the Court grant the Plaintiffs a judgment creating] an easement in gross on and across the disputed areas for access, storage and agricultural uses. The Plaintiffs also requested an Order requiring the Defendants to rebuild a fence that was removed and pay for half of its upkeep as well as granting an injunction preventing the Defendants from future removal of the fence once the fence has been restored to its historic location.

B. The Defendants filed a Counter Claim which alleged Causes of Action for (1) trespass, (2) assault and (3) intentional/negligent infliction of emotional distress. In a Ruling on Motion for Partial Summary Judgment dated October 18, 2002, the Court dismissed the Defendants' Causes of Action for assault and intentional/negligent infliction of emotional distress. The Defendants' claim for trespass sought money judgment for injuries: to Defendants' land as outlined more fully in paragraph 15 of Defendants' Counter Claim

C. At the conclusion of the Plaintiffs' Case in Chief, the Defendants made Motions to Dismiss certain of the Plaintiffs' Causes of Action. The Court issued the following rulings:

1. The Court granted Defendants' Motion to Dismiss the Plaintiffs' claim for boundary by acquiescence on the NDA.
2. The Court denied the Defendants' Motion to Dismiss the Cause of Action for a prescriptive easement on the NDA.
3. The Court denied Defendants' Motion to Dismiss the Cause of Action for boundary by acquiescence on the WDA.
4. The Court granted the Defendants' Motion to Dismiss the claim for prescriptive easement on the WDA as to farming, but denied the Motion to Dismiss the claim for prescriptive easement as to that portion of the curved road at the top of the WDA.
5. The Court granted Defendants' Motion to Dismiss the Cause of Action regarding estoppel, waiver and laches.
6. The Court denied the Motion to Dismiss the Cause of Action for trespass.

D. After addressing those issues which were dismissed before the conclusion of the trial, the Court now addresses those issues which still require resolution.

4. The parties are adjoining land owners in Emery County, Utah. The Plaintiffs purchased their property from DOUGLAS O. SITTERUD and LORRAINE SITTERUD on June 30, 1969, subject to a mortgage in favor of the FHA. The Defendants purchased their property from FAWN MCCANDLLESS in 1972 but leased the property during the preceding 10 years. The two properties are adjacent to each other and the legal descriptions do not overlap. The Plaintiffs' property is located to the west of the Defendants' property.

5. The fence (hereinafter called "the fence"), which is the subject of this lawsuit, is located entirely on land on which the Defendants are the record owners. The fence runs in an east/west direction and was built between 1948 and 1950 by ED GEARY and TED MCCANDLESS for the sole purpose of dividing EDWARD GEARY's non-irrigated land, which was used as a stackyard, from his irrigated crop land. When constructed it was not intended to serve as a boundary line fence.

6. On or about November 13, 1999, the Defendants caused the fence to be torn down for the purpose of constructing a building on a portion of the property where the fence was located. No prior notice of the removal of the fence was given to the Plaintiffs.

7. The Plaintiffs filed their lawsuit in this matter on May 31, 2000.

8. Plaintiffs' Complaint alleges boundary by acquiescence as one of their Causes of Action. If the Plaintiffs fail to establish any one of the elements of the doctrine of the boundary by acquiescence, the boundary is defeated. In Goodman v. Wilkinson, 629 P.2d 447, 448 (Utah 1981), the four elements of boundary by acquiescence are as follows:

1. Occupation up to a visible line marked by monuments, fences or buildings;
2. Mutual acquiescence in the line as a boundary;
3. For a long period of time;
4. By adjoining landowners.

The Court will address each of these elements.

9. In addressing the element of occupation up to a visible line marked by monuments, fences or building, the Court finds that the Plaintiffs occupied the WDA up to the visible fence by grazing cattle from October through April each year from 1969 until November 14, 1999 when the fence was

removed by the Defendants. The Defendant BLAKE JONES also testified that the Plaintiffs used the WDA each year up to the visible fence line from 1972 to 1999 for grazing purposes but testified that from 1983 forward the number of cattle grazing in that area. was minimal and not 60 to 70 head of cattle as testified to by the Plaintiffs. From the testimony of the various witnesses, the Court finds that the Plaintiffs occupied the WDA up to the visible fence line for grazing purposes from October through April each year from 1969 until November 14, 1999, which is a period in excess of twenty years.

10. The Court also finds that the Plaintiffs raised either alfalfa or corn, or both, on the bottom portion of the WLA, up to the visible fence line each year between 1969 and 1983. The Plaintiffs ceased cultivation of the WDA in 1983.

11. The court finds that the plaintiffs developed a prescriptive easement to use the curved road at the top of the WDA for the purpose of accessing their property located to the east of the WDA. The court finds that the road had been used openly, continuously, adversely and under a claim of right for a period in excess of 20 years for access to the plaintiffs' property prior to the time the plaintiffs purchased the property in 1969, and that the road was used for said purpose for a period in excess of 20 years prior to 1983.

The plaintiffs did not develop or perfect a prescriptive easement on the said road for the purpose of accessing the silage pit because the evidence shows that the pit was built in 1983, and the road was therefore not used for that purpose for a period of over twenty years.

12. In addressing the element of mutual acquiescence in the line as a boundary, the Court finds that in order to prevail on this requirement, the Plaintiffs must establish that the parties recognized and treated the fence line as the boundary dividing the Defendants' property from the Plaintiffs' property.

13. LEE MCELPRANG testified that at the time the Plaintiffs purchased their property in 1969, a Mr. HARWARD of the FHA told the Plaintiffs that the fence line was the eastern boundary of their property. As a result, the MCELPRANG's always thought they owned the WDA up to the fence line and thought that the fence was jointly owned by the parties. The Plaintiffs have never plotted their legal description nor have they ever had their property surveyed. The Court therefore finds that the Plaintiffs, although they did now know where their eastern boundary actually was, acquiesced in the fence line as the eastern boundary of their property. The Court also finds that the Plaintiffs recognized and treated the fence as the boundary dividing the Defendants' property from the Plaintiffs' property.

14. The Defendants had their property surveyed in 1583 by EVAN HANSEN, a registered land surveyor. MR. HANSEN placed stakes on the north and south corners of the west side of the WDA and at other points other than the WDA. BLAKE JONES testified that he never considered the fence to be the boundary between the adjacent properties.

15. BLAKE also testified that he had a conversation with Plaintiff LEE MCELPRANG in 1983 in which he gave LEE permission to use the disputed property for grazing purposes and to park equipment on it. BLAKE cannot remember where the conversation took place, or what exactly was said, or the date on which the conversation occurred. BLAKE further testified that shortly thereafter LEE plowed a furrow between the north and south stakes on the western edge of the WDA that was 4 to 6 inches deep and 1 to 2 feet wide. The MCELPRANGS never cultivated the land between the fence and the furrow after that date.

16. BLAKE further testified that in November of 1999, he revoked the permission for Plaintiffs to use the land in November because the Plaintiffs removed a culvert on the South side of the WDA along the country road and bulldozed a road northward across the WDA.

17. LEE denies that the 1983 conversation Over took place and testified that he was never given any permission by the Defendants to use the WDA.

18. RANALL ERNEST JONES, a son of the Defendants, testified that he was present at a conversation that occurred in the spring of 1987 on the county road immediately south f the WDA. He stated that he and his father were parked on the road when LEE cam driving by. They flagged him down and began discussing the 1983 survey when BLAKE asked LEE about the stake at the northwest corner of the WDA which had been placed there by surveyor EVAN HANSEN. LEE responded that he had pounded the rebar stake into the ground because he ruptured a tire on it. He offered to show RANDALL and BLAKE where the stake was when they were ready to install the fence on the property boundary. RANDALL also testified that following the 1983 conversation he saw the plowed line between the two stakes on the western edge of the WDA. RANDALL testified that the Plaintiffs did not cultivate the WDA after that line was drawn,

19. From the evidence presented, the Court finds (j) the Defendants did not acquiesce in the fence as the boundary between the adjacent properties. The Court further finds the Plaintiffs acquiesced in the fence as the boundary between the two properties only between 1969 up until the spring on 1983 when LEE had the conversation with BLAKE resulting in LEE plowing a line between the two stakes. The Court finds that the 1987 conversation on the county road reaffirmed the Plaintiffs' knowledge that the two stakes marked the boundary between the properties because LEE stated that he could show BLAKE and RANDALL where the northern stake was located "when they were ready to fence the property".

20. In addressing the element that the acquiescence must be for a long period of time, the Court finds that the period of acquiescence by the Defendants in treating the fence as a

boundary line was only for the period from 1969 through the spring of 1983, which is a period of less than twenty years and is, therefore, not ^a long period of time".

21. In addressing the element that the land must be between adjoining landowners, the Court finds that the parties are adjoining landowners with respect to the disputed properties.

22. Because the Court has found that the parties did not mutually acquiesce in the fence line as the boundary between the parties for a period of at least twenty (20) years, the Court finds that the Plaintiffs have failed to establish boundary by acquiescence. Moreover, the Court also finds that the Plaintiffs' occupation of the WDA was by permission granted by BLAKE JONES in 1983.

23. Plaintiffs allege as an additional Cause of Action that a prescriptive easement was created in their favor across Defendant's land. A prescriptive easement is created when the party claiming the prescriptive easement can prove that the use of another's land was (1) open, (2) continuous, (3) adverse, and (4) under a claim of right for a period of twenty (20) years. Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998).

24. The Court finds that the Plaintiffs' use of the NDA was permissive as a result of the 1983 conversation between LEE and BLAKE, and the permissive use vitiates the element of "adverse use". Accordingly, the Plaintiffs' use of the NDA for storing machinery, old vehicles, power poles, etc. was permissive and was not adverse as to the Defendants. Plaintiffs have, therefore, not established a prescriptive easement on the NDA. Furthermore, the Court is not persuaded that an easement can be created on another's land for the purpose of storing junk autos, power poles, etc.

25. The Court finds that the Plaintiffs have developed prescriptive easement to use the curved road which is located at the top of the WDA for the purpose of accessing their property that is

located to the east of the WDA. The Court finds that said road has been used for access to the property owned by the Plaintiffs prior even to the time the Plaintiffs purchased the property in 1969. That road has been used for purposes of access to those eastern fields for a period in excess of twenty (20) years prior to 1983. However, the Plaintiff did not develop a prescriptive easement on said road for the purpose of accessing the silage pit because the evidence shows that the silage pit was not built until 1983 and, the road was therefore not prescriptively used for the purpose of accessing a silage pit for a period of over twenty years.

26. With respect to Plaintiffs' claim for trespass, because the Court has found that the Plaintiffs were occupying the Defendants' land by verbal permission, the permission could be revoked at any time. The Court finds that the Defendants revoked that permission on the date they removed the fence, namely, November 13, 1999. Plaintiffs are not entitled to maintain an action for trespass as they occupied the property at the will of the Defendants.

27. With respect to Defendant's Counter Claim for trespass, the Court finds that in November, 1999, the Plaintiffs entered into and upon the Defendants' property and installed a culvert at the bottom end of the WDA, destroyed the Defendants' fence, and bulldozed a dozer-blade width road northward across the WDA, all without the permission of the Defendants. The Court therefore finds that the Plaintiffs have committed a trespass.

28. During trial, a stipulation was entered into by the parties which provided that in the event the Court found that the Plaintiffs had committed a trespass, then such trespass could be remedied as follow:

A. The parties' attorneys shall select a neutral third person to review and evaluate the restoration of Defendants' property in the WDP and the NDP to its original condition prior to November 1999.

B. Counsel for the parties, no later than March 1, 2006, shall select (1) a date for Lee McElprang to begin the restoration described below, (2) a date for the restoration date to be completed, and (3) a date by which all the junk and personal property shall be removed from the NDA and the WDA. Counsel of the parties shall inform the Court of these dates by filing a written stipulation. The Jones property shall be *restored* to its original condition prior to November 1999 trespass as follows:

1. Lee McElprang shall remove all personal property and junk of any kind whatsoever from both the NDA and the WDA .
2. Lee McElprang shall remove the culvert he caused to be installed in the ditch/canal located on the south end of the WDA;
3. Lee McElprang shall remove the road which he caused to be created from the culvert across the WDA to his property and he shall restore the land under same to its original condition prior to November 1999.
4. Lee McElprang shall restore the fence to its condition prior to November 1999;

C. Upon completion of the restoration by the McElprangs, the neutral third party shall inspect the restoration and either approve same or reject same as being a reasonable restoration. If the restoration is approved, then Plaintiffs shall be entitled to an entry of a Satisfaction of Judgment in this matter. If the restoration is not approved, then Plaintiffs shall have 10 days to bring the restoration up to standard or the agreement shall be cancelled and one of

the commercial contractors, namely Minchey Construction or Scamp Excavation, shall be brought in to finish the work and judgment for the reasonable costs of their work shall enter in favor of the Defendants and against the Plaintiffs herein.

29. The Court finds that said stipulation is fair and reasonable and approves and adopts same herein. In the event that the parties are unable to implement the Stipulation or require additional enforcement, then the Court reserves jurisdiction to enter additional orders concerning same.

30. The Court initially awarded the Defendants their attorney's fees because the Defendants had prevailed in the case. Following a review of Plaintiffs' objection to the award of attorney's fees, the Court has determined that said award was not proper. In civil actions, the Court may award attorney's fees only when there is either a contractual agreement to pay same or a statute that provides for attorney's fees. There was not contract in the current matter. The Court is also persuaded that there was not bad faith on the part of the Plaintiffs with respect to the filing of this action and, therefore, there is no statutory provision that would justify an award of Defendants' attorney's fees.

31. With respect to Defendants' costs, however, the Court finds that the Defendants are the prevailing party regarding Plaintiff's claims and they are entitled to an award of their costs. The Court has stricken the Affidavit of Costs and Attorney's Fees filed by Attorney White and the Amended Affidavit but granted leave for her to file same upon completion of the judgment in this matter. The Court finds that the award of costs and the itemization for same are premature until they are properly submitted as directed by Rule 54 (d) of the Utah Rules of Civil Procedure.

32. With respect to Plaintiffs' costs, the Court finds that Plaintiffs are the prevailing party regarding Defendants' counterclaims for assault and intentional/negligent infliction of emotional distress.

The Court having entered the foregoing Findings of Fact now concludes as follows:

CONCLUSIONS OF LAW

1. The Court concludes that the Plaintiffs established the first third and fourth elements of Boundary by Acquiescence as set forth in the Findings of Fact. However, the plaintiffs have failed to carry their burden of proof with respect to the second element of boundary by acquiescence as set forth in the Findings of Fact

2. The Court concludes that the Plaintiffs failed to establish a Prescriptive Easement for the NDA due to the permission which was granted by Blake for such use in 1983 and furthermore under Utah law a Prescriptive Easement cannot be established for the purpose of storage of Personal Property on the real property of another.

3. The Court concludes that the Plaintiffs established all of the elements for and hold a prescriptive easement to utilize the curved road to access Plaintiffs land but due to the fact that the sileage pit was not installed by Plaintiffs until 1983 Plaintiffs have not established a prescriptive easement over the same curved road for the purpose of accessing the sileage pit on the Plaintiffs land.

4. Based on the Courts ruling on Boundary by acquiescence the Plaintiffs have not met their burden of Proof with respect to their Claim of Trespass.

5. Prior to trial in this matter, the Court concluded that the Defendants counterclaims sounding in assault and in intentional/negligent infliction of emotional distress should be dismissed.

6. The Court now concludes that the Defendants have carried their burden of

proof with respect to their counterclaim for trespass. The parties entered into an oral stipulation in open court wherein they agreed found that LEE MCELPRANG had trespassed upon that if the Court and caused injury to the Defendants' land, that the following stipulation would apply. The Court has concluded that such a trespass has occurred and the Court adopts the Stipulation entered into by the parties as its remedy. The Stipulation is as follows:

A. The parties' attorneys shall select a neutral third person to review and evaluate the restoration of Defendants' property in the WDP and the NDP to its original condition prior to November 1999.

B. Unless a stay for appeal is issued, Counsel for the parties, no later than March 1, 2006 shall select (1) a date for Lee McElprang to begin the restoration described below, (2) a date for the restoration date to be completed, and (3) a date by which all the junk and personal property shall be removed from the NDA and the WDA. Counsel of the parties shall inform the Court of these dates by filing a written stipulation. The Jones property shall be *restored* to its original condition prior to November 1999 trespass as follows:

1. Lee McElprang shall remove all personal property and junk of any kind whatsoever from both the NDA and the WDA

2. Lee McElprang shall remove the culvert he caused to be installed in the ditch/canal located on the south end of the WDA

3. Lee McElprang shall remove the road which he caused to be created from the culvert across the WDA to his property and he shall restore the land under same to its original condition prior to November 1999 ,

4. Lee McElprang shall restore the fence to its condition

prior to November 1999;

C. Upon completion of the restoration by the McElprangs, the neutral third party shall inspect the restoration and either approve same or reject same as being a reasonable restoration. If the restoration is approved, then Plaintiffs shall be entitled to an entry of a Satisfaction of Judgment in this matter. If the restoration is not approved, then Plaintiffs shall have 10 days to bring the restoration up to standard of: the agreement shall be cancelled and one of the commercial contractors, namely *Minchey Construction* or *Scamp Excavation*, shall be brought in to finish the work and judgment for the reasonable costs of their work shall enter in favor of the Defendants and against the Plaintiffs herein.

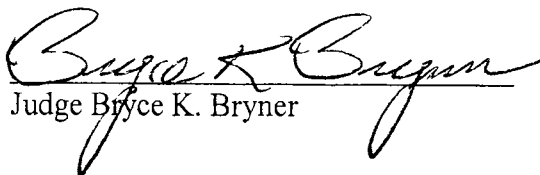
7. In the event that the Plaintiff does not perform the Stipulation outlined herein, the Court will retain ongoing jurisdiction to enter appropriate enforcement orders.

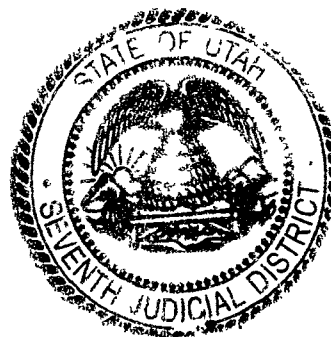
8. Having fully reviewed the issue of attorney's fees following the Court's original ruling and having determined that there is not a statute or bad faith that would justify same, each party is ordered to pay their respective attorney's fees in this matter.

9.. Defendants have prevailed on their trespass counterclaim and in obtaining dismissal of Plaintiffs' claims in this suit and, therefore are entitled to an award of their cost related to these claims pursuant to Rule 54 Utah Rules of Civil Procedure.

10. Plaintiffs have prevailed obtaining dismissal of Defendants' counterclaims for assault and intentional/negligent infliction of emotional distress and therefore are entitled to an award of their costs related to these claims pursuant to Rule 54 of the Utah Rules of Civil Procedure.

DATED this 13th day of January, 2006.


Judge Bryce K. Bryner



CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2006, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**, to:

Joane Pappas White
10 West Main St.
Price, UT 84501

R. Christopher Pantor

CERTIFICATE OF NOTIFICATION

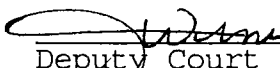
I certify that a copy of the attached document was sent to the following people for case 000700105 by the method and on the date specified.

METHOD NAME

Mail J. CRAIG SMITH
ATTORNEY PLA
215 S STATE ST STE 650
SALT LAKE CITY, UT 84111
Mail JOANE P WHITE
ATTORNEY DEF
10 W MAIN
PO BOX 754
PRICE UT 84501

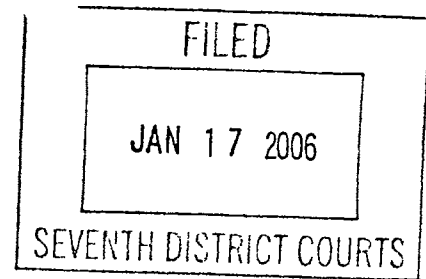
Fax R. CHRISTOPHER PRESTON
(801) 413-1620

Dated this 23rd day of Jan, 2006.


Deputy Court Clerk

Tab B

J. Craig Smith (4143)
R. Christopher Preston (9195)
Smith Hartvigsen, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111
Attorneys for Plaintiffs



IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR
EMERY COUNTY, STATE OF UTAH

BLAKE JONES and WILDA JONES,)	
)	JUDGMENT
Counterclaimants,)	
)	
vs.)	
LEE MCELPPANG and)	Case No. 0007000105
LORIE MCELPRANG,)	
)	Judge Bryce K. Bryner
Counterdefendants.)	

The above entitled matter came on regularly for bench trial to the Court on June 24-27, 2003. The Court heard the sworn testimony of the parties and their witnesses, received exhibits into evidence and took the matter under advisement pending the filing of written closing arguments. The Court having entered its Findings of Fact and Conclusions of Law now, therefore;

IT IS HEREBY ORDERED, ADJUGED AND DECREED AS FOLLOWS:

1. Plaintiffs' Causes of Action sounding in boundary by acquiescence, prescriptive easements, estoppel, waiver and laches and trespass are hereby dismissed with prejudice.
2. Defendants' Causes of Action alleged in their Counter Claim with respect to assault and intentional/negligent infliction of emotional distress are hereby dismissed with prejudice.
3. Judgment is hereby granted against the Plaintiffs, and each of them, and in favor

of the Defendants, and each of them, for the trespass and injury to the land committed by Plaintiff LEE MCELPRAMG against the Defendants' property:

A. Pursuant to the Stipulation of the parties, it is
ordered that the trespass shall be remedied as follows

A. The parties' attorneys shall select a neutral third person to
review and evaluate the restoration of Defendants' property in the WDP
and the NDP to its original condition prior to November 1999.

B. Counsel for the parties, no later than March 1, 2006 shall
select (1) a date for Lee McElprang to begin the restoration described
below, (2) a date for the restoration date to be completed, and (3) a date
by which all the junk and personal property shall be removed from the
NDA and the WDA. Counsel of the parties shall inform the Court of
these dates by filing a written stipulation. The Jones property shall be
restored to its original condition prior to November 1999 trespass as
follows:

1. Lee McElprang shall remove all personal property
and junk of any kind whatsoever from both the NDA and the
WDA

2. Lee McElprang shall remove the culvert he
caused to be installed in the ditch/canal located on the south end of
the WDA

3. Lee McElprang shall remove the road which he
caused to be created from the culvert across the WDA to his
property and he shall restore the land under same to its original

condition, prior to November 1999;

4. Lee McElprang shall restore the fence to its condition prior to November 1999;

C. Upon completion of the restoration by the McElprangs, the neutral third party shall inspect the restoration and either approve same or reject same as being a reasonable restoration. If restoration is approved, then Plaintiffs shall be entitled to an entry of a Satisfaction of Judgment in this matter. If the restoration is not approved, then Plaintiffs shall have 10 days to bring the restoration up to standard or the agreement shall be cancelled and one of the commercial contractors, namely M_nchey Construction or Scamp Excavation, shall be brought in to finish the work and judgment for the reasonable costs of their work shall enter in favor of the Defendants and against the Plaintiffs herein.

B. In the event that Plaintiff LEE MCELPRANG does not complete the remedy as outlined within the Stipulation, this Court retains jurisdiction to enforce the Stipulation or award money damages in order to allow the Defendants' land to be restored back to its original condition prior to the injury inflicted by Plaintiff LEE MCELPRANG.


4. Each party shall pay their respective attorney's fees in this matter.

5. Defendants are awarded costs related to their trespass counterclaim and dismissal of Plaintiff's claims in an amount to be determined pursuant to rule 54 of the Utah Rules of Civil Procedure.

6. Plaintiffs are awarded costs related to the dismissal of Defendants assault and intentional/negligent infliction of emotional distress counterclaims in an

amount to be determined pursuant to rule 54 of the Utah Rules of Civil Procedure.

DATED this ¹¹13 day of January, 2006.


Judge Bryce K. Bryner



CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2006, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **JUDGMENT**, to:

Joane Pappas White
10 West Main St.
Price, UT 84501

R. Cristy Pantor

CERTIFICATE OF NOTIFICATION

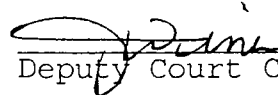
I certify that a copy of the attached document was sent to the following people for case 000700105 by the method and on the date specified.

METHOD NAME

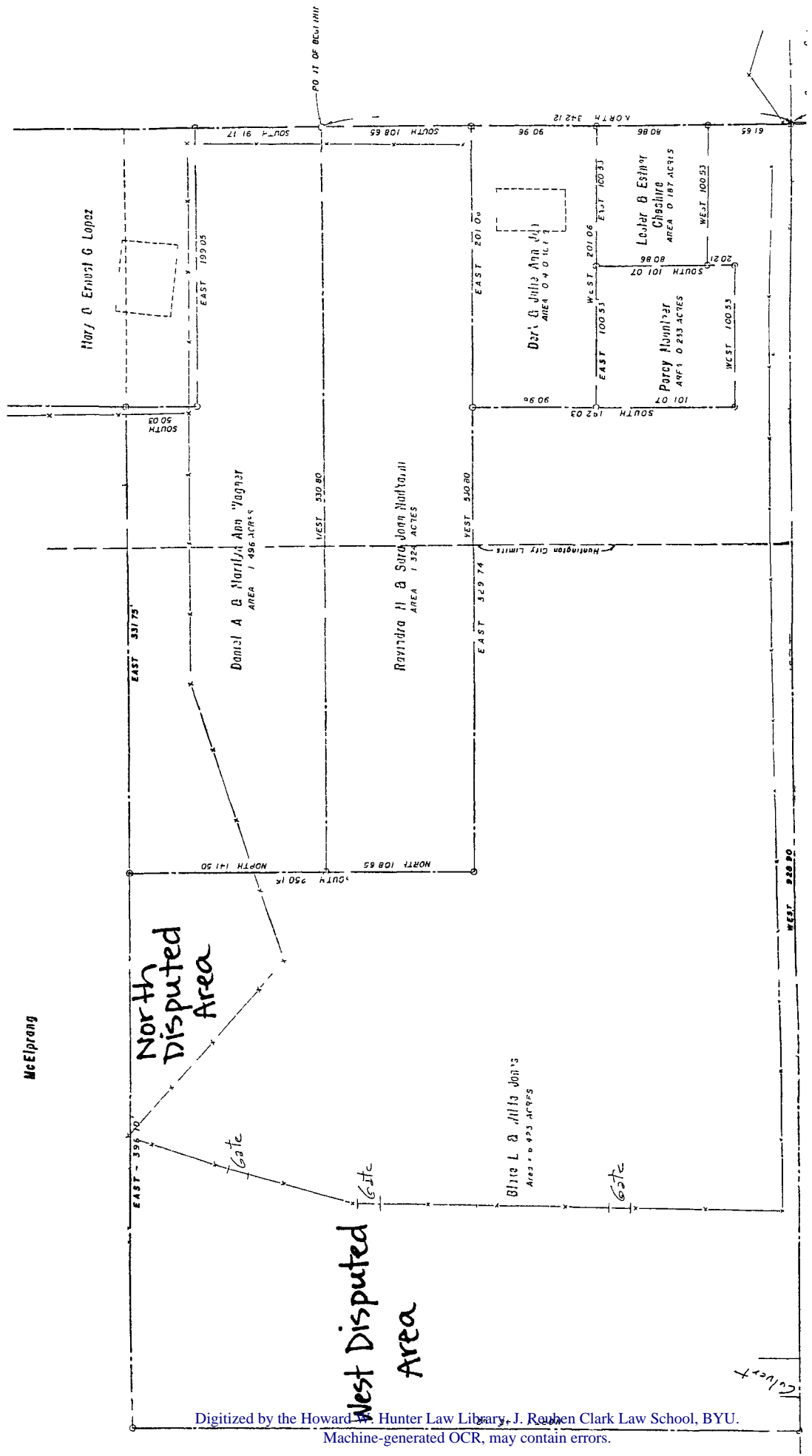
Mail J. CRAIG SMITH
 ATTORNEY PLA
 215 S STATE ST STE 650
 SALT LAKE CITY, UT 84111
Mail JOANE P WHITE
 ATTORNEY DEF
 10 W MAIN
 PO BOX 754
 PRICE UT 84501

Fax R. CHRISTOPHER PRESTON
 (801)413-1620

Dated this 23rd day of Jan., 2006.


Deputy Court Clerk

Tab C



Tab D

