Judicial Council Standing Committee on Model Utah Civil Jury Instructions

Agenda

May 8, 2023
4:00 to 6:00 p.m.
Via Webex

Welcome and Approval of April Minutes	Tab 1	Alyson/Lauren
Upcoming meeting schedule		Alyson/Lauren
CV632 Threshold and CV632A – draft revisions for caselaw and legislative update	Tab 2	Alyson/Samantha
Avoiding Bias instruction update (report re presentation to Board of District Ct. Judges)		Judge Kelly
Easement draft instructions (prescriptive, by necessity, and by implication)	Tab 3	Robert Cummings
Comments from Chris Hogle re prescriptive easement draft instructions	Tab 4	Lauren
Progress on Instruction Topics	Tab 5	(Informational)

Committee Web Page

Published Instructions

Meeting Schedule: Monthly on the 2nd Monday at 4 pm

Next meeting: June 12, 2023 (?)

TAB 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
April 10, 2023
4:00 p.m.

Present: Judge Kent Holmberg, Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, William Eggington, Ruth A. Shapiro, Douglas G. Mortensen, Mark Morris, Adam D. Wentz, Samantha Slark, Jace Willard (staff).

Also present: Adam Pace, Robert Cummings, ~~Samantha Slark~~Robert Fuller

Excused: Ricky Shelton

1. *Welcome.*

Alyson McAllister welcomed the Committee.

2. *Approval of Minutes.*

January and February, 2023 meeting minutes approved.

3. *CV920 Easement Defined.*

- Adam Pace joined the meeting to discuss the proposed instruction.
- The Committee made various edits to simplify and improve clarity.
- Added *Tschaggeny v. Union Pac. Land Resources Corp.*, 555 P.2d 277 (Utah 1976) and *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998) as a reference citations to the instruction.
- Committee changed easement by prescription instructions numbering system.

4. *CV930 Easement by Necessity. Introduction.*

- Robert Cummings joined the meeting to discuss the proposed instruction.
- Committee reviewed the instruction as drafted and made no changes.

5. *CV931 Easement by Necessity. Elements of a claim for access to landlocked property.*

- Removed *Abraham & Assoc. Trust v. Park*, 2012 UT App 173, 282 P.3d 1027, 1031 as a referenced citation.

6. *CV940 and CV941. New easement by implication instructions.*

- Committee created new "Introduction" and "Elements" instructions for ~~each of the various~~ easement ~~instructions~~by implication.
- Robert Fuller's group to consider (1) modifying CV940 "Introduction" draft to include fact summary statement similar to what is in the CV930 "Introduction" draft, and (2) the need for and potential form of a separate instruction defining "continuous" as used in element 4 of CV941 "Elements" draft.

7. *CV632 Threshold*

- Committee discussed whether the note providing examples of permanent injury should be included or not. Will address next time.
- Discussed whether the word "threshold" would be easily understood by jurors. Replaced it with "minimum injury requirements."
- Committee agreed to circle back at the beginning of next month's meeting.

8. *Adjournment*.

The meeting concluded at 6:03 PM.

TAB 2

CV632 Threshold. Minimum?
[Name of defendant] claims that [name of plaintiff] has not met the minimum ~~threshold~~ injury requirements and therefore cannot recover non-economic damages.

In order to ~~A person may~~ recover non-economic damages resulting from an automobile accident [name of Plaintiff] must prove~~only if~~ [he/she] has suffered one of the following:

[(1) death.] or

[(2) dismemberment.] or

[(3) permanent disability or permanent impairment based on objective findings.] or

[(~~2~~4) permanent disfigurement.] or

[(5) a bone fracture.] or

[(~~3~~6) reasonable and necessary medical expenses in excess of $3,000.]

References
Utah Code Section 31A-22-309(1)(a).
Pinney v Carrera, 2020 UT 43, 469 P.3d 970

Committee Notes
~~Neither~~ Both the statute ~~nor~~ and case law ~~has~~ have provided ~~clear boundaries~~examples and ~~on the~~ definitions ~~of~~ for disability and impairment. For example, a herniated disc and permanent scar tissue restricting range of motion have both been held to constitute permanent injury.

Here is the case law and statutory law that I used to update the instruction:

First, it relied on one of our earlier cases to conclude that a disability or impairment is "permanent" "whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."[14] Then it interpreted the term "disability" to mean "the inability to work" and the term "impairment" to mean "the loss of bodily function."[15] Finally, the court interpreted the phrase "objective finding."[16]
The court of appeals interpreted the phrase "objective findings" in two steps. First, it cited Black's Law Dictionary, which defines "objective" as "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions."[17] And second, it cited one of its previous cases, in which it held that a plaintiff had failed to provide "objective findings" of a permanent injury where the plaintiff did not support his claim "with something more than his say so."[18] After considering these sources, the court concluded that, to be considered "objective," "a finding need only be demonstrated through evidence other than the plaintiff's own subjective testimony."[19]

Pinney v. Carrera, 2020 UT 43, ¶¶ 19-20, 469 P.3d 970, 977

¶24 The statute imposes a burden on the plaintiff to prove that one of the circumstances enumerated in the statute exists.[2]

Pinney v. Carrera, 2020 UT 43, ¶ 24, 469 P.3d 970, 978

a permanent herniated disc in her back. And he specifically testified that the herniated disc constituted "a permanent injury." He also testified that scar tissue, stemming from injuries sustained in the crash, inhibited Ms. Pinney's range of motion, and that treatment failed to restore her range of motion back to "100 percent." He further testified that "the scar tissue is permanent."

Pinney v. Carrera, 2020 UT 43, ¶ 28, 469 P.3d 970, 979

(1)(a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:
(i) death;
(ii) dismemberment;
(iii) permanent disability or permanent impairment based upon objective findings;
(iv) permanent disfigurement;
(v) a bone fracture; or
(vi) medical expenses to a person in excess of $3,000.

Utah Code Ann. § 31A-22-309 (West)

CV 632A – Threshold - Definitions

A "permanent disability" is an inability to work that is reasonably certain to continue throughout the life of the person suffering from it.

A "permanent impairment" is the loss of a bodily function that is reasonably certain to continue throughout the life of the person suffering from it.

A finding that [plaintiff] is permanently disabled or permanently impaired must be demonstrated by externally verifiable evidence, which means something other than [plaintiff's] own testimony. Testimony of an expert or [plaintiff's] treating physician are examples of externally verifiable evidence.

A "permanent disfigurement" is a disfigurement that is reasonably certain to continue throughout the life of the person suffering from it.

References
Utah Code Section 31A-22-309(1)(a).
Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902 aff'd, 2020 UT 43, ¶ 24, 469 P.3d 970, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970

Committee Notes
Unlike disability and impairment, what is meant by "disfigurement" under this statute does not appear to have been defined so this definition just focusses on the "permanent" aspect. (In fact, the Supreme court specifically declined to reach the issue of disfigurement in Sheppard v. Geneva Rock, 2021 UT 31, n. 8 because it resolved the case on other grounds.) Only provide the jury with these definitions if applicable to the threshold or thresholds the plaintiff claims to meet.

TAB 3

CV920 Easement Defined.

An easement is a right to use or control land owned by another person for a specific limited purpose (such as to cross it for access [or insert other example]). An easement prohibits the landowner from interfering with the uses authorized by the easement.

[An express easement is an easement that the landowner grants to someone else in writing, such as in a contract or a deed.]

References
Black's Law Dictionary (Abridged 7th ed.).

Committee Notes
The parties may include in the parenthetical a description of additional or other particular uses more specific to the facts of the case. Depending on the easement at issue, the easement may include an area above or below the surface of the land.

If there are additional types of easements, the jury may be instructed according to the particular easement.

CV921 Prescriptive Easement. Introduction.

A prescriptive easement is a legal right to continue to use property of another based on longstanding use.

References
Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998) (prescriptive easement).

CV921 Prescriptive Easement. Elements of a claim.

[Plaintiff] claims a prescriptive easement to continue to use [Defendant's] property in the following manner: [describe the particular use]. To establish this prescriptive easement, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

1. That [Plaintiff] has been using [Defendant's] property for [describe the particular use];

2. That [Plaintiff's] use of [Defendant's] property in this manner was open and notorious;

3. That [Plaintiff's] use of [Defendant's] property in this manner was adverse; and

4. That [Plaintiff] continuously used [Defendant's] property in this manner for at least 20 years.

If you find that [Plaintiff] has proved each of these elements by clear and convincing evidence, then [Plaintiff] is entitled to a prescriptive easement to continue using [Defendant's] property for [describe the particular use].

References
Judd v. Bowen, 2017 UT App 56, ¶ 10, 397 P.3d 686, 692.
Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

CV922 Prescriptive Easement. "Open and Notorious" Defined.

[Plaintiff's] use of [Defendant's] property was "open and notorious" if [Defendant] knew about the use, or if [Defendant] could have learned about the use through the exercise of reasonable diligence.

References
Judd v. Bowen, 2017 UT App 56, ¶ 22, 397 P.3d 686, 694.
Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953).
Jensen v. Gerrard, 39 P.2d 1070, 1072 (1935).

CV923 Prescriptive Easement. "Adverse" Defined.
[Plaintiff's] use of [Defendant's] property was "adverse" if [Plaintiff] did not obtain permission for the use.

If you find [Plaintiff's] open and notorious use of [Defendant's] property continued for a period of twenty years, then you must presume that the use was adverse unless [Defendant] proves that [Defendant] [or a previous owner of [Defendant's] property] gave permission to [Plaintiff] for the use when it first began.

References
Harrison v. SPAH Family Ltd., 2020 UT 22, ¶ 51, 466 P.3d 107, 118.
Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).
Zollinger v. Frank, 175 P.2d 714, 716 (Utah 1946).
Jacob v. Bate, 2015 UT App 206, ¶¶ 18-19, 358 P.3d 346, 353.

CV924 Prescriptive Easement. "Continuous" Defined.

[Plaintiff's] use of [Defendant's] property was continuous if [Plaintiff] used [Defendant's] property as often as required by the nature of the use and [Plaintiff's] needs, for an uninterrupted period of at least twenty years.

A prescriptive use is interrupted where, sometime during the twenty-year period: (1) [Plaintiff] stops using [Defendant's] property; (2) [Defendant] [or a previous owner of [Defendant's] property] prevents [Plaintiff] from using the property; or (3) [Plaintiff] accepts permission from [Defendant] [or a previous owner of [Defendant's] property] to continue using the property.

References
Harrison v. SPAH Family Ltd., 2020 UT 22, ¶¶ 41-43, 466 P.3d 107, 116-17.
Judd v. Bowen, 2017 UT App 56, ¶ 16, 397 P.3d 686, 693.
Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).
Marchant v. Park City, 788 P.2d 520, 524 (Utah 1990).
SRB Inv. Co., Ltd v. Spencer, 2020 UT 23, 463 P.3d 654.
Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953).
Jacob v. Bate, 2015 UT App 206, ¶ 27, 358 P.3d 346, 355.
Jensen v. Gerrard, 39 P.2d 1070, 1073 (Utah 1935).
Zollinger v. Frank, 175 P.2d 714, 716 (Utah 1946).

Committee Notes
For the definition of clear and convincing, *see* CV118.

CV930 Easement by Necessity. Introduction.

An easement by necessity arises when there is a transfer of property from one owner to another that results in a tract of land becoming landlocked.

[Plaintiff] and [Defendant] are adjoining landowners. [Plaintiff] asserts that because [his/her/its] property is completely landlocked, [he/she/it] should be granted an "easement by necessity" across [Defendant's] property so that [Plaintiff] can get to or from [his/her/its] property from the [public highway]. [Defendant] asserts that [Plaintiff] has no right to enter or use [Defendant's] property to access [Plaintiff's] property.

References
Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976).
Abraham & Assocs. Trust v. Park, 2012 UT App 173, ¶ 12, 282 P.3d 1027, 1030–31.

CV931 Easement by Necessity. Elements of a claim for access to landlocked property.

To succeed on this claim, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

(1) All of the property was once owned by a single person who then divided the land and transferred away one tract of land, creating a landlocked property; and

(2) That the easement is reasonably necessary to the enjoyment of the landlocked property.

References
Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916).
Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948).
Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976).
Potter v. Chadaz, 1999 UT App 95, ¶ 18, 977 P.2d 533, 538.
David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021).

Committee Notes
This instruction applies to cases based solely upon a claim of a way of necessity. Other easement claims will require proof of additional elements. *Tschaggeny v. Union Pac. Land Res. Corp.*, 555 P.2d 277, 280 (Utah 1976).

CV940. Easement by Implication. Introduction.
An easement by implication is an easement that can arise when a landowner divides property into two or more pieces (i.e., Parcel A and Parcel B) and transfers Parcel B away. The transfer of Parcel B to the new owner may include by implication all those apparent or visible easements over Parcel A which were used by the original landowner for the benefit of Parcel B before it was transferred to the new owner.

References
Tschaggeny v. Union Pac. Land Resources Corp., 555 P.2d 277, 280 (Utah 1976).

CV941. Easement by Implication. Elements.
To succeed on this claim, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

(1) All of the property was once owned by a single person who then divided the land and transferred away one tract of land;

(2) At the time the property was divided, the use giving rise to the easement across the [retained/transferred] parcel for the benefit of the [transferred/retained] parcel was apparent, obvious, and visible;

(3) The easement is reasonably necessary to the enjoyment of the [transferred/retained] property; and

(4) The use giving rise to the easement was continuous rather than sporadic.

Committee Note
The Committee uses the terms "transferred" and "retained" in place of "dominant" and "servient." In most cases, the easement would be across the retained parcel for the benefit of the transferred parcel, but it is conceivable that there are circumstances when the reverse could be true. Thus, those terms are placed in brackets.

Separate instruction for meaning of "continuous" in element 4?

TAB 4

Chris Hogle (at Holland & Hart) questions why the Committee is drafting jury instructions for a prescriptive easement, which is an equitable claim for which there is no right to a jury trial. He submitted a trial court decision so holding.

And (although the draft instructions have not yet been published on the Committee website and public comments have not yet been invited) he submits certain comments to the Committee's draft instructions (previously CV951 and CV953; now CV921 and CV923). With mild edits by Lauren Shurman to add clarity, his comments are as follows:

Draft CV951 and CV953 leave out the "claim of right" requirement. CV951 cites two cases—*Judd v. Bowen*, 2017 UT App 56, ¶ 10, 397 P.3d 686, and *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998)—but both include the "claim of right" requirement as separate from the use, open-and-notorious, adverse, and continuous-for-20-years elements:

> To attain legal recognition of a prescriptive easement in Utah, the claimant must prove by clear and convincing evidence that the claimant's "use of another's land was open, continuous, and adverse **under a claim of right** for aperiod of twenty years."

Judd, 2017 UT App 56, ¶ 10 (emphasis added) (*quoting Orton v. Carter*, 970 P.2d 1254, 1258 (Utah 1998)).

> A party claiming a prescriptive easement must prove that his use of another's land was open, continuous, and adverse **under a claim of right** for a period of twenty years.

Valcarce, 961 P.2d at 311.

In *Judd v. Bowen*, 2018 UT 47, ¶ 12, 428 P.3d 1082, the Supreme Court held that the Court of Appeals' statement of the elements in *Judd v. Bowen*, 2017 UT App 56 ¶ 10 (including the "claim of right" element) was supported by "well-established caselaw from both this court and the court of appeals identifying the same legal standard."

That portion of the Supreme Court's *Judd* decision was cited in the most recent Utah Supreme Court case that squarely addresses a prescriptive easement claim:

> In Utah, a prescriptive easement is established where the "use of another's land was open, continuous, and adverse **under a claim of right** for a period of twenty years."

Harrison v. SPAH Family Ltd., 2020 UT 22, ¶ 12, 466 P.3d 107 (emphasis added) (quoting *Judd*, 2018 UT 47, ¶ 12).

Likewise, CV953 omits the "claim of right" condition to the presumption of adversity:

> If you find [Plaintiff's] open and notorious use of [Defendant's] property continued for a period of twenty years, then you must presume that the use was adverse unless [Defendant] proves that [Defendant] [or a previous owner of[Defendant's] property] gave permission to [Plaintiff] for the use when it first began.

It cites *Harrison* and *Valcarce*, but those cases hold that the presumption is triggered, not merely with open and notorious use for 20 years, but with such use "under a claim of right":

> Where a prescriptive user "has shown an open and continuous use of the land **under claim of right** for the twenty-year prescriptive period, the use will be presumed to have been adverse."

Harrison, 2020 UT 22, ¶ 51 (emphasis added).

> However, once a claimant has shown an open and continuous use of the land **under claim of right** for the twenty-year prescriptive period, the use will be presumed to have been adverse.

Valcarce, 961 P.2d at 311 (emphasis added); *see also Van Denburgh v. Sweeney Land Co*., 2013 UT App 265, ¶ 3, 315 P.3d 1058 ("[O]nce a claimant has shown an open and continuous use of the land **under claim of right** for the twenty-yearprescriptive period, the use will be presumed to have been adverse." (Emphasis added)).

The draft also cites *Zollinger* (and *Jacob v. Bate*, 2015 UT App 206, ¶¶ 18-19, 358 P.3d 346, 353, which was based on *Zollinger*) which could be read to support the draft:

> That is, where a claimant has shown an open and continuous use of the land for the prescriptive period (20 years in Utah) the use will be presumed to have been against the owner. . . .

Zollinger, however, is a 1946 decision that predates the Supreme Court's more recent pronouncements of the presumption, including in the Supreme Court's 2020 *Harrison* decision. Also, *Zollinger* was cited in *Valcarce* immediately after the *Valcarce* Court's articulation of the presumption's elements, suggesting that the *Valcarce* Court interpreted *Zollinger* to be consistent with the rule that the presumption requires "an open and continuous use of the land **under claim of right** for the twenty-year prescriptive period." (Emphasis added.)

Suggested edits for CV951 and CV953:

CV951

[Plaintiff] claims a prescriptive easement to continue to use [Defendant's] property in the following manner: [describe the particular use]. To establish this prescriptive

easement, [Plaintiff] must prove by clear and convincing evidence that for at least 20 years ~~each of the following elements~~:
1. ~~That~~ [Plaintiff] has been continuously using [Defendant's] property for [describe the particular use];
2. ~~That~~ [Plaintiff's] use of [Defendant's] property in this manner was open and notorious;
3. [Plaintiff's] use of [Defendant's] property was under a claim of right to use [Defendant's] property in this manner; and
~~3.~~ 4. ~~That~~ [Plaintiff's] use of [Defendant's] property in this manner was adverse; ~~and~~
~~4. That [Plaintiff] continuously used [Defendant's] property in this manner for at least 20 years~~.

If you find that [Plaintiff] has proved each of these elements by clear and convincing evidence, then [Plaintiff] is entitled to a prescriptive easement to continue using [Defendant's] property for [describe the particular use].

CV953

If [Plaintiff] has shown by clear and convincing evidence that ~~you find~~ [Plaintiff's] ~~open and notorious~~ use of [Defendant's] property was open and continuous ~~notorious use of [Defendant's] property~~ under a claim of right to use [Defendant's] property ~~continued~~ for a period of twenty years, then you must presume that the use was adverse unless [Defendant] proves that [Plaintiff's] use was not adverse for a period of twenty years. ~~[Defendant] [or a previous owner of [Defendant's]property] gave permission to [Plaintiff] for the use when it first began.~~

As is, the presumption instruction conflicts with *Lunt v. Kitchens*, 123 Utah 488, 260 P.2d 535, 537-38 (1953) ("In other words, the presumption of adversity will not arise under mere use by a licensee and knowledge of such use on the part of the licensor. The use cannot be adverse when it rests upon license or mere neighborly accommodation." (Citation omitted)).

The presumption instruction reads as if there is only one way for the landowner to rebut the presumption—by showing that the use was initially permissive. The case law does not so limit the landowner. It states that "the landowner **may** rebut this presumption by showing that 'the use was *initially* permissive.'" *Harrison*, 2020 UT 22, P 51 (quoting *Valcarce*, 961 P.2d at 311 (initial emphasis added). There's at least one other way for a landowner to rebut the presumption: "where the prescriptive user alters his or her mental state (so that the prescriptive user begins using the easement under the owner rather than against the owner). An alteration in a prescriptive user's mental state most often occurs where the prescriptive user accepts a landowner's permission to continue using the easement." *Id*. P 30.

The Committee may want to consider other instructions. For example, Utah caselaw provides:

“When a party’s use of property is permissive at its inception, the use cannot ripen into a prescriptive right unless there is a later distinct assertion of a right hostile to the owner, which is brought to the attention of the owner, and the use is continued for the full prescriptive period.” *Green*, 886 P.2d *v. Stansfield*, 886 P.2d 117, 121 (Utah Ct. App. 1994) (quoting *Wiedman v. Trinity Evangelical Lutheran Church*, 610 P.2d 1149, 1152 (Mont. 1980)); *Gashler v. Peay*, Case No. 20040948-CA, 2006 Utah App. LEXIS 32, *3 (“An antagonistic or adverse use of a way cannot spring from a permissive use. . . . It cannot be adverse when it rests upon a license or mere neighborly accommodation.” (Quoting *Jensen v. Gerrard*, 85 Utah481, 39 P.2d 1070, 1073 (1935)).

“‘[T]he extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period,’” which “means that the ‘purpose for which the easement was acquired’ limits both the extent of the easement right as well as the physical boundaries of the easement itself.” *Judd*, 2017 UT App 56, ¶ 58 (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) (plurality opinion), and *Whitesides v. Green*, 44 P. 1032, 1033 (Utah 1896)); *SRB Inv. Co. v. Spencer*, 2020UT 23, 463 P.3d 654.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALTA ZB, LLC, **Plaintiff / Counterclaim Defendant,** **vs.** **MARK LEVIN, and PAISLEY FERGUSON, LLC,** **Defendant / Counterclaimants.**	**MEMORANDUM DECISION AND ORDER** **Case No. 200901717** **Honorable Robert P. Faust**

The Court has before it the Motion to Strike Defendants'/Counterclaimants' Demand for Trial by Jury.

With this Motion, Plaintiff and Counterclaim Defendant, ALTA ZB, LLC ("Plaintiff") moves to strike Defendants'/ Counterclaimants' Demand for Trial by Jury. It is Plaintiff's position that there are no claims in this case that are appropriately tried to a jury and, therefore, this matter should be set for a bench trial.

Defendants and Counterclaimants Mark Levin and Paisley Ferguson, LLC ("Defendants") oppose the Motion arguing the primary issue in this case is the existence of a prescriptive easement, which is a legal question, and as such, Defendants have a right to a jury trial.

BACKGROUND

In the instant, Plaintiff asserts a single cause of action for a declaratory judgment that no prescriptive easement or any other property right for vehicle parking exists across any portion of

its land. Complaint. ¶¶ 15-16. In their Counterclaim, Defendants contend that they own an easement over a portion of Plaintiff's property for parking. Answer, Counterclaim and Jury Demand ¶¶ 23-46. There are no claims for damages.

LEGAL STANDARD

Utah Rules of Civil Procedure 39(a)(2) provides that when a trial by jury has been demanded under Rule 38, "[t]he trial of all issues so demanded shall be by jury, unless . . . the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist." The relevant question is whether the action is brought in equity – where there is not a right to a jury trial; or in law – where parties have a right to a jury trial. *See Kenny v. Rich*, 2008 UT App 209, ¶ 37, 186 P.3d 989, 1001 ("The constitutional right to a jury trial in civil cases extends only to cases that would have been cognizable at law at the time the constitution was adopted").

RULING

In support of their right to a jury trial, Defendants first cite to *Valley Mortuary v. Fairbanks*, 225 P.2d 739 (Utah 1950). *Valley* Mortuary, however, is a contract case in which the plaintiff sought both monetary damages and injunctive relief to remedy a breach of a non-compete clause in an agreement concerning the sale of a mortuary business. *Id.* at 225 P.2d at 741. The trial court declined to impanel a jury, and the Supreme Court reversed, holding that the defendant was entitled to a jury trial because the contract claim included a matter cognizable at law—the claim for damages—and the request for injunctive relief did not affect the right to a jury trial. *Id.* at 748-49.

In contrast, the above entitled matter does not involve any claim to damages, or any other issue cognizable at law. Thus, *Valley Mortuary* does not apply to this situation.

In *Valley Mortuary*, the Court cited to *Norback v. Board of Directors of Church Extension Society,* 37 P.2d 339 (Utah 1934), where the court held that a jury should have been empaneled in a prescriptive easement case because, "the instant case is an action at law." *Id.* at 37 P.2d at 517. *Norback* is, however, distinguishable as it included a claim for monetary damages. *Id.* at 37 P.2d at 340-41. Moreover, the *Norback* rationale was generally abrogated in *Valley Mortuary*. Indeed, in *Valley Mortuary,* the Court explained that the district court's refusal to impanel a jury was based on *Norback*, and that although *Norback* "is apparently correct in result," its rationale conflicted with the reasoning the Court adopted in *Valley Mortuary*. *Id.* at 225 P.2d at 750. Accordingly, after *Valley Mortuary*, while the ultimate result of *Norback* is consistent with Utah law, the analysis is not.

Additionally, in cases decided after *Valley Mortuary* and *Norback,* the Utah Supreme Court stated that an action, like the present case, in which one party seeks to establish a prescriptive easement over the land of another is "a proceeding in equity." *Richins v. Struhs,* 412 P.2d 314, 315 (Utah 1966). As in the instant, *Richins* involved a claim "to have an easement by prescription for joint use of [a] driveway declared in plaintiffs." *Id.* at 314-15. In *Richins,* the Court noted that, "this attempt to assert and establish an interest in land, the legal title to which is vested in another, is a proceeding in equity." *Id.* at 315 (emphasis added); *see also Cache County Drainage Dist. v. Westover*, 494 P.2d 944, 945-46 (Utah 1972) (in a case over whether a prescriptive easement existed, the Court characterized the action as "this equity case"); *Pitts v. Roberts,* 562 P.2d 231, 233 (Utah 1977) (same); *Richards v. Pines Ranch,* 559 P.2d 948, 949 (Utah 1977) (same); *McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978) (same); *Jensen v. Brown*, 639 P.2d 150, 151 (Utah 1981) (same). The assertions in *Richins,* that

quiet title actions involving claims for prescriptive easements are proceedings in equity, remains good law in Utah.

Finally, more recent Utah case law establishing the test to determine whether the right to a jury trial applies in a given case supersedes *Norback,* which was decided in 1934, decades prior to a constitutional right to jury trials in certain civil cases becoming first recognized in Utah in *International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.,* 626 P.2d 418 (Utah 1981). The test that *Norback* applied, that the case before it was "an action at law" because the case turned on questions of fact, has not been applied in Utah since at least 1986. Several decisions since then hold that there is no right to a jury trial, even in cases that turned on "basic facts to be established." *E.g., Hyatt v. Hill,* 714 P.2d 299 (Utah 1986) (paternity and child support proceedings); *Jensen v. State Tax Comm'n,* 835 P.2d 965 (Utah 1992) (tax deficiency proceedings); *Hahn v. Hahn,* 2018 UT App 135, 427 P.3d 1195 (domestic and divorce modification proceedings). *Norback* is incompatible with these subsequent decisions, as well as *Valley Mortuary.*

The test for whether there is a right to a jury trial in a civil case is whether the action would have been cognizable at law when the Utah constitution was adopted. *Hyatt,* 714 P.2d at 301; *Jensen,* 835 P.2d at 969. "Utah courts have 'made it clear that [the] constitutional right to a jury trial in civil cases extends only to cases that would have been cognizable at law at the time the constitution was adopted.'" *Failor v. MegaDyne Med. Prods.,* 2009 UT App 179, ¶ 12, 213 P.3d 899 (*quoting Zions v. First Nat'l Bank v. Rocky Mountain Irr., Inc.,* 795 P.2d 658, 661 (Utah 1990)); *Kenny v. Rich,* 2008 UT App 209, ¶ 37, 186 P.3d 989. "'In characterizing a cause of action, Utah courts look to the nature of the action and not the pleading labels chosen.'" *Id.* ¶ 13 (*quoting Records v. Briggs,* 887 P.2d 864, 868 (Utah Ct. App. 1994)). "'[I]t is the

prerogative of the judge who actually tries the case to make the determination of whether an issue is one in equity or in law wherein the party can insist on a jury as a matter of right.'" *Id.* at ¶ 9 (*quoting Kenny*, 2008 UT App 209, ¶ 21).

According to the pleadings, the nature of this case is one of quiet title to ascertain whether, and to what extent, Defendants have a constructive or prescriptive easement over Plaintiff's property. At the time the Utah Constitution was adopted in 1895, such cases were considered by courts in equity, not at law. *See e.g. Clawson v. Wallace,* 52 P. 9 (Utah 1898), *Dudley v. Facer*, 32 P. 668 (Utah 1893), *Richey v. Bues*, 87 P. 903, 267-68 (Utah 1906). *See also Baer v. Higson,* 72 P. 180, 180 (Utah 1903) (quiet title actions are "in equity"); *Palmer v. Palmer,* 72 P. 3, 4 (Utah 1903) (same).

Further, in *Wey v. Salt Lake City,* 101 P. 381, 383 (Utah 1909), the Court described as "ancient" the "jurisdiction of courts in equity in respect of suits to quiet title and to determine adverse claims."

The aforementioned case law demonstrates that when the constitution was adopted, cases like the instant were resolved by courts in equity, not at law. Accordingly, Defendants have failed to show that they have a right to a jury trial in this case.

Finally, although, Defendants as an alternative ask the Court to impanel an advisory jury, the ground they advance does not withstand scrutiny. Rather, trial to the bench is appropriate and will save judicial resources. Defendants can identify no extraordinary circumstance that warrants an advisory jury, and the Court declines to impanel such.

Based upon the forgoing, Defendants' jury demand is stricken. This is an action in equity. It is now, and it would have been so at the time the constitution was adopted. In this case, there is no right to a jury trial.

Furthermore, there is no valid reason to expend the time and resources that an advisory jury would require, thus, Defendants' request in this regard is, respectfully, denied.

This Memorandum Decision and Order constitutes the Order regarding the matters addressed herein. No further order is required.

DATED this 12th day of September 2022

BY THE COURT:

ROBERT P. FAUST
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I mailed/emailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 12th day of September 2022:

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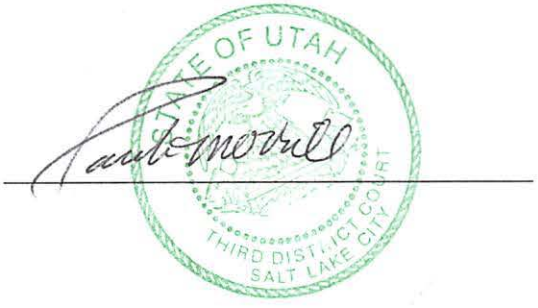

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF CASE ACTIVITY

Activity has occured RE:	200901717
Case Title:	BRIGHTON, RENFREW, et al. vs. TRAVIS, KAREN, et al.
Judge:	ROBERT FAUST
Commissioner:	
Date:	09-12-2022
Court:	3RD DISTRICT COURT - SALT LAKE District Salt Lake
Document(s) Filed:	Memorandum Decision and Order

This notice was automatically generated by the courts auto-notification system.

The following people were notified electronically:

RICHARD FLINT for RENFREW BRIGHTON et al
CHRISTOPHER HOGLE for RENFREW BRIGHTON et al
SCOTT DUBOIS for KAREN TRAVIS et al

The following people have not been notified electronically by the Court. Therefore, if service or notification is required, it must be completed according to Rule:

TAB 5

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
	Avoiding Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Approved in October 2022. Presented to Judicial Council November 2022. Discussed at December meeting. Going to Board of District Court Judges.	May 2023
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Prescriptive Easement draft addressed at January, February, and April 2023 meetings. Easement by Necessity addressed at April 2023 meeting. Easement by implication addressed at April 2023 meeting. Final versions to be addressed at May meeting.	May 2023
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	?
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, were these completed? Marianna could only find notes as to intention to form this subcommittee.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	

	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022