

IN THE UTAH COURT OF APPEALS

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Stephen Guy Terrell, by and)	MEMORANDUM DECISION
through his Guardian Ad Litem,)	(Not For Official Publication)
Gladye Edwards,)	
)	Case No. 20040829-CA
Plaintiff and Appellant,)	
)	
v.)	F I L E D
)	(May 11, 2006)
)	
Jack E. McBride and Edna S.)	2006 UT App 191
McBride,)	
)	
Defendants and Appellees.)	

Fourth District, Fillmore Department, 020700057
The Honorable Donald J. Eyre Jr.

Attorneys: Wilford N. Hansen, Payson, for Appellant
Randall R. Smart, Murray, for Appellees

Before Judges Greenwood, Davis, and Thorne.

GREENWOOD, Associate Presiding Judge:

After the trial court granted him an easement by necessity, Plaintiff Stephen Guy Terrell appeals the trial court's determination of the location of the easement and failure to award damages. We affirm.

We review "[f]indings of fact . . . under the clearly erroneous standard. . . . [T]o find clear error, [we] must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." State v. Pena, 869 P.2d 932, 935-36 (Utah 1994); see also Utah R. Civ. P. 52(a).

The trial court granted Plaintiff an easement by necessity on the East Road. Plaintiff contends the trial court's findings supporting the easement on the East Road are clearly erroneous and argues that the easement should instead be located on the Gravel Pit Road. Specifically, Plaintiff argues that the trial court failed to make findings as to whether roads other than the

East Road, such as the Gravel Pit Road, would be reasonable or convenient for Plaintiff, and instead focused on Defendants' burden if the easement were located on the Gravel Pit Road. See Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1133 (1916) ("In construing any grant of right of way the use, in character and extent, is limited to such as is reasonably necessary and convenient to the dominant estate and as little burdensome to the servient estate as possible for the use contemplated.").

We find substantial evidence in the record to support the trial court's factual findings for an easement on the East Road. In its findings of fact and conclusions of law, the trial court focused primarily on the burden to Defendants; however, it did not disregard the reasonable necessity and convenience to Plaintiff. Ultimately, a trial court could find that two rights of way exist that are reasonably necessary and convenient to the servient estate; however, the court must then determine which one is less burdensome to the dominant estate. Accordingly, for each road, the trial court properly weighed the convenience and reasonableness to Plaintiff against the probable burden to Defendants.

The trial court properly considered testimony from witnesses that the East Road was "well used" and "well traveled."¹ To show that the trial court erroneously found that the East Road was the most traversed, Plaintiff selectively cites testimony that seems to indicate that the Gravel Pit Road, not the East Road, was the most traversed. Plaintiff's argument is unavailing because he

¹Plaintiff may not now argue that Defendants failed to lay a proper foundation for the witnesses' descriptions of the East Road because Plaintiff failed to properly object on that basis at trial. "As a general rule, a timely and specific objection must be made in order to preserve an issue for appeal." State v. Whittle, 780 P.2d 819, 820-21 (Utah 1989); see also Utah R. Evid. 103(a)(1).

Furthermore, Plaintiff failed to argue that the trial court committed plain error. "Absent a timely objection, we will review an alleged error only if it is obvious and harmful, i.e., only if it constitutes 'plain error.'" Whittle, 780 P.2d at 821; see also Utah R. Evid. 103(d). Although Plaintiff raised plain error in his reply brief, under rule 24(c) of the Utah Rules of Appellate Procedure an appellant may not raise a new matter in the reply brief. See Utah R. App. P. 24(c) ("Reply briefs shall be limited to answering any new matter set forth in the opposing brief."); Coleman v. Stevens, 2000 UT 98, ¶9, 17 P.3d 1122 ("[W]e will not consider matters raised for the first time in the reply brief.").

takes some of the statements out of context, or omits evidence in Defendants' favor to highlight his own contentions. Moreover, although Plaintiff cites evidence that supports his contentions, the trial transcript adequately supports the trial court's findings. The evidence shows that although the Gravel Road is well used from the western border of Defendants' property to the Gravel Pit, there is no defined road from the Gravel Pit to Plaintiff's property, and substantial work would be necessary to make it passable.

The trial court also found that the burden to Defendants if the easement were located on the Gravel Pit Road would be substantial because it would be more difficult to prevent trespassing and theft. After reviewing the record, we conclude that the trial court's findings are adequately supported. Further, the findings are sufficient as a matter of law regarding the location of the easement.

Plaintiff's complaint also alleged forcible detainer under Utah Code section 78-36-10 because Defendants had blocked his access to his property. See Utah Code Ann. § 78-36-10(1) (2002) ("A judgment [for forcible entry and detainer] may be entered upon the merits."). Plaintiff claims that the trial court's failure to award him damages was clearly erroneous. See id. § 78-36-10(2)(b) ("[T]he court, if the proceeding is tried without a jury . . . , shall also assess the damages resulting to the plaintiff from . . . forcible or unlawful detainer.").

Although the trial court ruled that Plaintiff was "entitled to be restored access to his land," it concluded that Plaintiff had not provided sufficient evidence for an award of damages. The trial court found that Plaintiff had spent \$37,754.41 on equipment and construction materials to build a structure for a mining and gravel operation on his property, but that Plaintiff had not taken the "substantial steps necessary to make these desires a reality by obtaining the required permits, or entering into contracts." As a result, the trial court did not award damages to Plaintiff. The "adequacy of damages is a question of fact, [and] we [will not] overturn the trial court's findings unless they are clearly erroneous." In re Knickerbocker, 912 P.2d 969, 981 (Utah 1996). Plaintiff still possessed the materials he had purchased and provided no evidence of damage caused by the detainer. Because the record supports the trial

court's findings, we affirm the trial court's decision not to award damages.

Accordingly, we affirm.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

James Z. Davis, Judge

William A. Thorne Jr., Judge