IN THE UTAH COURT OF APPEALS

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| Lee McElprang and Lorie McElprang,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>Blake Jones and Wilda Jones,<br><br>Defendants and Appellees.<br>________________________________<br><br>Blake Jones and Wilda Jones,<br><br>Counterclaim Plaintiffs,<br><br>v.<br><br>Lee McElprang and Lorie McElprang,<br><br>Counterclaim Defendants. | ) | MEMORANDUM DECISION<br>(Not For Official Publication)<br><br>Case No. 20060165-CA<br><br>F I L E D<br>(February 15, 2007)<br><br>2007 UT App 42 |

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Seventh District, Castle Dale Department, 000700105
The Honorable Bryce K. Bryner
The Honorable George M. Harmond

Attorneys: R. Christopher Preston and J. Craig Smith, Salt Lake City, for Appellants
Joane Pappas White, Price, for Appellees

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Before Judges Greenwood, Billings, and McHugh.

GREENWOOD, Associate Presiding Judge:

Plaintiffs Lee and Lorie McElprang appeal the trial court's ruling in favor of Defendants Blake and Wilda Jones, claiming that the trial court erred in concluding that the McElprangs (1) failed to establish boundary by acquiescence to the western disputed area; (2) did not obtain a prescriptive easement to use the curved road through the northwest of the Joneses' property to access their own property; (3) were not entitled to a

prescriptive easement to use the same curved road to access their silage pit; and (4) did not establish a prescriptive easement on the northern disputed area for storing machinery, old vehicles, power poles, and other personal property. We reverse in part and affirm in part.[1]

Regarding the McElprangs' boundary by acquiescence claim, we "'will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous.'" RHN Corp. v. Veibell, 2004 UT 60,¶22, 96 P.3d 935 (omission in original) (quoting Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998)). "We review the trial court's conclusions of law on this issue 'for correctness, according the trial court no particular deference.'" Id. (quoting Orton, 970 P.2d at 1256).

The McElprangs and the Joneses have been adjoining property owners in Emery County for more than thirty years. A prior owner of both properties built a fence on both the north and the west sides of what is now the Joneses' property to separate irrigated crop land from non-irrigated crop land. When constructed, this fence was not intended to serve as a boundary line, although it became one of the contested issues leading to this lawsuit.

The McElprangs contend that the trial court erred in determining that the McElprangs failed to establish boundary by acquiescence up to the visible fence line on the western side of the Joneses' property.[2] The McElprangs claim the evidence was insufficient for the trial court to find that the Joneses did not acquiesce in the fence line as the boundary between the two properties, thus defeating the boundary by acquiescence claim. We disagree.

The party seeking to establish boundary by acquiescence must prove "'(i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a long period of time, (iv) by adjoining landowners.'" Id. at ¶23 (quoting Jacobs v. Hafen, 917 P.2d

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[1]The Joneses did not file a brief in this appeal, and therefore, this court has necessarily relied solely on the record and the McElprangs' brief.

[2]At the conclusion of the McElprangs' case in chief, the trial court granted the Joneses' motion to dismiss the McElprangs' claim for boundary by acquiescence in the northern disputed area. Therefore, we consider the McElprangs' argument regarding boundary by acquiescence only in relation to the western disputed area.

1078, 1080 (Utah 1996)). The Utah Supreme Court has held that "mere conversations between the parties evidencing either an ongoing dispute as to the property line or an unwillingness by one of the adjoining landowners to accept the line as the boundary refute any allegation that the parties have mutually acquiesced in the line as the property demarcation." Ault v. Holden, 2002 UT 33,¶21, 44 P.3d 781.

We conclude that the trial court did not clearly err in finding that the neighbors did not mutually acquiesce in the fence as the boundary line. The record supports the trial court's finding that the Joneses never considered the fence to be the boundary between the two properties and that after the 1983 survey, Mr. McElprang knew the fence did not demarcate the actual boundary. Further, after the 1983 survey, Mr. McElprang plowed a furrow between the two stakes marking the western boundary, indicating both his knowledge of the boundary and the Joneses' lack of acquiescence to the fence as the boundary. After he plowed the furrow, Mr. McElprang never cultivated the land between the fence and the furrow. Additionally, the trial court found Randall Jones, the Joneses' son, was present at a 1987 conversation which "reaffirmed" the McElprangs' knowledge that the two stakes from the survey marked the boundary between the properties. Randall Jones also testified that Mr. McElprang stated, during the 1987 conversation, that the placement of the stakes could be used to install a fence along the legal boundary line. The trial court thus found that there was no mutual acquiescence in the fence as the boundary for a long period of time and that the use was permissive since at least 1983. Therefore, we affirm the trial court's conclusion that the McElprangs did not establish boundary by acquiescence.

The McElprangs next argue that they have established a prescriptive easement in a curved road at the northwestern edge of the Joneses' property, which has been used for at least thirty years by the McElprangs and their predecessors to access part of what is now the McElprangs' property for irrigation and other agricultural purposes. The McElprangs argue that the trial court erred in denying them a prescriptive easement, despite finding that all elements of a prescriptive easement had been met. We agree.

A trial court's finding regarding the existence of an easement is a question of law, but it is "the type of highly fact-dependent question, with numerous potential fact patterns, which accords the trial judge a broad measure of discretion when applying the correct legal standard to the given set of facts." Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998). Therefore, we will "overturn the finding of an easement only if

we find that the trial judge's decision exceeded the broad discretion granted." Id.

A prescriptive easement requires "'use of another's land [that is] open, continuous, and adverse under a claim of right for a period of twenty years.'" Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998) (quoting Valcarce, 961 P.2d at 311). The trial court found that the McElprangs established all elements of a prescriptive easement in the curved road. Additionally, the McElprangs presented evidence that for more than twenty years they used the curved road to access their property to irrigate and for other agricultural purposes. Nonetheless, in its conclusions of law, the trial court denied the McElprangs a prescriptive easement to use the curved road. This conclusion is clearly contrary to the trial court's findings of fact.[3] Therefore, we conclude that the McElprangs established a prescriptive easement to use the curved road to access their own property for historic agricultural uses, such as irrigation, for which they used the road throughout the prescriptive period.

We disagree, however, with the McElprangs' claim that they should be able to use the prescriptive easement along the curved road to access the silage pit they installed in 1983. The trial court determined that because the silage pit was constructed in 1983, the road had not been used to access the silage pit for the entirety of the prescriptive period. The key consideration is whether using the road to access the silage pit impermissibly expanded the use of the road from the McElprangs' customary uses during the prescriptive period. "The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period. 'The right cannot be enlarged to place a greater burden or servitude on the property.'" Valcarce, 961 P.2d at 312 (internal citation omitted) (quoting Nielson v. Sandberg, 105 Utah 93, 141 P.2d 696, 701 (1943)).

The McElprangs claim that the road was used during the prescriptive period primarily for agricultural purposes and that the addition of the silage pit did not change the type or volume of traffic along the road. The trial court, however, heard contradictory testimony regarding the silage pit's effect upon use of the curved road, including testimony from Mr. Jones that the silage pit created "a lot of traffic" along the road because the McElprangs periodically used trucks and other vehicles to fill the silage pit with feed and daily used the road to disburse the feed to the livestock.

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[3]The findings of fact are consistent with the trial court's memorandum decision.

While the finding of an easement is a conclusion of law, it is highly fact-sensitive and "accords the trial judge a broad measure of discretion when applying the correct legal standard to the given set of facts." Id. at 311. We will overturn "the finding of an easement only if we find that the trial judge's decision exceeded the broad discretion granted." Id. In this case, the trial court did not exceed the broad discretion granted. We therefore affirm the trial court's denial of a prescriptive easement in the curved road to access the silage pit because use of the road was impermissibly expanded by the addition of the silage pit.

The McElprangs next argue that the trial court erred by not granting them a prescriptive easement to store personal property such as machinery, old vehicles, and power poles on the Joneses' northern disputed property. The McElprangs also challenge the trial court's finding that as a matter of law a prescriptive easement cannot be established for storing vehicles and other personal property. We affirm the trial court's conclusion that a prescriptive easement for storage was not established because the McElprangs' use of the Joneses' property was permissive and therefore does not satisfy the adversity requirement for a prescriptive easement. Because we affirm on the grounds of permissiveness, we do not reach the question of whether a prescriptive easement can be established for storage of personal property on the real property of another.

The trial court found that Blake Jones granted permission for such storage in a 1983 conversation. The McElprangs challenge the finding of this 1983 conversation. They also argue that the adversity requirement for a prescriptive easement can be presumed if the other factors are met. The McElprangs refer to the following language in Valcarce:

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

Valcarce, 961 P.2d at 311-12 (internal citation omitted).

In this case, the record contains sufficient evidence to support the trial court's finding that the use was permissive. Mr. Jones testified that he granted permission to Mr. McElprang

to use both the northern and the western parts of his property sometime after 1972, the year the Joneses acquired the property. Mr. Jones also testified that Mr. McElprang saw the 1983 survey being performed. Soon after the survey was completed, as previously noted, Mr. McElprang plowed a furrow along the property line established by the survey. The trial court apparently found the Joneses' evidence to be more credible than the McElprangs', and thus the McElprangs did not establish adverse use of the property for the necessary twenty years because permission was granted in 1972 or 1983, or at various times throughout this period. We conclude the trial court did not abuse its discretion in finding that the use was permissive.

In sum, we affirm the trial court's conclusion that the McElprangs failed to establish boundary by acquiescence to the western part of the Joneses' property. We reverse the trial court's conclusion that the McElprangs did not establish a prescriptive easement to use the curved road to access their own property for historic agricultural uses, such as irrigation. Finally, we affirm the trial court's ruling that the McElprangs did not establish a prescriptive easement in the curved road to access the silage pit, and that the McElprangs did not establish a prescriptive easement to store personal property on the Joneses' northern property.

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Pamela T. Greenwood,
Associate Presiding Judge

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WE CONCUR:

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Judith M. Billings, Judge

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Carolyn B. McHugh, Judge