IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLIE W. HARRISON and TRENA HARRISON, Plaintiffs/Appellants, vs. SPAH FAMILY, LTD; STAN E. HOLLAND; and PAIGE HOLLAND, Defendants/Appellees.	Case No. 20180537 Appeal From Seventh District Court, Grand County, State of Utah Civil No. 160700035 Judge Lyle R. Anderson

APPELLANTS' REPLY BRIEF

Kristine M. Rogers
8 East 300 South, Suite 500
Salt Lake City, UT 84111
Telephone: 801-994-6000
kristine@krisrogers.com
Attorney for Defendants/Appellees

Troy L. Booher
Freyja R. Johnson
ZIMMERMAN BOOHER
341 S. Main Street, 4th Floor
Salt Lake City, UT 84111
tbooher@zbappeals.com
fjohnson@zbappeals.com
Attorneys for Defendants/Appellees

Vincent C. Rampton
Jessica P. Wilde
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, UT 84101
Telephone: 801-521-3200
vrampton@joneswaldo.com
jwilde@joneswaldo.com
Attorneys for Plaintiffs/Appellants

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POINT I: THE HOLLANDS' USE OF THE ROAD ACROSS THE HARRISONS' PROPERTY WAS NOT CONTINUOUS AND UNINTERRUPTED FOR A FULL 20 YEARS.

It is undisputed that in June 2016 Charlie Harrison summoned law enforcement after confronting Stan Holland and denying the Hollands' use of the roadway. The Hollands' response to the merits of the Harrisons' claim is essentially that a verbal confrontation and calling law enforcement is not enough to interrupt their continuous use of the road. They maintain that the Harrisons were required to commence legal action or physically block the road, thereby risking a breach of the peace.

Preliminarily, though, the Hollands seek to impose procedural obstacles to this Court's examination of the merits of the case. None of these is well-taken.[1]

A. The Harrisons Have Appealed the Denial of Their Motion for Reconsideration.

The Harrisons recognize that they first raised evidence about law enforcement being called in June 2016 in their motion to reconsider. *See* Appellants' Brief ("Br.") at 22-23. As Harrisons' Notice of Appeal did not

[1] As discussed below, developing appellate jurisprudence in Utah is wisely discouraging the practice of procedural nitpicking. Increasingly, appellate advocacy has deteriorated into debates over mechanical minutiae – ignoring the resolution of the parties' dispute in favor of dissecting procedural decisions made by counsel (often in the heat of trial) with the goal of scoring victories having nothing to do with the merits of the case. Courts were created to resolve disputes among petitioners, not to evade them on the pretext of technicalities.

separately mention the trial court's denial of that motion as a discrete order being appealed, the Hollands claim it is not properly before the Court. Brief of Appellees ("Opp. Br.") at 17. This argument was disposed of long since by Utah's appellate courts.

In their Notice of Appeal, the Harrisons appealed from the final judgment – the Order of Judgment (Easement and Property Damage), which expressly incorporated the district court's order on motions for summary judgment. (R. 1299, 1308). The Utah Court of Appeals explained in *North Fork Special Service Dist. v. Bennion*, 2013 UT App 1, 297 P.3d 624, that when a party appeals from a final judgment, "'the notice of appeal is to be liberally construed.'" *Id.* ¶ 18 (citing *Goggin v. Goggin*, 2011 UT 76, ¶ 24, 276 P.3d 885). Thus, the Harrisons "need not 'indicate that the appeal also concerns intermediate orders or events that have led to that final judgment.'" *Id.* (citing *Zions First Nat'l Bank, N.A. v. Rocky Mtn. Irrigation, Inc.*, 931 P.2d 142, 144 (Utah 1997)). So long as the intermediate order constitutes a link in the "chain of rulings" that led to the final judgment, the Harrisons are entitled to challenge the order. *Id.* (citing *Braun v. Nevada Chems., Inc.*, 2010 UT App 188, ¶ 10, 236 P.3d 176).

The first "issue" appealed and presented for review was

> Whether the trial court erred in ruling on summary judgment that the Hollands had met all the elements necessary to establish an easement by prescription and specifically, whether the Hollands made continuous, adverse and uninterrupted use of the Harrisons' property

> for a period of 20 years or more, *even though the Harrisons summoned law enforcement* which interrupted the prescriptive period and caused a revocation of the Harrisons' acquiescence.

Br. at 7-8 (emphasis added). That the Harrisons specifically challenged the district court's summary judgment ruling in light of the new evidence, but did not mention the standard of review on a motion to reconsider, should be of no consequence. There can be no question that the Harrisons appeal from the "chain of rulings" including the summary judgment decision and denial of the motion to reconsider, where the issues of continuous and uninterrupted use of the roadway were fully briefed and presented (though the trial court forbade their presentation at oral argument, as explained below).[2]

B. The Trial Court Abused Its Discretion by Denying the Motion to Reconsider.

1. There is no way to determine the basis for the trial court's denial of the motion for reconsideration and remand is appropriate.

A trial court's denial of a motion to reconsider a summary judgment decision is reviewed under an abuse of discretion standard. *Spring Gardens Inc. v.*

[2] The Harrisons argue herein that the denial of the motion to reconsider was an abuse of discretion. First, the Harrisons are required to respond to the arguments raised by the appellees under Utah R. App. P. 24(b). Further, by doing so, they are responding to the Hollands' argument that the appropriate standard of review is whether the denial of the motion to reconsider was an abuse of discretion – a point that the Harrisons do not dispute. The Harrisons have therefore not waived this issue. *See Brown v. Glover*, 2000 UT 89, ¶¶ 21-25, 16 P.3d 540 (holding that the Utah Court of Appeals should have considered the merits of the denial of the summary judgment motion, as argued by the appellant in her reply, when the appellant challenged in her initial brief the summary judgment ruling based on her pending discovery motions).

Sec. Title Ins. Agency of Utah Inc., 2016 UT App 113, ¶10, 374 P.3d 1073; *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615; *Taft v. Taft*, 2016 UT App 135, ¶ 82, 379 P.3d 890. Under that standard, a trial court's decision on a motion to reconsider "'may be overturned *only* if there is no reasonable basis for the decision.'" *State v. Ruiz*, 2012 UT 29, ¶ 23, 282 P.3d 998 (citing *Tschaggeny*, 2007 UT 37, ¶ 16) (emphasis in original). In that connection, though, this Court has cautioned trial courts to give their reasons for a grant or denial of a motion to reconsider. *Id.*, ¶ 24 (citing *State v. Pecht*, 2002 UT 41, ¶ 34, 48 P.3d 931; *Neerings v. Utah State Bar*, 817 P.2d 320, 323 (Utah 1991)). The Court stated in *Ruiz* and *Pecht* that "we strongly recommend that trial courts enter written findings." 2012 UT 29, ¶ 24 (citing *Pecht*, 2002 UT 41, ¶ 34). However, if the record as a whole sufficiently supports the court's ruling, the "'absence of written findings will not invalidate the trial court's conclusions.'" *Id.*

Here there are no written findings to shed any light whatsoever on the trial court's denial of the motion to reconsider, nor does the record anywhere support or explain the decision. The lower court, in fact, would not even permit discussion on the Harrison's motion to reconsider. The Harrisons filed a proposed Order Continuing Pretrial Conference and Hearing on Pending Motions, which included a sentence that a hearing on the motion to reconsider would be heard at the pretrial conference. (R. 642). Yet, when the court entered the Order, the court modified

the sentence so it read that the motion to reconsider was denied, without any explanation. (R. 646). Then, at the pretrial conference, held on November 14, 2017, the court refused to hear any argument on the motion:

> MR. RAMPTON: Your Honor, Vince Rampton for Harrisons. There are actually two motions before the Court – one to reconsider on summary judgment –
>
> THE COURT: And I've denied that. That's in my order.
>
> MR. RAMPTON: May I – may I be heard on that?
>
> THE COURT: No.

(R. 1389).

The parties and this Court are left to wonder why the motion to reconsider was denied. The reason(s) for the denial is entirely speculative. Accordingly, it is impossible to address whether the trial court abused its discretion – which requires an inquiry into whether the decision was reasonable. *Ruiz*, 2012 UT 29, ¶ 23; *Tschaggeny*, 2007 UT 37, ¶ 16. At a minimum, the Court should remand so the trial court may consider the new evidence that law enforcement was contacted in June 2016 after a confrontation between Charlie Harrison and Stan Holland regarding the Hollands' use of the roadway. *Neerings*, 817 P.2d at 323 (in an "appropriate case" failure to state the grounds for its decision would justify remand to the trial court); *Ruiz*, 2012 UT 29, ¶ 24 (denying a reversal of the trial court's decision on a motion to reconsider because even though the court did not explain the basis for his decision, the reason was apparent on the record).

2. The trial court erred when it refused to reassess its summary judgment ruling, in that new evidence was presented.

An order of the trial court that adjudicates fewer than all of the claims "may be changed at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Utah R. Civ. P. 54(b). In *McLaughlin v. Schenk*, 2013 UT 20, 299 P.3d 1139, cited by the Hollands, the Utah Supreme Court explained that there are certain situations that *require* the court to "reassess a prior ruling", including "when new evidence has become available." *Id.*, ¶ 24 (citing *Mid-Am. Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶ 14, 216 P.3d 352)); *Koerber v. Mismash*, 2015 UT App 237, ¶ 38, 359 P.3d 701 ("new evidence" or a "change of authority" would "require the district court to reevaluate").[3]

The motion to reconsider presented new evidence on the Hollands' continuous use of the road across the Harrisons' property. As explained in the

[3] The Hollands challenge the Harrisons' argument in their reply to the motion to reconsider that the court's ability to revisit and revise an interim order is discretionary. Opp. Br., p. 17 (citing R. 607). The missing context is that the Harrisons were responding to the Hollands' argument that the sheriff's report was not "new evidence." (If there is "new evidence," a court is required to reassess a prior ruling. *McLaughlin*, 2013 UT 20, ¶ 24.) The Harrisons responded by citing cases that a court has the discretion to reconsider a prior order before final judgment is entered under Rule 54(b). (R. 607). Their argument in their reply assumes that the court were to make a determination that the evidence is not new. In any event, that the Harrisons did not argue that the trial court lacked discretion and was *required* to reassess its prior summary judgment ruling does not change the law. In other words, irrespective of what the Harrisons' argument was in in their reply to the motion to reconsider does not alter the *McLaughlin* holding that a court is required to "reassess a prior ruling" "when new evidence has become available." 2013 UT 20, ¶ 24.

motion, after argument on the parties' motions for summary judgment, the Harrisons obtained on July 17, 2017 a copy of a Deputy Report from the Grand County Sheriff's Office for Incident 1601698.[4] (R. 566; 586-89). It is undisputed that Deputy Black was called out on Father's Day weekend (in June 2016 before the 20-year period) to address the dispute over "the road accessing [the Hollands'] cabin" over the Harrison's property. (R. 586).

The trial court did not "reassess" its summary judgment ruling on a significant piece of *new* evidence.[5] *See McLaughlin*, 2013 UT 20, ¶ 24. By their motion, the Harrisons did not seek to rehash old arguments; rather, the Harrisons had evidence of Page Holland's sworn statement that law enforcement was called, interrupting the Hollands' continuous use during the 20-year prescriptive period. There is no ruling from the trial court that analyzes the effect of law enforcement being called prior to the 20-year prescriptive period – on the merits or rejecting the argument for procedural reasons.

[4] Although the Harrisons were aware of the altercation in June (R. 606), the Harrisons did not know that Page Holland had made the voluntary statement in the Sheriff's Report.
[5] The Hollands challenge whether the June 2016 discussion with the sheriff is new evidence. Opp. Br. at 17. But it is not the June 2016 discussion that was new; it was the sheriff's report that was newly-discovered evidence. If the trial court was of the opinion that the evidence was not "new" – a point disputed by the Harrisons – again, the trial court should have said so.

C. The Law Should Not Require Actual Physical Interference with the Hollands' Use of the Road.

As explained in their initial brief, since the Utah Supreme Court's decision in *Lunt v. Kitchens*, 260 P.2d 535 (Utah 1953), there has been no clear statement of form of "protest" required to defeat the presumption of acquiescence for purposes of easement by prescription. The Hollands argue that the Harrisons have not shown that the standard applied by the trial court was incorrect, yet argue only that the majority rule is that "most jurisdictions require 'actual physical interference with the claimant's use,' 'in such a way as to prevent, at least temporarily, the adverse use.'" Opp. Br. at 18 (citing Jon W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land,* § 5:16 (2019)).

The Harrisons first note that the *Law of Easements & Licenses,* § 5:16, on which the Hollands rely, notes authority that supports the *Harrisons'* position. It explains that "[s]everal jurisdictions have enacted statutes that enable a landowner to give persons using the owner's land written notice of an intention to dispute any claim arising from such use." *Id.* (citing statutes in Connecticut, Rhode Island, Indiana, Iowa, and Massachusetts). "This notice constitutes an interruption, preventing the acquisition of any prescriptive right." *Id.* The purpose behind such legislation is that it "avoids both the potential for violent confrontation and the uncertainty implicit in the requirement of actual interruption as well as the expense of instituting a lawsuit." *Id.* This is precisely the purpose of adopting a rule that

cuts off prescriptive rights as soon as conduct is manifested that indicates a revocation of acquiescence (which, unlike some jurisdictions, is a prerequisite to prescriptive use in Utah, *see* Br. at 35-39).

The Hollands attempt to distinguish the cases cited by the Harrisons on pages 36-38 of their Brief by saying that these cases concerned whether ineffective physical barriers interrupted the prescriptive period. Opp. Br. at 20. But the courts in these cases express the same reasons that the form of protest should be construed liberally, so that any conduct that clearly manifests a revocation of acquiescence is sufficient. For example, in *Allen v. Thomas*, 209 S.W.3d 475 (Ky. Ct. App. 2006), the issue was whether a landowner's repeated attempts to block access to hunters and fishermen was sufficient to interrupt the 15-year prescriptive period, even though persons that saw the "No Trespassing" signs, fences, gates and large rocks would remove or damage them. *Id.* at 479. The Kentucky court analyzed cases from other jurisdictions and stated: "[W]e find that clear conduct indicating that a property owner is not acquiescing as to a prospective easement owner's claim of right should rightfully be considered as ending the running of a prescriptive period." *Id.* at 481. This rule serves "to discourage the type of violate confrontations that could result from forcing a property owner to 'successfully' defend his right to keep others off of his land." *Id.* Similarly, in *Pittman v. Lowther*, 610 S.E.2d 479 (S.C. 2005), the Supreme Court of South Carolina held

that "*verbal threats* which convey . . . the impression the servient landowner does not acquiesce in the use of the land" is sufficient to interrupt the prescriptive period. *Id.* at 481 (emphasis added). *See also Kelley v. Westover*, 938 S.W.2d 235 (Ark. Ct. App. 1997) ("'any unambiguous act of the owner of the land which evinces his intention to exclude others from the uninterrupted use of the right claimed breaks its continuity'" (citation omitted)).

The Hollands' only response to all of this is that oral objections are "evidence of adverseness rather than interruption" and that this rule "makes sense." Opp. Br. at 19-20. Their argument is not supported by any case law,[6] however, and is presents poor policy for defending one's property rights. A demand that a landowner must defend his property by physical means is antiquated and is plagued with the potential for violation confrontations and more litigation.

Simply put, there is no question that the Harrisons did not acquiesce to the Hollands' use of the roadway in June 2016 and thereafter. Not only were verbal threats made, law enforcement was contacted. The Harrisons' conduct clearly manifests an interruption in the continuous use of the roadway, and requiring more

[6] The Hollands rely on *Crane v. Crane*, 682 P.2d 1062 (Utah 1984); as noted by Hollands, though, *Crane* did not directly address the issue. Opp. Br. at 19. The defendants attacked the district court's ruling that plaintiffs' use was permissive rather than adverse, *id.* at 1064-65, but it appears no argument was raised as to whether there was conduct to interrupt the continuous use of the property during the prescriptive period.

from the Harrisons[7] is to advocate a breach of the peace or to encourage costly time-consuming litigation.

D. The Altercation in June Pertained to the Hollands' Use of the Road Across the Harrisons' Property.

The Hollands next quibble over whether the altercation in June, and the summoning of law enforcement, related to Hollands' use of the roadway over the Harrisons' property (suggesting that, alternatively, the dispute was about the Harrisons' use of the road over the Hollands' property). The Voluntary Statement Form in the sheriff's report, however, makes clear that the dispute was about an argument in June about "rights to an access road in Willow Basin." (R. 586). It follows that this was the access road across the *Harrisons' property*, because Ms. Holland states in the next sentence that they were informed by the Harrisons' counsel that "we had no right to use a small portion of the road accessing our cabin." *Id.* She then adds more detail about the access-way in dispute: "The road was there when we bought our Parcel in August 1996.) Charlie owned this Parcel the past 8 years (where the small section in dispute is)[.]" (R. 587).

[7] With respect to Harrisons' defense of the Hollands' claim to a prescriptive easement, the trial court stated, "It was obvious that plaintiffs were being hardnosed, and certainly not very neighborly." (R. 1294). But the logic behind the trial court's summary judgment ruling and subsequent denial of the motion to reconsider appear to reflect that the Harrisons were not hardnosed *enough*. Charlie Harrison forbade the Hollands' use of the roadway, as set forth in his declaration (R. 304, 1365); again, law enforcement was called after an argument between the parties in June 2016 (R. 586). Yet, the court ruled and the Hollands maintain that more should have been done by the Harrisons to interrupt the Hollands' continuous use and to put a halt to the Harrisons' acquiescence.

There is a contradiction between Mr. Holland's deposition testimony and the sheriff's report.[8] Without a ruling from the trial court, it is unknown how the trial court would have handled what seems to be a contradiction in the Hollands' testimony. At the very least, a factual dispute should have precluded summary judgment.

POINT II: THE HOLLANDS' USE OF THE ROAD WAS PERMISSIVE.

As more fully set out in Harrisons' opening Brief, if the owner of a servient estate demonstrates that the claimant's use was initially permissive, the use *remains permissive*, and no prescriptive right matures unless it is thereafter converted to an adverse use.

> If the owner of the servient estate "sustains that burden and overcomes the presumption by proof that the use was initially permissive, then the burden of going forward with evidence and of ultimate persuasion shifts back to the claimant to show that the use [again] became adverse and continued for the prescriptive period."

Jacob v. Bate, 2015 UT App 206, ¶ 19, 358 P.3d 346 (citing *Richens v. Struhs*, 412 P.2d 314, 316 (Utah 1966)).

It is undisputed that Janice Hawley, at the time she conveyed the Hollands' parcel to the Torreses, permitted the Torreses to access the Harrison parcel (title to which she retained until its conveyance to the Harrisons in 2008) for marketing

[8] Mr. Holland claims that the dispute in June 2016 was about the pump house and widening the road across the Hollands' property. Opp. Br. at 23.

purposes. (R. 310). The use of the road across the Harrison property, in other words, was permissive, and she expressly so stated.

Hollands respond that Janice Hawley's permissive use ended when the Torreses no longer had any reason to market the property, once the Torreses sold to Hollands. The argument, though, is based on sheer speculation, unsupported by any evidence to satisfy their burden of proof on the issue. Janice Hawley, who signed her declaration in or about May 2017, attested that while she did not know of or authorize the creation of the road, "its use *thereafter* for the purposes stated at paragraph 9 was *pursuant to permission from [her]*." *Id.*, ¶ 10 (R. 311) (emphasis added). The use of the word "thereafter" is not qualified by some duration in time, or by any change of intended use. Ms. Hawley notably does not state that use of the road was anything other than permissive, and although she explains why she permitted the use of the road initially, she does not say anything in her declaration about revoking her permission (for whatever purpose). Although there was a purpose behind the permission she initially gave for use of the road, the Hollands cannot demonstrate that the use became adverse. *See Jacob*, 2015 UT App 206, ¶ 19.

POINT III: THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE EASEMENT WAS LIMITED TO ITS HISTORIC USE.

A. The Harrisons Preserved Their Objection to Instruction No. 27.

Predictably, the Hollands first assail the Harrisons' challenge to the trial court's failure to instruct on historic use with a procedural dodge: they argue that the issue was not properly preserved below. Contrary to the Hollands' argument, though, there can be no question that Harrisons objected to Instruction No. 27. At trial the court and the Harrisons' counsel had the following exchange:

> MR. RAMPTON: . . . So they really haven't established an historic center line or an historic width.
>
> THE COURT: I think you can still make that argument with the instruction I'm giving here by saying – by saying, the survey is not—does not say anything about the historic use, it just shows where the roadway is and – and so you need to move to Question 2, which is: You describe it to us. Jury, tell us where it is.
>
> MR. RAMPTON: Understood.
>
> THE COURT: And I think –
>
> MR. RAMPTON: We reserve our objection.
>
> THE COURT: this . . . gives you the option, that gives you the opportunity to argue that it hasn't been—they could—they could theoretically answer that, we have no idea because we don't have enough evidence about that.
>
> MR. RAMPTON: But it doesn't give them the option to find that except to answer the question.
>
> THE COURT: That's true, but I'm already giving them lots of questions to answer here and I have to—I have to deal with the practicalities of—of those special verdicts. They are finding the facts so I think I have to give them the chance to find some facts.

> Yeah. I'm—it's kind of a messy—it's a messy process, dividing the responsibilities this way, particularly with me having taken some of the issues away from them with summary judgment, but so I've—I understand and I've overruled Mr. Rampton's objection.

(R. 1747-48). Even after the objection was overruled, Mr. Rampton asked to speak with the court about the objection and again, the trial court overruled the objection:

> MR. RAMPTON: Largely happy.[9] I would ask that the second paragraph commence with the standard stated in the case law of the general rules to *the extent of a prescriptive easement is measured and limited by its historical use during the prescriptive period. That's from Valcare vs. Fitzgerald, that's from the Judd decision that's kind of the black letter standard in this area and I'd like to be able to argue it.*
>
> THE COURT: I'm sorry. What do you want me to add? What are the words you want me to add?
>
> MR. RAMPTON: *The general rules is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period.* (Inaudible)
>
> THE COURT: Well, I thought I got that with taking in the third paragraph, taking into account the historic use and shape of the roadway during its 20 years of use.
>
> MR. RAMPTON: I understand that and it—it—I agree it covers the substance of it but I think the jury ought to hear the legal standard that they're operating under, because I'd like to be able to read that, too, and—and argue it.
>
> THE COURT: Well, sorry. And there are—there are lots of words and lots of opinions over the years and I—I don't think I can

[9] The Hollands point out that Mr. Rampton said he was "[l]argely happy" with Instruction No. 27. Opp. Br. at 26. But counsel's state of being and emotion surrounding a jury instruction should have little import on whether an objection was made. Shortly after, Mr. Rampton clarified that the easement should be "limited by its historical use" and not merely take into account the historic use.

> give them every one of those words. So I've done the best I could to—to cull from each opinion that you presented to me and maybe –
>
> MS. ROGERS: I am going to object to that because I don't think that it is the only legal standard. And we go back to this Lent v. Lance case –
>
> THE COURT: Which is why I also say you should determine what is reasonably necessary from the facts and circumstances of this case for Spah and Hollands to access their property.

(R. 1749-50) (emphasis added).

If, given the foregoing, the Court accepted the Hollands' claim that the Harrisons' counsel failed to preserve the issue, it would signal the adoption of an unworkably intricate and hyper-technical standard for objecting to proposed instructions, rendering it impossibly difficult to obtain appellate review.

B. Historic Use Should Have Been the Standard to Determine the Scope of the Easement.

The Hollands rely on *Judd v. Bowen*, 2017 UT App 56, 397 P.3d 686, to support their argument that the "reasonably necessary" language included in Instruction No. 27 is supported by Utah law. *Judd*, however, contains somewhat contradictory language. The Court of Appeals cited *Valcare v. Fitzgerald*, 961 P.2d 305 (Utah 1998), when it explained that a prescriptive easement "'is measured and limited by its historic use during the prescriptive period.'" *Id.* ¶ 58 (citing 961 P.2d at 312). Further, the "easement holder "may not be granted a right 'which places a greater burden on the [landowner]' than during the prescriptive period.'" *Id.* Then the *Judd* Court stated that "[t]he physical extent of the

easement is a 'question of *reasonable necessity*.'" *Id.* (citing *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 158 (Utah 1946)) (emphasis added). These statements are in conflict: An easement should either be limited by its historic use, or limited by what is reasonably necessary in the present. It cannot do both.

The longstanding authority in Utah is that a prescriptive easement is and must be *limited by its historic use*. *Nielson v. Sandberg*, 141 P.2d 696, 701 (Utah 1943) ("[A] prescriptive right would be limited by the nature and extent of use during the prescriptive period."); *Harvey v. Haights Bench Irrigation Co.*, 318 P.2d 343, 349 (Utah 1957) ("we must look to the nature of the use which existed during the prescriptive period"); *Valcarce*, 961 P.2d at 312 ("The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period."). The trial court's instruction was broad, vague, and does not comport with Utah law; it gave the jury the discretion to decide where and how large the easement should be given the "reasonable" needs the "Hollands to access their property." (R. 1085). The language of the special verdict form established that the jurors adopted a standard (i.e. the width of express easements elsewhere in the subdivision) which was totally uninformed by any historic use of the road itself.

POINT IV: LUCAS BLAKE'S TESTIMONY SHOULD HAVE BEEN EXCLUDED.

The Hollands admit that Lucas Blake measured and surveyed the road as it existed in 2016, but knew nothing about the historic, 20-year long use of the easement. The trial court's denial of the Harrisons' motion in limine pertaining to Lucas Blake's testimony again reflects the court's misunderstanding as to the historic use of an easement by prescription. He did nothing to determine what the scope of the road was before 2016. He consulted no historic records but "eyeballed" the centerline of the road which he found on the property in 2016. Accordingly, the trial court should have excluded Mr. Blake's testimony.

POINT V: EXCLUDING BRAD BUNKER FROM PROVIDING REBUTTAL TESTIMONY WAS AN ABUSE OF DISCRETION.

Brad Bunker, the Harrisons' expert, was prepared to challenge Mr. Blake's methodology in determining the scope and historic use of the easement. This was perfectly proper rebuttal testimony, and should not have been excluded. *See Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993) (rebuttal expert testimony is presumed admissible when an expert has testified in the opposing party's case-in-chief).

By permitting Mr. Blake to present testimony concerning the location and course of the easement, and excluding any rebuttal by Mr. Bunker, the trial court permitted Mr. Blake's testimony to go unchecked. The Harrisons should have

been able to at least challenge the legitimacy and reliability of Mr. Blake's methodology through a rebuttal expert. Excluding Mr. Bunker from testifying entirely prejudiced the Harrisons.

CONCLUSION

It seems apparent, based on the trial court's chain of rulings, that the court was of the view at the beginning of the case that the Hollands should have a prescriptive easement across the Harrison's property. The Hollands did not demonstrate by clear and convincing evidence the right to a prescriptive easement on the essential elements; moreover, an improperly-instructed jury's verdict that the easement is 40-feet wide does not reflect in any way the historic use of the easement.

Based on the foregoing, the Court should reverse and remand to the trial court on all issues relevant to the Hollands' claim of easement by prescription.

DATED this 17th day of June, 2019.

JONES WALDO HOLBROOK & McDONOUGH, PC

By: /s/ Vincent C. Rampton
Vincent C. Rampton
Jessica P. Wilde
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE UNDER RULE 24(a)(11)

1. This brief complies with the word limitation in Utah R. App. P. 24(g)(1) because this brief contains 5,085 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) with respect to public and non-public filings.

Dated: June 17, 2019

/s/ Vincent C. Rampton
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 17, 2019, the foregoing Appellants' Reply Brief (two copies) was mailed via first class mail, postage prepaid, with a copy by email, to the following:

Kristine M. Rogers
Attorney for Defendants
8 East 300 South, Suite 500
Salt Lake City, Utah 84111
kristine@krisrogers.com
Attorney for Defendants/Appellees

Troy L. Booher
Freyja R. Johnson
ZIMMERMAN BOOHER
341 S. Main Street, 4th Floor
Salt Lake City, UT 84111
tbooher@zbappeals.com
fjohnson@zbappeals.com
Attorneys for Defendants/Appellees

/s/ Jessica P. Wilde