

2006

Jennings Investment, LC., GILBERT JENNINGS;
MANSFIELD JENNINGS; CONRAD
BOWLER; LEWIS J. and DORCUS N.
BOWLER; H. VAL HAFEN; RANDY and GAI
BOWLER; TROY and KERRIE BOWLER; and
JOHN BOWLER v. Dixie Riding Club, Inc. : Reply
Brief

Utah Court of Appeals
Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

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

V. Lowry Snow; Lewis P. Reece; Snow Jensen & Reece; Attorneys for Plaintiffs/Appellees Jennings Investment, LC, Gilbert Jennings, Mansfield Jennings, Conrad Bowler, Lewis J. and Dorcus N. Bowler, H. Val Hafen, Randy and Gai Bowler, Troy and Kerrie Bowler, and John Bowler.
Robert J. Dale; Bradley L. Tilt; Fabian & Clendenin, PC; Attorneys for Defendant Dixie Riding Club.

Recommended Citation

Reply Brief, *Jennings Investment, LC v. Dixie Riding Club, Inc.*, No. 20060631 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6672

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JENNINGS INVESTMENT, LC;
GILBERT JENNINGS; MANSFIELD
JENNINGS; CONRAD BOWLER;
LEWIS J. and DORCUS N. BOWLER;
H. VAL HAFEN; RANDY and GAI
BOWLER; TROY and KERRIE
BOWLER; and JOHN BOWLER,

Plaintiffs and Appellees,

vs.

DIXIE RIDING CLUB, INC., a Utah
corporation; and JOHN DOES 1-20,

Defendant and Appellant.

Case No. 20060631-CA

REPLY BRIEF OF APPELLANT DIXIE RIDING CLUB, INC.

Appeal from a Judgment of the Fifth Judicial District Court, Washington County,
Honorable G. Rand Beacham, District Judge

V. Lowry Snow (3030)
Lewis P. Reece (5785)
SNOW JENSEN & REECE
134 North 200 East, Suite 302
St. George, Utah 84771
Telephone: (435) 628-3688
Facsimile: (435) 628-3275

Attorneys for Plaintiffs/Appellees
Jennings Investment, LC, Gilbert
Jennings, Mansfield Jennings, Conrad
Bowler, Lewis J. and Dorcus N. Bowler,
H. Val Hafen, Randy and Gai Bowler,
Troy and Kerrie Bowler, and John Bowler

Robert J. Dale (0808)
Bradley L. Tilt (7649)
FABIAN & CLENDENIN, PC
Street Address:
215 South State Street, Twelfth Floor
Salt Lake City, Utah 84151-0210
Mailing Address:
P.O. Box 510210
Salt Lake City, Utah 84151-0210
Telephone: (801) 531-8900
Facsimile: (801) 596-2814

Attorneys for Defendant/
Dixie Riding Club

FILED
UTAH APPELLATE COURTS

FEB - 6 2006

IN THE UTAH COURT OF APPEALS

JENNINGS INVESTMENT, LC;)	
GILBERT JENNINGS; MANSFIELD)	
JENNINGS; CONRAD BOWLER;)	
LEWIS J. and DORCUS N. BOWLER;)	
H. VAL HAFEN; RANDY and GAI)	Case No. 20060631-CA
BOWLER; TROY and KERRIE)	
BOWLER; and JOHN BOWLER,)	
)	
Plaintiffs and Appellees,)	
)	
vs.)	
)	
DIXIE RIDING CLUB, INC., a Utah)	
corporation; and JOHN DOES 1-20,)	
)	
Defendant and Appellant.		

REPLY BRIEF OF APPELLANT DIXIE RIDING CLUB, INC.

Appeal from a Judgment of the Fifth Judicial District Court, Washington County,
Honorable G. Rand Beacham, District Judge

V. Lowry Snow (3030)
Lewis P. Reece (5785)
SNOW JENSEN & REECE
134 North 200 East, Suite 302
St. George, Utah 84771
Telephone: (435) 628-3688
Facsimile: (435) 628-3275

Attorneys for Plaintiffs/Appellees
Jennings Investment, LC, Gilbert
Jennings, Mansfield Jennings, Conrad
Bowler, Lewis J. and Dorcus N. Bowler,
H. Val Hafen, Randy and Gai Bowler,
Troy and Kerrie Bowler, and John Bowler

Robert J. Dale (0808)
Bradley L. Tilt (7649)
FABIAN & CLENDENIN, PC
Street Address:
215 South State Street, Twelfth Floor
Salt Lake City, Utah 84151-0210
Mailing Address:
P.O. Box 510210
Salt Lake City, Utah 84151-0210
Telephone: (801) 531-8900
Facsimile: (801) 596-2814

Attorneys for Defendant/Appellant
Dixie Riding Club

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. PLAINTIFFS FAILED THEIR <i>PRIMA FACIE</i> BURDEN TO PROVE THE EXISTENCE OF ANY PUBLIC THOROUGHFARE.....	2
A. Plaintiffs Failed To Establish Use By the Public In General	3
B. Plaintiffs Failed to Establish That Any Use By the General Public Was Without Permission	7
II. PLAINTIFFS FAILED THEIR <i>PRIMA FACIE</i> BURDEN TO PROVE, AND THE DISTRICT COURT COMMITTED PLAIN ERROR IN FAILING TO ASSESS, THE REASONABLE AND NECESSARY WIDTH OF THE ALLEGED ROADWAY	9
III. THIS COURT SHOULD AFFORD NO DISCRETION OR DEFERENCE TO THE DISTRICT COURT’S SUMMARY JUDGMENT RULING	15
A. Disputes of Material Facts Precluded Summary Judgment	16
B. The District Court Improperly Weighed Disputed Facts	19
C. The District Court Abused its Discretion in Declaring Plaintiffs’ Claimed Facts Admitted Under Rule 7	20
IV. ST. GEORGE IS A NECESSARY AND INDISPENSABLE PARTY	22
CONCLUSION.....	24

TABLE OF AUTHORITIES

Page

STATE CASES

<i>Amica Mut. Ins. Co. v. Schettler</i> , 768 P.2d 950 (Utah Ct. App. 1989).....	17
<i>Anderson Dev. Co. v. Tobias</i> , 2005 UT 36.....	21, 22
<i>Bluffdale City v. Smith</i> , 2007 UT App 25.....	21
<i>Bonner v. Sudbury</i> , 18 Utah 2d 140, 417 P.2d 646 (1966).....	5, 8
<i>Cassidy v. Salt Lake County Fire Serv. Council</i> , 976 P.2d 607 (Utah App. 1999).....	23
<i>Draper v. Bernardo</i> , 888 P.2d 1097 (Utah 1995).....	2, 6, 8, 15, 17, 18, 19, 20
<i>Drysdale v. Ford Motor Co.</i> , 947 P.2d 678 (Utah 1997)	17
<i>Durham v. Margetts</i> , 571 P.2d 1332 (Utah 1977)	17
<i>Gary Porter Const. v. Fox Const., Inc.</i> , 101 P.3d 371 (Utah App. 2004)	21
<i>Gottling v. P.R. Inc.</i> , 2002 UT 95 5, 61 P.3d 989.....	15
<i>Heber City Corp. v. Simpson</i> , 942 P.2d 307 (Utah 1997)	2, 7
<i>Jeremy v. Bertagnole</i> , 101 Utah 1, 116 P.2d 420 (1941)	7, 8, 12, 14
<i>Kohler v. Martin</i> , 916 P.2d 910 (Utah Ct. App. 1996).....	10, 14
<i>Landes v. Capital City Bank</i> , 795 P.2d 1127 (Utah 1990)	24
<i>Lindsay Land & Livestock Co. v. Churnos</i> , 285 P. 646 (Utah 1929)	10, 12
<i>Lucky Seven Rodeo Corp. v. Clark</i> , 755 P.2d 750 (Utah App. 1988)	20
<i>Memmott v. Anderson</i> , 642 P.2d 750 (Utah 1982)	9, 14
<i>Morris v. Blunt</i> , 49 Utah 243, 141 P.1127 (1916).....	6
<i>Nyman v. McDonald</i> , 966 P.2d 1210 (Utah Ct. App. 1998).....	2, 3, 17, 20
<i>Orvis v. Johnson</i> , 2006 UT App 394, 146 P.3d 886.....	4
<i>Orvis v. Johnson</i> , 2008 UT 2.....	4, 5, 6
<i>Petersen v. Combe</i> , 20 Utah 2d 376, 438 P.2d 545 (Utah 1968).....	3
<i>Renfro v. McCowan</i> , 2006 WL 3254509 (D. Utah 2006).....	5
<i>Salt Lake County v. Metro West Ready Mix, Inc.</i> , 89 P.3d 155 (Utah 2004)	21
<i>Schaer v. State</i> , 657 P.2d 1337 (Utah 1983).....	13, 14, 16
<i>Seftel v. Capital City Bank</i> , 767 P.2d 941 (Utah App.1989)	24
<i>State v. Pinder</i> , 2005 UT 15, 114 P.3d 551	12

<i>Thurman v. Byram</i> , 626 P.2d 447 (Utah 1981)	5
<i>Timm v. Dewsnap</i> , 851 P.2d 1178 (Utah 1993).....	18
<i>Utah County v. Butler</i> , 2006 UT App 444, 147 P.2d 963	15
<i>Werner-Jacobsen v. Bednarik</i> , 946 P.2d 744 (Utah App. 1997)	24

STATE STATUTES

Utah Code § 72-5-104(1).....	2, 12
Utah Code § 72-5-104(3).....	9
Utah Code § 72-5-104(3).....	12

STATE RULES

Rule 4-501(2)(B) of the Utah Rules of Judicial Administration	20
Utah R. Civ. P. Rule 7(c)(3)(B).....	20, 21
Utah R. Civ. P. Rule 19	23
Utah R. Civ. P. Rule 56(c).....	16

MUNICIPAL ORDINANCES

Revised Ordinances of Salt Lake City § 42-7-5 (1974)	13
--	----

INTRODUCTION

In granting the dedication of a fifty-foot wide public thoroughfare across Dixie's¹ private property, the District Court abandoned the presumptions, burdens of proof, and standards of review for public thoroughfare cases in general, as well as for summary judgment proceedings such as those employed in this case in particular.

First, Plaintiffs failed to provide clear and convincing evidence of nonpermissive use by the general public, as admittedly is required to overcome the well-established presumption in favor of private property owners and against claims for dedication of a public thoroughfare on private property.

Second, the District Court committed plain error when it declared the public thoroughfare is fifty feet in width, despite a lack of evidence of any use for such width and the absence of any analysis showing that width is "reasonable and necessary" as is expressly required by the governing statute and case law.

Third, the evidence Plaintiffs provided was disputed by Dixie, rendering summary judgment inappropriate.

Additionally, the absence of a necessary and indispensable party further precluded summary judgment in this case. The District Court erred in granting summary judgment for Plaintiffs. Therefore, this Court should reverse the District Court and remand this case for trial.

¹ Unless expressly stated otherwise herein, all defined terms used throughout this reply brief have the meanings and definitions set forth in Dixie's opening brief to this Court.

ARGUMENT

I. PLAINTIFFS FAILED THEIR *PRIMA FACIE* BURDEN TO PROVE THE EXISTENCE OF ANY PUBLIC THOROUGHFARE

Plaintiffs acknowledge that in order to establish the claimed dedication to the public of the Alleged Roadway across Dixie's private property, the governing statute requires Plaintiffs to prove continuous use of it "as a public thoroughfare" for at least ten years. Utah Code § 72-5-104(1) (emphasis added); Brief of Appellees, p. 31. Plaintiffs also acknowledge that in order to establish the public thoroughfare element they must prove use by the public in general that is without permission of the owner, Dixie. *E.g.*, *Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (Utah 1997); Brief of Appellees, p. 32. Plaintiffs further acknowledge they must prove each of those elements and sub-elements by clear and convincing evidence. (Brief of Appellees, p. 31). The Utah Supreme Court has consistently held:

The law does not lightly allow the transfer of property from private to public use. The public's taking of property in such circumstances as this case presents requires proof of dedication by clear and convincing evidence. This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect. In addition, "[t]he presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it." [*Draper v. Bernardo*, 888 P.2d at 1099 (Utah 1995) (emphases added) (citations omitted)].

Additionally, in summary judgment cases like this one, the District Court must view all facts and inferences in the light most favorable to Dixie as the non-moving party, any dispute of material fact will preclude relief. *E.g.*, *Nyman v. McDonald*, 966 P.2d 1210, 1212-13 (Utah Ct. App. 1998). The standard of proof demanded of Plaintiffs to

obtain a public thoroughfare is therefore even more rigorous on summary judgment. Furthermore, in reviewing a grant of summary judgment, this Court must “accord no deference to the trial court’s conclusions of law and review them for correctness.” *Id.* (citations omitted).

Plaintiffs’ public thoroughfare claim in this case fails, and the District Court erred in granting summary judgment for Plaintiffs, because (even before getting to the issue of Dixie’s disputes of material facts, discussed below) Plaintiffs did not establish sufficient evidence to prove by clear and convincing evidence use by the public in general that was without permission.

A. Plaintiffs Failed to Establish Use By the Public in General

It is well-established, and Plaintiffs admit, that “[adjoining] property owners cannot be considered members of the public generally, as that term generally is used in dedication by user statutes.” *Petersen v. Combe*, 20 Utah 2d 376, 377, 438 P.2d 545, 546 (Utah 1968) (emphasis added). Each of Plaintiffs’ affiants admitted they own, recently owned, or were members of a limited liability company (Plaintiff Jennings Investment, LC) which owns, property adjacent to the Alleged Roadway. Plaintiffs therefore properly conceded that to the extent they discuss the affiants’ own claimed use of the Alleged Roadway, and use by any other neighboring property owners, those affidavits are immaterial, irrelevant, and cannot be counted towards any showing of use by the public generally. (Brief of Appellees, pp. 21 & 34).

To the extent Plaintiffs' affidavits discuss any use of the Alleged Roadway by anyone other than themselves and other neighboring property owners, those affidavits are too vague, conclusory, and lacking foundation to satisfy Plaintiffs' burden of proof.

Plaintiffs cited the case of *Orvis v. Johnson*, 2006 UT App 394, 146 P.3d 886, for the proposition that summary judgment affidavits are deficient if they state only conclusions without factual foundation. (Brief of Appellees, p. 25). That very premise and the Utah Supreme Court's recent ruling in *Orvis* are fatal to Plaintiffs' claims in this case. To begin with, under Plaintiffs' own premise, the affidavits they submitted in this case do not establish general public use because they merely make general and conclusory references to unspecified "people" and a similarly amorphous "general public." Not one of those "people" nor one actual member of the "general public" is identified. Nor do Plaintiffs indicate how many members of the "general public" used the Alleged Roadway, how frequently they used it, the volume of such claimed use, or how much of the claimed use was by any vehicles versus just by people walking or riding horses that was the primary use referred to in Plaintiffs' affidavits.²

Moreover, not one member of the "general public" provided an affidavit describing his or her claimed use of the Alleged Roadway. This puts Plaintiffs' limited evidence in this case in stark contrast with the cases upon which Plaintiffs attempt to rely to show public use. (Brief of Appellees, pp. 37-38 (citing *Renfro v. McCowan*, 2006 WL

² See R. 232-33 (Affidavit of Conrad Bowler ¶¶ 5-6) (describing use by riders on horseback and walkers); R. 239-40 (Affidavit of Ethan Bundy ¶¶ 4-5) (same); R. 244-45 (Affidavit of H. Val Hafen ¶¶ 4-5) (same); R. 272-73 (Affidavit of Gilbert Jennings ¶¶ 4-5) (same); R. 278-79; (Affidavit of Mansfield Jennings ¶¶ 4-5) (same); R. 283-84 (Affidavit of Lewis J. Bowler ¶¶ 4-5) (same).

3254509 (D. Utah 2006); *Thurman v. Byram*, 626 P.2d 447 (Utah 1981); *Bonner v. Sudbury*, 417 P.2d 646 (Utah 1966) (where courts found general public use because multiple witnesses, including witnesses who were themselves members of the general public, testified to multiple and general uses made by particularized or identified members of the general public)).

Since Plaintiffs' affidavits fail to prove general use by the public at large, and certainly do not prove any such use by the required quantum of clear and convincing evidence, Plaintiffs failed to satisfy their initial burden to establish that material element of their claim.³ As the Utah Supreme Court recently reaffirmed in *Orvis*, 2008 UT 2, ¶ 10, the party who has the burden of proof at trial cannot obtain summary judgment if they fail to establish a necessary element of their claim. In *Orvis*, the Court explained “it is Orvis, the moving party, who bears the burden. As a result, Orvis also had the obligation to establish essential facts necessary to support his claim in order to justify [summary] judgment in his favor.” *Id.* at ¶ 9. However, “Orvis’s motion for summary judgment failed to establish the necessary elements of [his claim], and thus did not show that he was entitled to judgment as a matter of law. Summary judgment in his favor therefore was inappropriate.” *Id.* at ¶ 13.

Likewise in this case, it is Plaintiffs who bear the burden of proof at trial on their claim of a public thoroughfare. As a result, Plaintiffs, in moving for summary judgment,

³ Plaintiffs repeatedly claim that Dixie’s discovery responses at R. 265 acknowledge public use was so extensive that Dixie could not identify the users. (*E.g.*, Brief of Appellees, pp. 13 & 27). That is simply untrue. Dixie made absolutely no such acknowledgement.

also had the burden to establish all facts necessary to support their claim, including by clear and convincing evidence. As shown above, Plaintiffs failed to show use by the public in general, which is an essential element of their claim. Accordingly, as in *Orvis*, summary judgment in Plaintiffs' favor in this case was inappropriate.⁴

Plaintiffs assert they do not need to provide the amount or detail of information discussed above with respect to the claimed public users of the Alleged Roadway. That is simply incorrect. That is precisely the amount and detail the Utah Supreme Court has required, and for the absence of which it has held public thoroughfare dedications improper, for more than 90 years. *E.g.*, *Bernardo*, 888 P.2d at 1100 (reversing dedication granted on summary judgment, noting "infirmities" in claimant's affidavits which merely made conclusory reference to use purportedly by the general public but without identifying any such claimed users); *Morris v. Blunt*, 49 Utah 243, 141 P.1127, 1130-31 (1916) (holding that "there was not sufficient evidence of use by the public to effect any dedication of the road as a public highway where "the evidence does not disclose how

⁴ Plaintiffs argue Dixie did not raise below any claim of Plaintiffs' failure to establish use by the public in general. (Brief of Appellees, p. 27). Not only is that simply untrue (Dixie expressly argued this issue below, *see* R. 131, 288-89), but that also is an ineffective and improper attempt by Plaintiffs to shift the burden of proof in this case to Dixie. It is Plaintiffs' burden in this case to prove public use. Plaintiffs themselves acknowledge that "whether the use referred to in Plaintiffs' affidavits was sufficient to meet the public use requirement of the statute is a sufficiency of the evidence issue." (Brief of Appellees, pp. 27-28). Their affidavits were not sufficient to meet the statutory requirement, so Plaintiffs failed their burden to prove an essential element of their claim, regardless of what Dixie did or did not argue below. Summary judgment for Plaintiffs therefore was inappropriate, including as confirmed and explained in the Utah Supreme Court's ruling in *Orvis v. Johnson*, 2008 UT 2, discussed in the main text above.

many there are or ever were, how frequently they used the road, by what right they traveled the road, nor the circumstances of their use”) (emphasis added).

B. Plaintiffs Failed to Establish That Any Use By the General Public Was Without Permission

It is well-settled that any amount of use, even if it is by the public, cannot give rise to a public thoroughfare if such use is by permission of the owner. *See e.g., Heber City Corp. v. Simpson*, 942 P.2d 307, 311 (Utah 1997). Pursuant to the general presumption in public thoroughfare cases in favor of private property owners and against dedication, the Utah Supreme Court has explained that when parties testify about others’ use of a claimed thoroughfare, “such use would be presumed a permissive use, absent evidence to the contrary.” *Jeremy v. Bertagnole*, 101 Utah 1, 116 P.2d 420, 424 (1941). Again, such evidence must be clear and convincing. *E.g., Petersen*, 438 P.2d at 546.

Lacking a single affidavit from anyone qualifying as a member of the general public, only two of Plaintiffs’ affidavits make any mention or claim at all of whether the uses claimed to have been made of the Alleged Roadway by unidentified “people” or the amorphous “general public” were permissive uses. Even those two affidavits state only that those particular affiants do not recall Dixie ever telling anyone that use was by permission only. (R. 234 (Affidavit of Conrad Bowler, ¶ 8); R. 237 (Affidavit of Gilbert Jennings, ¶ 6)). Of course, those two affiants could not have been, and do not claim to have been, privy to all of Dixie’s communications and dealings with the entire general public. Plaintiffs’ affiants therefore have no basis to say whether any “people” who may

ever have used the Alleged Roadway did so with Dixie's permission. Plaintiffs' affiants' lack of knowledge of and inability to "recall" any communications Dixie had with any claimed public user allowing their use by permission certainly is not clear and convincing evidence of use without permission.⁵

Failure to prove either use by the general public or that any such use was without permission is alone fatal to the statutory "public thoroughfare" element required for Plaintiffs' claim, and is thus fatal to Plaintiffs' summary judgment motion. In this case Plaintiffs failed to prove both of those.⁶ The District Court therefore erred in holding the

⁵ Plaintiffs complain of a claimed paradox in requiring public thoroughfare claimants such as them to prove the public's use was without permission. They argue "[i]f the owner knows of unauthorized use of his property, and yet allows such use to continue," such use should be presumed to be adverse and not permissive, as in prescriptive easement cases. (Brief of Appellees, p. 41). However, it is indeed the burden of the party claiming a public thoroughfare, in this case Plaintiffs' burden, to prove use is without permission. *E.g., Bernardo*, 888 P.2d at 1099. Plaintiffs' complaint is an attempt to shift the burden of proof in this case to Dixie. That attempt is improper and ineffective, particularly since it presumes without proof that any use is "unauthorized." Adopting Plaintiffs' desired presumption of adverse use as in prescriptive easement cases is contrary to the long-settled rule in Utah public thoroughfare cases that "[t]he presumption is in favor of the property owner" against a dedication. *Bernardo*, 888 P.2d at 1099 (quoting *Bertagnole*, 639 P.2d at 213)(quoting *Bonner v. Sudbury*, 18 Utah 2d 140, 143, 417 P.2d 646, 648 (1966)). There are good reasons for this distinction from prescriptive easement cases, since a prescriptive easement is a private right and generally will therefore be more limited than dedicating a right to the general public to use one's private property as Plaintiffs seek in this case. It is Plaintiffs' burden in this case to prove, by clear and convincing evidence, that any use by the public was non-permissive. Their failure to do so below means they failed an essential element of their claim, and summary judgment in their favor was inappropriate. *Orvis v. Johnson*, 2008 UT 2, ¶¶ 7-13 (holding summary judgment inappropriate where moving party who would bear burden of proof at trial fails to prove all elements of its claim to justify judgment in his favor as a matter of law).

⁶ Plaintiffs mistakenly argue Dixie's standing argument is a new one raised for the first time on appeal. To the contrary, however, Dixie expressly argued below that "private

use alleged by Plaintiffs established the existence of a public thoroughfare by clear and convincing evidence. This is particularly true on summary judgment in contravention of the presumption against dedications in general as well as the summary judgment standard requiring all facts and inferences to be viewed in the light most favorable to Dixie as the nonmoving party on Plaintiffs' motion. This Court therefore should reverse the District Court and remand this case for trial.

II. PLAINTIFFS FAILED THEIR *PRIMA FACIE* BURDEN TO PROVE, AND THE DISTRICT COURT COMMITTED PLAIN ERROR IN FAILING TO ASSESS, THE REASONABLE AND NECESSARY WIDTH OF THE ALLEGED ROADWAY.

Even if a public thoroughfare were properly found to exist, which did not occur, the District Court erred in declaring it to be fifty feet wide without any evidence from Plaintiffs of, and without any assessment or analysis from the District Court regarding its "reasonable and necessary" scope and width.

The governing dedication statute states the scope of any public thoroughfare found to exist under that statute is "that which is reasonable and necessary to ensure safe travel under the facts and circumstances." Utah Code § 72-5-104(3) (emphasis added). Failure to make a reasoned assessment and determination is plain error and requires that the case be remanded. *Memmott v. Anderson*, 642 P.2d 750, 754 (Utah 1982) (remanding for trial

persons are seeking to deprive the plaintiff's [sic] of their property with no standing to do so." (R. 135 (Memorandum of Points and Authorities in Support of Defendant's Motion for Partial Summary Judgment p. 7)). As shown above, including by their own admissions, Plaintiffs are indeed private persons and are not members of the general public whose use could give rise to a public thoroughfare. That is why Plaintiffs lack standing to bring this claim.

on width even after a trial was held in which “substantial evidence of public usage” was produced and a public thoroughfare was dedicated explaining: “the record herein reveals no evidence concerning the reasonable and necessary width of the [] Road. We are simply unable to discover upon what basis the district court determined that the width of the road should be 16 feet.”); *See also, Kohler v. Martin*, 916 P.2d 910, 914 (Utah Ct. App. 1996) (upholding dedication of public thoroughfare due to “widespread public use,” but remanding because “the trial court erred in failing to assess the reasonable and necessary width of the roadway”).

As the Utah Supreme Court explained in *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 649 (Utah 1929):

It is proper and necessary for the court in defining [a public thoroughfare] to determine its width, and to fix the same according to what was reasonable and necessary, under all of the facts and circumstances, for the uses which were made of the road.” [emphasis added].

Similarly, in *Bertagnole*, 101 Utah 1, 116 P.2d 424 (1941), the Court stated:

The purpose for which the [public thoroughfare or public highway] was acquired must determine the effect of the right parted with by the owner, and the width necessary for the enjoyment of the highway by the public.’ Hence, while it is true as contended by appellant that where dedication is established by user the use to which the way has been put measures the extent of the right to use, this limitation goes to the kind of use. A particular use having been established, such width should be decreed by the court as will make such use convenient and safe. [emphasis added].

District courts therefore must make a reasoned ruling as to the scope and width of any thoroughfare created by court decree under the statute. Such ruling must take into

account and assess, discuss, and be limited to, the width that is reasonable and necessary in light of the evidence of the historic uses of the claimed thoroughfare.

In this case, however, there was no evidence whatsoever presented by Plaintiffs to show in any way what the reasonable and necessary width of any Alleged Roadway should be in light of the uses claimed to have been made of it historically. Plaintiffs failed to present a single affidavit or other piece of evidence showing the width to which the Alleged Roadway purportedly was used. As discussed above, Plaintiffs failed to identify who used the Alleged Roadway, how often, the volume of use, and how much of that volume was limited to pedestrian and horse back riders that was the focus of Plaintiffs' evidence. In addition to therefore failing Plaintiffs' burden of proof for the existence of a public thoroughfare at all, those failures also highlight the lack of evidence to support the fifty-foot road width. The District Court's Findings of Fact and Conclusions of Law do not contain any findings as to the reasonable and necessary width of the Alleged Roadway, nor could they since there was no evidence presented by Plaintiffs from which the District Court could have conducted any such analysis of that material issue. The District Court merely adopted without discussion or analysis the fifty-foot width unilaterally and subjectively inserted by Plaintiffs into the Decree of Dedication. The court below did that without any analysis or findings whatsoever regarding whether (and certainly not clearly and convincingly establishing), that was the reasonable and necessary width in light of the claimed historic uses. This is plain and

reversible error on the face and plain language of Utah Code Section 72-5-104(3), and each of the above-cited cases.⁷

The only evidence Plaintiffs now attempt to argue in support of the fifty-foot road width granted below is a proposed plat map from 1987, and a series of other documents making reference to a road. Those documents, however, are irrelevant to, and certainly are not clear and convincing evidence of, the reasonable and necessary width of any Alleged Roadway which must be based upon use under the very statute by which Plaintiffs seek the public thoroughfare dedication, and pursuant to the dispositive case law. Utah Code § 72-5-104(1) (allowing dedication of a public thoroughfare after “continuous use” by the public for a period of ten years) (emphasis added); *Lindsay*, 285 P. at 649 (stating that courts must determine and fix the width of a road based upon “the uses which were made of the road”) (emphasis added); *Bertagnole*, 116 P.2d at 424

⁷ Plaintiffs attempt to argue that the width of the Alleged Roadway is a new issue raised for the first time on appeal that cannot be heard by this Court. (Brief of Appellees, p. 42). That argument, however, again forgets that it is Plaintiffs’ burden to raise and prove the width of its claimed public thoroughfare. Plaintiffs’ argument, therefore, is an admission that Plaintiffs failed their burden below, and that summary judgment for Plaintiff was therefore improper. *Orvis*, 2008 UT 2 at ¶¶ 7-13 (explaining summary judgment for party who has the burden of proof is inappropriate where they fail to prove all elements of their claim). Moreover, Dixie actually did raise the width issue to the District Court below, including raising disputes of fact on that issue as will be shown below. In any event, appellate courts can consider issues raised for the first time on appeal where the district court committed plain error, as it did in this case in failing its express statutory duty to assess the reasonable and necessary width of any public thoroughfare. See *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551, 561.

(finding that “the use to which the way has been put measures the extent of the right of use”) (emphasis added).⁸

Plaintiffs’ argument that the Alleged Roadway must be fifty-feet wide as a matter of law under St. George city ordinances is completely without merit. The argument that city ordinances dictate public thoroughfare width determinations was soundly rejected in *Schaer v. State*, 657 P.2d 1337, 1342 (Utah 1983). In that case the district court had granted summary judgment declaring the existence of a public thoroughfare. As to its width, the Utah Supreme Court explained:

In granting the plaintiff’s motion, the trial court apparently relied on the Revised Ordinances of Salt Lake City § 42-7-5 (1974), as establishing the width of the Dugway road at 50 feet as a matter of law. This reliance was misplaced It does not address the reasonable and necessary width of a highway dedicated to the public [*Schaer*, 657 P.2d at 1342].

The *Schaer* court therefore remanded for trial a determination on the reasonable and necessary width, confirming the district courts’ duty under the public thoroughfare statute to receive evidence regarding and to analyze the “reasonable and necessary” width

⁸ The proposed 1987 plat map also cannot be relied upon for evidence of road width because the District Court erred in even making the proposed plat map a part of the record in this case. It never was a part of the record below, as shown in Dixie’s “Opposition of Dixie Riding Club, Inc. to Plaintiffs’/Appellees’ ‘Motion to Correct Error in Record’” on file herein. Despite statements in Plaintiffs’ motion to “correct” the record assuring that counsel confirmed the proposed plat map was submitted with Plaintiffs’ summary judgment materials, in oral argument on that issue before the District Court on remand, Plaintiffs’ counsel admitted: “I don’t have a specific recollection of seeing the dedication plat in my mind, and submitting it to the court” (R. 451 (Hearing Transcript of August 8, 2007 on Motion to Correct Record p. 4)). Quite simply, that map was not filed as a part of the record below, and the District Court erred in supplementing the record belatedly to include it. In any event as a proposed but admittedly never approved, recorded, or dedicated plat map, that document cannot sustain the District Court’s ruling of a 50-foot road width anyway in this action seeking a public thoroughfare based upon an alleged but not proven usage.

of a thoroughfare based on historic use, rather than to defer to city ordinances that may bear upon normal city road width decisions. *Id.* at 1342. Moreover, although *Schaer* states city ordinances may be considered as a part of the road width under the circumstances, *id.*, Plaintiffs have failed to identify any city ordinance that would require width in this case to be set at fifty feet, and have failed to offer any evidence to prove which, if any, such ordinance(s) might apply (for example, to support the arguments in their brief as to what type or class of road the Alleged Roadway in this case would be, and thus which St. George ordinance(s) to which it might be subject).⁹

Plaintiffs have wholly failed their statutory burden to prove, and the District Court failed its statutory duty to analyze and evaluate the reasonable and necessary width of the Alleged Roadway.¹⁰ Summary judgment for Plaintiff s was therefore improper, and this

⁹ Contrary to Plaintiffs' claim (Appellees' Brief, p. 45), Dixie has not acknowledged that St. George would require the width to be set at fifty feet. Rather, what Dixie said in its opening brief is that "fifty feet was a width unilaterally and subjectively chosen by Plaintiffs, likely because that is the width required by St. George City Code for development, an obvious and impermissible expansion of the scope of any Alleged Roadway and the historic use even as claimed by Plaintiffs." (Dixie's Brief, p. 32). As shown above, Plaintiffs' evidence was that the primary use of the Alleged Roadway was by walkers and people riding horses. As a matter of law, therefore, under the public thoroughfare statute Plaintiffs cannot receive a fifty-foot road for development. As noted above, a public thoroughfare by court decree is limited to the uses historically made of it. "A bridle path abandoned to the public may not be expanded by court decree into a boulevard." *Bertagnole*, 101 Utah 1, 116 P.2d at 424.

¹⁰ That is plain error as shown by the *Memmott* and *Kohler* cases cited above, and also under the three-part test discussed by Plaintiffs. First, the error exists because no relevant evidence of reasonable and necessary width of the Alleged Roadway was presented by Plaintiffs, and the District Court failed its duty to analyze the reasonable and necessary width. Second, such error should have been obvious to the District Court because the statute expressly requires on its face that the court determine the reasonable and necessary width of the Alleged Roadway. Third, the error is harmful because even if any

Court should reverse and remand for trial at least as to the reasonable and necessary width of the Alleged Roadway (as well as for the entire case at large).

III. THIS COURT SHOULD AFFORD NO DISCRETION OR DEFERENCE TO THE DISTRICT COURT'S SUMMARY JUDGMENT RULING

Plaintiffs argue (Brief of Appellees, p. 1) that this Court should grant “significant discretion” to the district court’s findings and conclusions in this case. This Court has explained, however, including in the case of *Utah County v. Butler*, 2006 UT App 444, 147 P.2d 963, which Plaintiffs cited in support of their above argument, that such discretion and deference is extended to only to district courts’ findings and conclusions made after a trial, where the trial court observed witnesses testify and is therefore specially situated for “evaluating the credibility of the witnesses and weighing the evidence.” *Id.* ¶ 3.

That deference is patently inappropriate in and inapplicable to the case at bar, which was decided not after a trial, but on summary judgment. It is well-settled that appellate courts must “review a trial court’s summary judgment ruling for correctness and afford no deference to its legal conclusions.” *Gottling v. P.R. Inc.*, 2002 UT 95 ¶ 5, 61 P.3d 989, 991 (emphasis added) (internal quotations omitted). That is because, among other things, “on a motion for summary judgment, a trial court should not weigh disputed evidence.” *Draper v. Bernardo*, 888 P.2d 1099 (Utah 1995).

public thoroughfare existed at all in this case, which has not been properly established, the evidence shows it would be substantially narrower than the fifty-feet that was dedicated by the District Court (and certainly that it may not be expanded into a road for Plaintiffs’ further property development).

Plaintiffs cite *Schaer*, for the proposition that public thoroughfare dedication cases can be decided on summary judgment. (Brief of Appellees at 28). The issue in this case, however, is not whether public thoroughfare cases in the abstract can be decided on summary judgment. The issue is whether the District Court erred in doing so in this case. In *Schaer*, the Court noted two reasons why summary judgment was granted in that case, both of which distinguish *Schaer* from the case at bar and actually highlight why summary judgment was inappropriate in this case. The Court there upheld the grant of summary judgment because “the moving party’s evidentiary material is in itself sufficient,” and because “the opposing party fail[ed] to proffer any evidentiary matter ... whatsoever” to oppose summary judgment, opting instead to rely exclusively on a failed cross-motion for summary judgment on an entirely different set of facts and an entirely different legal theory from the first party’s motion under the public thoroughfare dedication statute. *Schaer v. State*, 657 P.2d 1341 (Utah 1983).

In contrast, here, Plaintiffs’ evidence below was not sufficient to meet its burden of proof in the first place. Dixie presented evidence disputing and legal arguments opposing Plaintiffs’ motion. Therefore, as in *Schaer*, summary judgment was inappropriate and the Court should reverse the District Court’s grant of summary judgment and remand this case for trial.

A. Disputes of Material Facts Precluded Summary Judgment

In addition to Plaintiffs’ failure to meet its *prima facie* burden of proof in the first place, which alone rendered summary judgment inappropriate as shown above, the

District Court also erred in granting summary judgment for Plaintiffs where there were disputes of material fact. Summary judgment can be granted only if “there is no genuine issue as to any material fact” and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. Rule 56(c). It is well-settled that “[o]ne sworn statement under oath is all that is necessary to create a factual issue, thereby precluding summary judgment.” *Nyman v. McDonald*, 966 P.2d 1210, 1213 (Utah Ct. App. 1998) (quoting *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah Ct. App. 1989)) (alteration in original). In proceedings on a motion for summary judgment, the district court is required to view all facts, and all inferences that can reasonably be drawn from the facts, in the light most favorable to the non-moving party. *E.g., Drysdale v. Ford Motor Co.*, 947 P.2d 678, 680 (Utah 1997). Also, all facts asserted by Dixie in opposition to Plaintiffs’ cross-motion for summary judgment were required to be taken as established for the purposes of those proceedings. *E.g., Durham v. Margetts*, 571 P.2d 1332, 1334-35 (Utah 1977).

The case of *Draper v. Bernardo*, 888 P.2d 1097 (Utah 1995) is squarely on point and dispositive of this case. The district court in *Bernardo* had granted summary judgment, declaring a part of defendant’s property dedicated as a public thoroughfare, precisely as was done in this case. *Id.* at 1098. The Utah Supreme Court reversed, however, because affidavits submitted by defendants opposing summary judgment stated the people who used the claimed thoroughfare “were either owners of land adjacent to the road” and thus were not members of the general public, or sometimes, were given permission to do so. *Id.* at 1099-1100. The Utah Supreme Court held that summary

judgment was improper in that case due to disputes of material fact, noting that the “main thrust” of those affidavits conflicted with the district court’s findings regarding whether people using the claimed road were members of the general public whose use could ripen into a public thoroughfare at all, and whether, even if they were members of the general public, they used the claimed road with permission of the owners. *Id.* at 1100. The Court further explained:

Due to [those] conflicting sworn statements, clouds of doubt yet remain over the possible dedication of the road to the public. At this initial stage, plaintiffs have fallen short of presenting undisputed evidence which warrants summary judgment in their favor. Their affidavits certainly fail to clearly and convincingly prove their position. See *Petersen*, 438 P.2d at 548. “Summary judgment procedure is generally considered a drastic remedy,” *Timm v. Dewsnap*, 851 P.2d 1178, 1181 (Utah 1993), and is appropriate only when the facts are clear and undisputed. We therefore reverse the trial court’s conclusion that as a matter of law the road was dedicated to the public. [*Id.* at 1101 (emphasis added)].

Just as in *Bernardo*, the District Court in this case impermissibly granted summary judgment for Plaintiffs over and despite sworn affidavits submitted by Dixie which disputed Plaintiffs’ claims of use of the Alleged Roadway by the general public and whether any such claimed use of the Alleged Roadway in any event was without permission. (E.g., R. 139 & 140 (Charles Welch Affidavit, ¶¶ 3 & 10)). Each of those issues is material to Plaintiffs’ motion and necessary for it to prevail. Both, however, were disputed by Dixie, thereby creating fact disputes precluding summary judgment for Plaintiffs, particularly since the evidence and all inferences from the evidence were

required to be viewed in the light most favorable to Dixie and against Plaintiffs' motion.¹¹

There were also disputes of fact before the District Court pertaining to the width of the Alleged Roadway, thereby further precluding summary judgment at all and particularly as to the issue of width. (R. 140 Charles Welch Affidavit, ¶ 11). *Bernardo*, 888 P.2d at 1100 (reversing summary judgment where “[t]he affidavits filed by defendants also disputed the extent of the road which may have been traveled”)).

The District Court's grant of summary judgment to Plaintiffs must be reversed due to the presence of disputes of material facts, and this case should be remanded for trial.

B. The District Court Improperly Weighed Disputed Facts

Confirming unequivocally that it weighed the disputed and contradictory facts and evidence, the District Court remarked in its summary judgment Ruling that Plaintiffs' materials struck the court as “clearly more detailed and analytical.” (R. 309, n.1). Plaintiffs attempt to shrug that statement off as a mere observation about the manner in which the parties presented their respective cases and having nothing to do with weighing the evidence. By voicing that perceived contrast at all, however, it is readily apparent that the District Court was weighing, measuring, and otherwise evaluating the parties'

¹¹ Plaintiffs' arguments about acquiescence based on Dixie's discovery responses at R. 265 (*e.g.*, Brief of Appellees, pp. 13 & 27) also fail for those same reasons, *i.e.*, that evidence must be viewed in a light most favorable to Dixie to show the noted use was not “without permission,” and thus that it does not establish, and certainly not clearly and convincingly, that required element of Plaintiffs' claim.

evidence against one another. That is improper, and is grounds for reversal. As stated in *Bernardo*:

In granting summary judgment, it is apparent that the trial court gave more weight to some affidavits than to others. This was inappropriate at this stage of the litigation. On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist. [*Bernardo*, 888 P.2d at 1100].

Even if “the evidence on one side may appear to be strong or even compelling” (which it was not in this case in any event), quite simply “[i]t is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment.” *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah App. 1988) (emphasis added) (citations omitted). ““One sworn statement under oath is all that is necessary to create a factual issue, thereby precluding summary judgment.”” *Nyman*, 966 P.2d at 1213. In light of the sworn and disputed evidence before the District Court, and the District Court’s impermissible weighing of that evidence, summary judgment for Plaintiffs was improper and must be reversed.

C. The District Court Abused its Discretion in Declaring Plaintiffs’ Claimed Facts Admitted Under Rule 7

In its opening brief to this Court, Dixie showed that the District Court abused its discretion in deeming admitted all of the claimed facts set forth by Plaintiffs in their summary judgment memorandum simply because Dixie’s prior counsel did not quote them verbatim in numbered paragraphs and specifically controvert them line by line. In response, Plaintiffs argue only “this court well knows” the cases cited by Dixie “can no

longer be used.” (Brief of Appellees, p. 15). On the contrary, Plaintiffs’ own analysis shows the cases cited by Dixie (*Salt Lake County v. Metro West Ready Mix, Inc.*, 89 P.3d 155 (Utah 2004), and *Gary Porter Const. v. Fox Const., Inc.*, 101 P.3d 371 (Utah App. 2004)) are still relied upon to show that abuse of discretion is indeed the standard of review on this issue, and still provide the yardsticks by which courts measure whether that standard has been breached. Plaintiffs themselves acknowledge, for example, that the standard is that “courts have ‘discretion in requiring compliance’” with Rule 7,¹² and that “the Supreme Court cited *Gary Porter v. Fox*” as authority for that standard. (Brief of Appellees, p. 16 (quoting *Anderson Dev. Co. v. Tobias*, 2005 UT 36). Plaintiffs themselves then relied on *Bluffdale City v. Smith*, 2007 UT App 25, for their abuse of discretion argument, including quoting that case’s reliance upon and quotation of *Salt Lake County v. Metro West* as establishing “failure to comply with the technical requirements [of Rule 7 is] harmless,” and thus that it is an abuse of discretion to deem facts admitted in light on that basis, if “the disputed facts were clearly provided in the body of the memorandum with applicable record references.” (Brief of Appellees, p. 16).

Dixie filed two Affidavits of Charles Welch stating facts which dispute material factual allegations set forth in Plaintiffs’ summary judgment materials on essential

¹² As noted in footnote 5 of Dixie’s opening Brief, effective November 1, 2003, Rule 4-501(2)(B) of the Utah Rules of Judicial Administration was repealed, and its content regarding technical requirements for memoranda opposing summary judgment was moved to its present location in Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure. See *Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App 354, ¶ 9, n.1, 101 P.3d 371 (2004). That change in the location of the rule has not changed the application of interpretation of it.

elements of Plaintiffs' claim (*i.e.*, use by the general public, and without permission).

(R. 138-44 & R. 290-92).¹³ Mr. Welch's affidavits were referred to and discussed in the body of Dixie's summary judgment memoranda. (*E.g.*, R. 129-37 & R. 286-89).

Accordingly, Dixie's prior counsel's failure to fully comply with the technical format requirements of Rule 7(c)(3)(B) was harmless, and the District Court abused its discretion in disregarding those affidavits and deeming Plaintiffs' claimed facts as admitted. The District Court should have denied summary judgment based on the presence of disputes of material facts in the record even though they were not specifically presented in a format strictly compliant with Rule 7, as was done and upheld in the case of *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 21 n.3, 116 P.3d 323, 331 (cited by Plaintiffs).¹⁴ This Court therefore should reverse the District Court and remand this case for trial.

IV. ST. GEORGE IS A NECESSARY AND INDISPENSABLE PARTY.

Plaintiffs' arguments regarding the necessity of joining the City of St. George as a party to this case fail. To begin with, the necessary party argument was not raised for the

¹³ Due to an apparent error at the District Court, there are two pages in the record numbered 140 (as well as 139, 141, 142, and 143).

¹⁴ Plaintiffs' claim (Brief of Appellees, p. 16) that *Tobias* "indicated that appellate courts will respect the discretion of the trial courts in deeming a party's facts admitted" is incorrect and unfounded. To begin with, *Tobias* actually held it was proper not to deem a party's facts as admitted. *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 21 n.3, 116 P.3d 323, 331. Moreover, *Tobias* merely held that abuse of discretion is the standard of review. *Id.* It did not hold that any respect or deference is given, or is even appropriate, in evaluating whether a district court's discretion was abused. *Id.*

first time on appeal, contrary to Plaintiff's claim. Dixie expressly raised that issue below, objecting to the fact that "[t]he City of St. George ... is not a party to this lawsuit," despite Plaintiffs' claim that the City owns some of the land which Plaintiffs seek to have dedicated as a public thoroughfare." (R. 130 & 135-36). In any event, Plaintiffs themselves acknowledge "Dixie is correct that 'a party may raise the issue of failure to join an indispensable party at any time in the proceeding, including for the first time on appeal.'" (Brief of Appellees, p. 46 (quoting *Cassidy v. Salt Lake County Fire Serv. Council*, 976 P.2d 607, ¶ 9 (Utah App. 1999))).

On the merits of the issue of the City's indispensability in this case, Plaintiffs argue only that the public thoroughfare dedication in this case will not affect the City's property rights. Plaintiffs attempt to show that by discussing a series of statutes to ultimately argue that the dedication "held by the state" under the statute actually will not change any property interests the City has due to the type, or class of road the Alleged Roadway purportedly would be.

There is, however, a complete absence of any evidence in this case (both in Plaintiffs' brief to this Court, and perhaps even more importantly in Plaintiffs' materials presented below) upon which Plaintiffs can base any of its above-referenced arguments and conclusions. Also, as Plaintiffs' own analysis shows, if the Alleged Roadway would be a different kind of road than Plaintiffs surmise, that may indeed change the City's interests in the affected property. Rule 19 of the Utah Rules of Civil Procedure expressly requires that any person or entity who claims an interest relating to the subject matter of the action and whose interest may be affected by the outcome of the case "shall" be

joined as parties to the action. *See also e.g., Werner-Jacobsen v. Bednarik*, 946 P.2d 744, 747 (Utah App. 1997); *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990). Accordingly, since Plaintiffs' own evidence presented below showed that parts of the Alleged Roadway were either subject to an easement in favor of or may indeed have been owned by St. George (*e.g.*, R. 171-72 (Affidavit of David Elwess, title searcher, ¶¶ 5 & 19)), St. George had a property interest in the Alleged Roadway that could have been (and may have been) adversely affected by a finding of public dedication. St. George therefore is a necessary and indispensable party that was required to be joined to this case, and still must be, before any public thoroughfare could be declared. Having themselves presented the evidence of St. George's potential interests, Plaintiffs cannot now be heard to deny the legal consequences attendant to such evidence. The District Court's failure to conduct the two-step analysis required under Rule 19 to at least analyze St. George's indispensability to this case is reversible error. *E.g., Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990); *Seftel v. Capital City Bank*, 767 P.2d 941, 945 (Utah App.1989).

CONCLUSION

The District Court erred in declaring a portion of the Dixie Property dedicated and abandoned as a public highway on Plaintiffs' motion for summary judgment. Plaintiffs failed their burden to prove, by clear and convincing evidence, all the elements required for dedication of private property as a public thoroughfare, particularly on summary judgment where there were disputed facts on required elements of Plaintiffs' claim as to


whether any claimed use was by the public in general, whether it was without permission, and what the scope and width of any Alleged Roadway should be in light of the claimed historical use. The District Court also abused its discretion in declaring Plaintiffs' claimed facts as admitted by Dixie where they were actually disputed by sworn affidavit.

The District Court's failure to make any analysis or evaluation of the reasonable and necessary width of the Alleged Roadway as expressly required by statute also is itself enough to require reversal and remand.

Summary judgment also was inappropriate where Plaintiffs failed to join the City of St. George as a necessary and indispensable party to this case in light of Plaintiffs' evidence of the City's possible interests in a portion of the affected property.

The District Court's ruling was in contravention of the standards applicable to public thoroughfare cases in general, and violated standards of review applicable to summary judgment proceedings as well. In light of any and all of the District Court's several errors, this Court should reverse the District Court and remand this case for trial.

RESPECTFULLY SUBMITTED this 4th day of February, 2008.



Robert J. Dale
Bradley L. Tilk
FABIAN & CLENDENIN, PC
Attorneys for Defendant /Appellant
Dixie Riding Club, Inc.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT DIXIE RIDING CLUB, INC.** were mailed by first-class mail with postage fully prepaid this 4th day of February, 2008, to:

V. Lowry Snow
Lewis P. Reece
Snow, Jensen & Reece, P.C.
Tonaquint Business Park, Bldg. B
912 West 1600 South, Suite 200
St. George, Utah 84770

