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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,  
JOHN BOWLER, v. Dixie Riding Club, Inc. : Brief  
of Appellee

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IN THE UTAH COURT OF APPEALS

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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, JOHN BOWLER,

Plaintiffs and Appellees,

v.

DIXIE RIDING CLUB, INC., a Utah  
Corporation, and JOHN DOES 1  
THROUGH  
20,

Defendant and Appellant.

Appellate Court Case No. 20060631-CA  
(District Court Case No. 030500781)

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BRIEF OF APPELLEES

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Appeal from the Fifth District Court, Washington County  
Honorable G. Rand Beacham, District Judge

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and John Bowler

FILED  
UTAH APPELLATE COURTS

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**IN THE UTAH COURT OF APPEALS**

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GILBERT JENNINGS, MANSFIELD  
JENNINGS, CONRAD BOWLER,  
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and John Bowler

## **PARTIES TO THE PROCEEDINGS**

Pursuant to Rules 24(a) and 24(b) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the trial court proceedings that are subject of this appeal, and their respective party designations in those proceedings:

1. Jennings Investment, LC – Plaintiff
2. Gilbert Jennings – Plaintiff
3. Mansfield Jennings – Plaintiff
4. Conrad Bowler – Plaintiff
5. Lewis J. Bowler – Plaintiff
6. Dorcus N. Bowler – Plaintiff
7. H. Val Hafen – Plaintiff
8. Randy Bowler – Plaintiff
9. Gai Bowler – Plaintiff
10. Troy Bowler – Plaintiff
11. Kerrie Bowler – Plaintiff
12. John Bowler – Plaintiff
13. Dixie Riding Club, Inc. – Defendant
14. John Does 1-20 – Defendants

## TABLE OF CONTENTS

I.	PARTIES TO THE PROCEEDINGS .....	i
II.	TABLE OF CONTENTS .....	ii
III.	TABLE OF AUTHORITIES .....	iii
IV.	STATEMENT OF JURISDICTION .....	1
V.	ISSUES PRESENTED AND STANDARD OF REVIEW .....	1
VI.	STATUTES, ORDINANCES AND RULES OF CENTRAL IMPORTANCE TO THE APPEAL .....	4
VII.	STATEMENT OF THE CASE .....	5
	A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW .....	5
	B. STATEMENT OF FACTS .....	7
VIII.	SUMMARY OF ARGUMENT .....	12
IX.	ARGUMENT .....	15
	A. THE TRIAL COURT PROPERTY DEEMED PLAINTIFF'S FACTS ADMITTED .....	15
	B. THE TRIAL COURT DID NOT IMPROPERLY WEIGH DISPUTED EVIDENCE .....	17
	C. PLAINTIFFS MET THEIR BURDEN OF SHOWING DEDICATION OF THE ROAD AT ISSUE BY CLEAR AND CONVINCING EVIDENCE AND HAD STANDING TO DO SO .....	30
	1. USE BY THE PUBLIC .....	32
	a. STANDING .....	32
	b. FACTS REGARDING LOCAL AND GENERAL USE OF THE ROAD .....	34

2. USE BY PERMISSION.....	38
D. THERE WAS NO ERROR BY THE DISTRICT COURT IN RESPECT TO THE WIDTH OF THE ROAD.....	42
E. ST. GEORGE CITY IS NOT AN INDISPENSIBLE PARTY .....	45
X. CONCLUSION.....	50
XI. ADDENDUM.....	52

## TABLE OF AUTHORITIES

### CASES

<i>Anderson Devel. Co. v. Tobias</i> , 2005 UT 36.....	16
<i>AWINC v. Simonsen</i> , 2005 UT App 168, ¶ 7 .....	31,33, 41, 50
<i>Bertagnole v. Pine Meadow</i> , 639 P.2d 211 (Utah 1981) .....	33, 40, 49
<i>Bluffdale City v. Smith</i> , 2007 UT App 25, at ¶5 .....	2, 13, 15, 16, 17
<i>Bonner v. Sudbury</i> , 417 P.2d 646 (Utah 1966).....	33, 38, 49
<i>Boyer v. Clark</i> , 362 P.2d 107, 108 (Utah 1958) .....	41, 49
<i>Campbell v. Box Elder County</i> , 962 P.2d 806, fn.3 (Utah App. 1998).....	40
<i>Cassidy v. Salt Lake County Fire Service Council</i> , 976 P.2d 607, ¶9 (Utah App. 1999) .....	4, 46
<i>Clark v. Erekson</i> , 341 P.2d 424 (Utah 1959).....	49
<i>Dept. of Natural Resources v. Butler</i> , 2006 UT App 444, ¶ 6 .....	1, 40
<i>Deseret Livestock v. Sharp</i> , 259 P.2d 607 (Utah 1953) .....	49
<i>Dominguez v. Heward</i> , 2006 UT App. 20.....	2, 3, 32, 42
<i>Draper City v. Estate of Bernardo</i> , 888 P.2d 1097, 1099 (Utah 1995) .....	14, 28, 40
<i>Dupler v. Yates</i> , 351 P.2d 624, 637 (1960)(citations omitted) .....	29
<i>Fennell v. Green</i> , 2003 UT App 291, 77 P.3d 339 .....	15, 16

<i>Gary Porter Const. v. Fox Const., Inc.</i> , 101 P.3d 371 (Utah App. 2004) .....	15, 16
<i>Gillmor v. Carter</i> , 391 P.2d 426 (Utah 1964) .....	28
<i>Gottling v. P.R. Inc.</i> , 2002 UT 95, ¶ 5, 61 P.3d 989, 991.....	1
<i>Green v. Louder</i> , 29 P.3d 638, ¶40 (Utah 2001).....	4
<i>Harding v. Bohman</i> , 491 P.2d 233 (Utah 1971) .....	33
<i>Harmon v. Rasmussen</i> , 375 P.2d 762 (Utah 1962) .....	31
<i>Heber City Corp. v. Simpson</i> , 942 P.2d 307, 310 (Utah 1997) .....	1, 32, 41
<i>Jenkins v. Swan</i> , 675 P.2d 1145, 1150 (Utah 1983) .....	33
<i>Kohler v. Martin</i> , 916 P.1d 910 (Utah App. 1996) .....	33, 49
<i>Lovendahl v. Jordan School District</i> , 2002 UT 130, 63 P.3d 705.....	15
<i>Martinez v. Wells</i> , 2004 UT App 43, ¶ 22.....	41
<i>Memott v. Anderson</i> , 642 P.2d 750 (Utah 1982) .....	33
<i>Miller v. Martineau</i> , 983 P.2d 1107, ¶ 30 (Utah App. 1999).....	48
<i>Morris v. Blunt</i> , 161 P. 1127 (Utah 1916) .....	49
<i>Orvis v. Johnson</i> , 2006 UT App 394, ¶ 20 .....	25
<i>Peterson v. Combe</i> , 438 P.2d 545 (Utah 1968) .....	33, 34, 38, 49
<i>Pinetree Associates v. Ephraim City</i> , 67 P.3d 462, ¶ 19 (Utah 2003).....	31
<i>Pitts v. Roberts</i> , 562 P.2d 231 (Utah 1971).....	33, 38
<i>Renfro v. McCowan</i> , 2006 WL 3254509 (D. Utah 2006).....	28, 29, 30, 37
<i>Salt Lake County v. Metro West Ready Mix, Inc.</i> , 89 P.3d 155, n4 (Utah 2004) .....	15, 16
<i>Schaer v. State</i> , 657 P.2d 1337 (Utah 1983) .....	28, 29
<i>Sierra Club v. Utah Air Quality Board</i> , 2006 UT 74, at ¶¶ 19, 39 .....	33

<i>State v. Alfatlawi</i> , 2006 UT App 511, at ¶ 12.....	2, 3, 43, 45
<i>State v. Six Mile Ranch</i> , 2006 UT App 104, ¶¶ 23, 38.....	42
<i>Thurman v. Byram</i> , 626 P.2d 447 (Utah 1981) .....	37, 40, 41, 49
<i>Treloggan v. Treloggan</i> , 699 P.2d 747, 748 (Utah 1985) .....	25
<i>Utah Coal &amp; Lumber v. Outdoor Endeavors Unlimited</i> , 2001 UT 100, ¶ 9, 40 P.3d 581.....	1
<i>Wasatch County v. Okelberry</i> , 2006 UT App 473 at ¶ 9.....	31
<i>Webster v. Sill</i> , 675 P.2d 1170, 1172-73 (Utah 1983) .....	3
<i>White Pine Ranches v. Osguthorpe</i> , 731 P.2d 1076 (Utah 1986) .....	50

## STATUTES

Utah Code Ann. § 72-3-102 .....	4, 47
Utah Code Ann. § 72-3-104 .....	4, 5, 47, 48
Utah Code Ann. § 72-3-105 .....	4, 47, 48
Utah Code Ann. § 72-4-102.5 .....	47
Utah Code Ann. § 72-5-103 .....	4, 5, 47, 48
Utah Code Ann. § 72-5-104 .....	1, 3, 4, 5, 30, 31
Utah Code Ann. § 72-5-104(1) .....	47
Utah Code Ann. § 72-5-104(3) .....	43, 44
Utah Code Ann. § 72-5-108 .....	2, 4, 14, 44
Utah Code Ann. § 78-2a-3 .....	1
Utah Code Ann. § 78-2-2(4).....	1

## RULES

Utah R. Civ. P. 7 .....	2, 5, 6, 7, 12, 15, 16, 17, 18, 50
Utah R. Civ. P. 7(c)(3) .....	2, 15
Utah R. Civ. P. 19 .....	4, 5, 45, 49
Utah R. Civ. P. 56 .....	12
Utah R. Civ. P. 56(e) .....	5
Utah R. Evid. 103(d) .....	2, 43
Utah R. Jud. Admin. 4-501 .....	16
Utah R. Jud. Admin. 4-501(2)(B) .....	15, 16
Utah R. Jud. Admin 7(c)(3)(B) .....	15

#### **IV. STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(4) and § 78-2a-3.

#### **V. ISSUES PRESENTED AND STANDARD OF REVIEW**

Issues Presented: (1) The first issue raised by Dixie Riding Club, Inc. (“Dixie”) on appeal is in respect to the sufficiency of the evidence: Whether the trial court erred in concluding that Plaintiffs met their burden by clear and convincing evidence to show dedication and abandonment of the road at issue under Utah Code Ann. § 72-5-104, where Plaintiffs provided seven uncontroverted affidavits, with supporting plats and documents, showing use of the road by the public without permission for over ten years.

Standard of Review: “When reviewing a trial court's decision regarding whether a public highway has been established . . . , we review the decision for correctness but grant the court significant discretion in its application of the facts to the statute.” *Dept. of Natural Resources v. Butler*, 2006 UT App 444, ¶ 6, citing *Heber City Corp. v. Simpson*, 942 P.2d 307, 310 (Utah 1997). Since the district court decided this case on summary judgment, the appellate court 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 (quoting *Utah Coal & Lumber v. Outdoor Endeavors Unlimited*, 2001 UT 100, ¶ 9, 40 P.3d 581).

(2) The second issue raised by Dixie on appeal is a new issue, which has been raised for the first time on appeal, that the district court erred in not determining the scope or width of the road, in spite of the uncontested documentation produced by Plaintiffs which showed it to be 50 feet in width, some of which documents were executed by Dixie, and

Dixie's own acknowledgement that this width is what is required by St. George City for development in accordance with Utah Code Ann. § 72-5-108.

Standard of Review: Issues raised for the first time on appeal are not reviewed by appellate courts. *Dominguez v. Heward*, 2006 UT App 20. Dixie can only get past this rule by a showing of plain error pursuant to Rule 103(d) of the Utah Rules of Evidence. A showing of plain error requires a demonstration that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [Defendant]." *State v. Alfatlawi*, 2006 UT App 511, at ¶ 12. In respect to a claim of plain error, "the trial court commits error if it abuses its discretion by acting beyond the limits of reasonability." *Id.* at 20.

(3) The third issue raised by Dixie on appeal is whether the district court erred in deeming admitted all of Plaintiffs' facts in their Cross-Motion for Summary Judgment, although Dixie failed to contest said facts in the manner required by Rule 7(c)(3) of the Utah Rules of Civil Procedure, and further that the only supporting evidence presented by Dixie were two affidavits that did not materially conflict with Plaintiffs' facts and evidence.

Standard of Review: While normally an appellate court will review a grant of summary judgment for correctness, affording no deference to the district court, "the trial court has discretion in requiring compliance with [Rule 7 of the Utah Rules of Civil Procedure]." *Bluffdale City v. Smith*, 2007 UT App 25, at ¶5. Accordingly, this issue comes under the abuse of discretion standard.

(4) The fourth issue raised by Dixie on appeal is whether the District Court improperly weighed the evidence on summary judgment, even though there were no

disputed facts to weigh due to the court's having deemed all of Plaintiffs' facts admitted; yet even if Dixie's facts had not been stricken, Dixie's two affidavits and discovery responses in the record did not materially conflict with the facts and evidence presented by Plaintiffs.

Standard of Review: Trial courts may not weigh disputed evidence when dealing with motions for summary judgment. *Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983).

(5) The fifth issue raised by Dixie on appeal is whether the District Court erred in ruling that Plaintiffs have standing to maintain an action under Utah Code Ann. § 72-5-104, on the basis that the standing issue was not whether private parties may bring a claim under this statute, but that the evidence presented by Plaintiffs supposedly failed to show public as compared to private use of the road, notwithstanding Dixie's own acknowledgement of public use of the road and its failure to raise before the trial court the alleged inadequacy in Plaintiffs' affidavits of references to the public. This is an issue raised for the first time on appeal, and is misstated as a standing issue when it is an issue on sufficiency of the evidence.

Standard of Review: Issues raised for the first time on appeal are not reviewed by appellate courts (*Dominguez v. Heward*, 2006 UT App 20), except in cases of plain error. *State v. Alfatlani*, 2006 UT App 511, at ¶ 12. As with the first issue, this is an issue on sufficiency of the evidence, which in the summary judgment context is reviewed for correctness.

(6) The sixth issue raised by Dixie on appeal is that Plaintiffs improperly failed to name St. George City as an indispensable party, on the basis that Plaintiffs' request for recognition of the road as abandoned to the public would somehow take away the city's easement rights on said property and give it to the state rather than the city.

Standard of Review: Normally, a court's refusal to join an allegedly indispensable party under Rule 19 of the Utah Rules of Civil Procedure is reviewed under an abuse of discretion standard. *Green v. Louder*, 29 P.3d 638, ¶40 (Utah 2001). However, the trial court in the present case did not address the elements for a Rule 19 determination, since this issue was not raised before it, and is being raised now for the first time on appeal. Dixie is correct that "a party may raise the issue of failure to join an indispensable party at any time in the proceedings, including for the first time on appeal." *Cassidy v. Salt Lake County Fire Service Council*, 976 P.2d 607, ¶9 (Utah App. 1999). In such a case, the appellate court will address the merits of the claim. *Id.* Accordingly, the court will review whether complete relief can be afforded among those already parties in the absence of St. George City, and whether "the absent person claims an interest in the subject matter of the action and continuing without that person would (1) impair the person's ability to protect his or her interest, or (2) expose the parties already joined to the action to multiple litigation. *Id.* at ¶10 (citations omitted).

## **VI. STATUTES, ORDINANCES AND RULES OF CENTRAL IMPORTANCE TO THE APPEAL**

Utah Code Ann. § 72-5-104. Public use constituting dedication -- Scope.

(1) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

(2) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.

(3) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

Utah Code Ann. § 72-5-108. Width of rights-of-way for public highways.

The width of rights-of-way for public highways shall be set as the highway authorities of

the state, counties, or municipalities may determine for the highways under their respective jurisdiction.

The following statutes and rules are attached in the Addendum No. 1:

Utah Code Ann. § 72-5-103. Acquisition of rights-of-way and other real property -- Title to property acquired.

Utah Code Ann. § 72-3-104. City streets -- Class C roads -- Construction and maintenance. Utah Rules of Civil Procedure, Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

Utah Rules of Civil Procedure, Rule 19. Joinder of persons needed for just adjudication.

Utah Rules of Civil Procedure, Rule 56(e). Summary Judgment.

## **VII. STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURTS BELOW**

Plaintiffs Val Hafen, Gilbert Jennings, Mansfield Jennings, Conrad Bowler and Lewis Bowler ("Plaintiffs") filed this action on April 11, 2003 against Defendant David T. Welch and John Does 1-20. The Complaint sought declaratory relief pursuant to Utah Code Ann. § 72-5-104. R. 1-4. On April 21, 2003, before any responsive pleading had been filed, the same Plaintiffs filed an Amended Complaint. R. 11-14. On June 18, 2003, Defendant David Welch filed an Answer to the Complaint. R. 15-17. On October 14, 2003, Plaintiffs moved to amend the complaint, which motion was subsequently granted on October 29, 2003. R. 61-63, 77. Plaintiffs' Second Amended Complaint was filed on October 29, 2003, in which Dixie Riding Club, Inc. was substituted for David T. Welch as Defendant, a number of new Plaintiffs were added including Jennings Investment, LC, Dorcus N. Bowler, Randy and Gai Bowler, Troy and Kerrie Bowler, and John Bowler, and a second cause of action was added for a prescriptive easement. R. 78-82. On January 9, 2004, Defendant Dixie Riding Club filed an Answer to the Second Amended Complaint. R. 103-104.

Dixie filed a Motion for Partial Summary Judgment on the road dedication claim on January 14, 2005. R. 127-128. The Memorandum in Support of this motion contained a heading entitled “Statement of Facts,” which contained two brief paragraphs which did not contain any facts, but which stated that summary judgment was not being sought on the prescriptive easement claim because there was a “substantial factual dispute” as to whether such a prescriptive easement existed. R. 129-137. The body of the Memorandum asserted a variety of legal arguments, interspersed with factual assertions but contained only two references to an attached affidavit of Charles Welch, for the proposition that St. George City had at one time discussed acquiring the road but had not done so, and that members of the public were invited to use the road to attend rodeo types of events on the adjacent rodeo property, “to which their permission ceased after the event was concluded.” R. 132.

On March 9, 2005, Plaintiffs filed a Cross Motion for Summary Judgment and Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment, which also dealt only with the road dedication claim and not the prescriptive easement claim. R. 139-285. Said Cross Motion contained a detailed fact section, supported by seven affidavits and numerous plats and related documents. This Motion noted the lack of a fact section in Dixie’s motion to which it could respond, as required by Rule 7 of the Utah Rules of Civil Procedure, and that Dixie had sprinkled its facts throughout its Memorandum. R. 142-143. (Vol. II). Given the difficulty of identifying and distinguishing Dixie’s facts, Plaintiffs responded to the same by way of their own detailed statement of facts. R. 143.

On April 28, 2005, Dixie filed an Opposition to Plaintiffs’ Cross Motion and Reply. R. 286-289. Said document did not identify and dispute, with citations to the record, any

numbered paragraphs of facts set forth by Plaintiffs in their Cross Motion as contemplated by Rule 7, and in fact did not contain any fact section at all. Rather, in the argument section, Defendant attacked the status or credibility of the Plaintiffs' affiants. Defendant made reference to several of Plaintiffs' Affidavits attached to its Cross Motion, claiming that these affiants were interested parties and not members of the general public. In support of this proposition, Defendant referred to an attached second affidavit of Charles Welch that dealt solely with Plaintiffs' affiants. Defendant then attempted to use case law to distinguish Plaintiffs' affidavit of David Elwess, attached to Plaintiffs' Cross Motion.

Plaintiffs filed their Reply on July 11, 2005 (R. 293-301), in which they noted that "Defendant has nowhere controverted Plaintiffs' facts set forth in Plaintiffs memorandum in support of their cross motion for summary judgment, and accordingly each fact properly supported by Plaintiffs is deemed admitted." R. 294. A hearing was held on the parties' motions on November 10, 2005 (R. 308), and on January 12, 2006, the District Court issued its Rulings on Motions for Summary Judgment, in which it deemed Plaintiffs' facts admitted and granted Plaintiff's Motion for Summary Judgment, and denied that of Dixie. R. 309-311. The court signed Findings of Fact and Conclusions of Law to this effect (R. 319-337), and a Decree of Dedication on March 7, 2006. R. 338-40. The 50 foot width of the road is contained within the legal description in the Decree of Dedication. R. 339. Dixie then filed its notice of appeal. R. 377-78.

## **B. STATEMENT OF FACTS**

1. The present matter involves a road adjacent to a former rodeo arena located in the City of St. George, Washington County, Utah. The road is in the shape of a reverse "L,"

and is approximately 1,800 feet in length. This road was repeatedly identified by Plaintiffs before the trial court as the “1020 West X 1050 North Street.” *See e.g.*, R. 142; 232-235 (Aff. Conrad Bowler, ¶¶ 3, 5, 6, 7, 10, 12). The road connects between two city streets, namely 1230 North and 1100 West. R. 244 (Aff. H. Val Hafen ¶ 3).

2. This road and adjacent arena property were originally owned by the Washington County Sheriff’s Posse. The arena was used as a race track/rodeo ground and stable area for horses roughly 50 years ago. R. 232 (Aff. Of Conrad Bowler ¶ 2). Dixie Riding Club, Inc. is the current title holder of the arena and road. R. 139 (Aff. Charles Welch ¶ 4). However, documents of conveyance in the record show that St. George City holds a 46 foot wide easement for utilities under the road property, and holds title to a four foot wide strip of land adjacent to the road making a total of 50 feet. R. 181.

3. In 1962, property adjacent to the arena was subdivided for the building of homes. The plat of this subdivision identifies the rodeo property and road as the “Possy Race Track.” The arena and road were not part of the subdivision. R. 167 (Aff. D. Elwess ¶ 3); R. 175 (plat).

4. The arena, road and subdivision were annexed into the City of St. George in 1972. R. 184 (Subpoena response of Washington County).

5. From at least 1972 or 1973, until shortly after Washington County built the arena neighboring the Purgatory Correctional Facility, the sheriff’s posse arena was the location of numerous rodeos for children and high school rodeos, horse racing or barrel racing, amateur rodeos, rodeos on New Year’s Day, and other similar events. These public

events took place roughly four to six times a year. R. 139 (Aff. Charles Welch ¶ 8); R. 232 (Aff. Conrad Bowler ¶ 4).

6. The public were invited to use the road to access the arena where these events were held, but permission for such use of the road ceased after the event was concluded. Defendant asserts that it has never allowed the general public to use the property as a thoroughfare, a roadway, a right-of-way, or any other permissive use except by implied or express permission to attend these public rodeo events. R. 132; R. 139 ¶ 8, 140 (Aff. Charles Welch ¶ 8, ¶ 10).

7. Notwithstanding this alleged lack of permission by Dixie, there has never been a time since 1967 up until approximately 2002 that Dixie blocked any traffic of any persons not specifically members of Dixie, since open and free access existed to the South, to the West and to the North. It was not until approximately 2002 that Dixie stopped allowing the general public and other persons to use the road by gating the road. R. 256 (Dixie's Answer to Admission 14); R. 265 (Dixie's Answer to Interrogatory 4).

8. There was an occasion, sometime between 1985 and 1990, that Dixie put up posts and started to build a gate blocking public access to the road. However, after a brief legal dispute, Dixie did not proceed with the gate and access through the road remained unimpeded. R. 245 (Aff. V. Hafen ¶ 6). Dixie never put up signs saying the road could not be used by the public. R. 234 (Aff. Conrad Bowler ¶ 8); R. 273 (Aff. Gilbert Jennings ¶ 6).

9. Over the years, the general public used the road almost daily. R. 234 (Aff. Conrad Bowler ¶ 8). The road was used by the public to access a feed store and mill just

west of 1100 West Street for about ten years that was operated by the Ence Brothers, and many people used the subject road to get to this store. R. 234 (Aff. Conrad Bowler ¶ 7).

10. The general public also passed through the road on their way up to the old turkey farm about a mile north of the arena, or to access the trail head on the north that lead out into the country, up to Snow Canyon and Winchester Hills. R. 233 (Affid. Conrad Bowler ¶ 5); R. 239-240 (Aff. Ethan Bundy ¶ 4); R. 272-273 (Aff. G. Jennings ¶ 4).

11. The road was also used by the general public to access informal rodeo events in the arena. R. 234-235 (Aff. Conrad Bowler ¶ 9); R. 240 (Aff. Ethan Bundy ¶ 7); R. 245 (Aff. V. Hafen ¶ 6); R. 274 (Aff. G. Jennings ¶ 8). The public drove through the road to look at horses stabled along the road, to take horses to be bred or stabled, to discuss business regarding their horses, and to buy and sell horses. R. 234-235 (Aff. Conrad Bowler ¶¶ 7, 11); R. 240-241 (Aff. Ethan Bundy ¶ 8); R. 245 (Aff. V. Hafen ¶ 6); R. 274 (Aff. G. Jennings ¶ 9).

12. The road was used by the public as a thoroughfare (R. 246 Aff. V. Hafen ¶ 8), and was traveled on continuously by the public in general from about 1972 until 2002. R. 240 (Aff. Ethan Bundy ¶ 5); R. 279 (Aff. M. Jennings ¶ 5). The subject road was open, and access was open and unimpeded. The subject road did not dead end in any fashion, connected to two public streets in St. George, one on each end, and was continually used by the general public from about 1972 until 2002. R. 233 (Aff. Conrad Bowler ¶ 5); R. 244 (Aff. V. Hafen ¶ ¶ 3, 4); R. 278, 279 (Aff. M. Jennings ¶ 4). Dixie acknowledged that its “implied permission” for use of the road to the public was actually by way of mere acquiescence of

anyone desiring to use the road. It was not until 2002 that Dixie stopped allowing the general public to use the road. R. 265.

13. Regardless of whether it felt it allowed such use, Dixie has not denied or asserted any facts contrary to the actual ongoing and continuous use by the general public of the road as described above, and has only asserted that such public use was in some fashion by way of implied or express permission. R. 140 (Aff. Charles Welch ¶ 10); R. 255 (Answer to Admission 12).

14. In addition to the general public's use of the road as described above, the abutting property owners and others in the nearby neighborhood frequently used the road to travel from one part of the neighborhood to another. R. 244 (Aff. V. Hafen ¶ 4); R. 283 (Aff. L. Bowler ¶ 4).

15. A number of the Plaintiffs own property that abuts the road in question. However, while Plaintiff Conrad Bowler and affiant Ethan Bundy (not a Plaintiff) have owned property abutting the road in the past, they do not own such property at present. R. 232 (Aff. Conrad Bowler ¶ 3); R. 239 (Aff. Ethan Bundy ¶ 2). Plaintiffs Gilbert and Mansfield Jennings do not personally own property that abuts the road, although they do hold an ownership interest in Plaintiff Jennings Investment, LC, that owns property abutting the road. R. 272 (Aff. G. Jennings ¶ 2); R. 278 (Aff. M. Jennings ¶ 2).

16. St. George City or Washington County graded the road occasionally during these years of use by the general public. R. 235 (Aff. Conrad Bowler ¶ 12); R. 279 (Aff. M. Jennings ¶ 6). Legal counsel for the City of St. George asserted that "deeds, and historical uses evidence an existing and unimpeded right-of-way adjacent to the Posse Grounds." R.

249. In addition, Dixie discussed dedication of this road with the City of St. George in 1987, and a plat was prepared and approved and signed by the city and by Dixie's predecessor in title, David Welch, Trustee, although the plat was never recorded. R. 139, ¶¶ 6-7; R. 180; R. 181, R. 252 no. 3 and R. 456. The plat shows a road width of fifty feet. *Id.*

17. Washington County considered the road not to be part of Dixie's arena for many years, and did not include it in the legal description for the arena on which property taxes were levied. R. 171-172 (Aff. D. Elwess ¶¶ 19-20). After many years of being treated this way, at Dixie's request the road property was included with the arena property for tax purposes in 2002. R. 171-173, 258.

18. The road was identified specifically as a 'road,' a 'public road,' or an 'existing roadway' in the legal descriptions of numerous deed and conveyance documents, including those executed by Dixie. Many of these documents were signed by Defendant and its predecessors for conveyances of lots adjacent to the road. Others were signed by owners of property adjacent to the road who conveyed four feet of their property to St. George for use as a public roadway and easement for utilities. Most of these documents identify the width of the road as being fifty feet. R. 167-171 (Aff. D. Elwess ¶¶ 5-18); R. 181 (various deeds).

### **VIII. SUMMARY OF THE ARGUMENT**

Plaintiffs included a detailed fact section in their Cross Motion for Summary Judgment that was supported in the manner required by Rules 7 and 56 of the Utah Rules of Civil Procedure. Because Dixie did not make any effort to controvert or dispute Plaintiffs' facts presented by Plaintiffs in their Cross Motion for Summary Judgment in the manner required by Rule 7, the trial court properly deemed those facts admitted. In accordance with

the ruling of *Bluffdale City v. Smith*, 2007 UT App 25, there was no abuse of discretion by the trial court in doing so.

Even if Plaintiffs' facts had not been deemed admitted, a review and comparison of the facts asserted in Dixie's affidavits and discovery responses with the affidavits and supporting material presented by Plaintiffs shows that *there are no material facts in dispute in this case*. Many of Dixie's asserted facts are not material to dedication of the road. Those that are, are not in dispute. Accordingly, the trial court did not weigh disputed evidence because there was no disputed evidence to weigh.

Dixie never disputed the 10+ years of continuous use of the road. Regarding public use, Plaintiffs' affidavits overwhelmingly demonstrate observed use of the road by the general public— not just the abutting landowners— in traveling to and from a nearby horse-related business, in accessing a turkey farm and trailheads to the north, and to attend informal rodeo events in the arena and simply to go from one part of the neighborhood to another. Dixie has not disputed this, but in fact has acknowledged public use of the road so extensive that it could not identify the users. Dixie has asserted instead that such use was in some fashion by express or implied permission. However, Dixie acknowledged that express permission to the 4-6 rodeo events per year was withdrawn after each such event. Dixie's explanation of what it meant by implied permission was that use of the road by anyone desiring to use it was open and unimpeded, and was by acquiescence. Whether such acquiescence is the same as implied permission is a legal question, not a fact. This legal question has been answered by the Utah Supreme Court, which has stated that an owner's acquiescence in use of a road is interpreted as implied consent by the owner to dedicate the

road to the public, rather than as implied permissive use that would prevent such dedication. *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995).

The issue of the width of the road has been raised by Dixie for the first time on appeal, and has no bearing on whether the road is dedicated to the public. Even if the merits of the road width claim are reviewed, the trial court did not err in setting the length of the road at fifty feet. Ample evidence was presented by Plaintiffs that this was the width of the road, including documents of conveyance from Dixie itself that acknowledged this width, and the plat negotiated between Dixie and St. George City for dedication of this road. Further, Dixie admits that fifty feet is the width of streets in St. George City, and the city has the right and obligation to set street widths pursuant to Utah Code Ann. § 72-5-108. Dixie will not be harmed by leaving the designated width at fifty feet, since a review of the width issue would not result in any different width for this road.

The trial court did not err in failing to name St. George City as an indispensable party. Such joinder was not raised below, and therefore joinder is being raised for the first time on appeal. The interests of the City of St. George are not threatened by the present action because if the street is dedicated to the public, the city (rather than the state) will be the party receiving the dedicated road, and its prior easement interests will merge therein, whereas if the road is not dedicated, the city's easements that it received from Dixie will stay in place and the city will lose nothing. The city's interests are already protected and will not be impaired if they are not joined, and there is no danger of a double recovery in this case. Joinder of the city is not necessary for a full and fair adjudication of this matter.

## IX. ARGUMENT

Dixie has raised six issues on appeal as to why dedication of the road at issue by the trial court was supposedly improper. Each will be discussed below. The order in which the issues will be discussed has been rearranged from that asserted by Dixie for the sake of clarity, and because resolution of some issues tends to impact others.

### A. The Trial Court Properly Deemed Plaintiffs' Facts Admitted

Dixie asserts that the trial court elevated form over substance and abused its discretion by deeming admitted all of Plaintiffs' facts, since they were not controverted by Dixie as required by Rule 7 of the Utah Rules of Civil Procedure. Dixie's brief at 28. Dixie cites two cases in support of this proposition, *Salt Lake County v. Metro West Ready Mix, Inc.*, 89 P.3d 155, n4 (Utah 2004), and *Gary Porter Const. v. Fox Const., Inc.*, 101 P.3d 371 (Utah App. 2004). As this court well knows, the statements from these cases can no longer be used to support Dixie's claims.

As this court recently stated, "the district court's discretion in enforcing compliance with Rule 7(c)(3)(B) has been addressed in several cases decided under the former but comparable Rule 4-501(2)(B) of the Utah Rules of Judicial Administration. This court in *Fennell v. Green*, 2003 UT App 291, 77 P.3d 339, relying on the supreme court's ruling in *Lovendahl v. Jordan School District*, 2002 UT 130, 63 P.3d 705, held that the trial court did not abuse its discretion in deeming facts admitted due to noncompliance with Rule 4-501(2)(B)." *Bluffdale City v. Smith*, 2007 UT App 25, at ¶ 8.

However, a statement by the Supreme Court subsequent to the *Lovendahl* case created uncertainty about whether a trial court may deem a party's facts admitted where the facts

have not been controverted as provided in Rule 7. In the 2004 case of *Metro West*, “the supreme court, in a footnote, ruled plaintiff’s failure to comply with the technical requirements of rule 4-501(2)(b) to be harmless because ‘the disputed facts were clearly provided in the body of the memorandum with applicable record references.’” *Bluffdale City*, at ¶ 9.

Because of this new uncertainty about how Rule 7 was to be interpreted, later in the year of 2004, this court in *Gary Porter v. Fox* felt constrained to find an abuse of discretion by the trial court for deeming uncontroverted facts admitted under the rule. *Gary Porter v. Fox*, at ¶ 15. However, in footnote 2 of the same opinion, this court discussed the uncertain meaning of Rule 7, and invited the supreme court to clarify the issue. *Id.* at n. 2. The guidance from the supreme court came the next year in the case of *Anderson Devel. Co. v. Tobias*, 2005 UT 36. In footnote 3 of that case, the supreme court cited *Gary Porter v. Fox* and *Fennell v. Green*, for the proposition that “courts have ‘discretion in requiring compliance with rule 4-501.’” Then the court stated that “[w]hile the district court could have granted Tobias and Feld’s motion for summary judgment on the basis of ADC’s noncompliance with Rule 4-501, it exercised its discretion to address the motion on its merits, and we are unpersuaded that doing so constituted an abuse of that discretion.” Hence, the supreme court indicated that appellate courts will respect the discretion of the trial courts in deeming a party’s facts admitted if Rule 7 is not followed.

This court applied this newly clarified standard in the recent *Bluffdale* case, which has many similarities to the present case. This court in *Bluffdale* quoted the entirety of the fact section at issue in that case, and noted that it contained only two references to an attached

affidavit, and did not comply with Rue 7. *Bluffdale*, at ¶ 11. This court then upheld the trial court's discretion in deeming admitted the other parties' facts.

This case is like *Bluffdale*. Dixie's Memorandum in Support of its Motion for Summary Judgment did not allege any facts in its section entitled "Statement of Facts," but instead peppered various unsupported factual allegations throughout its arguments. R. 129-136. In the body of its argument it made only two references to the attached Affidavit of Charles Welch (R. 132), regarding Dixie's negotiations with St. George City about dedication of the road, and the withdrawal of permission for use of the road after rodeo events, *neither of which is disputed by Plaintiffs*. R. 456; 232 (Aff. Conrad Bowler ¶ 4). More tellingly, after Plaintiffs submitted their own Cross Motion for Summary Judgment with 18 numbered paragraphs of supported facts, Dixie in its Memorandum in Opposition and Reply made no attempt to identify any of these 18 paragraphs that it felt were controverted; neither did Dixie make any meaningful reference to its own affidavits to controvert Plaintiffs' facts. Indeed, as explained hereafter, Dixie's affidavits do not materially conflict with Plaintiffs' facts. Dixie's Memorandum in Opposition and Reply did not even contain a fact section. Hence, Dixie did not even come as close to compliance with Rule 7 as the losing party in *Bluffdale*, who at least included a fact section in its Memorandum in Opposition.

In light of the above, the trial court properly exercised its discretion and justifiably deemed admitted all of Plaintiffs' facts. There simply was no abuse of discretion here.

**B. The Trial Court did not Improperly Weigh Disputed Evidence**

Dixie asserts that the trial court improperly weighed disputed evidence in this case. As noted above, it was within the trial court's sound discretion to strike Dixie's asserted facts

and deem admitted all of Plaintiffs' facts due to Dixie's failure to follow Rule 7. The trial court's comment that Plaintiffs' materials struck the court as "clearly more detailed and analytical" (R. 309) was nothing more than an observation of the manner in which Plaintiffs presented their case, as well as Dixie's noncompliance with Rule 7, and had nothing to do with weighing of the evidence. Because Plaintiffs' facts were deemed admitted, it was impossible for there to be a weighing of the evidence because there was only one set of facts presented and nothing to weigh them against.

However, even if we ignored Rule 7, the trial court did not improperly weigh disputed evidence in this case because *even if both sets of facts were still at issue*, there was still no materially disputed evidence to weigh, because *there is no material fact in dispute*.

Dixie submitted two affidavits to the trial court, the first accompanying its Motion for Partial Summary Judgment, and the second accompanying its Memorandum in Opposition and Reply. R. 138-141 (Vol. II), 290-291. Plaintiffs also cited discovery responses from Dixie in their Cross Motion for Summary Judgment that were signed under oath by a representative of Dixie. R. 251-269. These two affidavits and discovery responses contain all of the evidence on the table from Dixie.<sup>1</sup> In contrast, Plaintiffs submitted six affidavits with a number of supporting documents. As will be seen, rather surprisingly, there are no material disputed issues of fact between the evidence from Dixie and that from Plaintiffs.

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<sup>1</sup> As noted above, Dixie hardly mentioned these affidavits in its pleadings, and did not mention the discovery responses at all. Plaintiffs refer to these discovery responses and affidavits to show that, even if all of the possible evidence from Dixie is considered, Dixie still has not raised any material issues of disputed facts in this case.

Dixie's first affidavit contains 17 paragraphs. R. 138-141. The first two merely identify the affiant, Charles Welch, as an officer of Dixie with authority to execute the affidavit, which is not contested. R. 138. The third paragraph states that all of the Plaintiffs are adjacent property owners, directly or indirectly. R. 139. The Affidavit of Conrad Bowler submitted by Plaintiffs indicates that Mr. Bowler is not presently an adjacent property owner (R. 232, ¶ 3), as does the Affidavit of Ethan Bundy (R. 239, ¶ 2).<sup>2</sup> At first blush this appears to create an issue of fact. However, Ethan Bundy is not a Plaintiff. Further he acknowledged in his affidavit that he was a former owner of adjacent property abutting the road (R. 239, ¶ 2). As one of the original owners and developers of the adjacent Ence Bowler Marsh subdivision, the same is true of Conrad Bowler. R. 232, ¶ 2. Indeed, Charles Welch himself clarifies in his second affidavit that "each one of them [plaintiffs] has been, or in fact, is presently an adjacent property owner," and further that Ethan Bundy was a former owner. R. 291, ¶¶ 3, 6-8. Plaintiffs do not dispute the former ownership status of Conrad Bowler or Ethan Bundy. Hence, there is no material dispute over the property ownership status of Plaintiffs.

The fourth and fifth paragraphs of Charles Welch's first affidavit (R. 139) state that the subject property is described on the deed that was issued to Dixie, and that Dixie has paid all tax bills it has received. Plaintiffs do not dispute these facts. While Plaintiffs have pointed out that the road was not taxed by Washington County for a number of years (R.

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<sup>2</sup> The affidavits of Gilbert and Mansfield Jennings also establish that they do not personally own property abutting the road, but they do have an ownership interest in Plaintiff Jennings Investment, LC, which does own property abutting the road. R. 272, ¶ 2, 278, ¶ 2. This appears to be the reason for Mr. Welch's reference to ownership "directly or indirectly" in his affidavit.

171-172, ¶¶ 19-20), this does not change the fact that the original deed included the road and Dixie has paid all its tax bills that it has received, even if the road was not part of what was taxed. Dixie cites these paragraphs of Mr. Welch's affidavit as support for an asserted dispute of fact regarding whether Dixie conveyed a 46 foot easement to the City of St. George, followed by an adjoining 4 foot easement. *See* Dixie's brief, page 34, footnote 8. However, Mr. Welch's affidavit said nothing about such an easement and ownership, but only stated that the original deed included the road property, and that Dixie has paid taxes on its property. Moreover, the Warranty Deed and Right-of-Way Easement conveyance documents in the record (R. 182, subparts A.4.1 and A.4.2) clearly show that Dixie did in fact make these conveyances. In sum, there is no dispute of these paragraphs, and any assertion to the contrary in footnote 8 of Dixie's brief is unsupported by the record.

Paragraphs 6 and 7 of Mr. Welch's first affidavit (R. 139) state that Dixie and St. George City discussed dedication of the road at one point in time, but the dedication was never consummated since the plat was never recorded. Plaintiffs do not contest this, and in fact the unrecorded plat in question was included among their exhibits accompanying their Cross Motion for Summary Judgment. R. 454 - 456. While Dixie in its discovery responses denies that several property owners abutting the subject road signed this plat, on the basis that it could not verify their signatures (R. 252-254), this is not material to the issues before the trial court or this court. Interestingly, David Welch, trustee of Dixie's predecessor in title, did sign the dedication plat. R. 252 no. 3; R. 456.

Paragraph 8 of Mr. Welch's affidavit (R. 139) states that over the years Dixie scheduled a number of rodeo type events on its property, a fact that is confirmed by

Plaintiffs' affidavits and clearly is not disputed. R. 232 (Aff. Conrad Bowler, ¶ 4), R. 239 (Aff. Ethan Bundy, ¶ 3).

Paragraph 9 of Mr. Welch's affidavit (R. 140) states that "from time to time, with our express permission, or with our implied permission, we have allowed *adjacent land owners* to use the property." (emphasis added). Mr. Welch specifically qualified this statement as pertaining solely to the use of adjacent landowners, not the general public. Dixie itself has pointed out that neighbor use of a claimed thoroughfare— with or without permission— is not material to a road dedication. Dixie's brief, at 20-21. Therefore, irrespective of whether use of the road by adjacent landowners was with or without permission, there is no material dispute regarding this fact that would prevent Plaintiffs' requested summary judgment.

Paragraph 10 of Mr. Welch's affidavit (R. 140) states that "[w]e, the Dixie Riding Club, have never allowed the general public to use the property as a thoroughfare, a roadway, a right-of-way, or any other permissive use save and except if by implied or express permission." Similar statements regarding express or implied permission to the public are repeated a number of times by Dixie. For example, paragraph 15 of the same affidavit states that "any use of the property has been permissive." R. 140. Similar statements are repeated in Dixie's discovery responses. R. 255-256, 258.

These statements about express and implied permission go to the heart of Dixie's claim that there are disputed issues of fact regarding permissive use. However, the express permission referred to by Dixie relates to attendance by the public at the 4 to 6 public rodeos held at the arena every year. *Plaintiffs do not dispute this* and indeed acknowledge the same by affidavit. R. 232, ¶ 4. After these public events, Dixie's permission ceased. R. 139

¶ 8 (Vol. II); R. 132. Dixie also asserted in its discovery responses that it gave express permission to the operators of a tack/saddle business, and a breeding business abutting the road for a number of years. R. 257. Plaintiffs do not dispute the existence of the tack/saddle and breeding businesses, or whether such use was permissive. R. 235, ¶¶ 10-11.

As for the implied permission referred to by Dixie, the nature of this implied permission is described by Dixie itself in its discovery responses. Dixie stated in response to an interrogatory that it identify all permissions for use of the road that “*the permission was, in fact, granted by acquiescence*, since there was, as having heretofore been mentioned, adequate egress and ingress up until the point that the Plaintiff Jennings built the shopping center complex. Therefore, it was by *acquiescence* of anyone desiring to use the property and it was only until approximately two years ago that the Defendants stopped allowing the general public, the Defendants, and other parties, who in fact, would now have the status of a trespasser, if in fact, they came upon the property.” R. 265 # 4 (emphasis added). This is corroborated by Dixie’s statement that “[t]here has never been a time since 1967 up until approximately two (2) years ago, that there was any necessity of blocking any traffic of any persons not specifically members of the Dixie Riding Club, Inc., because open and free access existed to the South, to the West, and to the North. Only when the Plaintiffs, Jennings built a shopping center complex, did the restriction of access to the areas, having heretofore been articulated, was cut off by the fabrication of the shopping center complex.” R. 256. This is why Dixie was unable to identify the users of the property that they claim to have given express or implied permission to, since the use by the public was wide open. No effort was made to block such use, and therefore Dixie was “without sufficient knowledge to

know any such individuals or witnesses,” and even the suggestion that it could identify such persons was “an impractical request” that was broad and overly burdensome. R. 265.

Whether Dixie’s claim that implied permissive acquiescence of this type can legally constitute permission for use is an entirely separate legal question, which will be discussed in more detail in subpart C below. For present purposes, it is enough to see that there is no dispute between the evidence presented by Dixie and that presented by Plaintiffs on this issue, *since Plaintiffs acknowledged this same wide open, unimpeded nature of the use due to Dixie’s acquiescence*. For example, Conrad Bowler stated that “the subject road was open, and access was open and unimpeded,” and that “no gates limited access to the subject road or through the subject road in any fashion” before 2002. R. 233, ¶¶ 5-6. “There were never any restrictions for use” of the road, and “there was never any indication that the subject road was not a public road open to use by the general public.” R. 234, ¶¶ 7-8. Similar statements are found in the other affidavits submitted by Plaintiffs. R. 239-241 (Aff. Ethan Bundy, ¶¶ 4, 5, 10); R. 244-245 (Aff. Val Hafen, ¶¶ 4-6); R. 273-275 (Aff. Gilbert Jennings, ¶¶ 4, 6, 9); R. 279-280 (Aff. Mansfield Jennings, ¶¶ 4, 5, 8); R. 283-284 (Aff. Lewis Bowler, ¶¶ 4, 5, 6). Val Hafen said that “sometime between 1985 and 1990, Defendant put up posts and started to build a gate blocking public access to the subject road. A brief legal dispute arose, and Defendant did not proceed with the gate. Access through the subject road remained unimpeded.” R. 245, ¶ 6.

In sum, regarding paragraph 10 of Mr. Welch’s affidavit, when the totality of Dixie’s statements are reviewed and compared with those of Plaintiffs, it is seen that there is no dispute at all. Both parties agree that express permission to rodeos occurred 4 to 6 times per

year, after which permission was withdrawn. Both parties agree that the implied permission claimed by Dixie was nothing other than acquiescence by Dixie in use of the road, and that use of the road was wide open and unimpeded. In short, Dixie's repeated statements that all use was permissive or by implication is simply a self-serving legal conclusion, which cannot prevent a road dedication or create an issue of disputed fact.

Paragraphs 11 and 12 of Mr. Welch's affidavit (R. 140) (Vol. II) pertain to a photograph of the road taken by Mr. Welch in 2005 (R. 143), long after the 10 years of continuous use of the road needed for the road dedication, and three years after Dixie finally gated the road. Plaintiffs do not dispute the existence of this photograph or that it accurately portrayed the appearance of the road at the time it was taken, but simply note that the road had fallen into disrepair, since the picture was taken three years after Dixie gated it. R. 235-236 (Aff. Conrad Bowler, ¶ 13); R. 245 (Aff. Val Hafen, ¶ 7); R. 284 (Aff. Lewis Bowler, ¶ 7). The statement in paragraph 12 of the affidavit that the photograph shows that the road "does not meet the criteria as outlined in the statutory language of the law, the case law, or any other facet of rights" is not a fact but a legal conclusion, and cannot prevent summary judgment.

Paragraph 13 of Mr. Welch's affidavit (R. 140) (Vol. II) states that "at no time has the Dixie Riding Club ever, by design, board action, or use ever abandoned the subject property, as required by the code." This is again a legal conclusion. Plaintiffs do not dispute that Dixie has not expressly abandoned the road by formal action. Indeed, Plaintiffs would not have brought this suit if there had been such a formal abandonment. However, whether the road is to be considered abandoned to public use pursuant to the statute is a separate matter,

and was the ultimate issue to be decided by the trial court, and the ultimate issue being reviewed by this court. “An affidavit is deficient if it ‘reveal[s] no evidentiary facts, but merely reflect[s] the affiant's unsubstantiated opinions and conclusions.’” *Orvis v. Johnson*, 2006 UT App 394, ¶ 20 citing *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985).

Paragraphs 14 through 17 of Mr. Welch’s affidavit (R. 140-141) refer to the recent shopping center built by Jennings, and Dixie’s decision to block access by gating the road. Plaintiffs do not dispute these facts. These paragraphs also make repeated reference to “open hostile and notorious” use of the road by Plaintiffs. Again, whether Plaintiffs current use (or inability to use) the road is open, hostile and notorious is a legal conclusion and cannot be established by a mere conclusory statement in an affidavit. Furthermore, current blockage of the road is not material to whether there were ten years or more of public use of the road under the statute. The ‘open and hostile’ language appears to be directed at Plaintiff’s prescriptive easement claim, which is not at issue in this appeal.

There are no more paragraphs in the first affidavit of Mr. Welch, and as has been seen above, none of the paragraphs in that affidavit raise facts in dispute. The second affidavit of Charles Welch has eight paragraphs (R. 290-291), and is directed solely at Plaintiffs’ affiants. In our discussion of the 3<sup>rd</sup> paragraph of the first affidavit above, we already discussed the assertions contained in paragraphs 3, and 6 through 8 of the second affidavit, in respect to the past or present ownership interest of Plaintiffs, and Ethan Bundy in particular. There is no dispute regarding these paragraphs since Plaintiffs acknowledge that the affiants in question are current or former owners of property adjacent to the road. Paragraph 1 of the second affidavit again only establishes Mr. Welch’s identity, while

paragraph 2 only states that he is not familiar with David Elwess, which is not in dispute. Paragraph 4 of the second affidavit discusses the Affidavit of David Elwess attached to Plaintiff's Cross Motion for Summary Judgment, and merely offers the conclusion, in somewhat confusing language, that "were those facts in dispute [the facts given in the Elwess affidavit], would state while true, do not change the status of the property in question." R. 291, ¶ 4. Hence, Mr. Welch acknowledges that the facts asserted in the Elwess affidavit are not disputed. Paragraph 5 states only that Mr. Welch relies on his previous affidavit. Hence, there are no paragraphs of the second affidavit that are disputed either.

Most of the issues raised in Dixie's discovery responses were discussed above, since these discovery responses generally coincide with and repeat and further explain the statements made by Mr. Welch in his affidavits. The only other issue discussed in Dixie's discovery responses not discussed above has to do with why Dixie feels the county did not assess taxes on the road for a time (R. 258), which is not necessarily material to the present summary judgment motions on dedication of the road, although that fact supports Dixie's acquiescence to treat the road as a public road.

The bottom line is that the trial court did not weigh any disputed evidence because *there was no disputed evidence to weigh*. Dixie has repeatedly asserted in its brief that there are supposedly issues of fact in dispute, but as seen above, there simply are none. Rather, there are disputed issues of law, primarily about whether the self-styled 'implied permission by acquiescence' from Dixie for public use of the road is legally sufficient under Utah law.

Apart from the affidavits and discovery responses, in its brief, Dixie asserts a variety of facts that it claims are in dispute, even though it has offered little if any supporting evidence for the same. One example is Dixie's assertion that there is a dispute of material fact about whether Plaintiffs' evidence of public use (1) sufficiently identifies who is the 'public,' or (2) sufficiently demonstrates public use as compared to neighbors' use. Dixie's brief at 23-24. However, these are issues related to the sufficiency of the evidence at law, not disputed facts. Furthermore, regarding the first of these, not one single time in any affidavit or discovery response did Dixie ever raise before the trial court the issue of Plaintiffs' alleged failure to identify the public, as is demonstrated by the discussion above. There is no statement in the affidavits or discovery responses saying that the public was not properly identified by Plaintiff. This 'disputed fact' is being raised for the first time on appeal, without any support. As for sufficient demonstration of public (as compared to neighbor) use of the road, it is noteworthy that the affidavits and discovery responses from Dixie before the trial court never once stated that the public did not use the road, and on the contrary acknowledged that such public use was apparently so extensive that Dixie could not identify the users. R. 265. Dixie admitted in 2004 that it was only "approximately two years ago that the Defendants stopped allowing the general public" to use the road. R. 265. Rather, the Welch affidavits and Dixie's discovery responses merely discussed the neighbor status of Plaintiffs' affiants, without dealing at all with whether these affiants' observations of public use of the road were correct. Indeed, Dixie's steadfast position before the trial court was that the uncontested public use of the road was by permission, express or implied. R. 140, ¶ 9 (Vol. II); 132; 265. Again, 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. As will be seen in subpart C below, there is more than enough clear and convincing evidence to sustain the trial court's findings of public use of the road, regardless of concurrent neighbor use.

A final note is in order regarding Dixie's assertion that supposedly almost all road dedication cases in Utah have not been decided on summary judgment because they are too fact intensive. This is not true. In addition to *Renfro v. McCowan*, 2006 WL 3254509 (D. Utah 2006), which Dixie acknowledged in its brief as being decided on summary judgment, Dixie conveniently overlooked other Utah cases regarding road dedications that were also decided on summary judgment.<sup>3</sup> In particular, Dixie overlooked *Schaer v. State*, 657 P.2d 1337 (Utah 1983), in which a road dedication was found by the Utah Supreme Court on summary judgment. Just as here, the party opposing dedication had failed to submit any material evidence against the dedication. The court stated,

[W]here the moving party's evidentiary material is in itself sufficient and the opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the courts should be justified in concluding that no genuine issue of fact is present, nor would one be present at trial.

Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so.

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<sup>3</sup> In addition to *Schaer* was the case of *Gillmor v. Carter*, 391 P.2d 426 (Utah 1964) in which dedication was denied on summary judgment not because of any facts in dispute, but because the facts showed that the underlying property owner made sure all use was permissive by putting up signs and gates along the road. This is similar to *Draper City v. Bernardo*, 888 P.2d 1097 (Utah 1995), cited by Dixie, in which summary judgment was denied because of affidavits from the underlying property owners that they had made every effort to block trespassing along the road. As noted above, such is not the case here since Dixie did not block use of the road or put up signs or gates until recently.

Where ... the materials presented by the moving party are sufficient to entitle him to a directed verdict [as a matter of law] and the opposing party fails either to offer counteraffidavits or other materials that raise a credible issue [of fact] or to show that he has evidence not then available, summary judgment may be rendered for the moving party.

*Id.* at 1341-1342, citing *Dupler v. Yates*, 351 P.2d 624, 637 (1960)(citations omitted). Such is the case here. As has been demonstrated above, Dixie did not submit facts to dispute the road dedication at issue. It provided no facts to dispute the continuous use of the road or the ten year use of the road by the public. It provided no facts— regardless of any use by local residents— to show there was no use by the general public. Indeed, Dixie conceded use by the public, but claimed such use was by permission— yet, Dixie admitted that its implied permission was nothing more or less than acquiescence in use of the road. Just as in *Schaer* where the party opposing road dedication asserted res judicata, Dixie merely asserted a legal argument against road dedication, that use by acquiescence is the same as implied permission. Just as in *Schaer*, such a legal argument must fail.

In addition, Dixie itself noted the recent case of *Renfro v. McCowan*, 2006 WL 3254509 (D. Utah 2006), in which a road dedication was found to exist under the statute on summary judgment. Contrary to Dixie's assertions, *Renfro* is not distinguishable from the present case, but is almost identical. Dixie claims there is a distinction because "in *Renfro* the defendant conceded that the general public used the road without permission ... whereas use by the public and use by permission both are contested issues in this case" (Dixie's brief at 25). However, the legal issues of public use and permission for use were indeed contested in *Renfro*. In fact, the defendant in *Renfro* claimed that the road should not be dedicated to the public because of "an alleged dispute as to whether it is, indeed, the 'public' that has used the

road.” *Id.* at \*1. This is identical to the argument raised by Dixie (without evidentiary support) about the sufficiency of the evidence of public use in the present case.

Furthermore, just as in this case, in respect to permissive use, in *Renfro* it was shown that the owner of the property during the ten year period never “permitted the public to come onto his property, or attempted to deter anyone from use of the road.” *Id.* at \*3. This is the same as Dixie’s admission in this case that it has never allowed the general public to use the road (R. 140, ¶ 10), and that “there has never been a time since 1967 up until approximately two (2) years ago, that there was any necessity of blocking any traffic of any persons not specifically members of the Riding Club, Inc., because open and free access existed to the South, to the West and to the North.” R. 256. In spite of disputed legal issues regarding public use, or use by permission, the *Renfro* court stated that the “unobstructed and constant use by numerous recreationists and sightseers, provides clear and convincing evidence that the users were not adjacent landowners, but members of the public enjoying the outdoors. *Renfro*, therefore, has provided clear and convincing evidence that the Road was a public thoroughfare for the purposes of Utah Code § 72-5-104.” *Id.* at \*5. As will be seen below, the same is true here, in light of the overwhelming evidence of public use of the road.

**C. Plaintiffs met their burden of showing dedication of the road at issue by clear and convincing evidence, and had standing to do so.**

Dixie has challenged the sufficiency of Plaintiff’s evidence in this case, asserting that dedication of the road to the public under the statute was for some reason not established by

clear and convincing evidence. As will be seen, this claim is contrary to the facts.<sup>4</sup>

Utah courts have indicated that road dedications under Utah Code Ann. § 72-5-104 must be established by clear and convincing evidence. *Wasatch County v. Okelberry*, 2006 UT App 473 at ¶ 9, citing *AWINC v. Simonsen*, 2005 UT App 168, ¶ 7. The clear and convincing evidence standard is a mid level review, between the standard of a ‘preponderance of the evidence’ and ‘proof beyond a reasonable doubt.’ “Clear and convincing evidence requires more clear and persuasive evidence and not subject to as much doubt as where only a preponderance of the evidence is required.” *Harmon v. Rasmussen*, 375 P.2d 762 (Utah 1962).

There are three points that must be established for a road dedication to the public, namely: (1) continuous use of the road (2) as a public thoroughfare (3) for ten or more years. Utah Code Ann. § 72-5-104. Dixie has not provided any facts or asserted any arguments in respect to (1) lack of continuous use, or (3) the ten year period in any of the documents it filed with the trial court or with this court. Plaintiffs established continuous use for more than ten years in the affidavits of Conrad Bowler (R. 233, ¶ 6), Ethan Bundy (R. 240, ¶ 8), Val Hafen (R. 244, ¶ 4), Gilbert Jennings (R. 273, ¶ 4), Mansfield Jennings (R. 279, ¶ 4), and Lewis Bowler (R. 283, ¶ 4). Dixie did not controvert these facts, and accordingly the trial court found continuous use for over ten years in this case. R. 351, ¶ 10, R. 360, ¶ 4.

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<sup>4</sup> In footnote 2 of Dixie’s brief, Dixie attacks Plaintiffs’ affidavits which support road dedication as supposedly ‘inadmissably vague, conclusory and without foundation,’ and asserts that they should not be relied on at all. However, not only is this incorrect but Dixie did not move to strike these affidavits before the trial court, and therefore waived its right to contest them now. *Pinetree Associates v. Ephraim City*, 67 P.3d 462, ¶ 19 (Utah 2003)(“Formal or evidentiary defects in an affidavit in support or opposition to a motion for summary judgment are waived in the absence of a motion to strike or other objection.”).

Dixie asserts that Plaintiffs failed to satisfy the public thoroughfare requirement for a road dedication by clear and convincing evidence. The public thoroughfare element requires proof of three sub elements, namely: (i) passing or travel (ii) by the public (iii) without permission. *Heber City v. Simpson*, 942 P.2d 307, 311 (Utah 1997). Dixie does not contest the first of these, passing or travel, but focuses solely on use by the public and permission for such use. Each will be discussed below.

1.     **Use by the Public** Dixie has argued two points in respect to public use. First, Dixie asserts that because Plaintiffs are current or former owners, or part owners, of property abutting the road whose testimony supposedly relates only to local use of the road, they lack standing to even bring the present suit at all, or alternatively to testify about public use. Second, even if they did have standing and could testify of public use, they testified primarily of their own local use, and were somehow not specific or clear enough in their observations of public use.

a.     **Standing** Dixie makes much of the fact that all of Plaintiffs' affiants are current or former owners, or part owners, of property abutting the road at issue. Dixie asserts as its fifth issue on appeal that this disqualifies them from having standing to bring the present action. As a preliminary matter, it must be observed that this is a new issue, raised for the first time on appeal. Whenever the term 'standing' was used by Dixie before the trial court, the lack of standing asserted was the alleged inability of Plaintiffs as private citizens to bring an action on behalf of the City of St. George. R. 130-31, 134-36, 287, 310. There was no mention of their supposedly not having standing because they were adjacent

property owners. Because this is a new issue raised for the first time on appeal, it should not be considered at all. *Dominguez v. Heward*, 2006 UT App 20.

Yet even if we reach the merits of Dixie's new argument on standing, it is not well founded. In raising this issue, Dixie confuses issues of standing with issues of sufficiency of the evidence, which are two entirely separate legal concepts. Dixie asserts that since the Plaintiffs are former or current adjacent property owners who supposedly cannot testify regarding public use of the road (an argument discussed more particularly below), this means that they also lacked standing to bring this suit at all. This is simply not true.

Standing is found where a "party has suffered or will 'suffer some distinct and palpable injury that gives [it] a personal stake in the outcome of the legal dispute," or alternatively where an appropriately situated party seeks to pursue an issue which is of sufficient public importance to warrant a grant of standing. *Sierra Club v. Utah Air Quality Board*, 2006 UT 74, at ¶¶ 19, 39, citing *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983). Plaintiffs clearly have standing here since many of them will lose an access road abutting their properties if Dixie prevails, and the issue of dedication of this public road is of sufficient public importance that it should be raised. Indeed, Utah courts for decades have never objected to the standing of adjacent property owners to raise road dedication claims.<sup>5</sup>

Finally, and apparently in the alternative, Dixie appears to suggest (particularly in its arguments to the trial court below) that because Plaintiffs were supposedly "interested

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<sup>5</sup> See: *Peterson v. Combe*, 438 P.2d 545 (Utah 1968), *Kohler v. Martin*, 916 P.1d 910 (Utah App. 1996), *Memott v. Anderson*, 642 P.2d 750 (Utah 1982), *Bertagnole v. Pine Meadow*, 639 P.2d 211 (Utah 1981), *Pitts v. Roberts*, 562 P.2d 231 (Utah 1971), *Harding v. Bohman*, 491 P.2d 233 (Utah 1971), *Bonner v. Sudbury*, 417 P.2d 646 (Utah 1966), and *AWTNC v. Simonsen*, 112 P.3d 1228 (Utah App. 2005).

parties” by virtue of having owned property abutting the road, they could not testify about the public’s use of the road. R. 133, 136, 287. This idea is apparently derived from the statement in *Peterson*, cited in Dixie’s brief, that “[adjoining] property owners cannot be considered members of the public generally, as that term generally is used in dedication by user statutes.” *Peterson*, 438 P.2d at 546, and Dixie’s Brief, at 19. However, the *Peterson* court also said that adjacent property owners “could testify as to what others not so situate might have done to perfect a dedication, including, if they could prove it, daily Greyhound Lines passengers.” *Id.* at 547 (emphasis added). Indeed, the same cases cited in footnote 6 above in respect to standing show that courts have freely relied on the testimony of adjacent landowners to establish use of the road by the general public. Such a position makes sense since there is no one better situated to testify of use of a road by the public than a neighbor.

In sum, Dixie’s argument that Plaintiffs somehow lacked standing to bring the present action due to their property ownership status is contrary to the law.

b. **Facts Regarding Local and General Use of the Road** Dixie asserts that the road dedication must fail on the basis of sufficiency of the evidence, since Plaintiffs allegedly testified primarily of their own use, and were somehow not specific or clear enough in their observations of public use. As a preliminary matter, Plaintiffs acknowledge that there was clearly use of the road at issue by abutting landowners and other nearby neighbors, and that their affiants made some reference to this use. This is only natural since the adjacent subdivision was oriented toward horse ownership, and “this area was horse country.” R. 232, 234, ¶¶ 2, 7. However, this in no way mitigates the extensive testimony by

Plaintiffs' affiants regarding the additional repeated and continuous use by the general public of this road.

Plaintiffs provided evidence that over the years, the general public used the road almost daily. R. 234 (Aff. Conrad Bowler ¶ 8). The road was used by the public to access a feed store<sup>6</sup> and mill operated by the Ence brothers west of the road for about ten years, and many people used the subject road to get to this store. R. 234 (Aff. Conrad Bowler ¶ 7). It defies logic and common sense that the only customers to use the road to reach this business were the property owners adjacent to the road.

The same is true of the public that came to watch informal rodeo events in the arena. As noted by Plaintiffs' affiants, the arena was used extensively for rodeo events until the county built a new arena near the purgatory jail. R. 232 (Aff. Conrad Bowler, ¶ 4); R. 239 (Aff. Ethan Bundy, ¶ 3); R. 272 (Aff. Gilbert Jennings, ¶ 3). Dixie has stated that permission for formal scheduled events was withdrawn after each such event ended. R. 132; R. 139, ¶ 8 (Vol. II). Because such permission was withdrawn, there was no permission for the informal practices. It again defies logic and common sense that the same public that came to these formal rodeo events was not the same public that was observed coming to the

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<sup>6</sup> This store is not to be confused with the tack and saddle shop which Plaintiffs indicated was just south of the arena (R. 241, Aff. Ethan Bundy ¶ 9; 245, Aff. V. Hafen ¶ 6), or the horse breeding business along the road (R. 235, Aff. Conrad Bowler ¶ 11), both of which businesses Dixie has stated were located along the road in question with its express permission. R. 257. Traffic to and from these businesses by the public is omitted from the present discussion based on Dixie's assertion that the same was a permissive use, for purposes of the present summary judgment. The Ence business however was not located along the subject road, nor has Dixie asserted that use of the road by its business invitees was with permission. Rather, according to Plaintiffs' unrefuted testimony, the general public used the subject road to access this business. R. 234, ¶ 7.

arena for informal practice events, and that the informal practices were only by the neighbors.

Likewise, the general public also passed through the road on their way up to the old turkey farm about a mile north of the arena, or to access the trail head on the north that lead out into the country, up to Snow Canyon and Winchester Hills. R. 233 (Affid. Conrad Bowler ¶ 5); R. 239-240 (Aff. Ethan Bundy ¶ 4); R. 272-273 (Aff. G. Jennings ¶ 4); R. 278 - 279 (Aff. M. Jennings ¶ 4). In addition, the public drove through the road to look at horses stabled along the road, to discuss business regarding their horses, and to buy and sell horses. R. 234-235 (Aff. Conrad Bowler ¶¶ 7, 11); 245 (Aff. V. Hafen ¶ 6); 274 (Aff. G. Jennings ¶ 9). Plaintiffs' affiants have indicated that this use was by more than the neighbors, and was by the general public. Dixie has not disputed these facts, but has only alleged that any and all such use was by implied permission, by acquiescence. R. 265.

Dixie complains that Plaintiffs in their affidavits have not specifically identified any members of the general public, or told how many of them used the road, or how often. Dixie's brief, at 22. In so saying, Dixie conveniently overlooks the fact that it admitted it was unable to do so in its own discovery responses. Dixie was asked to identify by name, address and phone number all persons of whom it was aware that had knowledge of the general public's use of the road. Dixie's response was that this request was "so broad that it is overly burdensome, and therefore the Defendants believe that it is an impractical request and ... the Defendants would be without sufficient knowledge to know any such witnesses or individuals." R. 264-265. Indeed, Dixie referred to use of the road by the unidentified "general public" (R. 265) in its statement that all use of the road was by acquiescence, since

use of the road was so extensive it was impossible to identify all the users. If use of the road truly were by permission, or were somehow limited to only a few local residents, surely Dixie would be able to identify most if not all of the users.

Numerous Utah cases have relied on general observations of road use by unidentified members of the general public. For example, in *Renfro*, the court stated that “[t]he record provides clear and convincing evidence that the continuous use of the Road has been by members of the public.” *Id.* at \*5. The court then quoted the following statements as specific examples to support this conclusion: an affidavit statement that the road was used “by all types of outdoor vehicles approaching from the northwest to exploit the view”; other affidavit statements about the road that “it’s a place where people used to drive out and drive to the end”, and that “people would go out and look off that point as they would other points.” (emphasis added) Finally was the statement that the road “has been a notorious area for four-wheelers and motorcycles to ride” and was “four-wheeler heaven.” *Id.* at \*5. None of these statements identified specific members of the public, or how often they used the road, or how many of them used the road, yet all of these statements were sufficient identification of public use to meet the clear and convincing evidence standard in the summary judgment context. It is also significant that one of the affiants in *Renfro* had resided in the area for 21 years, but the court said he “clearly does not qualify as an adjacent landowner.” *Id.* In similar fashion, many residents of the Ence Bowler Marsh subdivision near the road in question are also not adjacent landowners, but are members of the general public who happen to live close by. R. 232-233.

Likewise in *Thurman v. Byram*, 626 P.2d 447 (Utah 1981), it was stated that “[n]umerous witnesses testified that they had used the property frequently for more than 20 years, that they had observed other members of the general public using the road.” *Id.* at 449. Furthermore, “[b]oth the former county sheriff and the present sheriff testified that they had observed the general public using the roadway for many years.” *Id.* This use by the unidentified “general public” was sufficient for the court. In *Bonner v. Sudbury*, 417 P.2d 646 (Utah 1966), acknowledgements by two neighbors that they had seen “the general public using McClelland Street” was sufficient to establish public use. *Id.* at 648. The court noted that further testimony of these two witnesses “particularized as to the classes of persons ... who used the street. Yet, in our judgment it can be said advisedly that the trial court could reasonably regard their further answers as not contradictory of, but rather as consistent with their statements that the public used it.” *Id.* The dissent noted that these witnesses had gone on to say the use they had seen was by mostly local residents or their invitees, but conceded that there was occasional use of the road by school children as a shortcut, and unidentified members of the general public who thought it was a through street. *Id.* at 649-650. This is just like the present case, in which a mixture of local residents, abutting landowners and the general public were observed using the road.

Just as in these examples, use of the road at issue by far more than the local neighbors was clearly established. This is not a case where there was solely local traffic because of a dead end street or alley, such as *Peterson v. Combe*, or *Pitts v. Roberts*. In this case, the road connects between two city streets (R. 244), and was extensively used as a thoroughfare by the public to get to trailheads to the north, a business to the west, or to and

from the arena itself for informal rodeo practices. R. 233-235, 239-240, 272-273. In sum, Plaintiffs' evidence is more than clear and convincing of general public use of the road.

2. Use by Permission Dixie has repeatedly asserted that any and all use by the public of this road was somehow with express or implied permission. Dixie has tried to frame this point as supposedly being a disputed issue of fact. As discussed above, there is actually no disputed fact between the parties in this respect. Express permission for public use of the road occurred 4 to 6 times a year, after which permission for use was withdrawn (R. 139, ¶ 8 (Vol. II); R. 140 ¶10; R. 132; R. 232, ¶ 4; R. 239, ¶ 3). As for implied permission, Dixie admits that this was just use by acquiescence (R. 265), and both parties have acknowledged unfettered use of the road by the public due to Dixie's acquiescence. R. 233-234, ¶ 5-8; R. 256; R. 265. The implied permissive use repeatedly referenced by Dixie is an issue of law: whether permission to overcome a public dedication can be implied by acquiescence as claimed by Dixie.

In response to an interrogatory that Dixie identify all permissions it gave to the general public to use the road, and all overt actions it took to convey or express that permission, Dixie stated the following:

The permission was, in fact, granted by acquiescence, since there was, as having heretofore been mentioned, adequate egress and ingress up until the point that the Plaintiff Jennings built the shopping center complex. Therefore, it was by acquiescence of anyone desiring to use the property and it was only until approximately two years ago that the Defendants stopped allowing the general public, the Defendants, and other parties, who in fact, would now have the status of a trespasser, if in fact, they came upon the property."

R. 265 # 4. From this we see that the implied permission frequently referred to by Dixie in its affidavits and discovery responses was nothing more or less than use due to Dixie's

acquiescence. Yet if acquiescence was the same as implied permission to use a road, the road dedication statute would be rendered meaningless, since virtually every property owner of such a road has acquiesced in its use. Courts will not accept an interpretation of the road dedication statute that would render that statute meaningless or makes its enforcement unlikely or impossible. *See, e.g., Dept. of Natural Resources v. Butler*, 2006 UT App 444, ¶¶ 10-11.

In reality, acquiescence in use of a road such as in the present case stands for the opposite proposition to that argued by Dixie. The Utah Supreme Court has said that “the owner's intent [to dedicate the road to the public] may be inferred by the mere acquiescence in allowing the public to use the road.” *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995). Indeed, the argument that “mere acquiescence in the use of the land by the public” does not show intent to dedicate a road to the public has been expressly overruled. *Bertagnole v. Pine Meadow*, 639 P.2d 211, 212-213 (Utah 1981), citing *Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981). *See also Campbell v. Box Elder County*, 962 P.2d 806, fn3 (Utah App. 1998). The Supreme Court’s use of the term “inferred” in *Draper City* is significant. Essentially, the court was saying that if a property owner acquiesces in the use of his property for a road, we can infer an intent that the public dedication take place, rather than inferring permissive use that would deny public dedication as Dixie asserts. Hence, Dixie’s repeated claim in its affidavits and discovery responses that all use of the road due to its acquiescence constituted use by implied permission is nothing more or less than an erroneous legal conclusion, directly contrary to Utah law.

The permissive use element of a road dedication is a paradox. The public’s use of the road is almost always with the owner’s knowledge, yet the claimant is legally required to

show that the use was not permissive in order for a road dedication to be found. *Heber City v. Simpson*, 942 P.2d 307, 311 (Utah 1997). If the owner knows of unauthorized use of his property, and yet allows such use to continue, he may feel that all such use is by his implied permission. The owner will say that permission is implied by the fact that he either does nothing to stop it, or does not make more than token efforts to stop the use that are ineffective because the public use continues. Indeed that is what Dixie is claiming here. If such a presumption were true, a road dedication would never take place, since the use would be permissive every time.

It is because of this irony that the supreme court has concluded that the owner's acquiescence in use of the road is in fact an implied intent that it be dedicated to the public, rather than an implied permission that would deny such dedication. Any other interpretation would allow the property owner to profit by his own failure to block the public's use of the road. Analogy can be made to the law pertaining to prescriptive easements, whereby a landowner's knowing failure to prevent use of a road for a period in excess of 20 years is presumed to be adverse and not permissive. *Martinez v. Wells*, 2004 UT App 43, ¶ 22.

Indeed, several Utah cases have found a road dedication where the owner failed to give permission for use of a road, and the public failed to ask for such permission. *See e.g.*, *Boyer v. Clark*, 362 P.2d 107, 108 (Utah 1958) (No evidence that "permission was asked or obtained" for use of road); *Thurman v. Byram*, 626 P.2d 447, 449 (Utah 1981) ("[U]ntil 1978 they had never been asked not to use it [road], nor had they been prevented from doing so"); *AWINC v. Simonsen*, 112 P.3d 1228, ¶ 5 (Utah App. 2005) ("individuals testified that they were never asked not to use the road, nor were they told that they could not use the road");

*State v. Six Mile Ranch*, 2006 UT App 104, ¶¶ 23, 38 (dedication found of road that “was unobstructed and required neither the knowledge nor the permission of the Bleazards,” but there was no dedication of other roads where “the property owners ‘routinely’ asked the public to leave the Pass and Cable Roads,” and therefore public’s use of these other roads was not “as often as they found it convenient or necessary”). As noted by Plaintiffs’ affiants, there was never any restrictions or signs in respect to use of the road, and they did not recall anyone from Dixie telling them that use of the road was by permission only. R. 233-234 (Aff. Conrad Bowler, ¶¶ 7-8); R. 273 (Aff. Gilbert Jennings, ¶ 6).

Dixie’s lack of permission is further demonstrated by Dixie’s attempt, sometime between 1985 and 1990, to put up posts and build a gate blocking public access to the road. After a brief legal dispute, Dixie did not proceed with the gate but went back to acquiescence in public use of the road. R. 245 (Aff. V. Hafen ¶ 6). At no time was use of the road blocked. In sum, Dixie’s claim that all use of the road was with express or implied permission is directly contrary to Dixie’s own statements and Utah law.

**D. There was no Error by the District Court in Respect to the Width of the Road**

Dixie asserts that the trial court erred in not assessing the reasonable and necessary width of the roadway.<sup>7</sup> There was no mention of this issue by Dixie before the trial court, and therefore this is a new issue raised for the first time on appeal. Appellate courts will not hear new issues raised for the first time on appeal. *Dominguez v. Heward*, 2006 UT App 20.

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<sup>7</sup> The width of the road is contained within the legal description of the Decree of Dedication. R. 339. It must be remembered that this claim regarding the width of the road has no impact on the court’s determination of dedication of the road to the public. Hence, even if this court were to determine that the trial court somehow erred in this respect, the road dedication itself would still stand.

Dixie can only get past this rule by a showing of plain error pursuant to Rule 103(d) of the Utah Rules of Evidence. A showing of plain error requires a demonstration that “(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [Defendant].” *State v. Alfatlawi*, 2006 UT App 511, at ¶ 12. In respect to a claim of plain error, “the trial court commits error if it abuses its discretion by acting beyond the limits of reasonability.” *Id.* at 20. As will be seen, Dixie is unable to meet these requirements here.

The first element that Dixie must establish is that an error exists. An error would have occurred in respect to road width (1) if no evidence were presented by Plaintiffs regarding the width but the court granted a certain road width anyway, or (2) if the court had a duty to determine road width contrary to the determination of the city. In respect to the first point, Dixie ignores a mountain of evidence presented by Plaintiffs regarding the width of the road. Almost every affidavit Plaintiff submitted referenced the subject road as described in the dedication plat, “The 1020 West x 1050 North Street.” The plat by which Dixie negotiated dedication of this road with St. George City clearly identifies the width of the road at fifty feet. R. 456. In addition, numerous legal documents of conveyance, including an easement from Dixie itself to the City of St. George, identified this road as having a width of 50 feet. R. 167-171; 181, A.4.1 and A.4.2.

Furthermore, the Utah Code requires that “[t]he scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.” Utah Code Ann. § 72-5-104(3). Since the road at issue connects two city streets (R. 244 Aff. H. Val Hafen ¶ 3) and is located within a city rather than being an

isolated road in a canyon or a livestock trail across an uninhabited meadow as in many road dedication cases, the width of the road needed for safe travel will be set by the city. Indeed, Utah Code Ann. § 72-5-108 provides that “[t]he width of rights-of-way for public highways shall be set as the highway authorities of the state, counties, or municipalities may determine for the highways under their respective jurisdiction.”<sup>8</sup> Hence, it was for the City of St. George, not the court, to decide the safe width of this roadway.

The second element that Dixie must establish in its claim of plain error is that the error should have been obvious to the trial court. As noted above, the trial court was aware that the road was within the city. The court had before it a plat and numerous documents of conveyance that identified the road width at fifty feet. Dixie produced nothing to counter this, but indeed has acknowledged that a city street such as this must be fifty feet wide, just as is shown on the plat. Dixie brief at 32. Moreover, the evidence before the trial court was that the general public used this road almost everyday for a large number of purposes. R. 233-235 (Aff. Conrad Bowler, ¶¶ 5-11); R. 283-284 (Aff. Lewis Bowler, ¶¶ 2-8). The road is located in a residential area in a city where repeated and frequent use is likely, and a narrow road width would not suffice or provide for safe travel. This is not a case about a mountain road or meadow sheep trail in an isolated area. There was nothing obvious about the supposed need to establish a reasonable width of the road when the documents before the trial court, the location of the road and the frequency of use of the road all indicated that a

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<sup>8</sup> It is significant that Utah Code Ann. § 72-5-108 refers to the ‘width’ of the road, while Utah Code Ann. § 72-5-104(3) refers to the ‘scope’ of the road needed for safe travel. To the extent this reference to the ‘scope’ is interpreted to mean the ‘width’ of the road (as has occurred in a number of judicial interpretations), there would appear to be a conflict between

minimum standard city street width would be necessary for safe travel. In short, the trial court acted reasonably in identifying the width of the road at fifty feet. “The trial court commits error if it abuses its discretion by acting beyond the limits of reasonability.” *State v. Alfatlami*, 2006 UT App 511, at ¶ 20. There was nothing unreasonable about the court’s determination here.

The third element that Dixie must prove to sustain its claim of plain error is that “the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [Defendant].” *Id.* at ¶ 12. This is the most telling element of all in this case. As Dixie itself has acknowledged, St. George City has set the width of streets such as this at fifty feet. Dixie’s brief, at 32. Hence, even if the trial court did somehow commit error in this case, Dixie will gain nothing by it, since the width of the road in the end will still have to be established at fifty feet. Hence, at worst, the court’s inclusion of a width of 50 feet in its Decree of Dedication was harmless error.

In sum, the district court did not err in respect to the width of the street.

**E. St. George City is not an Indispensible Party**

Dixie asserts that Plaintiffs improperly failed to name St. George City as an indispensable party on the basis that Plaintiffs’ requested recognition of the road as abandoned to the public would somehow take away the city’s easement rights to said property and give it to the state rather than the city. Dixie’s brief, at 6. Dixie also asserts that the district court erred in not following the two step process in Rule 19 of the Utah Rules of Civil Procedure to determine if St. George City were an indispensable party.

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the two statutes as to which governmental entity— the courts or the city— should determine

However, the reason the trial court did not address this is because the issue was not really raised at all before the trial court, and is an issue raised for the first time on appeal. While Dixie noted at one point that the city was not a party to the suit (R. 130), at no point did it move to make the city a party or suggest that this needed to be done. Its argument was that Plaintiffs lacked standing themselves to pursue a dedication.

Dixie is correct that “a party may raise the issue of failure to join an indispensable party at any time in the proceedings, including for the first time on appeal.” *Cassidy v. Salt Lake County Fire Ser. Council*, 976 P.2d 607, ¶9 (Utah App. 1999). In such a case, the appellate court will address the merits of the claim, and will review whether complete relief can be afforded among those already parties in the absence of St. George City, and whether the absent person claims an interest in the subject matter of the action and continuing without that person would (1) impair the person's ability to protect his or her interest, or (2) expose the parties already joined to the action to multiple litigation. *Id.* at ¶10 (citations omitted).

Dixie asserts that “the effect of Plaintiffs’ claims in this case and the District Court’s Decree of Dedication were to declare property and property rights purportedly owned by the city of St. George to have been abandoned to the state, without Plaintiffs naming St. George as a party to this case.” Dixie’s brief, at 6. Dixie then claims that because Plaintiffs have asserted that the city has an easement/ownership rights already in the road, “the resolution of this litigation in favor of either Plaintiffs or in favor of Dixie is likely to impair or impede the City’s ability to protect its alleged interests.” Dixie’s brief at 34. In making

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a dedicated road’s width.

these statements, Dixie displays a misunderstanding of the consequences of a road dedication by assuming that the state, rather than the city, would be the recipient of the road.

Utah Code Ann. § 72-5-104(1) does not require joinder of the city as a party in a road dedication action. It speaks of roads being dedicated to the ‘public,’ not the state. Subpart (2) of this same statute says that “[t]he dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.” To understand who actually receives title to a dedicated road, we must review these statutes.

Utah Code Ann. § 72-3-102 says that state highways for which the state holds title are only those designated under Title 72, chapter 4 of the Utah Code. Utah Code Ann. § 72-4-102.5 says that a state highway, also known as a Class A state road, is one that is to “primarily move higher traffic volumes over longer distances than highways under local jurisdiction” (subpart (3)(b)), and shall “exclude all collector highways and local roads” (subpart (5)(c)). Clearly then, the state itself would not receive sole title to the road in question, since it is merely a local road.

Utah Code Ann. § 72-3-104 says that “[c]ity streets comprise highways, roads, and streets within the corporate limits of the municipalities that are not designated as class A state roads or as class B roads.” We have already seen above that the road at issue is not a Class A state road, nor would it be a Class B road under Utah Code Ann. § 72-3-103, since Class B roads are only those “situated outside of incorporated municipalities.” Section 72-3-104, subpart 3 states that title for virtually all city streets is held by the city itself if the city is in a larger county, or title is joint between the city and state in smaller counties. Whether St. George is in a larger or smaller county is immaterial since title it receives from the dedication

will be identical to title it already holds in all its other streets and therefore its rights would not be affected. Finally, section 72-3-104 subpart 4 states that “[t]he municipal governing body exercises sole jurisdiction and control of the city streets within the municipality.”

Utah Code Ann. § 72-3-105 deals only with Class D roads, which are only those not already designated as another class of road. As we have seen, the road at issue is classified as a Class C road, and therefore this statute does not apply to it. Utah Code Ann. § 72-5-103 merely indicates that if title to real property acquired in a road dedication is less than fee simple, it is held solely by the city in a large county, or jointly by the state and city if the city is in a small county, the same as fee title interests.

The bottom line from these statutes is that the effect of the road dedication in this case is to vest the same title in the City of St. George as the city has in its other city streets. Title to the dedicated road does not go solely to the State of Utah. Hence, the dedication does not take any title or rights from the city, as Dixie suggests. The prior conveyances to the city by Dixie and adjacent property owners of a utility easement and a four foot strip of property to be added to the road (R. R. 181, A.4.1 and A.4.2) would simply merge into the new title. *Miller v. Martineau*, 983 P.2d 1107, ¶ 30 (Utah App. 1999). On the other hand, if Dixie were to prevail, the city would lose nothing that it previously had. The utility easement it received from Dixie and the four foot strip it received from Dixie and adjacent property owners would not be lost, but would remain in place the same as before. Hence, no matter who prevails in this action, the city’s rights will not be adversely affected. The simple reality is that the city’s easement and the road dedication at issue are distinct, and involve entirely separate property rights. The city’s easements are not threatened at all by the dedication.

Dixie may assert that the city's ability to protect its interest may be impaired because it may lose a potential or expectancy interest in the street if the street is not dedicated to the public. However, Dixie has acknowledged that the city has previously declined to pursue dedication of this street, and therefore has shown that it apparently has no expectancy interest in the street, or at least none that it intends to assert. R. 139, ¶¶ 6-7. Furthermore, any interest by the city in the street is coincident with that of Plaintiffs, and therefore the lack of the City's presence as a party will not expose it to any risk since Plaintiffs are ardently seeking the road. This is not a case where some unique interest of the city will not be adequately protected if the city is not made a party. The city has always been aware of the present litigation (R. 31-33) and could have moved to intervene if it felt its interests were at risk, but has not done so. Complete relief in this case can be afforded among those already parties in the absence of St. George City.

Numerous road dedication cases in Utah have been between private parties, without joinder of the governmental entity that would receive title and responsibility for the road if it were dedicated.<sup>9</sup> Courts have never indicated in any of these cases that joinder of the governmental entity was required. Significantly, in *Kohler v. Martin*, 916 P.1d 910 (Utah App. 1996), this court specifically declined to find an abuse of discretion by the trial court for failing to join Midway City to the suit under Rule 19. *Id.*, n.1. In sum, there was no error here in respect to joinder of the City of St. George, since it is not an indispensable party.

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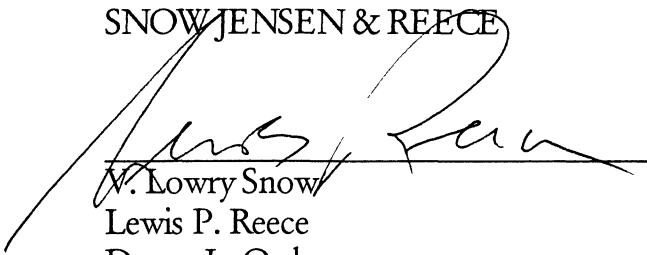
<sup>9</sup> See: *Morris v. Blunt*, 161 P. 1127 (Utah 1916), *Deseret Livestock v. Sharp*, 259 P.2d 607 (Utah 1953), *Boyer v. Clark*, 326 P.2d 107 (Utah 1958), *Clark v. Erekson*, 341 P.2d 424 (Utah 1959), *Bonner v. Sudbury*, 417 P.2d 646 (Utah 1966), *Peterson v. Combe*, 438 P.2d 545 (Utah 1968), *Thurman v. Byram*, 626 P.2d 447 (Utah 1981), *Bertagnole v. Pine Meadow*, 639 P.2d 211 (Utah

## **X. CONCLUSION**

The trial court properly deemed all of Plaintiffs' facts admitted, due to Dixie's failure to follow the requirements of Rule 7 of the Utah Rules of Civil Procedure. The trial court did not improperly weigh any disputed evidence, since there was no disputed evidence to weigh. Plaintiffs met their burden of proving dedication of the road at issue by clear and convincing evidence. Plaintiffs have standing to pursue dedication of the road, and are not precluded from doing so or from testifying of public use because they are former or present owners of abutting property. There was no error in respect to the road width set by the trial court's Decree of Dedication, or in respect to joinder of the City of St. George, and the city is not an indispensable party. The ruling of the trial court should accordingly be upheld.

Respectfully submitted this 28<sup>th</sup> day of December 2007.

SNOW JENSEN & REECE



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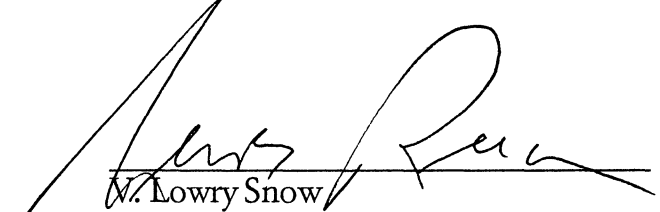
1981), *White Pine Ranches v. Osguthorpe*, 731 P.2d 1076 (Utah 1986); *AWINC v. Simonsen*, 112 P.3d 1228 (Utah App. 2005).

**CERTIFICATE OF MAILING**

This is to certify that on this 31<sup>st</sup> day of December 2007, I caused a true and correct copy of the BRIEF OF APPELLEE to be delivered via first class U.S. Mail, postage prepaid, to the following:

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## ADDENDUM

(12) the mitigation of impacts from public transportation projects. 2001

**72-5-103. Acquisition of rights-of-way and other real property — Title to property acquired.**

(1) The department may acquire any real property or interests in real property necessary for temporary, present, or reasonable future state transportation purposes by gift, agreement, exchange, purchase, condemnation, or otherwise.

(2) (a) (i) Title to real property acquired by the department or the counties, cities, and towns by gift, agreement, exchange, purchase, condemnation, or otherwise for highway rights-of-way or other transportation purposes may be in fee simple or any lesser estate or interest.

(ii) Title to real property acquired by the department for a public transit project shall be transferred to the public transit district responsible for the project.

(iii) A public transit district shall cover all costs associated with any condemnation on its behalf.

(b) If the highway is a county road, city street under joint title as provided in Subsection 72-3-104(3), or right-of-way described in Title 72, Chapter 5, Part 3, Rights-of-way Across Federal Lands Act, title to all interests in real property less than fee simple held under this section is held jointly by the state and the county, city, or town holding the interest.

(3) A transfer of land bounded by a highway on a right-of-way for which the public has only an easement passes the title of the person whose estate is transferred to the middle of the highway. 2001

**72-5-104. Public use constituting dedication — Scope.**

(1) A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

(2) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.

(3) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances. 2000

**72-5-105. Highways, streets, or roads once established continue until abandoned — Temporary closure.**

(1) All public highways, streets, or roads once established shall continue to be highways, streets, or roads until abandoned or vacated by order of a highway authority having jurisdiction or by other competent authority.

(2) (a) For purposes of assessment, upon the recordation of an order executed by the proper authority with the county recorder's office, title to the vacated or abandoned highway, street, or road shall vest to the adjoining record owners, with  $\frac{1}{2}$  of the width of the highway, street, or road assessed to each of the adjoining owners.

(b) Provided, however, that should a description of an owner of record extend into the vacated or abandoned highway, street, or road that portion of the vacated or abandoned highway, street, or road shall vest in the record owner, with the remainder of the highway, street, or road vested as otherwise provided in this Subsection (2).

(3) (a) In accordance with this section, a state or local highway authority may temporarily close a class B or D road, an R.S. 2477 right-of-way, or a portion of a class B or D road or R.S. 2477 right-of-way.

(b) A temporary closure authorized under this section is not an abandonment.

(c) A temporary closure under Subsection (3)(a) may be authorized only under the following circumstances:

(i) when a federal authority, or other person, provides an alternate route to an R.S. 2477 right-of-way or portion of an R.S. 2477 right-of-way that is:

(A) accepted by the highway authority; and  
(B) formalized by:

(I) a federal permit; or

(II) a written agreement between the federal authority or other person and the highway authority; or

(ii) when a state or local highway authority determines that correction or mitigation of injury to private or public land resources is necessary on or near a class B or D road or portion of a class B or D road.

(d) A highway authority shall reopen an R.S. 2477 right-of-way or portion of an R.S. 2477 right-of-way temporarily closed under this section if the alternate route is closed for any reason.

(e) A temporary closure authorized under Subsection (3)(c)(ii) shall:

(i) be authorized annually; and

(ii) not exceed two years or the time it takes to complete the correction or mitigation, whichever is less.

(4) Prior to authorizing a temporary closure under Subsection (3), a highway authority shall:

(a) hold a hearing on the proposed temporary closure;

(b) provide notice of the hearing by:

(i) mailing a notice to the Department of Transportation and all owners of property abutting the highway; and

(ii) (A) publishing the notice in a newspaper of general circulation in the county at least once a week for four consecutive weeks prior to the hearing; or

(B) posting the notice in three public places for at least four consecutive weeks prior to the hearing; and

(c) pass an ordinance authorizing the temporary closure.

(5) The right-of-way and easements, if any, of a property owner and the franchise rights of any public utility may not be impaired by a temporary closure authorized under this section. 2004

**72-5-106. Expiration of franchise of toll bridge or road.**

If the franchise of any toll bridge or road expires by limitation, forfeiture, or nonuser it is a free public highway and no claim shall be valid against the public for right-of-way or for land or material comprising the bridge or road. 199

**72-5-107. United States patents — Patentee and county to assert claims to roads crossing land.**

(1) (a) If any person acquires title from the United States to any land in this state over which any public highway extends that has not been duly platted, and that has not been continuously used as a public highway for a period of ten years, the person shall within three months after receipt of the person's patent assert the person's claim for damages in writing to the county executive of the county in which the land is situated.

(b) The county legislative body shall have an additional period of three months in which to begin proceedings to condemn the land according to law.

(2) (a) The highway shall continue open as a public highway during the periods described under Subsection (1).

(b) If no action is begun by the county executive within the period described under Subsection (1)(b), the highway shall be considered to be abandoned by the public.

(3) In case of a failure by the person so acquiring title to public lands to assert his claim for damage during the three months from the time the person received a patent to the lands, the person shall thereafter be barred from asserting or recovering any damages by reason of the public highway, and the public highway shall remain open. 1998

#### **72-5-108. Width of rights-of-way for public highways.**

The width of rights-of-way for public highways shall be set as the highway authorities of the state, counties, or municipalities may determine for the highways under their respective jurisdiction. 1998

#### **72-5-109. Contributions of property by counties and municipalities.**

Counties and municipalities may contribute real or personal property to the department for state transportation purposes. 2001

#### **72-5-110. Acquisition of personal property.**

The department may acquire by gift, agreement, exchange, purchase, or otherwise machinery, tools, equipment, materials, supplies, or other personal property necessary for the administration, construction, maintenance, and operation of the state highways, and may sell, exchange, or otherwise dispose of the machinery, tools, equipment, materials, supplies, and other personal property when no longer suitable or required for state transportation purposes. 2001

#### **72-5-111. Disposal of real property.**

(1) (a) If the department determines that any real property or interest in real property, acquired for a highway purpose, is no longer necessary for the purpose, the department may lease, sell, exchange, or otherwise dispose of the real property or interest in the real property.

(b) (i) Real property may be sold at private or public sale.

(ii) Except as provided in Subsection (1)(c) related to exchanges, proceeds of any sale shall be deposited with the state treasurer and credited to the Transportation Fund.

(c) If approved by the commission, real property or an interest in real property may be exchanged by the department for other real property or interest in real property, including improvements, for highway purposes.

(2) (a) In the disposition of real property at any private sale, first consideration shall be given to the original grantor or the original grantor's heirs.

(b) Notwithstanding the provisions of Section 78-34-20, if no portion of a parcel of real property acquired by the department is used for transportation purposes, then the original grantor or the grantor's heirs shall be given the opportunity to repurchase the parcel of real property at the department's original purchase price from the grantor.

(c) In accordance with Section 72-5-404, this Subsection (2) does not apply to property rights acquired in proposed transportation corridors using funds from the Transportation Corridor Preservation Revolving Loan Fund created in Section 72-2-117.

(3) (a) Any sale, exchange, or disposal of real property or interest in real property made by the department under this section, is exempt from the mineral reservation provisions of Title 65A, Chapter 6, Mineral Leases.

(b) Any deed made and delivered by the department under this section without specific reservations in the deed is a conveyance of all the state's right, title, and interest in the real property or interest in the real property. 2003

#### **72-5-112. Acquisition of real property from county, city, or other political subdivision — Exchange.**

The department may purchase or otherwise acquire from any county, city, or other political subdivision of the state real property or interests in real property which may be exchanged for or used in the purchase of other real property or interests in real property to be used in connection with the construction, maintenance, or operation of state highways. 1998

#### **72-5-113. Acquisition of entire lot, block, or tract — Sale or exchange of remainder.**

If a part of an entire lot, block, tract of land, or interest or improvement in real property is to be acquired by the department and the remainder is to be left in a shape or condition of little value to its owner or to give rise to claims or litigation concerning damages, the department may acquire the whole of the property and may sell the remainder or may exchange it for other property needed for highway purposes. 1998

#### **72-5-114. Property acquired in advance of construction — Lease or rental.**

(1) (a) The department may acquire real property or interests or improvements in real property in advance of the actual construction, reconstruction, or improvement of highways in order to save on acquisition costs or avoid the payment of excessive damages.

(b) The real property or interests or improvements in real property may be leased or rented by the department in a manner, for a period of time, and for a sum determined by the department to be in the best interest of the state.

(2) (a) The department may employ private agencies to manage rental properties when it is more economical and in the best interests of the state.

(b) All moneys received for leases and rentals, after deducting any portion to which the federal government may be entitled, shall be deposited with the state treasurer and credited to the Transportation Fund. 1998

#### **72-5-115. Acquisition of property devoted to or held for other public use.**

(1) If property devoted to or held for some other public use for which the power of eminent domain might be exercised is to be taken for state transportation purposes, the department may, with the consent of the person or agency in charge of the other public use, condemn real property to be exchanged with the person or agency for the real property to be taken for state transportation purposes.

(2) This section does not limit the department's authorization to acquire, other than by condemnation, property for exchange purposes. 2001

#### **72-5-116. Exemption from state licensure.**

In accordance with Section 61-2-3, an employee of the department when engaging in an act on behalf of the department related to one or more of the following is exempt from licensure under Title 61, Chapter 2, Division of Real Estate:

(1) acquiring real property pursuant to Section 72-5-103;

(2) disposing of real property pursuant to Section 72-5-111; or

(3) providing services that constitute property management, as defined in Section 61-2-2. 2007

## **PART 2**

### **RIGHTS-OF-WAY ACROSS STATE LANDS**

#### **72-5-201. Purpose statement.**

(1) (a) The Legislature recognizes that highways provide tangible benefits to private and public lands of the state

Sys. Int'l, 569 P.2d 1122 (Utah 1977).

### Motions and affidavits.

#### —Applicability of rule.

##### —Court orders.

The five-day notice of hearing provision of Subdivision (d) does not apply to orders made by a court, such as a show cause order. *Bott v. Bott*, 20 Utah 2d 329, 437 P.2d 684 (1968).

##### —New trial.

Provision that notice of hearing on motion be served not later than five days before the time specified for the hearing does not apply to motion for new trial and such notice is not integral part of motion for new trial; rule does not change procedure whereby a motion can be called up at any time parties desire to do so. *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960).

#### —Compliance with rule.

##### —Actual notice.

The trial court may dispense with technical compliance with the five-day notice provision of Subdivision (d) if there is satisfactory proof that a party had actual notice and time to prepare to meet the questions raised by the motion. *Jensen v. Eames*, 30 Utah 2d 423, 519 P.2d 236 (1974); *Sandy City v. Salt Lake County*, 794 P.2d 482 (Utah Ct. App. 1990), rev'd on other grounds, 827 P.2d 212 (Utah 1992).

##### —Ineffective notice.

Eight days' notice of trial was ineffective to give five days' notice when notice was by mail, since Saturday, Sunday, and three days for mailing were to be deducted from eight-day period. *Mickelson v. Shelley*, 542 P.2d 740 (Utah 1975).

##### —Time to prepare.

Plaintiff was not prejudiced by two-day no-

tice of hearing to release property subject to writ of attachment where he had adequate time to prepare for hearing and defendant was required to post cashier's check in lieu of security. *Jensen v. Eames*, 30 Utah 2d 423, 519 P.2d 236 (1974).

#### —Continuance.

##### —Surprise.

Neither plaintiff's failure to serve motion for continuance five days before date set for hearing nor failure to file affidavits accompanying motion justified denial of motion where plaintiff's counsel did not learn of reason for plaintiff's inability to appear at hearing in time to make motion five days before hearing and Rule 40(b) does not expressly require affidavits to accompany motion for continuance. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

**Cited in** *Goddard v. Bundy*, 121 Utah 299, 241 P.2d 462 (1952); *Mower v. Bohmke*, 9 Utah 2d 52, 337 P.2d 429 (1959); *Western States Thrift & Loan Co. v. Blomquist*, 29 Utah 2d 58, 504 P.2d 1019 (1972); *Connelly v. Rathjen*, 547 P.2d 1336 (Utah 1976); *Genuine Parts Co. v. Larson*, 555 P.2d 285 (Utah 1976); *McEwen Irrigation Co. v. Michaud*, 558 P.2d 606 (Utah 1976); *Utah Chiropractic Ass'n v. Equitable Life Assurance Soc'y*, 579 P.2d 1327 (Utah 1978); *Reagan Outdoor Adv., Inc. v. Utah DOT*, 589 P.2d 782 (Utah 1979); *Albrecht v. Uranium Servs., Inc.*, 596 P.2d 1025 (Utah 1979); *Ute-Cal Land Dev. v. Intermountain Stock Exch.*, 628 P.2d 1278 (Utah 1981); *Bennion v. Hansen*, 699 P.2d 757 (Utah 1985); *K.O. v. Denison*, 748 P.2d 588 (Utah Ct. App. 1988); *P & B Land, Inc. v. Klungervik*, 751 P.2d 274 (Utah Ct. App. 1988); *Huston v. Lewis*, 818 P.2d 531 (Utah 1991); *Wilcox v. Geneva Rock Corp.*, 911 P.2d 367 (Utah 1996); *Low v. City of Monticello*, 2002 UT 90, 54 P.3d 1153.

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 20 Am. Jur. 2d Courts § 20 et seq.; 56 Am. Jur. 2d Motions, Rules, and Orders § 10; 62B Am. Jur. 2d Process §§ 114-117, 227-229.

**C.J.S.** — 60 C.J.S. Motions and Orders § 8; 66 C.J.S. Notice § 27 et seq.; 71 C.J.S. Pleading §§ 98, 114, 219; 72 C.J.S. Process §§ 72, 78.

**A.L.R.** — Vacating judgment or granting new trial in civil case, consent as ground of after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

Validity of service of summons or complaint on Sunday or holiday, 63 A.L.R.3d 423.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Consequences of prosecution's failure to file timely brief in appeal by accused, 27 A.L.R.4th 213.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 A.L.R.4th 840.

## PART III. PLEADINGS, MOTIONS, AND ORDERS

### Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) *Pleadings.* There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned

under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) *Motions.* An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(c) *Memoranda.*

(c)(1) *Memoranda required, exceptions, filing times.* All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) *Length.* Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) *Content.*

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) *Request to submit for decision.* When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) *Hearings.* The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or

opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) *Orders.*

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) *Objection to court commissioner's recommendation.* A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

(Amended effective November 1, 2003; April 1, 2004; November 1, 2005.)

**Advisory Committee Note.** — The practice for courtesy copies varies by judge and so is not regulated by rule. Each party should ascertain whether the judge wants a courtesy copy of that party's motion, memoranda and supporting documents and, if so, when and where to deliver them.

Paragraph (f) applies to all orders, not just orders upon motion.

**Amendment Notes.** — The 2003 amendment deleted "denominated as such" after "counterclaim" in Subdivision (a); rewrote Subdivisions (b) and (c); and added Subdivisions (d) to (g).

The 2004 amendment inserted "or in proceedings before a court commissioner" in Subdivision (b); substituted the first paragraph in Subdivision (c)(2) for a list of maximum lengths for different types of memoranda; in Subdivision (f)(2), substituted "serve upon the other parties" for "file" in the first sentence and added the last sentence; in Subdivision (g), substituted "recommendation" for "recommended order" several times and substituted "made in open court" for "entered" and added the clause beginning "or, if" in the second sentence; and added the second paragraph of the Advisory Committee Note.

The 2005 amendment added Subdivision (f)(3).

**Compiler's Notes.** — This rule is similar to Rule 7, F.R.C.P.

**Cross-References.** — Amendment of pleadings to conform to evidence, motion for, U.R.C.P. 15(b).

Commencement of action, U.R.C.P. 3.

Consolidation of defenses made by motion, U.R.C.P. 12(g).

Counterclaim and cross-claim, U.R.C.P. 13.

Defenses and objections, U.R.C.P. 12.

Denial of motion, pleading after, U.R.C.P. 12(i).

Directed verdict and judgment notwithstanding the verdict, motion for, U.R.C.P. 50.

Dismissal of actions, U.R.C.P. 41.

Eminent domain proceedings, contents of complaint in, § 78-34-6.

Evidence in support of motion, U.R.C.P. 43(b).

Execution and proceedings supplemental thereto, U.R.C.P. 69A et seq.

Extraordinary relief, U.R.C.P. 65B.

Forcible entry or detainer, proof required, § 78-36-9.

Form of pleadings, U.R.C.P. 10.

"Judgment" defined, U.R.C.P. 54(a).

One form of action, U.R.C.P. 2.

Partition of property, complaint to set forth interests of all parties, § 78-39-2.

Pleading special matters, U.R.C.P. 9.

Relief from judgment or order, U.R.C.P. 60.

Requirements of signature, U.R.C.P. 11.

Service and filing of motions, pleadings and other papers, U.R.C.P. 5.

Special forms of writs abolished, U.R.C.P. 65B(a).

Supreme Court, rulemaking power of, § 78-2-4.

Temporary restraining orders, setting aside, U.R.C.P. 65A.

Time for service of written motions, U.R.C.P. 6(d).

## Rule 19. Joinder of persons needed for just adjudication.

(a) *Persons to be joined if feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by court whenever joinder not feasible.* If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading reasons for nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of class actions.* This rule is subject to the provisions of Rule 23.

(Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is substantially identical to Rule 19, F.R.C.P.

### NOTES TO DECISIONS

#### Discretion of court.

##### Indispensable parties.

- Determination.
- Failure to join.
- Assertion for first time at trial.
- Assertion for first time on appeal.
- Dismissal not bar to action on merits.
- Partner in joint venture.
- Two-part inquiry.
- Joinder not required.
- Necessary parties.
- Corporate stock transfers.
- Definition.
- Denial of joinder.
- Failure to intervene.
- Effect upon subsequent suit.
- Failure to join.
- Involuntary plaintiff.
- Relationship or interest.
- Joinder not required.
- Purpose of rule.
- Cited.

#### Discretion of court.

Ordinarily, a trial court's determination properly entered under this rule will not be disturbed absent an abuse of discretion. *Seftel v. Capital City Bank*, 767 P.2d 941 (Utah Ct. App. 1989), *aff'd sub nom. Landes v. Capital City Bank*, 795 P.2d 1127 (Utah 1990).

#### Indispensable parties.

##### —Determination.

Only when the court finds a party necessary, but joinder not feasible, must the court address indispensability. *Johnson v. Higley*, 1999 UT App 278, 989 P.2d 61.

##### —Failure to join.

Trial court abused its discretion in dismissing an action with prejudice for failure to join indispensable parties, and not allowing an amendment or granting a continuance, where defendant claimed no surprise but merely relied on the likelihood of increased costs and

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion *Griffiths v Hammon*, 560 P.2d 1375 (Utah 1977)

#### Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from

the date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see *Central Bank & Trust Co. v. Jensen*, *supra*, and Rule 58A(d))

**Cited** in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965), *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979), *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Lund v. Brown*, 2000 UT 75, 11 P.3d 277.

#### COLLATERAL REFERENCES

**Brigham Young Law Review.** — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937

**Am. Jur. 2d.** — 46 Am. Jur. 2d Judgments § 265 et seq.

**C.J.S.** — 49 C.J.S. Judgments §§ 187 to 218.

**A.L.R.** — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and

hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

### Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified

copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997; November 1, 2004.)

**Amendment Notes.** — The 2004 amendment substituted "move for summary judgment" for "move with or without supporting affidavits for a summary judgment in his favor" in Subdivisions (a) and (b); in Subdivision (c), deleted "filed and served" before "in accordance with" and substituted "Rule 7" for "CJA 4-501"; substituted "If" for "Should it appear to the

satisfaction of the court at any time that" at the beginning of the first sentence in Subdivision (g); and made stylistic changes throughout.

**Compiler's Notes.** — This rule is similar to Rule 56, F.R.C.P.

**Cross-References.** — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

#### NOTES TO DECISIONS

##### Affidavit.

- Contents.
- Corporation.
- Experts.
- Extension of time to submit.
- Failure to submit.
- Inconsistency with deposition.
- Necessity of opposing affidavits.
- Resting on pleadings.
- Objection.
- Sufficiency.
- Hearsay and opinion testimony.
- Superseding pleadings.
- Unpleaded defenses.
- Verified pleading.
- Waiver of right to contest.
- When unavailable.
- Exclusive control of facts.
- Who may make.

##### Affirmative defense.

##### Answers to interrogatories.

##### Appeal.

- Adversely affected party.
- Standard of review.

##### Applicability.

##### Attorney's fees.

##### Availability of motion.

##### Compliance with rule.

##### Continuance for further discovery.

##### Cross-motions.

##### Discovery.

##### Discovery.

##### Disputed facts.

##### Effect of denial.

##### Evidence.

##### — Admissions of plaintiff.

##### — Facts considered.

##### — Improper evidence.

##### — Proof.

##### — Unsupported motion.

##### — Weight of testimony.

##### Implicit rulings.

##### Improper party plaintiff.

##### Issue of fact.

##### — Contract interpretation.

##### — Corporate existence.

##### — Deeds.

##### — Discovery of medical condition.

##### — Intent to remove trustee.

##### — Lease as security.

##### — Notice.

##### — Wills.

##### Judicial attitude.

##### Motion for new trial.

##### Motion to dismiss.

##### Motion to reconsider.

##### Notice.

##### — Provision not jurisdictional.

##### — Waiver of defect.

##### Parties.

##### Procedural due process.

##### Purpose.